



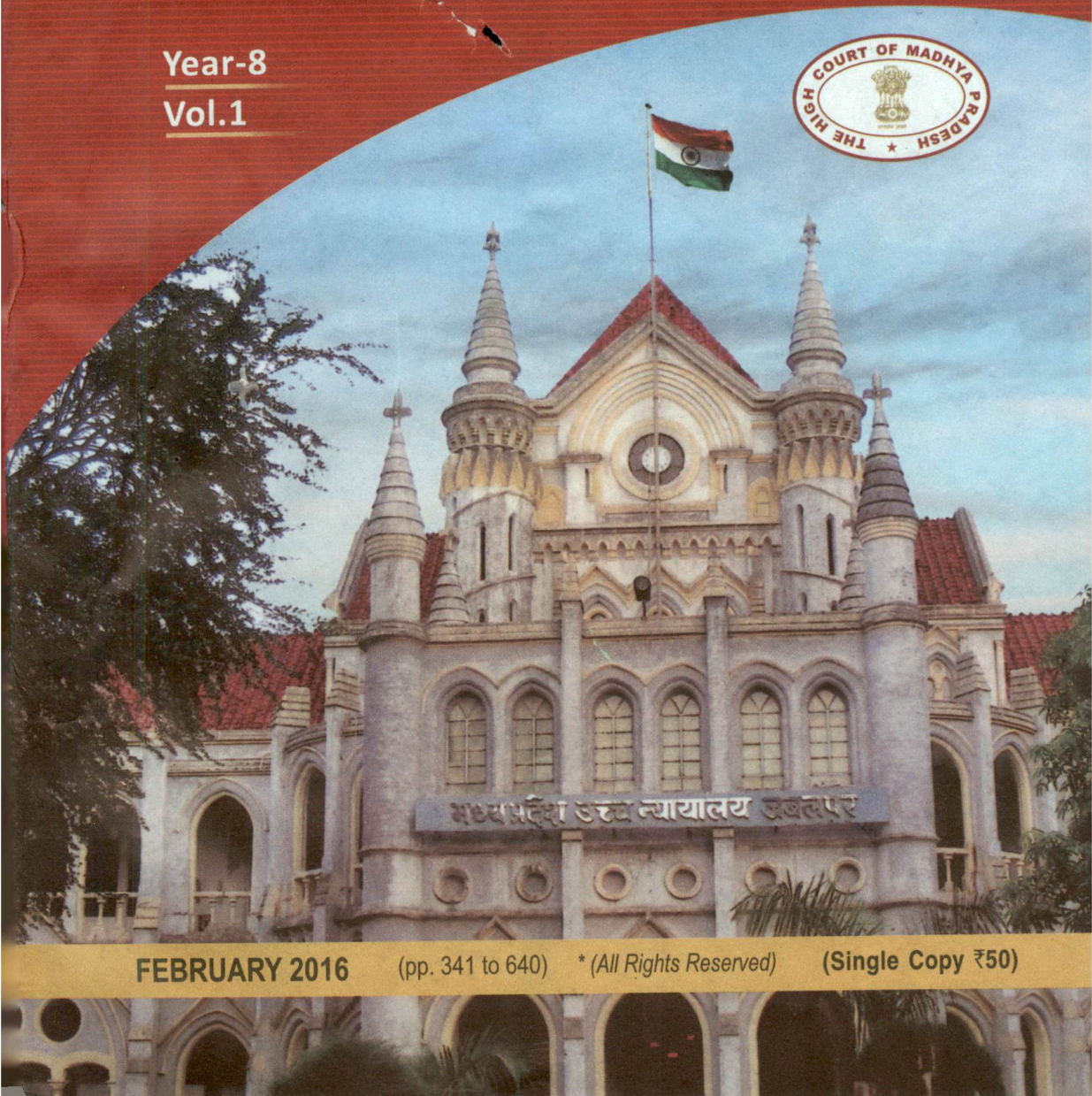
THE INDIAN LAW REPORTS

M.P. SERIES

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

Year-8

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THE INDIAN LAW REPORTS M.P. SERIES, 2016

(VOL-1)

JOURNAL SECTION

**IMPORTANT ACTS, AMENDMENTS, CIRCULARS,
NOTIFICATIONS AND STANDING ORDERS.****THE ARBITRATION AND CONCILIATION (AMENDMENT)
ACT, 2015****NO. 3 OF 2016**

[Received the assent of the President on the 31st December, 2015 and published in the Gazette of India (Extraordinary) Part II, Section 1, dated 01.01.2016, Page no. 1-15]

An Act to amend the Arbitration and Conciliation Act, 1996.

BE it enacted by Parliament in the Sixty-sixth Year of the Republic of India as follows:—

1. Short title and commencement. (1) This Act may be called the Arbitration and Conciliation (Amendment) Act, 2015.

(2) It shall be deemed to have come into force on the 23rd October, 2015.

2. Amendment of section 2. In the Arbitration and Conciliation Act, 1996 (26 of 1996) (hereinafter referred to as the principal Act), in section 2,—

(1) in sub-section (1),—

(A) for clause (e), the following clause shall be substituted, namely:—

“(e) “Court” means—

(i) in the case of an arbitration other

than international commercial arbitration, the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes;

(ii) in the case of international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court;';

(B) in clause (f), in sub-clause (iii), the words "a company or" shall be omitted;

(II) in sub-section (2), the following proviso shall be inserted, namely:—

"Provided that subject to an agreement to the contrary, the provisions of sections 9, 27 and clause (a) of sub-section (1) and sub-section (3) of section 37 shall also apply to international commercial arbitration, even if the place of arbitration is outside India, and an arbitral award made or to be made in such place is enforceable and recognised under the provisions of Part II of this Act."

3. Amendment of section 7. In section 7 of the principal Act, in sub-section (4), in clause (b), after the words "or other means of telecommunication", the words "including communication through electronic

means” shall be inserted.

4. Amendment of section 8. In section 8 of the principal Act,—

(i) for sub-section (1), the following sub-section shall be substituted, namely:—

“(1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that *prima facie* no valid arbitration agreement exists.”;

(ii) in sub-section (2), the following proviso shall be inserted, namely:—

“Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court.”.

5. Amendment of section 9. Section 9 of the principal Act shall be renumbered as sub-section (1) thereof, and after sub-section (1) as so renumbered, the following sub-sections shall be inserted, namely:—

“(2) Where, before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection under sub-section (1), the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the Court may determine.

(3) Once the arbitral tribunal has been constituted, the Court

shall not entertain an application under sub-section (1), unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious.”.

6. Amendment of section 11. In section 11 of the principal Act,—

(i) in sub-sections (4), (5) and (6), for the words “the Chief Justice or any person or institution designated by him” wherever they occur, the words “the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court” shall be substituted;

(ii) after sub-section (6), the following sub-sections shall be inserted, namely:—

“(6A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement.

(6B) The designation of any person or institution by the Supreme Court or, as the case may be, the High Court, for the purposes of this section shall not be regarded as a delegation of judicial power by the Supreme Court or the High Court.”;

(iii) in sub-section (7), for the words “the Chief Justice or the person or institution designated by him is final”, the words “the Supreme Court or, as the case may be, the High Court or the person or institution designated by such Court is final and no appeal including Letters Patent Appeal shall lie against such decision” shall be substituted;

(iv) for sub-section (8), the following sub-section shall be substituted, namely:—

“(8) The Supreme Court or, as the case may be, the High Court or the person or institution designated by such

Court, before appointing an arbitrator, shall seek a disclosure in writing from the prospective arbitrator in terms of sub-section (1) of section 12, and have due regard to—

(a) any qualifications required for the arbitrator by the agreement of the parties; and

(b) the contents of the disclosure and other considerations as are likely to secure the appointment of an independent and impartial arbitrator.”;

(v) in sub-section (9), for the words “the Chief Justice of India or the person or institution designated by him”, the words “the Supreme Court or the person or institution designated by that Court” shall be substituted;

(vi) for sub-section (10), the following sub-section shall be substituted, namely:—

“(10) The Supreme Court or, as the case may be, the High Court, may make such scheme as the said Court may deem appropriate for dealing with matters entrusted by sub-section (4) or sub-section (5) or sub-section (6), to it.”;

(vii) in sub-section (11), for the words “the Chief Justices of different High Courts or their designates, the Chief Justice or his designate to whom the request has been first made”, the words “different High Courts or their designates, the High Court or its designate to whom the request has been first made” shall be substituted;

(viii) for sub-section (12), the following sub-section shall be substituted, namely:—

“(12) (a) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and sub-section (10) arise in an international commercial arbitration, the reference to the “Supreme Court or, as the case may be, the High Court” in those sub-sections shall be construed as a reference to the “Supreme Court”; and

(b) where the matters referred to in sub-sections (4),

(5), (6), (7), (8) and sub-section (10) arise in any other arbitration, the reference to “the Supreme Court or, as the case may be, the High Court” in those sub-sections shall be construed as a reference to the “High Court” within whose local limits the principal Civil Court referred to in clause (e) of sub-section (1) of section 2 is situate, and where the High Court itself is the Court referred to in that clause, to that High Court.”;

(ix) after sub-section (12), the following sub-sections shall be inserted, namely:—

“(13) An application made under this section for appointment of an arbitrator or arbitrators shall be disposed of by the Supreme Court or the High Court or the person or institution designated by such Court, as the case may be, as expeditiously as possible and an endeavour shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party.

(14) For the purpose of determination of the fees of the arbitral tribunal and the manner of its payment to the arbitral tribunal, the High Court may frame such rules as may be necessary, after taking into consideration the rates specified in the Fourth Schedule.

Explanation.—For the removal of doubts, it is hereby clarified that this sub-section shall not apply to international commercial arbitration and in arbitrations (other than international commercial arbitration) in case where parties have agreed for determination of fees as per the rules of an arbitral institution.”.

7. Insertion of new section 11A. After section 11 of the principal Act, the following new section shall be inserted, namely:—

“11A. Power of Central Government to amend Fourth Schedule. (1) If the Central Government is satisfied that it is necessary or expedient so to do, it may, by notification in the Official Gazette,

amend the Fourth Schedule and thereupon the Fourth Schedule shall be deemed to have been amended accordingly.

(2) A copy of every notification proposed to be issued under sub-section (1), shall be laid in draft before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in disapproving the issue of the notification or both Houses agree in making any modification in the notification, the notification shall not be issued or, as the case may be, shall be issued only in such modified form as may be agreed upon by the both Houses of Parliament.”.

8. Amendment of section 12. In section 12 of the principal Act,—

(i) for sub-section (1), the following sub-section shall be substituted, namely:—

“(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances,—

(a) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and

(b) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.

Explanation 1.—The grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.

Explanation 2.—The disclosure shall be made by such person in the form specified in the Sixth Schedule.”;

(ii) after sub-section (4), the following sub-section shall be inserted, namely:—

“(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.

9. Amendment of section 14. In section 14 of the principal Act, in sub-section (1), in the opening portion, for the words “The mandate of an arbitrator shall terminate if”, the words “The mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator, if ” shall be substituted.

10. Substitution of new section for section 17. For section 17 of the principal Act, the following section shall be substituted, namely:—

“**17. Interim measures ordered by arbitral tribunal.** (1) A party may, during the arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to the arbitral tribunal—

(i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters, namely:—

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the

arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the arbitral tribunal to be just and convenient,

and the arbitral tribunal shall have the same power for making orders, as the court has for the purpose of, and in relation to, any proceedings before it.

(2) Subject to any orders passed in an appeal under section 37, any order issued by the arbitral tribunal under this section shall be deemed to be an order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were an order of the Court.”.

11. Amendment of section 23. In section 23 of the principal Act, after sub-section (2), the following sub-section shall be inserted, namely:—

“(2A) The respondent, in support of his case, may also submit a counterclaim or plead a set-off, which shall be adjudicated upon by the arbitral tribunal, if such counterclaim or set-off falls within the scope of the arbitration agreement.”.

12. Amendment of section 24. In section 24 of the principal Act, after the proviso to sub-section (1), the following proviso shall be inserted,

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namely:—

“Provided further that the arbitral tribunal shall, as far as possible, hold oral hearings for the presentation of evidence or for oral argument on day-to-day basis, and not grant any adjournments unless sufficient cause is made out, and may impose costs including exemplary costs on the party seeking adjournment without any sufficient cause.”.

13. Amendment of section 25. In section 25 of the principal Act, in clause (b), at the end, after the words “allegations by the claimant”, the words “and shall have the discretion to treat the right of the respondent to file such statement of defence as having been forfeited” shall be inserted.

14. Amendment of section 28. In section 28 of the principal Act, for sub-section (3), the following sub-section shall be substituted, namely:—

“(3) While deciding and making an award, the arbitral tribunal shall, in all cases, take into account the terms of the contract and trade usages applicable to the transaction.”.

15. Insertion of new sections 29A and 29B. After section 29 of the principal Act, the following new sections shall be inserted, namely:—

“29A. Time limit for arbitral award. (1) The award shall be made within a period of twelve months from the date the arbitral tribunal enters upon the reference.

Explanation.—For the purpose of this sub-section, an arbitral tribunal shall be deemed to have entered upon the reference on the date on which the arbitrator or all the arbitrators, as the case may be, have received notice, in writing, of their appointment.

(2) If the award is made within a period of six months from the date the arbitral tribunal enters upon the reference, the arbitral tribunal shall be entitled to receive such amount of additional fees as the parties may agree.

(3) The parties may, by consent, extend the period specified in sub-section (1) for making award for a further period not exceeding six months.

(4) If the award is not made within the period specified in sub-section (1) or the extended period specified under sub-section (3), the mandate of the arbitrator(s) shall terminate unless the Court has, either prior to or after the expiry of the period so specified, extended the period:

Provided that while extending the period under this sub-section, if the Court finds that the proceedings have been delayed for the reasons attributable to the arbitral tribunal, then, it may order reduction of fees of arbitrator(s) by not exceeding five per cent, for each month of such delay.

(5) The extension of period referred to in sub-section (4) may be on the application of any of the parties and may be granted only for sufficient cause and on such terms and conditions as may be imposed by the Court.

(6) While extending the period referred to in sub-section (4), it shall be open to the Court to substitute one or all of the arbitrators and if one or all of the arbitrators are substituted, the arbitral proceedings shall continue from the stage already reached and on the basis of the evidence and material already on record, and the arbitrator(s) appointed under this section shall be deemed to have received the said evidence and material.

(7) In the event of arbitrator(s) being appointed under this section, the arbitral tribunal thus reconstituted shall be deemed to be in continuation of the previously appointed arbitral tribunal.

(8) It shall be open to the Court to impose actual or exemplary costs upon any of the parties under this section.

(9) An application filed under sub-section (5) shall be disposed of by the Court as expeditiously as possible and endeavour shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party.

29B. Fast track procedure. (1) Notwithstanding anything contained in this Act, the parties to an arbitration agreement, may, at any stage either before or at the time of appointment of the arbitral

tribunal, agree in writing to have their dispute resolved by fast track procedure specified in sub-section (3).

(2) The parties to the arbitration agreement, while agreeing for resolution of dispute by fast track procedure, may agree that the arbitral tribunal shall consist of a sole arbitrator who shall be chosen by the parties.

(3) The arbitral tribunal shall follow the following procedure while conducting arbitration proceedings under sub-section (1):

(a) The arbitral tribunal shall decide the dispute on the basis of written pleadings, documents and submissions filed by the parties without any oral hearing;

(b) The arbitral tribunal shall have power to call for any further information or clarification from the parties in addition to the pleadings and documents filed by them;

(c) An oral hearing may be held only, if, all the parties make a request or if the arbitral tribunal considers it necessary to have oral hearing for clarifying certain issues;

(d) The arbitral tribunal may dispense with any technical formalities, if an oral hearing is held, and adopt such procedure as deemed appropriate for expeditious disposal of the case.

(4) The award under this section shall be made within a period of six months from the date the arbitral tribunal enters upon the reference.

(5) If the award is not made within the period specified in sub-section (4), the provisions of sub-sections (3) to (9) of section 29A shall apply to the proceedings.

(6) The fees payable to the arbitrator and the manner of payment of the fees shall be such as may be agreed between the arbitrator and the parties.”

16. Amendment of section 31. In section 31 of the principal Act,—

(i) in sub-section (7), for clause (b), the following clause shall

be substituted, namely:—

“(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of two percent, higher than the current rate of interest prevalent on the date of award, from the date of award to the date of payment.

Explanation.—The expression “current rate of interest” shall have the same meaning as assigned to it under clause (b) of section 2 of the Interest Act, 1978 (14 of 1978).”;

(ii) for sub-section (8), the following sub-section shall be substituted, namely:—

“(8) The costs of an arbitration shall be fixed by the arbitral tribunal in accordance with section 31A.”.

17. Insertion of new section 31A. After section 31 of the principal Act, the following new section shall be inserted, namely:—

‘31A. Regime for costs. (1) In relation to any arbitration proceeding or a proceeding under any of the provisions of this Act pertaining to the arbitration, the Court or arbitral tribunal, notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908), shall have the discretion to determine—

(a) whether costs are payable by one party to another;

(b) the amount of such costs; and

(c) when such costs are to be paid.

Explanation.—For the purpose of this sub-section, “costs” means reasonable costs relating to—

(i) the fees and expenses of the arbitrators, Courts and witnesses;

(ii) legal fees and expenses;

(iii) any administration fees of the institution supervising the arbitration; and

(iv) any other expenses incurred in connection with the arbitral or Court proceedings and the arbitral award.

(2) If the Court or arbitral tribunal decides to make an order as to payment of costs,—

(a) the general rule is that the unsuccessful party shall be ordered to pay the costs of the successful party; or

(b) the Court or arbitral tribunal may make a different order for reasons to be recorded in writing.

(3) In determining the costs, the Court or arbitral tribunal shall have regard to all the circumstances, including—

(a) the conduct of all the parties;

(b) whether a party has succeeded partly in the case;

(c) whether the party had made a frivolous counter claim leading to delay in the disposal of the arbitral proceedings; and

(d) whether any reasonable offer to settle the dispute is made by a party and refused by the other party.

(4) The Court or arbitral tribunal may make any order under this section including the order that a party shall pay—

(a) a proportion of another party's costs;

(b) a stated amount in respect of another party's costs;

(c) costs from or until a certain date only;

(d) costs incurred before proceedings have begun;

(e) costs relating to particular steps taken in the proceedings;

(f) costs relating only to a distinct part of the proceedings; and

(g) interest on costs from or until a certain date.

(5) An agreement which has the effect that a party is to pay the whole or part of the costs of the arbitration in any event shall be only valid if such agreement is made after the dispute in question has arisen.’

18. Amendment of section 34. In section 34 of the principal Act,—

(I) in sub-section (2), in clause (b), for the *Explanation*, the following *Explanations* shall be substituted, namely:—

“*Explanation 1.*—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,—

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.”;

(II) after sub-section (2), the following sub-section shall be inserted, namely:—

“(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.”;

(III) after sub-section (4), the following sub-sections shall be

inserted, namely:—

“(5) An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.

(6) An application under this section shall be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice referred to in sub-section (5) is served upon the other party.”.

19. Substitution of new section for section 36. For section 36 of the principal Act, the following section shall be substituted, namely:—

“36. Enforcement. (1) Where the time for making an application to set aside the arbitral award under section 34 has expired, then, subject to the provisions of sub-section (2), such award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were a decree of the court.

(2) Where an application to set aside the arbitral award has been filed in the Court under section 34, the filing of such an application shall not by itself render that award unenforceable, unless the Court grants an order of stay of the operation of the said arbitral award in accordance with the provisions of sub-section (3), on a separate application made for that purpose.

(3) Upon filing of an application under sub-section (2) for stay of the operation of the arbitral award, the Court may, subject to such conditions as it may deem fit, grant stay of the operation of such award for reasons to be recorded in writing:

Provided that the Court shall, while considering the application for grant of stay in the case of an arbitral award for payment of money, have due regard to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure, 1908 (5 of 1908).”.

20. Amendment of section 37. In section 37 of the principal Act, in sub-section (1), for clauses (a) and (b), the following clauses shall be substituted, namely:—

“(a) refusing to refer the parties to arbitration under section 8;

(b) granting or refusing to grant any measure under section 9;

(c) setting aside or refusing to set aside an arbitral award under section 34.”.

21. Amendment of section 47. In section 47 of the principal Act, for the *Explanation*, the following *Explanation* shall be substituted, namely:—

‘*Explanation.*—In this section and in the sections following in this Chapter, “Court” means the High Court having original jurisdiction to decide the questions forming the subject-matter of the arbitral award if the same had been the subject-matter of a suit on its original civil jurisdiction and in other cases, in the High Court having jurisdiction to hear appeals from decrees of courts subordinate to such High Court.’.

22. Amendment of section 48. In section 48 of the principal Act, for the *Explanation* to sub-section (2), the following *Explanations* shall be substituted, namely:—

“*Explanation 1.*—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,—

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian

law shall not entail a review on the merits of the dispute.”.

23. Amendment of section 56. In section 56 of the principal Act, for the *Explanation*, the following *Explanation* shall be substituted, namely:—

‘Explanation.—In this section and in the sections following in this Chapter, “Court” means the High Court having original jurisdiction to decide the questions forming the subject-matter of the arbitral award if the same had been the subject-matter of a suit on its original civil jurisdiction and in other cases, in the High Court having jurisdiction to hear appeals from decrees of courts subordinate to such High Court.’.

24. Amendment of section 57. In section 57 of the principal Act, in sub-section (1), for the *Explanation*, the following *Explanations* shall be substituted, namely:—

“Explanation 1.—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,—

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.”.

25. Insertion of new Fourth Schedule, Fifth Schedule, Sixth Schedule and Seventh Schedule. After the Third Schedule to the principal Act, the following new Schedules shall be inserted, namely:—

‘THE FOURTH SCHEDULE

[See section 11 (14)]

Sum in dispute	Model fee
Up to Rs. 5,00,000	Rs. 45,000
Above Rs. 5,00,000 and up to Rs. 20,00,000	Rs. 45,000 plus 3.5 per cent. of the claim amount over and above Rs. 5,00,000
Above Rs. 20,00,000 and up to Rs. 1,00,00,000	Rs. 97,500 plus 3 per cent. of the claim amount over and above Rs. 20,00,000
Above Rs. 1,00,00,000 and up to Rs. 10,00,00,000	Rs. 3,37,500 plus 1 per cent. of the claim amount over and above Rs. 1,00,00,000
Above Rs. 10,00,00,000 and up to Rs. 20,00,00,000	Rs. 12,37,500 plus 0.75 per cent. of the claim amount over and above Rs. 1,00,00,000
Above Rs. 20,00,00,000	Rs. 19,87,500 plus 0.5 per cent. of the claim amount over and above Rs. 20,00,00,000 with a ceiling of Rs. 30,00,000

Note:— In the event, the arbitral tribunal is a sole arbitrator, he shall be entitled to an additional amount of twenty-five per cent. on the fee payable as per the table set out above.

THE FIFTH SCHEDULE

[See section 12 (1)(b)]

The following grounds give rise to justifiable doubts as to the independence or impartiality of arbitrators:

Arbitrator's relationship with the parties or counsel

1. The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party.

2. The arbitrator currently represents or advises one of the parties or an affiliate of one of the parties.

3. The arbitrator currently represents the lawyer or law firm acting as counsel for one of the parties.

4. The arbitrator is a lawyer in the same law firm which is representing one of the parties.

5. The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration.

6. The arbitrator's law firm had a previous but terminated involvement in the case without the arbitrator being involved himself or herself.

7. The arbitrator's law firm currently has a significant commercial relationship with one of the parties or an affiliate of one of the parties.

8. The arbitrator regularly advises the appointing party or an affiliate of the appointing party even though neither the arbitrator nor his or her firm derives a significant financial income therefrom.

9. The arbitrator has a close family relationship with one of the parties and in the case of companies with the persons in the management and controlling the company.

10. A close family member of the arbitrator has a significant financial interest in one of the parties or an affiliate of one of the parties.

11. The arbitrator is a legal representative of an entity that is a party in the arbitration.

12. The arbitrator is a manager, director or part of the management, or has a similar controlling influence in one of the parties.

13. The arbitrator has a significant financial interest in one of the parties or the outcome of the case.

14. The arbitrator regularly advises the appointing party or an affiliate of the appointing party, and the arbitrator or his or her firm derives a significant financial income therefrom.

Relationship of the arbitrator to the dispute

15. The arbitrator has given legal advice or provided an expert opinion on the dispute to a party or an affiliate of one of the parties.

16. The arbitrator has previous involvement in the case.

Arbitrator's direct or indirect interest in the dispute

17. The arbitrator holds shares, either directly or indirectly, in one of the parties or an affiliate of one of the parties that is privately held.

18. A close family member of the arbitrator has a significant financial interest in the outcome of the dispute.

19. The arbitrator or a close family member of the arbitrator has a close relationship with a third party who may be liable to recourse on the part of the unsuccessful party in the dispute.

Previous services for one of the parties or other involvement in the case

20. The arbitrator has within the past three years served as counsel for one of the parties or an affiliate of one of the parties or has previously advised or been consulted by the party or an affiliate of the party making the appointment in an unrelated matter, but the arbitrator and the party or the affiliate of the party have no ongoing relationship.

21. The arbitrator has within the past three years served as counsel against one of the parties or an affiliate of one of the parties in an unrelated matter.

22. The arbitrator has within the past three years been appointed as arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties.

23. The arbitrator's law firm has within the past three years acted for one of the parties or an affiliate of one of the parties in an unrelated matter without the involvement of the arbitrator.

24. The arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties or an affiliate of one of the parties.

Relationship between an arbitrator and another arbitrator or counsel

25. The arbitrator and another arbitrator are lawyers in the same law firm.

26. The arbitrator was within the past three years a partner of, or otherwise affiliated with, another arbitrator or any of the counsel in the same arbitration.

27. A lawyer in the arbitrator's law firm is an arbitrator in another dispute involving the same party or parties or an affiliate of one of the parties.

28. A close family member of the arbitrator is a partner or employee of the law firm representing one of the parties, but is not assisting with the dispute.

29. The arbitrator has within the past three years received more than three appointments by the same counsel or the same law firm.

Relationship between arbitrator and party and others involved in the arbitration

30. The arbitrator's law firm is currently acting adverse to one of the parties or an affiliate of one of the parties.

31. The arbitrator had been associated within the past three years with a party or an affiliate of one of the parties in a professional capacity, such as a former employee or partner.

Other circumstances

32. The arbitrator holds shares, either directly or indirectly, which by reason of number or denomination constitute a material holding in one of the parties or an affiliate of one of the parties that is publicly listed.

33. The arbitrator holds a position in an arbitration institution with appointing authority over the dispute.

34. The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties, where the affiliate is not directly involved in the matters in dispute in the arbitration.

Explanation 1.—The term “close family member” refers to a spouse,

sibling, child, parent or life partner.

Explanation 2.—The term “affiliate” encompasses all companies in one group of companies including the parent company.

Explanation 3.—For the removal of doubts, it is clarified that it may be the practice in certain specific kinds of arbitration, such as maritime or commodities arbitration, to draw arbitrators from a small, specialised pool. If in such fields it is the custom and practice for parties frequently to appoint the same arbitrator in different cases, this is a relevant fact to be taken into account while applying the rules set out above.

THE SIXTH SCHEDULE

[See section 12 (1)(b)]

NAME:

CONTACT DETAILS:

PRIOR EXPERIENCE (INCLUDING EXPERIENCE WITH ARBITRATIONS):

NUMBER OF ONGOING ARBITRATIONS:

CIRCUMSTANCES DISCLOSING ANY PAST OR PRESENT RELATIONSHIP WITH OR INTEREST IN ANY OF THE PARTIES OR IN RELATION TO THE SUBJECT-MATTER IN DISPUTE, WHETHER FINANCIAL, BUSINESS, PROFESSIONAL OR OTHER KIND, WHICH IS LIKELY TO GIVE RISE TO JUSTIFIABLE DOUBTS AS TO YOUR INDEPENDENCE OR IMPARTIALITY (LIST OUT):

CIRCUMSTANCES WHICH ARE LIKELY TO AFFECT YOUR ABILITY TO DEVOTE SUFFICIENT TIME TO THE ARBITRATION AND IN PARTICULAR YOUR ABILITY TO FINISH THE ENTIRE ARBITRATION WITHIN TWELVE MONTHS (LIST OUT):

THE SEVENTH SCHEDULE

[See section 12 (5)]

Arbitrator's relationship with the parties or counsel

1. The arbitrator is an employee, consultant, advisor or has any other

past or present business relationship with a party.

2. The arbitrator currently represents or advises one of the parties or an affiliate of one of the parties.

3. The arbitrator currently represents the lawyer or law firm acting as counsel for one of the parties.

4. The arbitrator is a lawyer in the same law firm which is representing one of the parties.

5. The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration.

6. The arbitrator's law firm had a previous but terminated involvement in the case without the arbitrator being involved himself or herself.

7. The arbitrator's law firm currently has a significant commercial relationship with one of the parties or an affiliate of one of the parties.

8. The arbitrator regularly advises the appointing party or an affiliate of the appointing party even though neither the arbitrator nor his or her firm derives a significant financial income therefrom.

9. The arbitrator has a close family relationship with one of the parties and in the case of companies with the persons in the management and controlling the company.

10. A close family member of the arbitrator has a significant financial interest in one of the parties or an affiliate of one of the parties.

11. The arbitrator is a legal representative of an entity that is a party in the arbitration.

12. The arbitrator is a manager, director or part of the management, or has a similar controlling influence in one of the parties.

13. The arbitrator has a significant financial interest in one of the parties or the outcome of the case.

14. The arbitrator regularly advises the appointing party or an affiliate of the appointing party, and the arbitrator or his or her firm derives a significant

financial income therefrom.

Relationship of the arbitrator to the dispute

15. The arbitrator has given legal advice or provided an expert opinion on the dispute to a party or an affiliate of one of the parties.

16. The arbitrator has previous involvement in the case.

Arbitrator's direct or indirect interest in the dispute

17. The arbitrator holds shares, either directly or indirectly, in one of the parties or an affiliate of one of the parties that is privately held.

18. A close family member of the arbitrator has a significant financial interest in the outcome of the dispute.

19. The arbitrator or a close family member of the arbitrator has a close relationship with a third party who may be liable to recourse on the part of the unsuccessful party in the dispute.

Explanation 1.—The term “close family member” refers to a spouse, sibling, child, parent or life partner.

Explanation 2.—The term “affiliate” encompasses all companies in one group of companies including the parent company.

Explanation 3.—For the removal of doubts, it is clarified that it may be the practice in certain specific kinds of arbitration, such as maritime or commodities arbitration, to draw arbitrators from a small, specialised pool. If in such fields it is the custom and practice for parties frequently to appoint the same arbitrator in different cases, this is a relevant fact to be taken into account while applying the rules set out above.

26. Act not to apply to pending arbitral proceedings. Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act.

27. Repeal and savings. (1) The Arbitration and Conciliation (Amendment) Ordinance, 2015 (Ord. 9 of 2015), is hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken under the principal Act, as amended by the said Ordinance, shall be deemed to have been done or taken under the corresponding provisions of the principal Act, as amended by this Act.

DR. G. NARAYANARAJU,
Secretary to the Govt. of India.

THE SCHEDULED CASTES AND THE SCHEDULED TRIBES (PREVENTION OF ATROCITIES) AMENDMENT ACT, 2015

No. 1 OF 2016

[Received the assent of the President on the 31st December, 2015 and published in the Gazette of India (Extraordinary) Part II, Section 1, dated 01.01.2016, Page no. 1-12]

An Act to amend the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989.

BE it enacted by Parliament in the Sixty-sixth Year of the Republic of India as follows:—

1. Short title and commencement. (1) This Act may be called the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2015.

(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

2. Amendment of long title. In the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (33 of 1989) (hereinafter referred to as the principal Act), in the long title, for the words “Special Courts”, the words “Special Courts and the Exclusive Special Courts” shall be substituted.

3. Amendment of section 2. In section 2 of the principal Act, in subsection (1),—

(i) after clause (b), the following clauses shall be inserted,

namely:—

‘(bb) “dependent” means the spouse, children, parents, brother and sister of the victim, who are dependent wholly or mainly on such victim for his support and maintenance;

(bc) “economic boycott” means—

(i) a refusal to deal with, work for hire or do business with other person; or

(ii) to deny opportunities including access to services or contractual opportunities for rendering service for consideration; or

(iii) to refuse to do anything on the terms on which things would be commonly done in the ordinary course of business; or

(iv) to abstain from the professional or business relations that one would maintain with other person;

(bd) “Exclusive Special Court” means the Exclusive Special Court established under sub-section (1) of section 14 exclusively to try the offences under this Act;

(be) “forest rights” shall have the meaning assigned to it in sub-section (1) of section 3 of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (2 of 2007);

(bf) “manual scavenger” shall have the meaning assigned to it in clause (g) of sub-section (1) of section 2 of the Prohibition of Employment as Manual Scavengers and their Rehabilitation Act, 2013 (25 of 2013);

(bg) “public servant” means a public servant as defined under section 21 of the Indian Penal Code, as well as any other person deemed to be a public servant under any other law for the time being in force and includes any person acting in his official capacity under the Central Government or the

State Government, as the case may be;";

(ii) after clause (e), the following clauses shall be inserted, namely:—

“(ea) “Schedule” means the Schedule appended to this Act;

(eb) “social boycott” means a refusal to permit a person to render to other person or receive from him any customary service or to abstain from social relations that one would maintain with other person or to isolate him from others;

(ec) “victim” means any individual who falls within the definition of the “Scheduled Castes and Scheduled Tribes” under clause (c) of sub-section (1) of section 2, and who has suffered or experienced physical, mental, psychological, emotional or monetary harm or harm to his property as a result of the commission of any offence under this Act and includes his relatives, legal guardian and legal heirs;

(ed) “witness” means any person who is acquainted with the facts and circumstances, or is in possession of any information or has knowledge necessary for the purpose of investigation, inquiry or trial of any crime involving an offence under this Act, and who is or may be required to give information or make a statement or produce any document during investigation, inquiry or trial of such case and includes a victim of such offence;”;

(iii) for clause (f), the following clause shall be substituted, namely:—

“(f) the words and expressions used but not defined in this Act and defined in the Indian Penal Code (45 of 1860), the Indian Evidence Act, 1872 (1 of 1872) or the Code of Criminal Procedure, 1973 (2 of 1974) as the case may be, shall be deemed to have the meanings respectively assigned to them in those enactments.”.

4. Amendment of Section 3. In section 3 of the principal Act,—

(i) for sub-section (1), the following sub-section shall be substituted, namely:—

‘(1) Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe,—

(a) puts any inedible or obnoxious substance into the mouth of a member of a Scheduled Caste or a Scheduled Tribe or forces such member to drink or eat such inedible or obnoxious substance;

(b) dumps excreta, sewage, carcasses or any other obnoxious substance in premises, or at the entrance of the premises, occupied by a member of a Scheduled Caste or a Scheduled Tribe;

(c) with intent to cause injury, insult or annoyance to any member of a Scheduled Caste or a Scheduled Tribe, dumps excreta, waste matter, carcasses or any other obnoxious substance in his neighbourhood;

(d) garlands with footwear or parades naked or semi-naked a member of a Scheduled Caste or a Scheduled Tribe;

(e) forcibly commits on a member of a Scheduled Caste or a Scheduled Tribe any act, such as removing clothes from the person, forcible tonsuring of head, removing moustaches, painting face or body or any other similar act, which is derogatory to human dignity;

(f) wrongfully occupies or cultivates any land, owned by, or in the possession of or allotted to, or notified by any competent authority to be allotted to, a member of a Scheduled Caste or a Scheduled Tribe, or gets such land transferred;

(g) wrongfully dispossesses a member of a Scheduled Caste or a Scheduled Tribe from his land or premises or interferes with the enjoyment of his rights, including forest rights, over any land or premises or water or irrigation facilities or destroys the crops or takes away the produce therefrom.

Explanation.—For the purposes of clause (f) and this clause, the expression “wrongfully” includes—

(A) against the person’s will;

(B) without the person’s consent;

(C) with the person’s consent, where such consent has been obtained by putting the person, or any other person in whom the person is interested in fear of death or of hurt; or

(D) fabricating records of such land;

(h) makes a member of a Scheduled Caste or a Scheduled Tribe to do “*begar*” or other forms of forced or bonded labour other than any compulsory service for public purposes imposed by the Government;

(i) compels a member of a Scheduled Caste or a Scheduled Tribe to dispose or carry human or animal carcasses, or to dig graves;

(j) makes a member of a Scheduled Caste or a Scheduled Tribe to do manual scavenging or employs or permits the employment of such member for such purpose;

(k) performs, or promotes dedicating a Scheduled Caste or a Scheduled Tribe woman to a deity, idol, object of worship, temple, or other religious institution as a *devadasi* or any other similar practice

or permits aforementioned acts;

(l) forces or intimidates or prevents a member of a Scheduled Caste or a Scheduled Tribe—

(A) not to vote or to vote for a particular candidate or to vote in a manner other than that provided by law;

(B) not to file a nomination as a candidate or to withdraw such nomination; or

(C) not to propose or second the nomination of a member of a Scheduled Caste or a Scheduled Tribe as a candidate in any election;

(m) forces or intimidates or obstructs a member of a Scheduled Caste or a Scheduled Tribe, who is a member or a Chairperson or a holder of any other office of a Panchayat under Part IX of the Constitution or a Municipality under Part IXA of the Constitution, from performing their normal duties and functions;

(n) after the poll, causes hurt or grievous hurt or assault or imposes or threatens to impose social or economic boycott upon a member of a Scheduled Caste or a Scheduled Tribe or prevents from availing benefits of any public service which is due to him;

(o) commits any offence under this Act against a member of a Scheduled Caste or a Scheduled Tribe for having voted or not having voted for a particular candidate or for having voted in a manner provided by law;

(p) institutes false, malicious or vexatious suit or criminal or other legal proceedings against a member of a Scheduled Caste or a Scheduled Tribe;

(q) gives any false or frivolous information to

any public servant and thereby causes such public servant to use his lawful power to the injury or annoyance of a member of a Scheduled Caste or a Scheduled Tribe;

(r) intentionally insults or intimidates with intent to humiliate a member of a Scheduled Caste or a Scheduled Tribe in any place within public view;

(s) abuses any member of a Scheduled Caste or a Scheduled Tribe by caste name in any place within public view;

(t) destroys, damages or defiles any object generally known to be held sacred or in high esteem by members of the Scheduled Castes or the Scheduled Tribes.

Explanation.—For the purposes of this clause, the expression “object” means and includes statue, photograph and portrait;

(u) by words either written or spoken or by signs or by visible representation or otherwise promotes or attempts to promote feelings of enmity, hatred or ill-will against members of the Scheduled Castes or the Scheduled Tribes;

(v) by words either written or spoken or by any other means disrespects any late person held in high esteem by members of the Scheduled Castes or the Scheduled Tribes;

(w) (i) intentionally touches a woman belonging to a Scheduled Caste or a Scheduled Tribe, knowing that she belongs to a Scheduled Caste or a Scheduled Tribe, when such act of touching is of a sexual nature and is without the recipient's consent;

(ii) uses words, acts or gestures of a sexual

nature towards a woman belonging to a Scheduled Caste or a Scheduled Tribe, knowing that she belongs to a Scheduled Caste or a Scheduled Tribe.

Explanation.—For the purposes of sub-clause (i), the expression “consent” means an unequivocal voluntary agreement when the person by words, gestures, or any form of non-verbal communication, communicates willingness to participate in the specific act:

Provided that a woman belonging to a Scheduled Caste or a Scheduled Tribe who does not offer physical resistance to any act of a sexual nature is not by reason only of that fact, is to be regarded as consenting to the sexual activity:

Provided further that a woman’s sexual history, including with the offender shall not imply consent or mitigate the offence;

(x) corrupts or fouls the water of any spring, reservoir or any other source ordinarily used by members of the Scheduled Castes or the Scheduled Tribes so as to render it less fit for the purpose for which it is ordinarily used;

(y) denies a member of a Scheduled Caste or a Scheduled Tribe any customary right of passage to a place of public resort or obstructs such member so as to prevent him from using or having access to a place of public resort to which other members of public or any other section thereof have a right to use or access to;

(z) forces or causes a member of a Scheduled Caste or a Scheduled Tribe to leave his house, village or other place of residence:

Provided that nothing contained in this clause

shall apply to any action taken in discharge of a public duty;

(za) obstructs or prevents a member of a Scheduled Caste or a Scheduled Tribe in any manner with regard to—

(A) using common property resources of an area, or burial or cremation ground equally with others or using any river, stream, spring, well, tank, cistern, water-tap or other watering place, or any bathing *ghat*, any public conveyance, any road, or passage;

(B) mounting or riding bicycles or motor cycles or wearing footwear or new clothes in public places or taking out wedding procession, or mounting a horse or any other vehicle during wedding processions;

(C) entering any place of worship which is open to the public or other persons professing the same religion or taking part in, or taking out, any religious, social or cultural processions including *jatras*;

(D) entering any educational institution, hospital, dispensary, primary health centre, shop or place of public entertainment or any other public place; or using any utensils or articles meant for public use in any place open to the public; or

(E) practicing any profession or the carrying on of any occupation, trade or business or employment in any job which other members of the public, or any section thereof, have a right to use or have access to;

(zb) causes physical harm or mental agony of

a member of a Scheduled Caste or a Scheduled Tribe on the allegation of practicing witchcraft or being a witch; or

(zc) imposes or threatens a social or economic boycott of any person or a family or a group belonging to a Scheduled Caste or a Scheduled Tribe,

shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to five years and with fine.;

(ii) in sub-section (2),—

(a) in clause (v), for the words “on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member”, the words “knowing that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member” shall be substituted;

(b) after clause (v), the following clause shall be inserted, namely:—

“(va) commits any offence specified in the Schedule, against a person or property, knowing that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member, shall be punishable with such punishment as specified under the Indian Penal Code (45 of 1860) for such offences and shall also be liable to fine.”.

5. Substitution of new section for section 4. For section 4 of the principal Act, the following section shall be substituted, namely:—

“4. Punishment for neglect of duties. (1) Whoever, being a public servant but not being a member of a Scheduled Caste or a Scheduled Tribe, wilfully neglects his duties required to be performed by him under this Act and the rules made thereunder, shall be punishable with imprisonment for a term which shall not be less than

six months but which may extend to one year.

(2) The duties of public servant referred to in sub-section (1) shall include—

(a) to read out to an informant the information given orally, and reduced to writing by the officer in charge of the police station, before taking the signature of the informant;

(b) to register a complaint or a First Information Report under this Act and other relevant provisions and to register it under appropriate sections of this Act;

(c) to furnish a copy of the information so recorded forthwith to the informant;

(d) to record the statement of the victims or witnesses;

(e) to conduct the investigation and file charge sheet in the Special Court or the Exclusive Special Court within a period of sixty days, and to explain the delay if any, in writing;

(f) to correctly prepare, frame and translate any document or electronic record;

(g) to perform any other duty specified in this Act or the rules made thereunder:

Provided that the charges in this regard against the public servant shall be booked on the recommendation of an administrative enquiry.

(3) The cognizance in respect of any dereliction of duty referred to in sub-section (2) by a public servant shall be taken by the Special Court or the Exclusive Special Court and shall give direction for penal proceedings against such public servant.”.

6. Amendment of section 8. In section 8 of the principal Act,—

(i) in clause (a), for the words “any financial assistance to a person accused of”, the words “any financial assistance in relation to the offences committed by a person accused of” shall be substituted;

(ii) after clause (b), the following clause shall be inserted, namely:—

“(c) the accused was having personal knowledge of the victim or his family, the Court shall presume that the accused was aware of the caste or tribal identity of the victim, unless the contrary is proved.”.

7. Amendment of section 10. In section 10 of the principal Act, in sub-section (1),—

(a) after the words and figures “article 244 of the Constitution”, the words, brackets and figures “or any area identified under the provisions of clause (vi) of sub-section (2) of section 21” shall be inserted;

(b) for the words “two years”, the words “three years” shall be substituted.

8. Substitution of new section for section 14. For section 14 of the principal Act, the following section shall be substituted, namely:—

“14. Special Court and Exclusive Special Court. (1) For the purpose of providing for speedy trial, the State Government shall, with the concurrence of the Chief Justice of the High Court, by notification in the Official Gazette, establish an Exclusive Special Court for one or more Districts:

Provided that in Districts where less number of cases under this Act is recorded, the State Government shall, with the concurrence of the Chief Justice of the High Court, by notification in the Official Gazette, specify for such Districts, the Court of Session to be a Special Court to try the offences under this Act:

Provided further that the Courts so established or specified shall have power to directly take cognizance of offences under this Act.

(2) It shall be the duty of the State Government to establish adequate number of Courts to ensure that cases under this Act are disposed of within a period of two months, as far as possible.

(3) In every trial in the Special Court or the Exclusive Special Court, the proceedings shall be continued from day-to-day until all the witnesses in attendance have been examined, unless the Special Court or the Exclusive Special Court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded in writing:

Provided that when the trial relates to an offence under this Act, the trial shall, as far as possible, be completed within a period of two months from the date of filing of the charge sheet.”.

9. Insertion of new section 14A. After section 14 of the principal Act, the following section shall be inserted, namely:—

“14A. Appeals. (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), an appeal shall lie, from any judgment, sentence or order, not being an interlocutory order, of a Special Court or an Exclusive Special Court, to the High Court both on facts and on law.

(2) Notwithstanding anything contained in sub-section (3) of section 378 of the Code of Criminal Procedure, 1973 (2 of 1974), an appeal shall lie to the High Court against an order of the Special Court or the Exclusive Special Court granting or refusing bail.

(3) Notwithstanding anything contained in any other law for the time being in force, every appeal under this section shall be preferred within a period of ninety days from the date of the judgment, sentence or order appealed from:

Provided that the High Court may entertain an appeal after the expiry of the said period of ninety days if it is satisfied that the appellant had sufficient cause for not preferring the appeal within the period of ninety days:

Provided further that no appeal shall be entertained after the expiry of the period of one hundred and eighty days.

(4) Every appeal preferred under sub-section (1) shall, as far as possible, be disposed of within a period of three months from the

date of admission of the appeal.”

10. Substitution of new section for section 15. For section 15 of the principal Act, the following section shall be substituted, namely:—

“15. Special Public Prosecutor and Exclusive Public Prosecutor. (1) For every Special Court, the State Government shall, by notification in the Official Gazette, specify a Public Prosecutor or appoint an advocate who has been in practice as an advocate for not less than seven years, as a Special Public Prosecutor for the purpose of conducting cases in that Court.

(2) For every Exclusive Special Court, the State Government shall, by notification in the Official Gazette, specify an Exclusive Special Public Prosecutor or appoint an advocate who has been in practice as an advocate for not less than seven years, as an Exclusive Special Public Prosecutor for the purpose of conducting cases in that Court.”

11. Insertion of new Chapter IVA. After Chapter IV of the principal Act, the following Chapter shall be inserted, namely:—

“CHAPTER IVA

RIGHTS OF VICTIMS AND WITNESSES

15A. Rights of victims and witnesses. (1) It shall be the duty and responsibility of the State to make arrangements for the protection of victims, their dependents, and witnesses against any kind of intimidation or coercion or inducement or violence or threats of violence.

(2) A victim shall be treated with fairness, respect and dignity and with due regard to any special need that arises because of the victim's age or gender or educational disadvantage or poverty.

(3) A victim or his dependent shall have the right to reasonable, accurate, and timely notice of any Court proceeding including any bail proceeding and the Special Public Prosecutor or the State Government shall inform the victim about any proceedings under this Act.

(4) A victim or his dependent shall have the right to apply to the Special Court or the Exclusive Special Court, as the case may be,

to summon parties for production of any documents or material, witnesses or examine the persons present.

(5) A victim or his dependent shall be entitled to be heard at any proceeding under this Act in respect of bail, discharge, release, parole, conviction or sentence of an accused or any connected proceedings or arguments and file written submission on conviction, acquittal or sentencing.

(6) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the Special Court or the Exclusive Special Court trying a case under this Act shall provide to a victim, his dependent, informant or witnesses—

(a) the complete protection to secure the ends of justice;

(b) the travelling and maintenance expenses during investigation, inquiry and trial;

(c) the social-economic rehabilitation during investigation, inquiry and trial; and

(d) relocation.

(7) The State shall inform the concerned Special Court or the Exclusive Special Court about the protection provided to any victim or his dependent, informant or witnesses and such Court shall periodically review the protection being offered and pass appropriate orders.

(8) Without prejudice to the generality of the provisions of sub-section (6), the concerned Special Court or the Exclusive Special Court may, on an application made by a victim or his dependent, informant or witness in any proceedings before it or by the Special Public Prosecutor in relation to such victim, informant or witness or on its own motion, take such measures including—

(a) concealing the names and addresses of the witnesses in its orders or judgments or in any records of the case accessible to the public;

(b) issuing directions for non-disclosure of the identity

and addresses of the witnesses;

(c) take immediate action in respect of any complaint relating to harassment of a victim, informant or witness and on the same day, if necessary, pass appropriate orders for protection:

Provided that inquiry or investigation into the complaint received under clause (c) shall be tried separately from the main case by such Court and concluded within a period of two months from the date of receipt of the complaint:

Provided further that where the complaint under clause (c) is against any public servant, the Court shall restrain such public servant from interfering with the victim, informant or witness, as the case may be, in any matter related or unrelated to the pending case, except with the permission of the Court.

(9) It shall be the duty of the Investigating Officer and the Station House Officer to record the complaint of victim, informant or witnesses against any kind of intimidation, coercion or inducement or violence or threats of violence, whether given orally or in writing, and a photocopy of the First Information Report shall be immediately given to them at free of cost.

(10) All proceedings relating to offences under this Act shall be video recorded.

(11) It shall be the duty of the concerned State to specify an appropriate scheme to ensure implementation of the following rights and entitlements of victims and witnesses in accessing justice so as—

(a) to provide a copy of the recorded First Information Report at free of cost;

(b) to provide immediate relief in cash or in kind to atrocity victims or their dependents;

(c) to provide necessary protection to the atrocity victims or their dependents, and witnesses;

(d) to provide relief in respect of death or injury or

damage to property;

(e) to arrange food or water or clothing or shelter or medical aid or transport facilities or daily allowances to victims;

(f) to provide the maintenance expenses to the atrocity victims and their dependents;

(g) to provide the information about the rights of atrocity victims at the time of making complaints and registering the First Information Report;

(h) to provide the protection to atrocity victims or their dependents and witnesses from intimidation and harassment;

(i) to provide the information to atrocity victims or their dependents or associated organisations or individuals, on the status of investigation and charge sheet and to provide copy of the charge sheet at free of cost;

(j) to take necessary precautions at the time of medical examination;

(k) to provide information to atrocity victims or their dependents or associated organisations or individuals, regarding the relief amount;

(l) to provide information to atrocity victims or their dependents or associated organisations or individuals, in advance about the dates and place of investigation and trial;

(m) to give adequate briefing on the case and preparation for trial to atrocity victims or their dependents or associated organisations or individuals and to provide the legal aid for the said purpose;

(n) to execute the rights of atrocity victims or their dependents or associated organisations or individuals at every stage of the proceedings under this Act and to provide the necessary assistance for the execution of the rights.

(12) It shall be the right of the atrocity victims or their dependents, to take assistance from the Non-Government

Organisations, social workers or advocates.”.

12. Insertion of new Schedule. After section 23 of the principal Act, the following Schedule shall be inserted, namely:—

“THE SCHEDULE

[See section 3(2) (va)]

Section under the Indian Penal Code	Name of offence and punishment
120A	Definition of criminal conspiracy.
120B	Punishment of criminal conspiracy.
141	Unlawful assembly.
142	Being member of unlawful assembly.
143	Punishment for unlawful assembly.
144	Joining unlawful assembly armed with deadly weapon
145	Joining or continuing in unlawful assembly, knowing it has been commanded to disperse.
146	Rioting.
147	Punishment for rioting.
148	Rioting, armed with deadly weapon.
217	Public servant disobeying direction of law with intent to save person from punishment or property from forfeiture.
319	Hurt.
320	Grievous hurt.
323	Punishment for voluntarily causing hurt.
324	Voluntarily causing hurt by dangerous weapons or means.
325	Punishment for voluntarily causing grievous hurt.
326B	Voluntarily throwing or attempting to throw acid.
332	Voluntarily causing hurt to deter public servant from

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his duty.

341 Punishment for wrongful restraint.

354 Assault or criminal force to woman with intent to outrage her modesty.

354A Sexual harassment and punishment for sexual harassment.

354B Assault or use of criminal force to woman with intent to disrobe.

354C Voyeurism.

354D Stalking.

359 Kidnapping.

363 Punishment for kidnapping.

365 Kidnapping or abducting with intent secretly and wrongfully to confine person.

376B Sexual intercourse by husband upon his wife during separation.

376C Sexual intercourse by a person in authority.

447 Punishment for criminal trespass.

506 Punishment for criminal intimidation.

509 Word, gesture or act intended to insult the modesty of a woman.”

13. Repeal and saving. (1) The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Amendment Ordinance, 2014 (1 of 2014) is hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken under the principal Act, as amended by the said Ordinance, shall be deemed to have been done or taken under the corresponding provisions of the principal Act, as amended by this Act.

DR. G. NARAYANA RAJU,
Secretary to the Govt. of India.

I.L.R. [2016] M.P., 341
SUPREME COURT OF INDIA

Before Mr. Justice Pinaki Chandra Ghose & Mr. Justice R.K. Agrawal
Cr.A. Nos. 1793-1794/2011 decided on 15 October, 2015

RAM SUNDER SEN

...Appellant

Vs.

NARENDER @ BODE SINGH PATEL

...Respondent

(Alongwith Cr.A. Nos. 1795-1796/2011)

A. Penal Code (45 of 1860), Sections 302, 376(2)(f) & 201 - Rape and murder - No document brought on record that accused on earlier occasion had made attempt to commit rape - Doctor who had examined accused failed to identify him in Court - Further, abrasions could be caused during the day while working in and around - Recovery of undergarments of deceased also doubtful - No blood was found on the underwear of deceased - Allegation of presence of accused on the spot was missing in statement made to police u/s 161 Cr.P.C. - High Court rightly acquitted the respondent. (Paras 7 to 14)

क. दण्ड संहिता (1860 का 45), धाराएं 302, 376(2)(एफ) व 201 - बलात्कार और हत्या - अभिलेख पर कोई दस्तावेज नहीं लाया गया कि अभियुक्त ने पूर्वतर अवसर पर बलात्कार कारित करने का प्रयत्न किया था - चिकित्सक, जिसने अभियुक्त का परीक्षण किया था, उसे न्यायालय में पहचानने में असफल रहा - इसके अतिरिक्त, खरोंचें, प्रतिदिन के कार्य के दौरान कारित हो सकती हैं - मृत्तिका के अंतर्वस्त्रों की बरामदगी भी संदेहास्पद - मृत्तिका की जांधिया पर कोई रक्त नहीं पाया गया - पुलिस को दं.प्र.सं. धारा 161 के अंतर्गत दिये गये कथन में अभियुक्त की घटनास्थल पर उपस्थिति का अभिकथन मौजूद नहीं - उच्च न्यायालय ने उचित रूप से प्रत्यर्थी को दोषमुक्त किया।

B. Penal Code (45 of 1860), Sections 302 & 376 - Rape and murder - Circumstantial evidence - Law discussed. (Para 15)

ख. दण्ड संहिता (1860 का 45), धाराएं 302 व 376 - बलात्कार और हत्या - परिस्थितिजन्य साक्ष्य - विधि विवेचित।

J U D G M E N T

The Judgment of the Court was delivered by :
PINAKI CHANDRA GHOSE, J. :- These appeals, by special leave, are directed

against the judgment and order dated 23.07.2008, passed by the High Court of Madhya Pradesh at Jabalpur in Criminal Appeal No.11 of 2008 along with Criminal Reference No.4 of 2007, whereby the High Court allowed the criminal appeal filed by the respondent herein and acquitted him and disposed of the Criminal Reference No.4 of 2007 filed by the State of Madhya Pradesh.

2. The case of the prosecution, stated briefly, is that on 19.05.2004 at 8.30 A.M., the complainant Ram Sunder Sen lodged a report at Police Chowki Kotar stating that there was a function in his house on 18.05.2004 in which his relatives and family members had gathered. His daughter Anita, aged about 12 years, after eating meal, had gone to sleep at 7.00 P.M. in front of the main gate of his house as there was no electricity in the house then. After the function was over, at about 11.00 P.M., he and his family members also slept there. Next morning i.e. on 19.05.2004 at 6.00 A.M., the wife of Sarpanch Vansbahadur informed that the dead body of Anita was lying in Bari near the house of the Sarpanch. She was not wearing underwear and skirt. There were abrasions on her forehead, nose and face. Abrasions were also found on the neck as well as nearby navel region. Blood was oozing out of private part, cut on the face and ankles of both the legs. FIR against an unknown person was lodged, the dead body was sent for post-mortem and investigation was thrown open. The Investigating Officer recorded the statements of the witnesses. On the basis of the statement of the witnesses, accused Narendra @ Bode Singh Patel was arrested who admitted his guilt and at his instance, blood-stained underwears of the deceased as also the accused were recovered from a pitcher kept behind his house.

3. After investigation was complete, Police filed challan before the Court against accused Narendra and the case was committed to the Sessions Court for trial. After considering the material on record and hearing the counsel for the accused, charges were framed against accused Narendra for offence punishable under Sections 302, 376(2)(f) and 201 of the Indian Penal Code, 1873 (sic:1860) ("IPC" for short). The charges were read over and explained to the accused to which he pleaded not guilty and claimed for trial.

4. The Trial Court by its judgment and order dated 18.12.2007, convicted the respondent accused and awarded capital punishment to him for offence punishable under Section 302 IPC. The Trial Court further sentenced him to rigorous imprisonment for life for offence punishable under Section 376(2)(f),

and rigorous imprisonment for seven years and a fine of Rs100, with default clause, for the offence punishable under Section 201 IPC. Thereafter, the matter was referred to the High Court of Madhya Pradesh for confirmation of death sentence vide Criminal Reference No.4 of 2007. The accused also filed an appeal before the High Court, being Criminal Appeal No.11 of 2008. The High Court by the impugned judgment allowed the appeal filed by the accused on the ground that the prosecution failed to prove the chain of circumstances sufficient enough to connect the accused with the alleged offence and, consequently, the respondent accused was set at liberty.

5. Aggrieved by the judgment of acquittal passed by the High Court of Madhya Pradesh, the complainant, who is the father of the deceased, has approached this Court by filing Criminal Appeal Nos.1793-1794 of 2011. The State of Madhya Pradesh has also challenged before us the judgment of acquittal passed by the High Court vide Criminal Appeal Nos.1795-1796 of 2011. Learned counsel for the complainant-appellant has inter alia submitted that the judgment of the Trial Court is well reasoned and well considered. Both the counsel for the complainant-appellant and counsel for the State have assailed the reasoning given by the High Court in arriving at a wrong conclusion i.e. the innocence of the accused.

6. The Trial Court convicted the accused respondent on the basis of the prosecution story relying upon the circumstantial evidence. The law is well settled in deciding a case based upon circumstantial evidences. The prosecution tried to establish the following facts before the Trial Court :

- (i) Motive : in order to satisfy the lust,
- (ii) The recovery of underwear of the deceased as also the underwear of the accused was made at the instance of the accused in his own house,
- (iii) Human blood was found on the underwear of the accused,
- (iv) The accused came to the house of the deceased at 11.00pm on 18.05.2004 under the pretext of a Bidi but was turned back by the mother of the deceased.
- (v) Previous acts of the accused to make the deceased sit in his lap and to kiss her for which he was rebuked by the

deceased's father reveals his ill-intentions.

(vi) Accused made an attempt to rape the daughter of one Kallu Prajapati of Village Golhata prior to the incident,

(vii) In the morning of 19.05.2004 the accused was not found in the village,

(viii) Accused was seen around the place of incident at night within close proximate time when the incident occurred,

(ix) Accused failed to give reasonable explanation about the injuries suffered by him.

The Trial Court held that the above facts proved the prosecution case beyond reasonable doubt and hence the accused was convicted for the offence charged. However, the High Court pointed out serious lacunae in the above-mentioned evidences and hence the conviction order was set aside by the High Court giving benefit of doubt to the accused.

7. We shall now examine each and every contention in light of the arguments advanced before us: It is settled law that motive is not a necessary element in deciding culpability but it is equally an important missing link which can be used to corroborate the evidence where conviction is based on circumstantial evidence. In the present case, the motive of the accused was stated to be 'to satisfy his lust'. For this purpose the prosecution argued that although the accused was married and had children, but his wife was living at her parent's house. The same fact was deposed by Lalli Bai, mother of the prosecutrix (PW4). The Trial Court accepted the said argument. However, the High Court rightly refused to rely only on the statement of PW4 to establish the said fact. Further, it is not adequately established as to for how long the wife of the accused was not living with him. The burden to prove this fact is on the prosecution and not on the accused. The prosecution also tried to impute bad character upon the accused. The High Court rightly held that such evidences are not relevant. Sections 53 and 54 of the Indian Evidence Act, 1872 were discussed at length by the High Court and it was held that the accused neither tried to prove his previous good character, nor the said fact was in question. An earlier instance of attempt to rape by the accused, as deposed by the mother of the prosecutrix (PW4), Savitri, aunt of the deceased (PW5) and Rajendra Kumar Sen, brother of the deceased (PW6), is not established at

any stage of the trial. These witnesses are not only interested witnesses but they themselves stated that their evidence is hearsay. The prosecution neither produced any complaint/FIR nor any record was shown that any such incident occurred. Thus, the prosecution squarely failed to impute bad character upon the accused. Further, the motive is also not firmly established against the accused.

8. The next aspect for consideration before us is the non-explanation by the accused of the injuries sustained by him. As per the medical examination, the accused had certain abrasions on his wrists and ankles and also some injuries on private part. PW24 - the doctor who examined the accused, deposed that he examined one Narendra S/o Ram Babu. But this doctor failed to identify the accused before the Court. The prosecution also failed to produce any evidence in order to prove that the name of the father of the accused is Ram Babu. The name of accused's father is Ram Bahore and it is nowhere shown that Ram Bahore is *alias* of Ram Babu. With these discrepancies, the High Court refused to accept that the accused was the same person who was examined by the doctor PW24. However, even if it is presumed that there could have been error in writing down the name of the father of the accused and due to long time, the doctor failed to identify the accused, yet the medical evidences are not clinching enough. The accused is a young man, certain abrasions can be regularly sustained during the day while working in and around. Moreover, the accused having worked in his cousin's wedding might have received the abrasions. Medical opinion for explanation to such abrasion is that such abrasion can occur due to itching also. The other injuries on private part, in medical opinion, could be a result of sexual intercourse with his wife. The accused is a married man having children and it is not established that his wife was living away from him. Hence, non-explanation of the above said injuries is not an incriminating circumstance so as to attribute any criminality upon the accused.

9. The next incriminating fact is the recovery of the blood-stained underwear of the deceased made at the instance of the accused, from the house of the accused. However, upon careful examination, serious doubts are cast upon the incident of recovery. The witnesses to this seizure memo are Lalit Kumar Sen (PW9) and Dayanand (PW22). As per the deposition of PW9, many doubts are created. He deposed that red colour underwear as well as an underwear of accused were seized. However, he did not state as to

whom did the red colour underwear belong. He also did not mention the place from where it was recovered nor did he mention the manner in which the articles were seized. PW22 further made certain doubtful revelations stating that at the time of recovery, only he, accused and the police were present. However, he only confirms the recovery of a red colour underwear, but the place and surrounding of the place of recovery were not deposed by PW22. The deposition of the above two witnesses raises various doubts about recovery of material facts. Therefore, the High Court correctly raised doubt that it is highly unnatural that the accused will keep the underwear in a pitcher in his own house.

10. The prosecution failed to prove its case on one more aspect. Upon recovery of the underwear of the accused and the deceased, although the same were sent for Serological examination and it was proved that blood was found on the underwear of the accused, but no blood was found on the undergarments of the deceased. During investigation, the blood sample and soil samples were collected from the place of incident. However, it is shocking to note that none of these samples were sent for FSL examination. The said examination could have been very useful to establish the identity of the accused. There is thus a serious lacunae in the investigating procedure that a necessary test was not conducted.

11. The underwear of deceased vide identification memo Ex.P/14 was put for test identification. PW4 deposed that she identified the underwear as the same was torn from the bottom. However, when this witness was put to cross-examination, she deposed that none of the underwears which were put for identification, was torn from the bottom. PW4 also stated that the underwear was blood-stained. However, it is proved by serological report that no blood was found on the underwear of the deceased. Upon perusal, numerous contradictions appear from the statements made by PW4, and serious doubt is raised not only on recovery of the undergarments, but also upon the identification test.

12. The next evidence is the presence of the accused in the village at and around the time of the incident against which the accused has pleaded alibi. The prosecution placed on record the testaments of Ram Sunder Sen, father of the deceased (PW3), stating that the accused came to his house 3-4 times during the night of 18.05.2004. He also deposed that on 18.05.2004 at 11.00

P.M. the accused came to his house and asked for bidi, but he was turned back by his wife PW4. PW4 also made deposition to this effect. However, upon cross-examination both these witnesses stated that this fact was told to the police officer upon examination. But no such fact is present in their statements made to the police during investigation. The High Court disbelieved the said fact as there was a deviation from the earlier statement. Further, the High Court examined the statements of the defence witnesses, who deposed that on the date of incident, the accused was present in another village to attend the marriage function of his cousin. The defence witnesses specifically deposed that the accused was present during and after the function on 18.05.2004 and the accused stayed there at night. It was further deposed that the accused left for his home only after breakfast. This also explains the absence of the accused in his village in the morning of the incident. The High Court rightly relied upon the statement of an independent witness, namely, Kalawati (PW1) who deposed that the accused was not in the village on the fateful night as he had gone to the marriage ceremony in other village. The said factum of marriage ceremony and function in other village has been admitted even by the family members of the deceased.

13. The prosecution also placed on record an incident alleged to have occurred a few days prior to the fateful day, when the accused made the deceased sit on his lap and kissed her, for which the accused was rebuked and beaten by the father of the deceased. However, in their statement to the police, no such fact was deposed by PW3 or PW4 and it was only before the Court that the above witnesses stated this fact. Even if the said fact is presumed to be true, we concur with the reasoning of the High Court that mere snuggling the deceased once, in itself, is no ground to connect the accused with the alleged incident.

14. The prosecution also adduced the testimony of Sanjeev Kumar Sen (PW28), cousin of the deceased, who alleged that in the night intervening between 18th and 19th May, 2004 at about 4:30 A.M., he woke up to attend the call of nature when he saw the accused coming towards his house from the Badi of the house of Vanshgopal Sarpanch. Very close to that place, the deceased was found dead in the morning. However, upon careful examination, it can be gathered that this witness did not state such an important fact to the police officer. Although he alleged that the said fact was known to him yet the report was lodged against an unknown person. Further, if the veracity of this

statement is tested, it fails to adduce confidence. PW28 himself stated that he saw the accused at 4:30 A.M., however, none of the details as to the distance, surrounding, etc. were given. The source of light in which the witness saw the accused is also not stated. Therefore, the High Court correctly rejected the testimony of PW28.

15. The present case is, thus, based purely on circumstantial evidence. It is a settled law that when prosecution relies on circumstantial evidence, the following tests to be clearly established:

- (i) The circumstances from which an inference of guilt is sought to be drawn, must be cogent and firm;
- (ii) Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
- (iii) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and
- (iv) The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

The prosecution, however, in the present case, has failed at the foremost to link the accused with the incident. The prosecution has the responsibility to present a chain of events. The accused's culpability could have been established if the blood samples were tested and matched, the recovery of underwear is not proven to be that of the deceased. Otherwise, the recovery was unnatural and did not adduce confidence. One prosecution witness who is an independent witness has stated that the accused had gone to another village on the date of incident. There were material discrepancies in the statements of the prosecution witnesses. The testimonies of the interested witnesses, namely, PW3, PW4, PW5 and PW28 clearly show that they materially improvised from their earlier depositions. The accused also examined two defence witnesses who stated that the accused was attending function in some other village on the fateful night. The High Court went into each and every material aspect of the case,

examined at length the deposition of the witnesses and rightly held that the links which are collected by the prosecution have not at all been proved by any cogent evidence and, therefore, it is difficult to hold that it was the accused who committed rape upon the deceased and thereafter killed her.

16. Thus, in the light of the above discussion, we do not find any ground to interfere with the judgment passed by the High Court. The appeals are, accordingly, dismissed.

Appeal dismissed.

I.L.R. [2016] M.P., 349

WRIT APPEAL

Before Mr. Justice P.K. Jaiswal & Mr. Justice D.K. Paliwal

W.A. No. 735/2012 (Indore) decided on 5 November, 2014

STATE OF M.P. & ors.

...Appellants

Vs.

GAJRAJ SINGH & ors.

...Respondents

(Alongwith W.A. No. 737/2012, W.A. No. 736/2012 & W.A. No. 13/2013).

Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (1 of 1996), Sections 32, 33 & 36 - Appointment of hearing Impaired Candidates - Posts of Samvida Shala Shikshak Grade-II and III in Panchayat & Social welfare department & Urban Administration & Development Department - Advertisement issued by M.P. Professional Examination Board does not reflect reservation for hearing Impaired persons - State Government notification dated 24.03.2006 provided 6% reservation for disabled persons in which 2% reserved for hearing Impaired persons - Subsequent notification dated 2.12.2011 includes School Education department of Urban Administration to appoint disabled persons on post of Assistant Teachers - Held - No question of depriving legitimate right guaranteed under the Act only because of omission in the advertisement. (Paras 21, 22, 25 & 30)

निःशक्त व्यक्ति (समान अवसर, अधिकार संरक्षण और पूर्ण भागीदारी) अधिनियम, 1995 (1996 का 1), धाराएं 32, 33 व 36 - श्रवण बाधित अभ्यर्थियों की नियुक्ति - पंचायत एवं सामाजिक कल्याण विभाग तथा नगरीय प्रशासन एवं विकास

विभाग में संविदा शाला शिक्षक वर्ग-II एवं वर्ग-III के पद - म.प्र. व्यवसायिक परीक्षा मण्डल द्वारा जारी विज्ञापन में श्रवण बाधित अम्प्यर्थियों हेतु आरक्षण दर्शित नहीं - राज्य सरकार द्वारा जारी अधिसूचना दिनांक 24.03.2006 निःशक्त व्यक्तियों हेतु 6% आरक्षण उपबंधित करती है, जिसमें से 2% आरक्षण श्रवण बाधित व्यक्तियों हेतु है - निःशक्त व्यक्तियों को सहायक अध्यापकों के पदों पर नियुक्त किये जाने हेतु पश्चातवर्ती अधिसूचना दिनांकित 02.12.2011 में नगरीय प्रशासन विभाग के शाला शिक्षा विभाग को सम्मिलित किया गया - अभिनिर्धारित - मात्र विज्ञापन में हुए लोप के कारण, अधिनियम द्वारा प्रत्याभूत विधिसम्मत अधिकार से वंचित रखे जाने का कोई प्रश्न नहीं है।

Cases referred :

2013 (10) SCC 772, (2010) 3 SCC 603.

Mini Ravindran, Dy.G.A. for the appellants.

Piyush Mathur with Ashish Choubey, for the respondents.

ORDER

The Order of the Court was delivered by :
P.K. JAISWAL, J. :- By this batch of intra court appeals filed under Section 2 (1) of M.P. *Uchha Nyayalay (Khand Nyaya Peeth Ko Appeal) Adhiniyam*, 2005, by the appellants - State have, assailed the validity of the order dated 6.9.2012 passed in Writ Petition No.8548 of 2011, Writ Petition No.8623 of 2011, Writ Petition No.8868 of 2011 and Writ Petition No.8549 of 2011. The controversy involved in these cases are identical and they have been analogously heard together with the consent of the parties and disposed of by a common order with the following directions :-

- (i) *the respondent Madhya Pradesh Professional Examination Board is directed to permit the petitioner to participate in the process of selection and to declare the result of the petitioner under the reservation category of 2%, which is reserved by virtue of the notification dated 24- 03-2006 in respect of persons suffering from hearing impairment.*
- (ii) *Respondents State Government as well as Madhya Pradesh Professional Examination Board are*

directed to scrutinize all the applications and in case a candidate has submitted his application under the category of physical disabled persons and in fact they are hearing impaired persons then they should be granted the benefit under the 2% quota, which is exclusively reserved for hearing impaired persons.

- iii) Respondents shall permit and declare the result of such persons who are suffering from hearing impairment after conducting the process of selection and in case they are in the merit list, they shall be eligible for appointment to the post of Sanvidya Shala Shikshak, Grade-II and Sanvidya Shala Shikshak, Grade-III. The respondents shall also issue necessary consequential appointment orders.*
- (iv) Finally, the respondent Madhya Pradesh Professional Examination Board while issuing any subsequent advertisement shall clarify that the circular dated 24-03-2006 in respect of the reservation clause provides for 4% reservation to Orthopedically handicapped persons, which includes 2% for hearing impairment and 2% for persons suffering from locomotor disability or cerebral palsy.*

2. For the sake of convenience the facts are borrowed from W.A.No.735/2012.

3. The respondents in these writ appeals have claimed that they all belonged to Hearing Impaired category and have raised their plight by filing writ petitions saying that the appellants /Government of M.P. are not accommodating the Hearing Impaired category students/candidates for employment to the various posts of Sanvidya Shala Shikshak Grade – II & III (for short 'SSS Gr.II or SSS Gr.III') in Panchayat and Social Welfare Department and Urban Administration and Development Department. According to them, they all are otherwise fit for consideration for their

appointment following due procedure that is appearing in competitive written test and followed by their selection under the quota of 2% otherwise reserved by the State Government of M.P. For the Hearing Impaired (Deaf & Dumb persons) as per the Notification dated 24.3.2006 (Annexure P/3). Their further contention is that the aforesaid notification read with Section 33 of "The Persons with Disabilities (Equal Opportunities Protection of Rights and full participation) Act, 1995 (hereinafter referred as 'the Act of 1995') makes it mandatory for the State Government of M.P. to reserve 2% posts of SSS Gr.II and SSS Gr.III for persons suffering from Hearing Impaired disabilities and, therefore, they all are entitled to participate under the prescribed and reserved category.

4. An advertisement was issued by the Madhya Pradesh Professional Examination Board, Bhopal, in the month of October 2011 inviting applications for SSS Gr.II under the Panchayat and Social Welfare Department and Urban Administration and Development Department. It has further stated that the aforesaid advertisement was in respect of SSS Gr.II Examination, 2011 and a similar advertisement was issued (at page 22) for SSS Gr.III. Their grievance is that in the impugned advertisement no reservation has been provided for persons suffering from hearing impairment and a reservation has been provided to persons suffering from blindness to the extent of 2% and the persons suffering from locomotor disability or cerebral palsy to the extent of 4%.

5. As per sub-clause 3 of Clause 12 of the advertisement Annexure /P4, it is clear that 4% reservation was provided to the Orthopedically handicapped persons. Their grievance that no reservation was provided for Hearing Impaired persons.

6. They immediately after issuance of the advertisement filed these bunch of writ petitions and an interim order was passed on 24.10.2011 permitting them to participate in the process of selection.

7. The Government of M.P. has issued a notification dated 24.3.2006 provided a reservation to the extent of 6% for persons suffering from disability and the aforesaid notification makes it very clear that 2% posts are reserved for persons suffering from Hearing Impaired. Circular dated 24.3.2006 reads as under :-

**मध्यप्रदेश शासन
सामान्य प्रशासन विभाग
मंत्रालय
वल्लभ भवन, भोपाल-462004**

क्रमांक 380 / 1773 / 05 / आ.प्र. / एक

भोपाल दिनांक 24.03.2006

प्रति,

प्रमुख सचिव

मध्यप्रदेश शासन,

स्कूल शिक्षा / नगरीय प्रशासन एवं विकास /

पंचायत एवं ग्रामीण विकास / सामाजिक न्याय विभाग,

समस्त संभागीय आयुक्त,

समस्त जिला कलेक्टर्स,

समस्त मुख्य कार्यपालन अधिकारी,

जिला पंचायत मध्यप्रदेश।

विषय :- संविदा शाला शिक्षकों की भरती में निःशक्त व्यक्तियों को आरक्षण।

निःशक्त व्यक्ति (समान अवसर, अधिकार संरक्षण एवं पूर्ण भागीदारी) अधिनियम, 1955 की धारा-32 के तहत प्रमुख सचिव, सामान्य प्रशासन विभाग की अध्यक्षता में गठित समिति की अनुशंसा दिनांक 10-11-2005 पर उक्त अधिनियम की धारा-36 में उल्लेखित परन्तु में दिये गये प्रावधान के परिप्रेक्ष्य में राज्य शासन द्वारा निर्णय लिया गया है कि संविदा शाला शिक्षकों की भरती में श्रवण बाधित निःशक्तजनों के लिए निर्धारित 2 प्रतिशत पर अस्थि-बाधित प्रवर्ग में आरक्षित किये जाते हैं। अर्थात् संविदा शाला शिक्षक भरती में दृष्टिबाधित निःशक्तजन के लिए 2 प्रतिशत एवं अस्थिबाधित निःशक्तजनों के लिए 4 प्रतिशत का आरक्षण रहेगा।

8. The aforesaid notification read with Section 33 of the Act of 1995, makes it mandatory for the State Government to reserve 2% posts of SSS Gr.II and SSS Gr.III from the person suffering from Hearing Impaired. The contention of the learned Senior counsel before the writ Court was that the aforesaid notification provides for reservation to the extent of 2% for persons suffering with blindness, 2% for persons suffering from hearing impairment and 2% for persons suffering from locomotor disability or cerebral palsy.

9. On 21.9.2011 the Government of M.P. has issued a notification (Annexure P/6) in exercise of powers conferred under Section 32 of the Act, 1995, identifying the School Education Department for providing reservation,

as per the statutory provisions u/s 33 of the Act, 1995 and reservation has been provided in respect of other departments also. Subsequently, another notification was issued on 2.12.2011 (Annexure P/9), wherein the department of Higher Education, the department of Tribal Welfare as well as Panchayat and Rural Development Department have included for reserving 2% vacancies for persons suffering from blindness, hearing impairment and locomotor disability etc. each. As per Schedule appended to the notification dated 2.12.2011, it is very clear that 526 posts are reserved for SSS Gr.II and 863 posts are reserved for SSS Gr.III for disabled persons and out of the aforesaid posts 175 and 273 posts are reserved for persons suffering from Hearing Impairment. The contention of the respondents in the writ petition was that by virtue of notification issued by the State Government from time to time, they are entitled for participating in the process of selection. As per reply filed by the appellants the appellants have placed reliance upon the notification dated 31.5.2001. Their stand was that the committee was constituted by the Ministry of Social Justice and Empowerments and as per recommendation of the committee certain posts have been reserved for persons suffering from Hearing Impairment. It has been stated that for persons suffering from hearing impairment, the post of Craft Teacher and post of Art Teacher is reserved and they cannot be appointed against other teaching posts. It is also been stated that on 18-05-2010 a clarification was issued by the Deputy Commissioner (Persons with Disability) Government of India, wherein it was provided that posts of Art Teachers and Craft Teachers are reserved for persons suffering with hearing impairment. Another letter has been filed dated 31-05-2005, wherein the Deputy Chief Commissioner, Office of the Chief Commissioner for persons with disabilities, has again informed the State Government to reserve posts of teachers and it reflects that persons with hearing impaired are entitled to be appointed on the post of Art and Craft Teachers. They have further stated that a committee was constituted by the State Government and the Committee submitted its recommendation on 2.5.2005 and the teaching posts were reserved for physically disabled persons, specifically for Orthopedically handicapped persons and persons suffering from blindness. They also relied on notification dated 2.11.2011 published by the Government of M.P. in exercise of power conferred under Section 32 of the Act, 1995 and contended that for reserving the posts in respect of physically disabled persons it is only the School Education Department, which finds place in the aforesaid notification and the department of Panchayat and Social Welfare as well as the department

of Urban Administration does not find place in the aforesaid list and therefore the Professional Examination Board has rightly issued the advertisement and no reservation has been done in respect of persons suffering from hearing impaired. They in their return also admitted that the Government of M.P. has issued a notification dated 23.4.2006, which is in respect of School Education Department, Urban Administration and Development Department Social Welfare Department and the same provide for a reservation of 2% in respect of posts of SSS.

10. By impugned order the writ petitions are allowed and appellant No.4 is directed to permit the respondent to participate in process of selection and to declare their results under the reservation category of 2% which is reserved by virtue of notification dated 24.3.2006 in respect of persons suffering from Hearing Impairment. The writ court also directed to scrutinize all the applications and in case a candidate has submitted an application under the category of physical disabled persons and infact they are hearing impaired persons then they should be granted the benefit under the 2% quota, which is exclusively reserved for hearing impaired persons. The appellants are also directed to declare the results of such persons who are suffering from hearing impairment after conducting the process of selection and in case they are in the merit list, they shall be eligible for appointment to the post of SSS, Grade.II and SSS, Gr. III. The writ court also directed the appellant No.4 that in subsequent advertisement shall clarify that the circular dated 24-03-2006 in respect of the reservation clause provides for 4% reservation to Orthopedically handicapped persons, which includes 2% for hearing impairment and 2% for persons suffering from locomotor disability or cerebral palsy.

11. Learned Deputy Government Advocate submits that by the aforesaid direction the requisite process of appointment of the successful candidates SSS Gr.II & III are likely to be affected as the post of the said categories has not been identified by the State Government for the Hearing Impairment (Deaf and Dumb) category under the said advertisement issued for the purpose of such appointments.

12. She submits that candidates suffering from above aggrieved category lack very essential skill of Inter Personal Communication which is the basic essence of classroom teaching in Primary/Middle School Classes. As Right to Children Act, 2009 having come into force across the nation including

State of M.P. w.e.f. 1.4.2010. The right of every children under the said age group is to receive proper quality of education whereas persons who are lacking in Inter personal communication skill are given such appointment then it is doubted that they will be able to do proper justice to both teacher (themselves) and the taught. The basic essence of dialogue is inherent part of classroom teaching and is mind and soul of the same any compromise on the said issue will not ensure quality concept of teaching. She further submitted that the Government of Madhya Pradesh is the appropriate Government and has sympathetic approach towards the plight of the Hearing Impaired category as it has already identified distinct posts of the Craft Teacher and Art Teacher whenever the said posts in accordance with the requirement across the State becomes available then in accordance with the quota reserved for the Hearing Impaired category due process shall be ensured. She further submitted that skill of the candidates suffering from Hearing Impairment can be seen in practical classroom situation not in principle everyone can show sympathy towards the said class but the nature of the job of the Classroom teaching does not require any compromise and the learned Single Judge has not considered the matter on this aspect and on the basis of sympathy decided the matter. She also pointed out that under Section 32 of the Act, 1995, the identification of the posts/ vacancies has been done for the first time by Union of India in 2001. The State Government looking to the nature of each post and liability associated with it, for the purpose of identification of the post under the various establishments for disabled persons a committee under the chairmanship of Principal Secretary, General Administration Department, Vallabh Bhavan Mantralaya Bhopal has been set up which also includes Additional Secretary/ Dy. Secretary of the Department of Social Justice and Welfare M.P. as their nominated members as Convener. The Department of Social Justice & Empowerment Ministry of Union of India through its Gazette notification dated 31.5.2001 New Delhi which was later on published under the Gazette of Union of India on 30.6.2001 clearly in its illustrates which posts shall be reserved for disabled persons. Hearing Impaired persons have not been found suitable for the posts teaching, thus, they have not been considered fit for employment as SSS Gr.II. She also placed reliance of the communication dated 18.10.2005 of the Union of India and submitted that the post of primary teacher is identified for only low-vision persons and is also not identified for cent percent blindness, similarly the post of Arts and Craft Teachers have been identified for the Hearing Impaired persons. The Central Government

has taken decision after due consultation in principle then the question of going beyond any consideration by the State Government of Madhya Pradesh would be inappropriate as well as discriminatory.

13.. She also submitted that as per Section 36 of the Act, 1995, 2% posts reserved for Hearing Impairment persons were mutually interchangeable and same was interchanged to the existing quota of 2% posts which were reserved for locomotor disability and cerebral palsy persons and in consonance with above fact a circular was issued by the G.A.D. Madhya Pradesh Government.

14. She also submits that as per provisions under Section 32 of the Act of 1995 the committee was set up by the Government of Madhya Pradesh and on the basis of report of the committee the Department of Social Justice & Welfare of the State of M.P. issued notification whereby persons with locomotor Disability and low or blind vision persons at Serial No.6 were considered suitable for the post of SSS. The writ court has failed to consider that the identification of the posts to be reserved for the disabled persons was carried out by a committee comprising experts in the concerned fields notifications to this effect were issued on 18.1.2007, 15.3.2007 and 22.3.2007 thereby Higher Secondary School, High School, Middle School and Primary Schools Teacher's posts were only identified for persons with Locomotor Disability / Blind or persons with low vision.

15. From the contentions made under preceding paras of this appeal it becomes evident that there is no parity of both the cases as have been mentioned under the order dated 6.9.2012 with the present matter and under the facts and circumstances of the case hence no reliance and parity can be placed on them. It also has been clearly established by present appellants that the nature of job involved herein is quite different and involves inter personal communication as the form of dialogue which is "heart & soul" to the classroom teaching. It is further evident to mention that the protection of children right to obtain free and compulsory Education Act, 2009 has already come into force across the State of M.P. and as per provisions under the Act, children below the age of 14 have a right to get suitable teachers for the purpose of their quality teaching and under the facts and circumstances of this case no compromise on the basis of its quality can be made as even Union of India has not appreciated this fact and has not identified the Hearing Impaired persons category fit for classroom teaching from primary to senior secondary

classes, hence stand of State of M.P. in not considering and identifying Hearing Impaired class for appointment as SSS Gr.II and III is just and proper.

16. It is further submitted that State Government has not used Section 32 and 36 of the Act of 1995 as a tool to deny any benefit to the persons of disabled category infact entire action on parts of the State Government has been so ensured in exercise of the powers that are contained under the “appropriate government” and no irregularity has been done, only the posts reserved for 2% Hearing Impaired category as per the requisite provisions and prescribed recommendation has been interchanged to specified category of Locomotor Disabled persons for whom 2% reservation already exists.

17. Shri Piyush Mathur, learned Senior counsel for the respondents submits that identification of the posts has been done under Section 32 of 1995 Act. He also placed reliance on Annexure P/6, communication dated 21.9.2011 by which 175 and 273 posts have been identified for SSS Gr.II and SSS Gr. III, respectively. He also submitted that as per Gazette of India (extra ordinary) dated 18.1.2007, at Serial No.241 posts of Senior Master has been identified for hearing handicap category. Similarly, Government of India by notification dated 4.1.2007 constituted a sub-committee to identify the post for hearing handicapped. He lastly submitted that the learned writ court rightly directed to appoint teachers, who are hearing impaired to cater to the need of children, who are suffering from hearing impairment and no case to interfere with the order as the same is as per the provisions of 1995 Act and prayed for dismissal of the writ appeals.

18. The respondents before this court a young girl child suffering from hearing impairment has approached the learned writ court for issuance of an appropriate writ, order or direction directing the respondents to permit her to participate in the process of selection for the post of SSS Gr.II and SSS Gr.III. The Examination is being conducted by the Madhya Pradesh Professional Examination Board, Bhopal. The advertisement issued by the Madhya Pradesh Professional Examination Board, does not provide reservation for persons suffering from hearing impairment and it provides for reservation to the extent of 2% for persons suffering from Blindness and 4% for persons suffering from locomotor disability or cerebral palsy. The persons with Disabilities (Equal Opportunities Protection of Rights and Full Participation) Act, 1995 has enacted on 26.8.1995 with a view to provide a

suitable legislation in respect of the following :-

- “(i) to spell out the responsibility of the State towards the prevention of disabilities, protection of rights, provision of medial care, education, training, employment and rehabilitation of persons with disabilities;
- (ii) to create barrier free environment for persons with disabilities;
- (iii) to remove any discrimination against persons with disabilities in the sharing of development benefits, vis-a-vis non-disabled persons;
- (iv) to counteract any situation or the abuse and the exploitation of persons with disabilities;
- (v) to lay down a strategy for comprehensive development of programmes and services and equalization of opportunities for persons with disabilities; and ;
- (vi) to make special provision of the integration of persons with disabilities into the social mainstream.”

19. The Act of 1995 which was based upon the recommendation of the Asian and Pacific Region Decade of Disabled Persons 1993-2002 convended by the Economic and Social Commission for Asian and Pacific Region provides for reservation to physically disabled persons. Section 2 of the Act, 1995 defines “appropriate Government”. Section 2 (a) (iii) reads as under :-

- (a) **“appropriate Government” means,-**
 - (ii) *in relation to a State Government or any establishment wholly or substantially financed by that Government or any local authority, other than a Cantonment Board, the State Government;”*

20. The aforesaid statutory law makes it very clear that it is the State Government which is an appropriate Government in respect of posts under the State Government or in respect of jobs under the control of the State Government including local authorities. Sections 32, 33 and 36 of the Act, 1995 reads as under :-

"32. Identification of posts which can be reserved for persons with disabilities- Appropriate Governments shall-

(a) identify posts, in the establishments, which can be reserved for the persons with disability;

(b) at periodical intervals not exceeding three years, review the list of posts identified and update the list taking into consideration the developments in technology.

33. Reservation of posts- Every appropriate Government shall appoint in every establishment such percentage of vacancies not less than three per cent for persons or class of persons with disability of which one per cent each shall be reserved for persons suffering from-

(i) blindness or low vision;

(ii) hearing impairment;

(iii) locomotor disability or cerebral palsy, in the posts identified for each disability;

Provided that the appropriate Government may, having regard to the type of work carried on in any department or establishment, by notification subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section.

COMMENTS

The Central Government has exempted all categories of posts of "Combatant personnel" only of the Special Service bureau (SSB) under the Ministry of Home Affairs from the provisions of Section 33, Vide S.O. 946 (E), dated 16th August, 2004.

36. Vacancies not filled up to be carried forward.-

Where in any recruitment year any vacancy under section 33 cannot be filled up due to non-availability of a suitable

person with disability or, for any other sufficient reason, such vacancy shall be carried forward in the succeeding recruitment years and if in the succeeding recruitment year also suitable person with disability is not available, it may first be filled by interchange among the three categories and only when there is no person with disability available for the post in that years, the employer shall fill up the vacancy by appointment of a person, other than a person with disability:

Provided that if the nature of vacancies in an establishment is such that a given category of person cannot be employed, the vacancies may be interchanged among the three categories with the prior approval of the appropriate Government."

21. The aforesaid statutory provisions of law makes it mandatory for the appropriate Government to reserve 3% or more than 3% posts for persons suffering with disability and equal participation is provided for persons suffering from blindness, hearing impairment and locomotor disability. The State Government has issued a notification dated 24.3.2006 providing a reservation to the extent of 6% for persons suffering from disability and the aforesaid notification makes it very clear that 2% posts are reserved for persons suffering from hearing impairment. Learned Deputy Government Advocate has not disputed the aforesaid circular and her contention is that the Circular has been issued keeping in view the provisions of the Act of 1995 by the State Government.

22. Not only this a notification was issued by the State Government which is enclosed alongwith the Return as Annexure R/6 and it includes the department of School Education as one of the department, wherein persons with disability can be appointed. It is true that the aforesaid notification does not include the department of Panchayat and Social Welfare and the department of Urban Administration. However, a subsequent notification was issued by the State Government on 2.12.2011 (Annexure P/9) wherein the School Education Department of Urban Administration have been included as departments, wherein persons suffering from disabilities can be appointed on certain posts. The appendix enclosed alongwith Annexure P/9 establishes that

even on the post of Assistant Teachers, a person who is physically disabled can be appointed. Meaning thereby, besides the post of Craft Teacher and Art Teacher a persons suffering with hearing impairment can be appointed on the post of Assistant Teachers/SSS Gr.I and II.

23. Notification dated 21-09-2011 (Annexure-P/6) and the schedule appended to the notification, provides for reservation. It establishes that as many as 175 posts are reserved for persons suffering from hearing impairment in respect of Sanvidha Shala Shikshak Grade-II and 273 posts are reserved for persons suffering from hearing impairment in respect of Sanvidha Shala Shikshak Grade-III. Meaning thereby there is categoric reservation on the post of Sanvidha Shala Shikshak Grade II and Sanvidha Shala Shikshak Grade-III in the Tribal Welfare Department and other Departments of the State of Madhya Pradesh. Section 32 provides for reserving the post in an establishment by the appropriate government and therefore as in the present case, the appropriate Government is the State Government, the notification issued by Government of India as contained in Annexure-R/1. as Government of India is not the appropriate in the present case will not help the State of Madhya Pradesh in any manner. Not only this, the State Government has later on keeping in view the nature of work which a person suffering from hearing impairment has to discourage has issued a circular in the year 2005-2006 dated 24-03-2006, which provides for a reservation to the extent of 2% in respect of persons suffering with hearing impairment for the post of Sanvidha Shala Shikshak also. Notification dated 02-11-2011 includes the department in question and therefore the learned writ Court was right holding that the notification dated 24-03-2006 read with subsequent notification issued by the State Government dated 02- 12-2011 makes it mandatory for the State Government to reserve 2% of the posts for persons suffering with hearing impairment.

24. Not only this, Section 33 also provides for diversion of vacancies from one category of disabled persons to another category of disabled persons and even if it is presumed that the vacancies are being diverted by providing 2% reservation to persons suffering with hearing impairment, the action of the respondents in issuing the circular dated 24-03-2006 is in consonance with the statutory provisions of law as contained u/s 36 of the Act, 1995.

25. Resultantly, as the State Government has provided 2% reservation to

persons suffering with hearing impairment in respect of SSS, Gr-II and SSS Gr-III in the Tribal Welfare Department, School Education Department, local bodies, the question of depriving of the respondent her legitimate right which has been guaranteed to her as per the statutory provisions as contained in Act of 1995 cannot be wiped off, only because of the omission in the advertisement issued by the Madhya Pradesh Professional Examination, Board.

26. The Apex Court in the case of *Union of India & Anr. v/s. National Federation of the Blind & Ors.* reported as 2013 (10) SCC 772, the Government of India sought to contend that since they have conducted the exercise of identification of posts in civil services in term of Section 32 only in the year 2005, the reservation has to be computed and applied only with reference to the vacancies filled up from 2005 onwards and not from 1996 when Act came into force. The Apex Court, after examining the interdependence of Sections 32 and 33 of the Disabilities Act 1995 viz. identification of posts and the scheme of reservation, rejected this contention and held as follows:-

"25. ... The submission made on behalf of the Union of India regarding the implementation of the provisions of Section 33 of the Disabilities Act, 1995, only after identification of posts suitable for such appointment, under Section 32 thereof, runs counter to the legislative intent with which the Act was enacted. To accept such a submission would amount to accepting a situation where the provisions of Section 33 of the aforesaid Act could be kept deferred indefinitely by (sic:by) bureaucratic inaction. Such a stand taken by the petitioners before the High Court was rightly rejected. Accordingly, the submission made on behalf of the Union of India that identification of Groups A and B posts in the IAS was undertaken after the year 2005 is not of much substance.

26. As has been pointed out by the High court, neither Section 32 nor Section 33 of the aforesaid Act makes any distinction with regard to Groups A, B, C and D posts. They only speak of identification and reservation of posts for people with disabilities, though the proviso to Section

33 does empower the appropriate Government to exempt any establishment from the provisions of the said section, having regard to the type of work carried on in any department or establishment. No such exemption has been pleaded or brought to our notice on behalf of the petitioners.

27. It is only logical that, as provided in Section 32 of the aforesaid Act, posts have to be identified for reservation for the purposes of Section 33, but such identification was meant to be simultaneously undertaken with the coming into operation of the Act, to give effect to the provisions of Section 33. The legislature never intended the provisions of Section 32 of the Act to be used as a tool to deny the benefits of Section 33 to these categories of disabled persons indicated therein. Such a submission strikes at the foundation of the provisions relating to the duty cast upon the appropriate Government to make appointments in every establishment. "

29. While it cannot be denied that unless posts are identified for the purposes of Section 33 of the aforesaid Act, no appointments from the reserved categories contained therein can be made, and that to such extent the provisions of Section 33 are dependent on Section 32 of the Act, as submitted by the learned ASG, but the extent of such dependence would be for the purpose of making appointments and not for the purpose of making reservation. In other words, reservation under Section 33 of the Act is not dependent on identification, as urged on behalf of the Union of India, though a duty has been cast upon the appropriate Government to make appointments in the number of posts reserved for the three categories mentioned in Section 33 of the Act in respect of persons suffering from the disabilities spent out therein. In fact, a situation has also been noticed where on account of non-availability of candidates some of the reserved posts could remain vacant in a given year. For meeting such

eventualities, provision was made to carry forward such vacancies for two years after which they would lapse. Since in the instant case such a situation did not arise and posts were not reserved under Section 33 of the Disabilities Act, 1995, the question of carrying forward of vacancies or lapse thereof, does not arise.

31. *We, therefore, see no reason to interfere with the judgment of the High Court impugned in the special leave petition which is, accordingly, dismissed with costs. All interim orders are vacated. The petitioners are given eight weeks' time from today to give effect to the directions of the High Court."*

27. Keeping in view the aforesaid judgment of the Apex court, we are of the considered opinion that as a categoric reservation has been provided vide notification dated 24-03-2006 to persons suffering from hearing impairment their rights flowing out of the Act. 1995 cannot be taken away by the State Government in the manner it is being done by the respondents. Meaning thereby the respondent and all other identically placed persons suffering from hearing impairment are entitled to participate in the process of selection which is being held by the Madhya Pradesh Professional Examination Board for the posts of Sanvida Shala Shikshak, Grade-II and Sanvida Shala Shikshak Grade-III.

28. The Apex Court in the case of *Syed Basir-Ud-Din Qadri Vs. Nazir Ahmed Shah and others* reported in (2010) 3 SCC 603, while dealing with the case of person suffering from speech Impairment has directed the employer therein to continue the disabled persons in service as he was disengaged wrongly. Paragraphs- 51 to 60 reads as under :-

"51. Chapter VI of the Act makes provision for affirmative action and Section 31 thereof provides as follows :-

"31. Aids and appliances to persons with disabilities. The Government shall by notification make schemes to provide aids and appliances to persons with disabilities."

52. As submitted by Mr. Gonsalves, while a person suffering from cerebral palsy may not be able to write on a blackboard, an electronic external aid could be provided which could

eliminate the need for drawing a diagram and the same could be substituted by a picture on a screen, which could be projected with minimum effort.

53. It is only to be expected that the movement of a person suffering from cerebral palsy would be jerky on account of locomotor disability and that his speech would be somewhat impaired, but despite the same, the Legislature thought it fit to provide for reservation of 1% of the vacancies for such persons. So long as the same did not impede the person from discharging his duties efficiently and without causing prejudice to the children being taught, there could, therefore, be no reason for a rigid approach to be taken not to continue with the appellant's services as Rehbar-e- Taleem, particularly, when his students had themselves stated that they had got used to his manner of talking and did not have any difficulty in understanding the subject being taught by him.

54. Coupled with the above is the fact that the results achieved by him in the different classes were extremely good; his appearance and demeanour in school had been highly appreciated by the Committee which had been constituted pursuant to the orders of the High Court to assess the appellant's ability in conducting his classes.

55. Reference may also be made to the observations made by an earlier Committee consisting of the Joint Director of Education and the Chief Education Officer, Srinagar, wherein it was observed as follows :-

"4. The candidate (petitioner) was called to the office in presence of Director School Education. He was found reading and talking well and thus assessed by Committee to be able to teach. His problem is that he cannot write.

5. On the overall consideration, with particular regard to the State policy on the rehabilitation of the physically handicapped, the Committee is of the view that the boy (petitioner) be given a chance. His appointment as ReT could also help restore a

sense of self esteem in him. The Middle School, Kanjinagh having already six teaching staff in position, the petitioner not being able to write should not come in the way of his selection."

56. In the aforesaid background of events, the disengagement of the appellant as Rehbar-e-Taleem by virtue of the order of the Chief Education Officer, Pulwama, dated 19th January, 2008, goes against the grain of the 1998 Act. Apart from the fact that the appellant is a victim of cerebral palsy, which impairs the movements of limbs and also the speech of a victim, there is nothing on record to show that the appellant had not been performing his duties as Rehbar-e-Taleem efficiently and with dedication. On the other hand, his performance as a teacher was reflected in the exceptionally good results that he achieved in his discipline in the classes taught by him.

57. It is unfortunate that in spite of the positive aspects of the appellant's functioning as Rehbar-e-Taleem and the clear and unambiguous object of the 1998 Act, the High Court adopted a view which was not compatible therewith. The High Court has dealt with the matter mechanically, without even referring to the 1998 Act or even the provisions of Sections 22 and 27 thereof. Instead, the High Court chose a rather unusual method in assessing the appellant's capacity to function as a teacher by calling him to appear before the Court and to respond to questions put to him.

58. The High Court appeared to be insensitive to the fact that as a victim of cerebral palsy, the appellant suffered from a slight speech disability which must have worsened on account of nervousness when asked to appear before the Court to answer questions. As has been submitted by Mr. Gonsalves, the intimidating atmosphere in which the appellant found himself must have triggered a reaction which made it difficult for him to respond to the questions put to him.

59. In our view, since the Committee constituted to assess his performance as a teacher notwithstanding his disability had formed a favourable impression about him, his tenure as a

Rehbar-e-Taleem ought to have been continued without being pitch-forked into a controversy which was uncalled for.

60. We are convinced that the approach of the local authorities, as well as the High Court, was not in consonance with the objects of the 1998 Act and scheme of the State Government to fill up a certain percentage of vacancies with disabled candidates, and was too pedantic and rigid. The order of the High Court cannot, therefore, be sustained and has to be set aside.”

29. The Apex court in the aforesaid land mark judgment has looked into the plight of the disabled persons and after scanning of statutory provisions as contained under the Act of 1995 has held the discontinuation of a disabled persons who was suffering from the speech impairment to be bad in law.

30. In the present case, the State Government is appointing persons with hearing impairment on the post of Sanvidha Shala Shikshak, Grade-II and Sanvidha Shala Shikshak, Grade-III in most of the departments by virtue of the notification dated 24-03-2006 and the department in question have been included by the appropriate Government i.e the State Government for appointing persons with disability and therefore by no stretch of imagination respondents can deny the participation of the petitioner in the process of selection. Not only this, the relevant clause of the advertisement (Annexure P/4), which deals with the reservation reads as under :-

12. आरक्षण :

संविदा शाला शिक्षकों के पदों का जिलेवार आरक्षण जिले के निर्धारित रोल्टर के अनुक्रम में जिला कलेक्टर/नियुक्तकर्ता अधिकारी स्तर पर किया जायेगा।

आरक्षण से संबंधित स्पष्टीकरण :-

1. मध्यप्रदेश लोक सेवा (अनुसूचित जातियों, अनुसूचित जनजातियों और अन्य पिछड़े वर्गों के लिये आरक्षण) अधिनियम, 1994 (कमांक 21 सन् 1994) के उपबंध, संविदा शाला शिक्षक के नियोजन पर लागू होंगे।
2. मध्यप्रदेश लोक सेवा (अनुसूचित जातियों, अनुसूचित जनजातियों और अन्य पिछड़े वर्गों के लिये आरक्षण) अधिनियम, 1994 (कमांक 21 सन् 1994) के उपबंधों, सामान्य प्रशासन विभाग द्वारा उसकी अधिसूचना कमांक-एफ-6-1/2002/आ0प्र0/एक, दिनांक 19 सितंबर, 2002 द्वारा

जारी किए गए अनुदेशों के अनुसार, मध्यप्रदेश लोक सेवा (अनुसूचित जातियों, अनुसूचित जनजातियों और अन्य पिछड़े वर्गों के लिये आरक्षण) नियम, 1998 और राज्य शासन द्वारा, समय-समय पर जारी किये गए आदेश के अनुसरण में, अनुसूचित जातियों, अनुसूचित जनजातियों और अन्य पिछड़े वर्गों के अभ्यर्थियों के लिये पद आरक्षित किये जायेंगे।

3. रिक्त पदों के प्रत्येक प्रवर्ग के लिये निम्नानुसार आरक्षण रहेंगा
 - (1) महिलाओं के लिये 50 % ;
 - (2) निःशक्त व्यक्ति (समान अवसर, अधिकार संरक्षण और पूर्ण भागीदारी) अधिनियम, 1995 (1996 का सं. 1) की धारा 33 के परन्तुक के अध्याधोन रहते हुए निःशक्त व्यक्तियों के लिये 6%, यथा दृष्टि बाधित के लिये 2%, एवं अस्थि जन्य निःशक्त के लिये 4% य (निःशक्तजनों के लिये आरक्षण सामान्य प्रशासन विभाग के परिपत्र क्रमांक 380/1773/05/आ.प्र /एक दिनोंक 24.03.06 के अनुसार होगा)
 - (3) भूतपूर्व सैनिकों के लिये 10% ;
 - (4) अन्य किसी ऐसे प्रवर्ग के लिये जो सरकार द्वारा समय-समय पर अधिसूचित किया जायेगा।

पिछड़ी आदिम जन. जातियों के लिए विशेष उपबन्ध :-

जिला श्योपुर, मुरैना, दतिया, ग्वालियर, भिण्ड, शिवपुरी, गुना तथा अशोक नगर के सहारिया जनजाति, जिला बालाघाट, मण्डला, डिंडोरी, शहडोल, तथा उमरिया के बैगा जनजाति एवं जिला छिंदवाड़ा में तामिया विकासखण्ड के भारिया जनजाति का आवेदक विनिर्दिष्ट/विहित की गई न्यूनतम शैक्षणिक अर्हताएं तथा अन्य पात्रता रखता है, तो उसे इन नियमों में उल्लिखित चयन प्रक्रिया का अनुसरण किए बिना संबंधित पंचायत द्वारा संविदा शाला शिक्षक श्रेणी1/श्रेणी2/श्रेणी3 के पद पर नियोजित किया जाएगा। ये अभ्यर्थी राज्य की किसी भी जिला/जनपद पंचायत में इस उपबंध की प्रसुविधा अभिप्राप्त करने के लिए समर्थ होंगे। ऐसी स्थिति में जब प्राप्त किये गये आवेदनों की संख्या उपलब्ध कुल पदों से अधिक हो तो चयन, न्यूनतम शैक्षणिक योग्यता परीक्षा में अभिप्राप्त अंकों के आधार पर अवरोही क्रम में किया जायेगा।

31. The aforesaid reservation clause in the advertisement published by Madhya Pradesh Professional Examination Board makes it very clear that reservation for persons suffering from Blindness, hearing impairment and persons suffering with locomotor disability is in consonance of the notification of the State Government dated 24-03-2006. Meaning thereby, the Madhya Pradesh Professional Examination Board has also relied upon the notification

dated 24-03-2006, which certainly provides for 2% reservation for the persons suffering with hearing impairment and therefore this court is of the considered opinion that the petitioner's case is included under the 2% reservation quota provided for persons suffering with hearing impairment and therefore the respondents deserve a command for permitting the petitioner to participate in the process of selection and in case the petitioner finds place in the merit list then the petitioner is certainly entitled for consequential appointment.

32. Respondent has also filed a document as Annexure-P- 10, which deals with the State Level District Survey reflecting disability status of children in the State of Madhya Pradesh studying in Government School. The aforesaid chart makes it very clear that there are as many as 9032 boys studying in Government School, who are suffering from hearing impairment. There are as many as 6660 girls, who are hearing impaired. This brings to a total of 15692. Meaning thereby, a large number of boys and girls, who are studying in various Government Schools are hearing impaired and, therefore, there is certainly a necessity to appoint teachers, who are hearing impaired in order to cater to the need of children, who are suffering from hearing impairment.

33. Admittedly, the Act is a social legislation enacted for the benefit of persons with disabilities and its provisions must be interpreted in order to fulfil its objective. Besides, it is a settled rule of interpretation that if the language of a statutory provision is unambiguous, it has to be interpreted according to the plain meaning of the said statutory provision.

34. Thus, after thoughtful consideration, we are of the candid view that none of the submissions advanced on behalf of the appellants is tenable. In our opinion, in order to ensure proper implementation of the reservation policy for the disabled and to protect their rights, the learned writ court rightly directed the appropriate Government as well as M.P. Professional Examination Board to provide reservation of 2% to the hearing impairment person and implement the same without default. The appellants herein shall issue instructions to all the departments that the non-observance of the directions made by the learned writ court should be considered as an act of non-obedience.

35. Writ appeals No.735/2012, 737/2012, 736/2012 and 13/2013, are devoid of any merit. The cases do not warrant any interference. The appeal are accordingly, dismissed, but without any orders as to costs.

Appeal dismissed.

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WRIT PETITION

Before Mr. Justice P.K. Jaiswal & Mrs. Justice S.R. Waghmare

W.P. No. 1192/2005 (Indore) decided on 8 August, 2013

MENA TRANSPORT (MS.)

...Petitioner

Vs.

ASSISTANT COMMISSIONER OF

COMMERCIAL TAX and ors.

...Respondents

(Alongwith W.P. No. 1194/2005)

Commercial Tax Act, M.P. 1994 (5 of 1995), Sections 45-A (10) & (12) - Imposition of Penalty - Penalty has to be exercised judiciously - Deliberate defiance of Law, guilty conduct and dishonest intentions are necessary ingredients for imposing penalty - Technical or Venial breach of a statutory provision by itself not reason for imposing penalty - Finding should be recorded as to whether there was intention to evade tax - Mere non production of a document, i.e. form no. 75 does not establish intention on the part of company to evade law - Technical lapse unaccompanied by mala fide or dishonest intention can be classified as bona fide mistake - Imposition of penalty set aside - Petition allowed.

(Para 23)

वाणिज्यिक कर अधिनियम, म.प्र. 1994 (1995 का 5), धाराएं 45-ए (10) व (12) - शास्ति का अधिरोपण - शास्ति का प्रयोग न्याय सम्मत रूप से किया जाना चाहिए - जानबूझकर विधि की अवज्ञा, दोषपूर्ण आचरण एवं बेईमान आशय शास्ति अधिरोपित करने हेतु आवश्यक तत्व है - किसी कानूनी उपबंध का तकनीकी अथवा क्षम्य भंग अपने आप में शास्ति अधिरोपित करने हेतु कोई कारण नहीं है। - ऐसे निष्कर्ष अभिलिखित किया जाना चाहिए कि क्या कर से बचने का आशय था - मात्र किसी दस्तावेज अर्थात् फॉर्म नं. 75 के प्रस्तुत न किये जाने से यह स्थापित नहीं होता कि कंपनी का आशय विधि से बचने का था - कदाशय अथवा बेईमान आशय रहित तकनीकी गलती को सद्भाविक भूल में वर्गीकृत किया जा सकता है - शास्ति का अधिरोपण अपास्त - याचिका मंजूर।

Cases referred:

2011 (18) STJ 629 (Raj), (2008) 13 STJ 255 (SC), (2007) 11 STJ 22 (MP), (2001) 18 STJ 418 (Ori), 1997 (106) STC 604, (2001) 124 STC 611 (SC)

P.M. Choudhary, for the petitioner.

Mini Ravindran, P.L. for the respondents/State .

ORDER

The Order of the Court was delivered by :
P.K. JAISWAL, J. :- Since the common question of law is involved in both the petitions and, therefore, they are being disposed of by this order.

2. In W.P.No.1192/2005, the petitioner is challenging the order dated 26.2.2005 and in W.P.No.1194/2005, the petitioner is challenging the order dated 26.2.2005, Annexure P/9, passed in Revision Nos.16/04 & 17/04 by which the order passed by the Assistant Commissioner, Commercial Tax in Penalty Case Nos.48/03-04 with respect to vehicle No.M.P 09 – KB – 0817 and Penalty Case No.49/03-04 with respect to vehicle no. M.P 09 – KB – 2195 has been confirmed and both the revision petitions filed by the petitioner were dismissed.

3. Brief facts of the case are that petitioner is a transporter engaged in the business of transportation of goods. That certain consignment contending various consumer goods were loaded at Bombay in two trucks bearing registration nos. M.P 09 – KB – 0817 and M.P 09 – KB – 2195. The goods loaded in the truck were consigned by various parties for delivery to M/s. Hindustan Lever Ltd at different places. Part of the goods were to be delivered at Indore and Jabalpur in the State of Madhya Pradesh and part of the goods to be delivered at places outside the State of Madhya Pradesh viz., Varanasi and Shuklaganj in Uttar Pradesh. The goods consigned to the places outside Madhya Pradesh were only to pass through the State of Madhya Pradesh and were not meant for the sale in Madhya Pradesh. The truck no.817 reached Sendhwa check post on 27.5.2003 and truck no.2195 reached on 28.5.2003. They were stopped and detained at check post barrier. It is the case of the petitioner that the requisite declaration in Form No.75 were not available with the trucks. Though the case of the petitioner is that the trucks were having invoice, built, challan etc, contained all the necessary details except the requisite declarations, in respect of some of the cases and in some cases declaration was found to be incorrect. Both the trucks were detained at the check post because of requisite declarations in form no.75 in respect of consignment of Jabalpur and some wrong declarations were sent instead of form no.75 in form no.85.

4. The petitioner received two notices in form no.76 under Section 45-A (10) of the M.P. Commercial Tax Act, 1994 (in short 'the Act of 1994'), directing the petitioner to show cause on 11.6.03 that for not filing proper declarations why a penalty of Rs.7,80,270/- and Rs.26,90,860/- be not imposed. The authorities without providing opportunity of hearing and without waiting till the date of hearing up to 11.6.03 passed an order imposing penalty on 6.6.03 and thereafter on 13.6.03. The authority rejected the reply of the petitioner, which was filed on 11.6.03. The petitioner challenged the said action by filing writ petition no.1108/2003 before the High Court. The learned writ Court by order dated 28.7.03 set aside the order of penalty with the observation that the petitioner should be provided an opportunity of hearing before passing any order of penalty.

5. In furtherance of the direction issued in W.P.No.1108/2003, the respondent no.1 issued a fresh notice in form no.76 prescribed under Section 45-A (10) of the Act of 1994. The check post authority issued separate notice for both the trucks vide its notices dated 2.8.03.

6. In response to the show cause notice, the petitioner appeared on 28.3.03 and submitted (1) one declaration no.75 form before the check post officer and 3 (three) declaration forms with regard to form no.85. It is further submitted by the petitioner that bulky no.301795 dated 26.5.03 for Rs.2,52,883/- in form no.75 had already submitted which is available on record and prayed that no penalty can be imposed. It is also submitted in the reply that non furnishing and furnishing incorrect declaration was merely an inadvertant error without any ulterior motive and there was no intention of facilitating the evasion of tax. The defect / default was merely a technical / venial breach without any intention of evasion of tax because except the declaration in question all other information and documents were available with the consignments in the shape of other documents like invoices, bilties, challan etc. Moreover, the accompanying documents contained all the information that was required to be filled in the requisite prescribed Forms. The petitioner furnished all the necessary declarations and requested the check post authority to drop the penalty proceedings after taking the said declaration on record.

7. The respondent No.1 again imposed the penalty under Section 45-A(12) of the Act of 1994, mainly on the ground that declaration in question

were not available with the goods and the filing of the declarations subsequently cannot absolve the petitioner from the liability of penalty. The check post authority imposed the penalty at Rs.3,91,000/- in respect of truck no.MP 09 KB 0817 vide his order dated 1.9.03 passed in case no.48/2003-04 (remand) and in respect of truck no. M.P 09 – KB – 2195, the check post authority has imposed the penalty at Rs.6,17,000/- in case no.49/2003-04 (remand).

8. Petitioner being aggrieved by the said order filed a revision petition under Section 62 of the Act of 1994, before the Additional Commissioner of Commercial Tax, Indore. The contention of the petitioner before the revisional authority was that, in absence of any finding regarding any attempt of facilitating the evasion of tax, the imposition of penalty in question amounted to punishing the petitioner for a mere technical or venial breach.

9. The revisional authority by order dated 26.2.05 affirmed the order passed by the check post authority and dismissed the revision petition no. 16/04 and 17/04.

10. The petitioner submits that the requirement regarding the furnishing of declaration with the object of preventing evasion of tax and hence imposition of penalty even where there is no evasion of tax amounts to imposing a penalty for technical default, which is not warranted under Section 45A of the Act, 1994. *Mens – rea* behind non furnishing of the declaration is essential for attracting the penal provisions contained in Section 45A. It is also contended that the revisional authority levied a penalty without satisfying the requirement of Section 45 of the Act of 1994 is without jurisdiction and prayed that impugned order be quashed.

11. The respondents filed their return and submitted that petitioner ought to have submitted 8 forms but even after remand, the petitioner has submitted total 5 forms in number including form no.75 (1+1) 2 in number and form no.85, 3 in number. So even after remand the petitioner was failed to produce 3 declaration forms less before the check post officer or even at the stage of revisional authority. It is also submitted that the check post officer has already reduced the penalty to the extent the forms submitted by the petitioner after remand, which was confirmed by the revisional authority. It is also submitted that the check post officer while passing the order dated 1.9.03 recorded a finding of fact that the conduct of the petitioner do suggest that the petitioner was trying to facilitate the evasion of tax. It is also submitted that the *mens –*

rea can be presumed by the conduct of the petitioner at the first stage as he has failed to produce the requisite number of form numbers 75 or 85 before the check post officer. It is also submitted that some of the forms were incorrectly submitted by the petitioner which means instead of form no.75, the petitioner submitted form no.85. In respect of a submissions of wrong forms, according to the respondents, the purpose and object of form no.75 and 85 are altogether different, because form no.75 is described for importing goods within the State, whereas, form no.85 describes about out to out transaction. In case of form no.85, there is no need to provide the information about the registration number to consignee whereas in Form No.75, the registration number of consignee is necessary, so the exigibility of tax can be ascertained from the consignee of Madhya Pradesh. It is further submitted that the form no.75 is issued by the department, whereas form no 85 is easily available in the market. For proper accounting of the transaction the department issues form no.75. While in case of form no.85, since it is for the out to out, the State of M.P. has no concern with the ascertainment of tax liability. It is further submitted that the petitioner has submitted some form no.85 in case of goods of which the consignee is of Jabalpur, which is admittedly within the State of M.P. The said conduct of the petitioner does suggest that in the garb of form no.85, the petitioner is facilitating evasion of tax. With the aforesaid, learned Dy. Govt. Advocate prayed for dismissal of the writ petitions.

12. The petitioner filed their rejoinder to the return filed by the respondents and submitted that in the course of proceedings, the petitioner has filed all the necessary declarations, which were not available at the earlier stage and could not be filed for want of proper and reasonable opportunity of hearing. It was also contended that the non-available of declaration was only an inadvertent error committed through over sight because the uneducated drivers of the two trucks proceeded to their destination without collecting the declarations. Without there being any *malafide* intention of facilitating the evasion of tax, more so because all other relevant documents containing all the necessary particulars of the consigner, consignee and about the goods were already available through the other documents, which were admittedly available and were filed before the check post authority. The default being a technical default, with the filing of the declaration in the course of proceedings in consequence of the direction of this Court stood cured. It is also submitted that the impugned order would show that respondent no.1 has extracted his earlier order

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containing allegations regarding non filing of the declarations by way of a chart, which contains details regarding concerned built number and date of the seller and purchaser, details of goods and the value of goods. In respect of filing of declarations, it is submitted that petitioner has filed in all 12 declarations as per chart which is annexed along with the rejoinder is Annexure P/11 :-

**STATEMENT OF DECLARATION IN FORM NO.75/85
SUBMITTED BEFORE THE CHECK POST OFFICER – GAWADI
– SENDHWA ON 28.8.03.**

RELATING TO TRUCK NO. MP 09 KB 0817

S.No.	FORM NO. & DATE	M.T.R. No. & DATE	VALUE
1.	FORM NO.75	13781	2,52,883.38
2.	FORM NO.75	(4254 (26.05.03 (4254 (26.05.03 (4254 (26.05.03 (4254 (26.05.03	44,859.60 45,325.22 1,10,857.07 3,13,712.18
3.	FORM NO.85	13780 26.05.03	5,29,575.94
4.	FORM NO.85	13779 26.05.03	2,89,281.92
5.	FORM NO.85	13778 26.05.03	3,51,723.54

NOTE:

The transporter was carrying and had furnished Form No.75 for MTR No.13781 at S.No.1 above at the Check Post at the time of entry of the Truck and has been so mentioned in the order u/S 45-A by the Check Post Officer dated 6.6.2003.

13. It is submitted that petitioner has filed all declarations and wherever there are more consignment for one consignee only a single declaration has been filed, which meets the requirement of Section 45-A (5). It is also stated that if all the declarations, which were filed before the check post authority in respect of both the truck numbers are verified from the documents which the driver of both the trucks were having at the time of checking, it would be clear that all the necessary declarations have been filed.

14. It is submitted by the learned counsel for the petitioner that if the particulars of the both the charts are compared with the particular of deficiency as pointed out in the original order Annexure P/6, it would be clear that all the necessary declarations for all consignments have been filed. These facts have not been disputed by the respondents.

15. Learned Deputy Government Advocate has submitted that some of the forms were incorrectly submitted by the petitioner and, therefore, the authorities have not committed any legal error in imposing the penalty and prayed for dismissal of the writ petition.

16. We have heard the learned counsel for the parties at length and perused the record of the case.

17. Admittedly, in this case, the petitioner was not having declaration form no.75 which is required as per sub – section (5) of Section 45A of the Act of 1994. A bare reading of the aforesaid provisions of Section 45A would show that under sub section (1) every person transporting such goods as may be notified by the State Government in this behalf shall carry with him an invoice, bill or challan or any other document, by whatever name called, issued by the consignor of the goods giving such particulars as may be prescribed. Under sub-section (5) every transporter shall, before crossing any check post or barrier set up or erected under sub-section (1), deliver to the check-post officer a declaration duly signed by the consignor in such manner, in such form and containing such particulars as may be prescribed. A separate declaration shall be filed in respect of the consignment or consignments relating to each consignee where the goods are being imported into Madhya Pradesh and of each consignor where the goods are being sent outside the State. No declaration in relation to goods to be delivered in Madhya Pradesh shall be accepted if the consignee in Madhya Pradesh is shown or described as “self” unless the particulars and address of the person who delivery of the goods at

the declaration in Madhya Pradesh and furnished. A bare reading of two provisions would show that the intention of the legislature is to make them mandatory. Therefore, after the enforcement of section 45-A it is mandatory for every person or transporter who is transporting the goods to deliver to the check-post officer a declaration duly signed by the consignor as has been prescribed.

18. From the aforesaid, it is also clear that before imposing penalty, the check-post officer shall also consider whether the transporter has deliberately violated the provisions for not delivering the declarations with a view to make an attempt of evasion of tax in respect of such goods. The check-post officer may presume but this presumption is a rebuttable presumption as has been specifically provided under sub-section (7) may presume, until the contrary is proved.

19. Shri P.M. Choudhary, learned counsel for the petitioner taking us through the provisions of Section 45-A sub – Section (7), (10) & (12) and submitted that the purpose of imposing the penalty is to check the evasion of tax and to punish a person who evade the tax. According to him in the present case, there is no intention for avoiding tax. He invited our attention to the delivery chart MTRS and other documents. He pointed out that in all these documents the particulars of the material and other details are clearly mentioned. It was a case where because of inadvertance or over sight, form nos.75 and 85 did not accompany the consignment. The form nos. 75 and 85 were also produced and submitted, but the authorities have imposed the penalty which is unsustainable. Accordingly, the learned counsel submitted that as there is no intention on the part of petitioner transporter to evade the tax and there is no malice a bonafide mistake technically in nature is not contained and tax and penalty imposed without taking note of the totality of the facts and circumstances of the case. Placing reliance on a judgment rendered by the Apex Court in the case of *State of Rajasthan & Anr. V/s. D.P. Metals*, (2008) 13 STJ 255 (SC), *Hindustan Steel Ltd. V/s. The State of Orissa*, AIR 170 SC 253, *State of M.P & Ors. V/s. Bharat Heavy Electricals*, 1997 (106) STC 604, *Assistant Commercial Tax Officer, Flying Squad I Jaipur V/s. Prakash Punj*, 2011 (18) STJ 629 (Raj), *Assam Transport Service & Ors V/s State of Orrisa & Ors.*, (2001) 18 STJ 418 (Ori) and the decision of M.P. High Court Bench at Gwalior in the case of *Cadbury India Ltd., Malanpur & Anr. V/s. State of M.P. & Ors*, (2007) 11 STJ 22 (MP).

20. Shri P.M. Choudhary, learned counsel for the petitioner has submitted that in the facts and circumstances of the case, authorities concerned have acted in an arbitrary & unjustified manner in the matter of imposing penalty. Taking us through the reasons indicated by the revisional authority, and the assessing authority, he submitted that action of the respondents in the present case is not just fair and reasonable, and therefore, he seeks for interference in the matter.

21. Ms. M. Ravindran, Dy. Govt. Advocate taking us through section 45-A of the Act and other documents available on record emphasized that once a breach, statutory in nature is established, imposition of penalty is the discretion of the competent authority and the discretion having been exercised on the statutory breach proved, this Court is not required to interfere in the matter. It is not disputed by her that after passing of the order in writ petition when petitioner received show cause notice they filed their reply and filed declarations forms No.75 & 85. She also submitted that petitioner deliberately filed wrong declaration, ie., declaration no.85 instead of declaration 75 and, therefore, learned authorities have not committed any error in passing the impugned orders and prayed for dismissal of the writ petitions.

22. In the present case, the irregularity that was detected when both the vehicles were checked. It is not in dispute in both the writ petitions that the declaration required under form nos. 75 and 85 were not produced by the transporter when the goods were seized that being so, the check post was well within his right in taking action. However, while taking action the competent authority of the check post the revisional authority proceeded on a assumption that the declaration under Form No.75 and 85 was not produced and the intention to facilitate evasion of tax was presumed due to non-production of this statutory form in the check post. The presumption was drawn in the matter of evasion of tax without taking note of the circumstances that were existing in the present case. Neither the assessing authority in the check post nor the revisional authority have considered this aspect of the matter before holding that there was intention to evade tax. The invoices and other documents produced by the transporter in the check post do not indicate that any attempt was made to evade tax. It is not the case of the assessing authority or revisional authority that the documents produced at the time of taking showed any difference in the matter. Record indicates that all the material particulars and information which were required were available in the documents produced

at the time of checking of the vehicle and no malafides are proved or established and the nexus to the act of non-production of documents and the intention to evade tax is not proved. Under these circumstances, the question is can penalty be imposed merely because some documents were not produced at the time of checking of the vehicle or because instead of declaration of form no.75, declaration of form no.85 was produced by the petitioner. In this regard, the principle laid down by the Apex Court in the case of *M/s.Hindustan Steel Ltd* (Supra) may be considered in paragraph 7 of the aforesaid judgment. The Supreme Court has held as under :-

An order imposing penalty for failure to carry out a statutory obligation is the result of a quasicriminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute.

23. If the facts and circumstances of the present case are evaluated in the back drop of the aforesaid principles laid down by the Supreme Court in the case matter of imposition of penalty, it would be seen that in the present case, penalty has been imposed mechanically without any dishonest intention or malice or mens rea having been established or proved. The bona fide reason given by the company explaining the circumstances in the matter of non availability of form no.75 is not at all considered by the authorities concerned while imposing the penalty. Imposition of penalty has penal consequence. Penalty is a measure of punishing a wrong doer and the discretion for imposing penalty has to be exercised judiciously after considering all the relevant facts

and circumstances in a given case. Merely, because the law empowers an authority to impose penalty that by itself is not a reason for imposing penalty. Deliberate defiance of law, guilty conduct and dishonest intention are the necessary ingredients which should be available for imposing penalty. Merely, because some technical or venial breach of a statutory provision is established that by itself is not a reason for imposing penalty. In the present case authorities have proceeded to impose penalty without taking note of all these factors. There is nothing on record to indicate that the act of the company or concerned transporter in the matter of non-production of Form No.75 was a deliberate and intentional act for the purpose of evasion of tax. On the contrary, the records indicates that all the necessary information which was required under the law was supplied during the time of verification at the check post. Under these circumstances, it was incumbent upon the authorities concerned to examine the entire matter and find out if there was any intention to evade payment of tax. Before imposing penalty on the petitioner a finding should have been recorded as to whether there was any intention on the part of the petitioner to evade tax as not such intention is either established or proved. On the contrary, as a matter of course, mechanically penalty is imposed merely on the ground that the statutory provisions are violated and a particular declaration form is not produced. Mere non-production of a document, i.e., Form No.75 in the facts and circumstances of the present case does not establish any intention on the part of the company to evade tax. The lapse found established is a technical lapse unaccompanied by any mala fide or dishonest intention and therefore, can be classified as a bona fide mistake, and accordingly under such circumstances, imposition of penalty was not warranted.

24. There is no dispute between the parties that declaration form was not accompanied with the goods when the vehicle was checked, but it was produced along with the reply to show cause notice itself before the check post officer. The Hon'ble Apex Court in the case of *State of Rajasthan & Anr. V/s. D.P. Metals*, (Supra) held:

Firstly if there is non-compliance with Section 78(2)(a) i.e. not carrying the documents mentioned in that sub-clause or, secondly if false or forged documents or declaration is submitted. This sub-section cannot relate to personal belongings which are not meant for sale but would

relate to those types of goods in respect of which documents referred to in Section 78(2)(a) exist or can exist.

*31. Such submission of false or forged documents or declaration at the check-post or even thereafter can safely be presumed to have been motivated by desire to mislead the authorities. Hiding the truth and tendering falsehood would per se show existence of mens rea, even if required. Similarly where, despite opportunity having been granted under Section 78(5) if the requisite documents referred to in sub- clause 2(a) are not produced, even though the same should exist, would clearly prove the guilty intent. It is not possible to agree with the counsel for the respondents that breach referred to in Section 78(5) can be regarded as technical or venial. Once the ingredients of Section 78(5) are established, after giving a hearing and complying with the principles of natural justice, there is no discretion not to levy or levy lesser amount of penalty. If by mistake some of the documents are not readily available at the time of checking, principles of natural justice may require some opportunity being given to produce the same. This provision cannot be read as to imply that the penalty of 30% is the maximum and lesser penalty can be levied. The legislature thought it fit to specify a fixed rate of penalty and not any discretion in lowering the rate of penalty. The penalty so fixed is meant to be a deterrent and we do not see anything wrong in this. The quantum of penalty under the circumstances enumerated in Section 78(5) cannot, in our opinion, be regarded as illegal. The legislature in its wisdom has thought it appropriate to fix it at 30% of the value of goods and it had the competence to so fix. As held by this Court in **Rai Ramakrishna & Others vs. The State of Bihar** at 910; "The objects to be taxed so long as they happen to be within the legislative competence of the legislature can be taxed by the legislature according to the exigencies of its needs, because there can be no doubt that the State is entitled to raise revenue by taxation.*

The quantum of tax levied by the taxing statute, the conditions subject to which it is levied, the manner in which it is sought to be recovered, are all matters within the competence of the legislature, and in dealing with the contention raised by a citizen that the taxing statute contravenes Art. 19, courts would naturally be circumspect and cautious” as such there cannot, in the present case, be any valid challenge to the rate of penalty provided for in Section 78(5) of the Act.

25. In the instant case, requisite documents have been produced at the time when opportunity of hearing was given and as noted above, the correctness of document has not been questioned. Therefore, even in *D.P. Metals* (2001) 124 STC 611 (SC), the Hon'ble Supreme Court has not held whereby mistake some documents are not produced but subsequently produced even in such case, imposition of penalty is not automatic, even though the language used in Section 78(5) of the Rajasthan Act is 'shall impose'.

26. It is well settled when discretion has been conferred on the authority in the matter and imposition of penalty that discretion must be reasonably exercised.

27. Following the aforesaid principles, this Court holds that the imposition of penalty in the facts and circumstances of the case is not a proper exercise of the discretion by the authority concerned. The authority who have passed the orders have not acted in accordance with law and exercised their discretion in manner which cannot be approved.

28. Considering the totality of the facts and circumstances of the case and keeping in view the principles, which governed the imposition of penalty as indicated herein above, both the petitions are liable to be allowed.

29. The impugned orders passed by the assessing authority dated 1.9.2003 and revisional authority, Additional Commissioner dated 26.2.2005 as contained in (Annexure P/9) are quashed. In the result, both the writ petitions are allowed and disposed of, without any orders as to cost.

Copy of this order be kept in other connected matter.

Petition allowed.

I.L.R. [2016] M.P., 384**WRIT PETITION****Before Mr. Justice Sujoy Paul**

W.P. No. 952/2014 (S) (Gwalior) decided on 15 May, 2014

HARENDRA JASEJA (DR.)

...Petitioner

Vs.

STATE OF M.P. & anr.

...Respondents

A. Civil Services (Pension) Rules, M.P. 1976, Rule 42 - Voluntary retirement - Date of retirement - Notice indicating the particular period of time - Held - In absence of any rejection within such period same will become operative from the date on completion of notice period. (Para 11)

क. सिविल सेवा (पेंशन) नियम, म.प्र. 1976, नियम 42 - स्वैच्छिक सेवानिवृत्ति - सेवानिवृत्ति की तिथि - नोटिस में दर्शित निश्चित समयावधि - अभिनिर्धारित - ऐसी समयावधि के भीतर किसी खारिजी के अभाव में नोटिस की अवधि पूर्ण होने की तिथि से स्वैच्छिक सेवानिवृत्ति प्रभावशील होगी।

B. Civil Services (Pension) Rules, M.P. 1976, Rule 42 - Voluntary retirement - Requirement of prior permission - Circumstances - (i) where the Government servant is under suspension (ii) where it is under consideration of the appointing authority to institute disciplinary action against the Government Servant. (Para 8)

ख. सिविल सेवा (पेंशन) नियम, म.प्र. 1976, नियम 42 - स्वैच्छिक सेवानिवृत्ति - पूर्व अनुमति की आवश्यकता - परिस्थितियों - (i) जहाँ कि शासकीय सेवक निलंबन के अधीन है (ii) जहाँ कि शासकीय सेवक के विरुद्ध अनुशासनात्मक कार्यवाही संस्थित किये जाने हेतु कोई मामला नियोक्ता प्राधिकारी के समक्ष विचाराधीन है।

C. Civil Services (Pension) Rules, M.P. 1976, Rule 42 - Deemed Permission - Voluntary retirement can be presumed - If no action taken within six months - Even in circumstance (ii). (Para 9)

ग. सिविल सेवा (पेंशन) नियम, म.प्र. 1976, नियम 42 - मानी हुई अनुमति - स्वैच्छिक सेवानिवृत्ति की उपधारणा की जा सकती है - यदि छह माह की अवधि के भीतर कोई कार्यवाही नहीं की जाती - यहाँ तक कि परिस्थिति क्रं. (ii) में भी।

D. Civil Services (Pension) Rules, M.P. 1976, Rule 42 - Voluntary retirement - Prior permission - Requirement - Rule 42 - Nowhere prescribes for express permission - Except circumstances (i) & (ii). (Para 9)

घ. सिविल सेवा (पेंशन) नियम, म.प्र. 1976, नियम 42 - स्वैच्छिक सेवानिवृत्ति - पूर्व अनुमति - आवश्यकता - नियम 42 - अभिव्यक्त अनुमति हेतु कहीं विहित नहीं करता - केवल परिस्थिति क्रं. (i) एवं (ii) को छोड़कर।

E. Constitution - Article 226 - Moulding of relief - Powers and duties - To do substantive justice, if same flows from the fact of the case - Petition can not be non-suited on hyper technical grounds - Permitted moulding. (Para 15)

ड. संविधान - अनुच्छेद 226 - अनुतोष का सुधार - शक्तियाँ एवं कर्तव्य - मौलिक न्याय किये जाने हेतु, यदि प्रकरण के तथ्यों से ऐसा प्रकट होता है - परातकनीकी आधारों पर याचिका अस्वीकार नहीं की जा सकती है - सुधार की अनुमति स्वीकृत।

Cases referred:

1985 MPLJ 229, (2001) 3 SCC 290, 2013 AIR SCW 5141, (2004) 11 SCC 402, 2013 (1) MPLJ 396, 2003 (1) MPLJ 489, 2008 (1) MPLJ 152, 2002 (2) MPLJ 401.

V.K. Bhardwaj, assisted by Anand V. Bhardwaj, for the petitioner.

Nidhi Patankar, G.A. for respondents no. 1 & 2/State as well as for the respondent no. 3.

ORDER

SUJOY PAUL, J. :- This writ petition is filed under Article 226 of the Constitution, challenging the order dated 07-02-2014 (Annexure P-1), whereby the petitioner is transferred from Gwalior to Sagar. In addition, it is prayed that the petitioner's application for voluntary retirement be decided and necessary benefits be extended in his favour.

2. The petitioner was appointed on 24-12-1979 as Demonstrator. He was subsequently promoted to the post of Assistant Professor on 02-04-1987 and then to the post of Associate Professor on 01-01-2002. It is urged by Shri V.K. Bhardwaj, learned Senior Counsel for the petitioner that the petitioner's whole service record is clean, excellent and unblemished.

3. The petitioner's elder daughter Ms. Namita Jaseja is suffering from Cerebral Palsy with mental retardation. To look after her daughter, petitioner made a request to the respondents-authorities to not to award him any further promotion which may result into his posting elsewhere. Due to health condition of daughter, petitioner decided to take voluntary retirement to look after her. He submitted an application in prescribed form on 06-08-2013 (Annexure P-5). One month's notice for voluntary retirement was given by assigning reason of daughter's ailment. In addition, petitioner informed that he himself is suffering from certain ailments.

4. The Department did not take any decision on the said application. Petitioner, in turn, sent reminders and then stopped attending the Office from 31-10-2013 afternoon. Neither main application seeking voluntary retirement nor reminders could fetch any result. Petitioner was served with transfer order dated 07-2-2014 (Annexure P-1). After preferring representation against it, this petition is filed.

5. It is submitted by learned Senior Counsel for the petitioner that as per Rule 42 of M.P. Civil Services (Pension) Rules, 1976 [hereinafter referred to as "the Rules"], voluntary retirement automatically comes into effect after 30 days from 06-08-2013. In absence of its rejection, during notice period, automatic permission can be presumed. In support of his submissions, he relied on 1985 MPLJ 229 [*Indra Prakash Bhatnagar vs. State of MP & another*], (2001) 3 SCC 290 [*Tek Chand vs. Dile Ram*] and 2013 AIR SCW 5141 [*C. V. Francis vs. Union of India & Ors*]. Lastly, it is submitted that once voluntary retirement comes into effect after one month from 06-08-2013, petitioner stood voluntarily retired and there is no question of his transfer thereafter by impugned order.

6. *Per contra*, Smt. Nidhi Patankar, supported the impugned order. By taking this Court to various paragraphs of the return, it is submitted that decision on voluntary retirement is yet to be taken and it will be effective only after approval of the competent authority. The transfer order is supported on the basis of judgment of Supreme Court delivered in the case of *State of U.P. vs. Gobardhan Lal* (2004) 11 SCC 402. Interestingly, she also relied on 2013 AIR SCW 5141 [*C. V. Francis vs. Union of India & Ors*].

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

8. Before dealing with the rival contentions, it is apt to quote Rule 42 of

the Rules, which reads as under:“

42. Retirement on completion of [20/25 years] qualifying service [1] (a) Government service (sic:servant) may retire at any time after completing 20 years qualifying service, by giving a notice in form 28 to the appointing authority at least one month before the date on which he wishes to retire or on payment by him of pay and allowances for the period of one month or for the period by which the notice actually given by him falls short of one month:

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

- (a) Public Health & Family Welfare Department (Medical, Paramedical & Technical Staff);
- (b) Medical Education Department (Teaching Staff, Paramedical & Technical staff):

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

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

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

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

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

9. It is not the case of the respondents that the petitioner is either facing any disciplinary proceeding or criminal case or any such action is contemplated against him. In the text and context of the Rule 42, in my opinion, prior permission of the competent authority is required only in following circumstances:

- "(i) where the Government servant is under suspension.
- (ii) where it is under consideration of the appointing authority to institute disciplinary action against the Government servant.

Even in the contingency (ii) aforesaid, the deemed permission can be presumed if within six months no action is taken."

Rule 42 otherwise nowhere prescribes that express permission is required. In other words, prior permission is not required in cases where contingencies (i) & (ii) aforesaid are not applicable. In fact, the point involved in this case is no more *res integra*.

10. This Court after considering judgment of *Indra Prakash Bhatnagar* (supra), in the case of *S. S. Nafde vs. State of MP & Others* [2013 (1) MPLJ 396], opined as under:

"5. Once a notice is prescribed proforma is given, there is a

specific bar under subrule (2) of Rule 42 of the Rules that the same will not be withdrawn by the Government servant without the approval of the competent authority. This is indicative of the fact that the acceptance of a notice of voluntary retirement is not required or contemplated for full operation of the said notice of voluntary retirement. If no orders are communicated in this respect or if the notice of voluntary retirement is not withdrawn before the date indicated in the said notice of voluntary retirement, it will become automatically operative from the date indicated in the notice of voluntary retirement and the Government servant would retire voluntarily from the date of his choice indicated in the aforesaid notice. For better appreciation, the findings given by this Court in paragraphs 27, 28 and 29 of the report are reproduced hereunder:“

27. It is, therefore, such a statutory right, infeasible and absolute in nature that is enshrined in clause (a) of sub-rule (i) of Rule 42 of the Civil Services (Pension) Rules, 1976.

28. The next factor is the choice of the Government servant of the date of his retirement. Now the first part of clause (a) of sub-rule (i) of Rule 42 says that a Government servant may retire at any time which falls after completing the period of 20 years qualifying service. The second part of clause (a) of sub-rule (i) of Rule 42 gives the Government servant a wide choice. He may choose to retire on the date of his notice. He may also choose to retire on the date of expiry of a period of three months, the beginning of which period is reckonable in accordance with note 2 below sub-rule (i) of Rule 42, or any date within the aforementioned period of 3 months or any date following after a period of 3 months from the date of the giving of the notice under clause (a) but in such a case understandably before the date of his superannuation.

29. Now where a Government servant chooses

to retire on the date of sending of the notice under clause (a) or on a date which falls after the date of sending or on a date which falls before expiry of a period of three months, he has to make payment of pay and allowances respectively for a period of three months or for the period by which the notice period falls short of a period of three months in both cases reckoning of the beginning of the period of three months will be done in accordance with note 2, which is the second of the four Notes set out after the end of clause (b) of sub-rule (i) of Rule 42. However, even in these two cases it is the Government servant's choice of the date of his retirement which determines the date of his retirement under clause (a)."

6. Thus, the allegation made by the petitioner that the notice of voluntary retirement was required to be accepted and then only it would become operative, cannot be accepted."

(Emphasis supplied)

11. In view of the aforesaid legal position and considering the Rule in hand, it is clear that once a notice of voluntary retirement is given indicating the particular period of time, same will become operative from the date on completion of notice period. Admittedly, in the present case, the notice was given for thirty days. In absence of any rejection within thirty days, it became effective on completion of 30th day. Thus, the petitioner shall be treated to be retired automatically from the said date.

12. The Apex Court in *Tek Chand* (supra) opined as under:-

"There are three categories of rules relating to seeking of voluntary retirement after notice. In the first category, voluntary retirement automatically comes into force on expiry of notice period. In the second category also, retirement comes into force unless an order is passed during notice period withholding permission to retire and in the third category, voluntary retirement does not come into force unless permission to this effect is granted by the competent authority. In such a case, refusal of permission can be communicated even after the expiry

of the notice period. It all depends upon the relevant rules.”

13. The petitioner's case is covered as per first two categories mentioned above by Supreme Court. Third category is of those cases where permission is required under relevant rules. It is apt to mention here that in *Tek Chand* (supra), the Apex Court considered Rule 48-A of the Rules. As per sub-rule(A) of the said Rule, the notice of voluntary retirement given under sub-rule(1) shall require acceptance by the appointing authority. [Page 309]. Thus, it depends upon the nature of Rule whether permission is required, deemed permission can be assumed or expressed permission is a condition precedent. In the context of present Rules, it can be safely concluded that no such prior permission or acceptance is required for the reasons stated above.

14. In *C. V. Francis*(supra) also, the Apex Court opined on the basis of Rule in hand. In the said case, the Rule appears to be different. Thus, the said judgment has no application.

15. It is noticed that in the relief clause the petitioner has prayed for a direction to take a decision on his application for voluntary retirement. However, in paragraph 10 of the petition, it is specifically pleaded that the petitioner is deemed to have been retired as per Rule 42 of the Rules. The relief clause is not happily worded. But Court is required to do substantive justice. If the reading of the petition shows the clear nature of relief desired by the petitioner, he cannot be non-suited on hyper-technical grounds.

16. The Division Bench of this Court in *Prakash Chand Jain and another vs. State of MP and others* [2003 (1) MPLJ 489], opined as under:-

“6. It is well settled in law that a Writ Court can mould the relief clause if the same flows from the facts of the case and the same is not dependent upon any other kind of inference. To put it differently: if the Court is not required to advert to many a complex fact of moulding the relief, the same can always be granted by moulding the relief clause. This is the prerogative of the writ court and this view of ours gets fortified by the decision rendered in the case *Nilamani Mishra vs. State of Orissa*, 71(1991)C.L.T. 99 wherein the Chief Justice B.L.Hansaria (as his Lordship then was) held as under:

“8. The next question is relatable to the grant of

appropriate relief to the petitioner. In this connection it has been urged by Mr. Mishra that as the petitioner has not specifically prayed for setting aside the approval accorded to the promotion of O.P. No. 4 by the Director of Secondary Education, the promotion in favour of his opposite party cannot be set aside by this Court in the present proceedings. Reference to the prayers as made by the petitioner shows that the first of the same concerns the seniority and the second to the question of recommendation of the name of the petitioner for promotion as the Headmaster and a direction to O. P. No. 2 to approve the same. This shows that there is specific prayer for declaring the promotion of O.P.No. 4 as invalid in the eye of law. But then the petitioner having prayed for an other order or direction which would afford complete relief to him we are of the opinion that merely because of absence of any specific prayer for setting aside the approval of the promotion of O. P. No.4 to the post of Head Master, this relief may not be denied to the petitioner. In taking this view, we have borne in mind certain decisions of the Apex Court which have held that court have very wide discretion in the matter of framing their writ to suit the exigencies of particular cases and an application cannot be thrown out simply on the ground that the proper writ or direction has not been prayed for. This was the view expressed in *Charnjit Lal Chowdhary vs. Union of India and Others*, AIR 1951 SC 41. In *Satya Narain Singh vs. District Engineer, PWD*, AIR 1962 SC 1161 appropriate relief was granted due to changed circumstances and because of the prayer for grant of any other relief to the petitioner. In *State of Haryana vs. Haryana Co-op. Transport Ltd.* AIR 1977 SC 237 the mere circumstance of the petitioner not asking for the writ of *quo warranto* in so many words was not regard as sufficient not to entertain that question, as facts necessary for

challenging the appointment in question had been clearly stated in the petition. It was pointed out that the petitioner had invited the Court to issue such other suitable writ (apart from certiorari which was specifically asked for, but which was regarded as inappropriate) as the Court may deem fit and proper. In *B. R. Ramabhadriah vs. Secretary, F. and A. Deptt.* AIR 1981 SC 1653, it was reiterated that the relief should be suitably moulded and it should not be denied as purely technical and narrow procedural grounds.”

(Emphasis supplied)

Same view is taken by Special Bench of Five Judges of this Court in *Manoj Kumar vs. Board of Revenue and Others* (2008 (1) MPLJ 152. The relevant portion of paragraph 65 reads as under:

“65. It has to be borne in mind that the power of the High Court under Article 226 of the Constitution are not confined to prerogative writs inasmuch as it can issue directions, orders, writs and can mould the relief to meet the peculiar requirements. The powers conferred on the High Court under the said Article is of 'wide expanse'. In *Director of Settlements, A. P. and others vs. M. R. Apparao and another*, (2002) 4 SCC 638, it has been held that the power under Article 226 is essentially a power upon the High Court for issuance of high prerogative writs for enforcement of fundamental rights as well as non-fundamental or ordinary legal rights, which may come within the expression 'for any other purposes'. The powers of the High Courts under Article 226 though are discretionary and no limits can be placed upon their discretion they must be exercised along the recognized lines and subject to certain self-imposed restrictions. It is a constitutional power conferred on the High Court to see no man is subject to injustice by violation of law. In exercise of this Article the High Court is expected to erase injustice and not to make justice a bye-product.”

(Emphasis supplied)

In *Gram Panchayat, Parei vs. State of M. P. and others* [2002 (2) MPLJ 401], this Court in paragraph 17 opined as under:

“17..... True it is, prayer in specific terms has not been made to declare that the Panchayat has the right and the Janpad Panchayat does not have the right but when from the pleadings and the relief sought it flows to some extent, I am of the considered view that this Court has the jurisdiction to mould the relief.”

17. In view of the aforesaid, the ends of justice would be met if the relief is suitably moulded by this Court. Resultantly, it is directed that respondents shall treat the petitioner as voluntary retirement on completion of one month's notice period as per notice dated 06-08-2013. Since the petitioner stood voluntarily retired on the said date automatically, the transfer order passed subsequently on 07-02-2014 is of no consequence. It cannot be passed against a retired employee. Thus, this order dated 07-02-2014 is set aside. Respondents are directed to work out the retiral benefits of the petitioner and pay it to him in accordance with law, within 45 days.

18. The petition is allowed. No costs.

Petition allowed.

I.L.R. [2016] M.P., 394

WRIT PETITION

Before Mr. Justice Rohit Arya

W.P. No. 8304/2013 (Gwalior) decided on 20 June, 2014

JABBAR KHAN

...Petitioner

Vs.

RAUF BEG & ors.

...Respondents

Civil Procedure Code (5 of 1908), Order 18 Rule 4 - Cross-examination of witness - Right to cross-examination was closed as counsel was engaged in another case - Court could have deferred cross-examination unless & until reason given for non availability of counsel was tainted with some oblique motive - Petition allowed. (Paras 2 & 5)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 18 नियम 4 - साक्षी का प्रतिपरीक्षण - प्रतिपरीक्षण करने के अधिकार को समाप्त किया गया क्योंकि अधिवक्ता अन्य प्रकरण में व्यस्त था - न्यायालय, प्रतिपरीक्षण को आस्थगित कर

सकता था जब तक कि अधिवक्ता की अनुपलब्धता के लिये दिया गया कारण किसी परोक्ष हेतु से दूषित नहीं था – याचिका मंजूर।

R.K. Upadhyay, for the petitioner.

Rohit Mishra, for the respondents No. 1 & 4.

(Supplied: Paragraph numbers)

ORDER

ROHIT ARYA, J. :- This Writ Petition under Article 227 of the Constitution of India is directed against the order dated 24/10/2013 passed by Civil Judge, Class-I, Ganjbasoda, District Vidisha in Civil Suit No.110-A/2009.

2. By the aforesaid order, the petitioner/plaintiff has been denied opportunity of cross-examining the witnesses produced by defendants *inter alia* on the ground that defendants had produced the witnesses at 1 O' Clock; case was fixed for cross-examination at 3:30 PM; and, defendants' witnesses alongwith counsel were present at 3:00 O' Clock, however, request was made on behalf of plaintiff's senior counsel Shri Hariprasad Sharma for deferment of cross-examination, as he was occupied in another case in a different Court. According to the Court, up-till 5 O' Clock as the counsel for plaintiff did not turn up for cross-examination and, therefore, it closed the right of plaintiff for cross-examining the defendants' witnesses.

3. It is submitted by the plaintiff/petitioner that it was not a deliberate intentional attempt on behalf of petitioner/ plaintiff's counsel to avoid cross-examination of defendants' witnesses. As plaintiff's counsel was on his legs before the another Court, therefore, request was made for deferment of cross-examination. It is further contended that right of cross-examination is a precious right and denial thereof under such circumstance shall be to the grave prejudice to the petitioner/plaintiff. It is prayed that an opportunity to cross-examine defendants' witnesses may kindly be afforded to plaintiff subject to such terms and conditions as this Court may deem fit and proper.

4. Learned counsel for respondents/defendants supported the order passed by the Trial Court.

5. Having heard counsel for the parties, this Court is of the opinion, as a matter of fact, observance of discipline of law in Court proceedings is always

appreciated. Expeditious disposal of cases is certainly need of the hour, looking to the rise in institution of number of cases and pendency thereof, to maintain faith, trust and confidence reposed by the people/litigants on Court, however, this has to be tempered with the cherished goal of complete substantive justice between the parties in our legal system of judicial disposition. Merely because the plaintiff's counsel could not appear at 3:30 PM on 24/10/2013 for the reason that plaintiff's senior counsel was occupied in another Court, as was informed to the Court, instead of taking exception thereto, the Court below could have deferred cross-examination in the interest of justice unless and until the reason given for non-availability of the counsel was tainted with some oblique motive to achieve collateral purposes, which is not the case in hand. Therefore, with due regard to the concept of justice, equity and good conscience it is hereby ordered that the Trial Court shall fix a date for cross-examination of defendants' witnesses examined on 24/10/2013 and afford an opportunity to plaintiff to cross-examine them subject to such terms and conditions the Trial Court deems fit and proper including cost. The Trial Court may also order that no adjournment shall be granted. The parties shall cooperate with the Court in expeditious completion of proceedings. No unwarranted adjournments shall be sought by the parties.

6. With the aforesaid observations, petition stands disposed of.

Petition disposed of.

I.L.R. [2016] M.P., 396

WRIT PETITION

Before Mr. Justice Rohit Arya

W.P. No. 2191/2013 (Gwalior) decided on 22 July, 2014

MANOJ JAIN

Vs.

SMT. SUMAN GOYAL

...Petitioner

...Respondent

Civil Procedure Code (5 of 1908), Order 6 Rule 17 - Amendment - Application for amendment is filed by a party after commencement of trial - Held - The trial court must address upon the issue as regards existence of jurisdictional facts - Only after recording its satisfaction, trial court shall move further to decide the application on merits. (Para 11)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 6 नियम 17 - संशोधन -

विचारण आरंभ होने के पश्चात् एक पक्षकार द्वारा संशोधन हेतु आवेदन प्रस्तुत किया गया – अभिनिर्धारित – विचारण न्यायालय को अधिकारिता के तथ्यों के अस्तित्व से संबंधित मुद्दे पर विचार करना चाहिए – केवल अपनी संतुष्टि अभिलिखित किये जाने के पश्चात् विचारण न्यायालय आवेदन को गुणदोषों पर निर्णीत करने के लिये अग्रसर होगा।

Cases referred :

(2012) 11 SCC 341, 2009 (3) MPLJ 122.

N.K. Gupta with Ravi Gupta, for the petitioner.

D.D. Bansal, for the respondent.

(Supplied: Paragraph numbers)

ORDER

ROHIT ARYA, J. :- By this petition under Article 227 of the Constitution of India defendant has challenged the legality, validity and propriety of the impugned order dated 13/03/2013 passed in civil suit No.32A/2011 by II Additional District Judge, Guna. By the aforesaid order, plaintiff's applications under Order VI Rule 17 and Order VII Rule 14 (3) CPC have been allowed.

2. Plaintiff filed a suit for declaration, recovery of possession and mesne profit *inter alia* contending that the suit land admeasuring 0.230 hectare falling in survey No.20/1 situated in village Chhawani, Patwari Halka No.76, Tahsil & District Guna was purchased by the plaintiff (hereinafter referred to as 'the suit land'). Out of the aforesaid suit land, 0.139 hectare was transferred through various registered sale deeds and, therefore, plaintiff claimed to be owner to the extent of 0.091 hectare and in the map attached with the plaint in respect of the suit land marked in "green colour".

3. Defendant filed written statement and denied plaint allegations. During pendency of the suit, plaintiff filed an application under Order VI Rule 17 CPC for amendment in the plaint and map on 11/09/2012 but the same was withdrawn on 09/01/2103. Thereafter issues were framed and parties were directed to lead evidence. Accordingly, plaintiff submitted affidavits of three witnesses who were cross-examined as well. At that stage, plaintiff again filed an application under Order VI Rule 17 CPC alongwith an application under Order VII Rule 14 (3) CPC. Reply thereto was filed by the defendant. However, the trial Court by the impugned order has allowed the applications.

The aforesaid order has been challenged in this petition by the defendant.

4. Learned counsel for the petitioner has *inter alia* contended that provisions as regards amendment have undergone change by amendment brought in the Act by the Act of 46 of 1999 w.e.f. 1/7/2002 and are now stringent in nature. The incorporation of such provisions, counsel submits, is in fact with the aim and object to avoid dilatory tactics responsible for unduly delayed trials and ensure speedy trial to subserve the cause of justice. The main thrust of submission is on proviso appended to Rule 17, which reads as under:-

“17. Amendment of pleadings.- XXXX

Provided that no application for amendment shall be allowed after the trial has commenced, *unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.*”

(Emphasis supplied)

5. It is submitted that in a situation where the trial has begun and evidence has been led by a party, amendment at his instance can only be allowed if the jurisdictional facts, as deducible from the proviso, are brought on record and the court comes to the conclusion recording its satisfaction as regards existence thereof and not otherwise. It is contended that; first, a party must plead and prove the facts and circumstances that despite due diligence the matter could not be raised before the commencement of trial; and second, the trial court has to necessarily address upon such facts and circumstances to reach to the conclusion as regards existence thereof before allowing the amendment. The counsel relies on the judgment of Hon'ble Supreme Court in (2012) 11 SCC 341, *Abdul Rehman and another vs. Ruldu and others*, wherein the Hon'ble Supreme Court has held as under:-

“The Courts have to be liberal in accepting same, if the same is made prior to the commencement of the trial. **If such application is made after the commencement of the trial, in that event, the Court has to arrive at a conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.**”

(emphasis supplied)

6. It is submitted that there can be no cavil of doubt that in the instant case the application for amendment has been filed after the commencement of trial.

7. As a matter of fact, words “after the commencement of trial” as incorporated in proviso to Order VI Rule 17 of CPC have received an authoritative interpretation and do not admit any doubt. It has been held that *the date on which issues are framed is the date of first hearing. Filing of affidavit in lieu of examination-in-chief of a witness would amount to commencement of proceedings.* (Emphasis supplied). For ready reference para 8 of *Vidyabai and others vs. Padmalatha and another*, 2009 (3) MPLJ 122, which reads as under:-

“8. From the order passed by the learned Trial Judge, it is evident that the respondents had not been able to fulfil the said pre-condition. The question, therefore, which arises for consideration is as to whether the trial had commenced or not. In our opinion, it did. The date on which the issues are framed is the date of first hearing. Provisions of the Code of Civil Procedure envisage taking of various steps at different stages of the proceeding. *Filing of an affidavit in lieu of examination-in-chief of the witness, in our opinion, would amount to 'commencement of proceeding'.*”

(Emphasis supplied).

8. On facts, it is contended that earlier an application for amendment was filed under Order VI Rule 17 of CPC on 11/9/2012. The same was dismissed as not pressed on 9/1/2013 with no liberty to file fresh application. Thereafter, in lieu of examination-in-chief three affidavits under Order XVIII Rule 4 of CPC of plaintiff's witnesses, namely, Chandragupt Goyal, husband of plaintiff as power of attorney holder of plaintiff, Anil Bhadoriya and Dhiraj Singh Raghuvanshi were brought on record on 5/7/2012, 18/7/2012 and 1/8/2012 respectively. Thereafter, on 7/2/2013 second application for amendment under Order VI Rule 17 CPC was filed seeking substitution of proposed para 2 for para 2 of the plaint. Alongwith this application another application under Order VII Rule 14 of CPC was filed to bring on record a

map different from the one which was filed with the plaint. The aforesaid application, on a bare perusal, does not reflect that the facts sought to be brought on record despite due diligence could not be brought on record in the plaint at the time of filing of the suit or in any case before commencement of trial. That apart, even upon perusal of the proposed amendment, the factual fabric of the suit is sought to be changed with changed dimensions, measurements etc. of the suit land in contents and in the map attached with the suit by introducing new set of facts. Such afterthought amendment based on concocted fabricated facts cannot be permitted to impede the trial and the course of justice at the instance of the plaintiff. The plaintiff while filing the second amendment application did not disclose the fact that earlier application under Order VI Rule 17 of CPC was dismissed. No fact and circumstance is stated in the second application which may be based on subsequent events after filing of the suit and dismissal of earlier amendment application. As such, in fact the plaintiff does not deserve indulgence of the court for the reason of suppression of facts and lack of bonafide in moving subsequent amendment application. With the aforesaid submissions, learned counsel submitted that the trial court while passing the impugned order did not address upon the sustainability of the application in the light of proviso to Order VI Rule 17 of CPC and judgments of the Hon'ble Supreme Court in *Abdul Rehman and Vidyabai* (supra). The trial court, as such, failed to exercise jurisdiction as contemplated in proviso to Order VI Rule 17 CPC and committed patent error of law in that behalf. The trial court totally unmindful of its statutory obligations, as referred above, has passed the impugned order allowing amendment, which tantamounts to improper exercise of discretionary power, as the order impugned is totally evasive in nature and intended only to allow the amendment asked for irrespective of its sustainability and relevancy. Trial court also allowed an application under Order VII Rule 14 of CPC by which the amended map was brought on record, as a consequence of allowing the amendment. Learned counsel, therefore, prayed that the impugned order deserves to be set aside.

9. On the other hand, counsel for respondent supported the order impugned and submitted that by allowing the amendment the trial court has not committed any error much less jurisdictional error, as nature of suit is not changed. Amendment is only consequential in nature. Mere change of dimension and area of the suit land as well as change of map shall not prejudice the

defendant.

10. Having heard learned counsel for the parties, this court is of the view that this writ petition deserves to be allowed for more than one reason. Admittedly, by the proposed amendment through second application under Order VI Rule 17 of CPC, the entire para 2 of the existing plaint is sought to be deleted and new para 2 to be substituted, wherein description of length, width and dimensions are changed. The map sought to be produced under Order VII Rule 14 of CPC is materially different from the map attached to the plaint. Such amendments are sought to be brought on record at the stage when issues have been framed. Plaintiff has already filed affidavits under Order XVIII Rule 4 CPC of her three witnesses in lieu of examination-in-chief. There is no disclosure of the fact as to why the averments as proposed in new para 2 could not be brought on record either at the time of presentation of suit or later on before the trial began. There is also no disclosure as regards dismissal of earlier application under Order VI Rule 17 of CPC by the trial court on 9/1/2013. These aspects assume importance and need to be addressed while the court exercises its jurisdiction under Order VI Rule 17 of CPC in the light of the proviso appended to Order VI Rule 17 of CPC by the amendment Act in 2002. The proposed amendments definitely are sought to be brought on record after the commencement of trial. As such, the trial court was obliged to address upon jurisdictional facts as contemplated in proviso to Order VI Rule 17 of CPC. That has not been done.

11. In the light of the foregoing discussions, it is considered apposite to state that in a given situation of facts where trial has commenced and an application under Order VI Rule 17 of CPC is filed by a party seeking amendment in the pleadings, the trial court must address upon the issue as regards existence of jurisdictional facts as embodied in proviso to Order VI Rule 17 of CPC and only after recording its satisfaction trial court shall move further to decide the application on merits.

12. Neither such facts are stated in the application nor have been addressed upon by the trial court. Hence, the contentions advanced by the learned counsel for petitioner have force of law and, therefore, are sustained. Accordingly, writ petition is allowed. The impugned Order of the Trial Court is set aside.

Petition allowed.

I.L.R. [2016] M.P., 402

WRIT PETITION

Before Mr. Justice Sanjay Yadav

W.P. No. 6230/2013 (Jabalpur) decided on 14 August, 2014.

BEER BHAN SINGH

Vs.

STATE OF M.P.

...Petitioner

...Respondent

Constitution - Article 226 - Recovery of excess payment -
Petitioner retired as Ranger - Respondents directed for recovery of
Rs. 24,116/- including interest - Held - State Government unable to
establish any role of petitioner in fixation of pay and unless established
that damage is caused, petitioner not subjected to pay interest - Liability
to refund the excess amount upheld - Charging of compound interest
quashed - Petition partially allowed. (Paras 5 to 7)

संविधान - अनुच्छेद 226 - अतिरिक्त भुगतान की वसूली - याची रेंजर के रूप में सेवानिवृत्त हुआ - प्रत्यर्थीगण को ब्याज शामिल करते हुये रु. 24,116/- की वसूली हेतु निदेशित किया गया - अभिनिर्धारित - राज्य सरकार वेतन निर्धारण में याची की किसी भूमिका को स्थापित करने में असमर्थ और जब तक कि यह स्थापित नहीं किया जाता कि क्षति कारित हुई है, याची ब्याज का भुगतान करने के लिये अध्याधीन नहीं - अतिरिक्त राशि के प्रतिदाय के दायित्व की पुष्टि की गई - चक्रवृद्धि ब्याज का अधिरोपण अभिखंडित - याचिका अंशतः मंजूर।

S.K. Chaturvedi, for the petitioner.

Sheetal Dubey, for the respondents.

(Supplied: Paragraph numbers)

O R D E R

SANJAY YADAV, J. :- Heard

2. Order-dated 21.3.2013 is being assailed vide this petition; whereby, recovery to the tune of Rs.24,116/- is being effected towards excess payment.

3. Appointed as Forest Guard in 1975, the petitioner was made Forester in 1983 and thereafter, was promoted as Deputy Ranger in 2007 and Ranger in 2012. Petitioner had superannuated in December, 2012. That, before his retirement, the discrepancy in pay fixation as on 1.1.2006 was noticed wherein instead of fixing the pay at Rs.11160+2400, the pay was fixed at

Rs.11980+2400. The discrepancy has occurred due to excess increment paid to the petitioner from 1.1.1986, which cumulated to Rs.2244. That, by adding compound interest, the petitioner was held liable for a recovery of Rs.24,116/-. The interest as apparent from the reply filed by respondents is charged on the basis of circular issued by the Finance Department No.F-11-2/2011/नियम/चार dated 31.5.2011 (Annexure R/3) wherein paragraph (i), (ii), (iii) and (iv) stipulates -

“(1) शासन की समस्त वसूली योग्य राशि 12 प्रतिशत वार्षिक ब्याज के साथ वसूल की जाएगी । ब्याज की राशि की गणना सामान्य भविष्य निधि की भाँति प्रत्येक वर्ष के अन्त में Compounding करते हुये की जावेगी । ब्याज की गणना शासन को पहुँची हानि की तिथि से प्रारम्भ होकर वसूली की अंतिम किश्त के भुगतान के दिनांक तक की जाएगी ।

(2) शासकीय बकाया की वसूली देय राशि के निर्धारण के तत्काल पश्चात् के मासिक वेतन के बिल से सकल वेतन (Basic Pay + Grade Pay + D.A.) के 1/3 भाग की दर से स्वतः शुरू हो जाएगी एवं तब तक जारी रहेगी, जब तक ब्याज सहित पूर्ण राशि की वसूली नहीं हो जाती । शासकीय सेवक पर ब्याज का भार कम करने के उद्देश्य से शासकीय सेवक को देय अन्य स्वत्व जैसे वेतन/भत्तों के एरियर्स, मानदेय आदि से भी बकाया की वसूली की जानी चाहिए । कार्यालय प्रमुख के लिए यह आवश्यक होगा कि वसूली की राशि के निर्धारण के पश्चात् 10 दिन की समयावधि में शासकीय सेवक से वसूली के आदेश जारी करें ।

(3) बकाया की वसूली इस आधार पर स्थगित नहीं की जाना चाहिए कि संबंधित शासकीय सेवक के द्वारा इस संबंध में सक्षम अधिकारी को अपील की गई है, जो अभी निर्णय हेतु लंबित है । जब तक ऐसी किसी कार्यवाही में वसूली पर स्थगन आदेश नहीं हो, वसूली कंडिका (2) में निर्धारित प्रक्रिया अनुसार जारी रहेगी ।

(4) शासकीय सेवक से शासकीय बकाया एवं ब्याज की वसूली के लिए कार्यालय प्रमुख, जिन कार्यालयों में संबंधित शासकीय सेवक कार्यरत है, पूर्ण रूप से उत्तरदायी होंगे । यदि उपरोक्त निर्देशों के पालन में लापरवाही की जाती है, तो संबंधित कार्यालय प्रमुख से वसूली में हुए विलंब की अवधि के लिए वसूली योग्य राशि पर 12 प्रतिशत ब्याज की दर से क्षतिपूर्ण वसूल की जाएगी । ब्याज की राशि की गणना सामान्य भविष्य निधि की भाँति प्रत्येक वर्ष के अन्त में Compounding करते हुये की जावेगी ।”

4. Grievance of the petitioner is two fold; *firstly*, that the pay which was fixed and paid to him was in consonance with the fixation, as per his entitlement

as per his promotion and *secondly*, that the recovery, if any, with compound interest is not tenable in the eyes of law when the petitioner is not instrumental in regard to the payment made to him and for the mistake committed by the functionaries of the State, the petitioner cannot be penalized.

5. As to first contention, record reveals that the pay of the petitioner which was to be fixed at Rs.1150 as on 1.1.1986 was fixed at Rs.1180 as a result whereof excess payment was made which percolated right till his retirement. The petitioner is unable to establish that instead of Rs.1150/- he was entitled for fixation at Rs.1180/- i.e. the maximum of the pay scale as on 1.1.1986; in view whereof, the rectification of the pay and the recovery of excess of Rs.2244 cannot be faulted with. The first contention therefore fails.

6. As regard to second contention, the State Government is unable to establish that the petitioner had any role in fixation of pay which is attributed to the State Government functionaries. Interest is the legal damages or penalties for detention of money (Law Laxicon : P. Ramnatha Aiyar). Thus, unless established that the damage is caused, a person cannot be subjected to pay interest.

7. In view whereof, though the liability to refund the excess amount is upheld; however, charging of compound interest thereon is quashed.

The petition is allowed to the extent above. No costs.

Petition partially allowed.

I.L.R. [2016] M.P., 404

WRIT PETITION

Before Mr. Justice Sanjay Yadav

W.P. No. 7481/2013 (Jabalpur) decided on 20 August, 2014

RAVI SHANKAR SARATHE

...Petitioner

Vs.

STATE OF M.P.

...Respondent

A. Vas-Sthan Dakhalkar (Bhumiswami Adhikaron Ka Pradan Kiya Jana) Adhiniyam, M.P. (4 of 1980), Section 4 - Charnoi land - Revenue Authorities - No power to grant patta. (Para 10)

क. वास-स्थान दखलकार (भूमिस्वामी अधिकारों का प्रदान किया जाना) अधिनियम, म.प्र. (1980 का 4), धारा 4 - चरनोई भूमि - राजस्व प्राधिकारी - पट्टा

प्रदान करने की शक्ति नहीं।

B. Land Revenue Code, M.P. (20 of 1959), Section 237(3) - Grass land reserved - None of the authorities have power to divert the same. (Para 11)

ख. भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 237(3) - घासभूमि आरक्षित - प्राधिकारियों में से किसी को भी उसे अपयोजित करने की शक्ति नहीं।

Parag Chaturvedi, for the petitioner.

Sudesh Verma, G.A. for the respondents.

(Supplied: Paragraph numbers)

ORDER

SANJAY YADAV, J. :- Heard on admission.

2. Petition is directed against the order-dated 26.2.2013; whereby, Collector Hoshangabad has dismissed the appeal preferred under Section 6 of the M.P. Vas-Sthan Dakhalkar (Bhumiswami Adhikaron Ka Pradan Kiya Jana) Adhiniyam, 1980 (referred as 'Adhiniyam, 1980').

3. Claiming to be an occupant of 0.32 Hectare of Khasra No.130/1 in Village Bankhedi, recorded as Chhota-Ghas in the revenue record, petitioner moved the Sub-Divisional Officer, Pipariya for grant of *patta*. That, on a report which was sought for from Tahsildar Bankhedi, the land in question was found to be Charnoi and the area of Charnoi land in Bankhedi being less than 2% led the Sub-Divisional Officer to reject the application.

4. An appeal under Section 6 of the Adhiniyam, 1980 was also dismissed upholding the finding. The Appellate Court also held that in consonance to the direction by the Supreme Court in Civil Appeal No.3511/2004 decided on 5.2.2009, the State Government through its Revenue Department, has issued the Circular No.F-4-1/2003/सात/2A dated 4.12.2009 that in any village, the percentage of charnoi land shall not be less than 2%.

5. Whether the Authorities are justified in the conclusion arrived at by them is the question.

6. Adhiniyam, 1980 was brought in with an object to provide for the conferring Bhumiswami rights on landless persons in respect of dwelling house and sites on or appurtenant to agricultural land in non urban areas in the State

of Madhya Pradesh.

7. "Agricultural land" as per Section 2(a) means any land in non-urban area used for the purpose of agriculture.

8. "Dwelling house" includes hut as per Section 2(c) and the expression "Homestead" is defined under Section 2(f) as a dwelling house situated on or appurtenant to an agricultural land which is complete in itself and is not shared in common with any other person other than a person belonging to the same family and includes any court yard, compound, garden, place of worship, family grave-yard, tank, well, privy, latrine, drain and boundary wall annexed to or appertaining to such dwelling house and in actual physical possession of the landless person on the 14th April, 2003.

9. Section 3 of Adhiniyam, 1980 excludes certain homestead from the Adhiniyam. Sub-section (1) of Section 4 stipulates that in any non-urban area, homestead occupied by a landless person in or appurtenant to an agricultural land on the 14th April, 2003 shall on the said date be deemed to have vested in him in Bhumiswani (sic:Bhumiswami) rights provided he had been in possession thereof for one or more years prior to that date. Sub-section (2) envisages that on such vesting of the homestead in the landless person, the original tenure holder shall cease to be a Bhumiswami of the area comprised in the homestead.

10. Thus, there is no provision in the Adhiniyam 1980 which confers powers in the Revenue Authorities to grant *patta* to an occupier of a charnoi land. Section 236 of the Madhya Pradesh Land Revenue Code, 1959 stipulates that in preparing the Nistar Patrak as provided in Section 235, the Collector shall, as far as possible, make provision for free grazing of the cattle used for agriculture. That, sub-section (1)(b) of Section 237 envisages that subject to the rules made under the Code, the Collector may set apart unoccupied land for pasture, grass bir or fodder reserve. Sub-section (3) of Section 237 stipulates that -

"Subject to the rules made under this Code, the Collector after securing the land mentioned in clause (b) of sub-section (1) to minimum two percent of the total agriculture land of that village, may divert such unoccupied land as mentioned in sub-section (1) into abadi or for construction of roads, state highways, national highways, canals, tanks,

hospitals, schools, colleges, Goshalas and any other public utility projects as may be determined by the State Government :

Provided that the land set apart for the purposes mentioned in sub-section (1) shall not be diverted and allotted to any person for agriculture purpose."

11. In the case at hand, as evident from the revenue record (Annexure P/2), the land in question over which a house admeasuring 62x42=2604 Sq.Ft. is constructed, is a grass land so reserved under the Code and none of the Authorities have the power to divert the same. The conclusion arrived at by the Revenue Authorities cannot be faulted with. Rather, as rightly pointed out by learned Government Advocate, the petitioner is an encroacher of grass land.

12. During course of hearing, the petitioner has given an example of one Ravishankar Malviya in whose favour Bhumiswami rights are created.

13. This Court is of the considered opinion that a wrong committed by the Authorities concerned will not create any legal right in other, because such wrongs are always amenable for correction. Therefore, in that case, the respondents are at liberty to re-examine the case of Ravishankar Malviya in accordance with law, because no adverse order, in the present case, can be passed as Ravishankar Malviya is not a party.

14. With these observations, petition fails and is dismissed. No costs.

Petition dismissed.

I.L.R. [2016] M.P., 407

WRIT PETITION

Before Mr. Justice Sanjay Yadav

W.P. No. 6127/2007 (S) (Jabalpur) decided on 26 August, 2014

DEPUTY DIRECTOR, NAGARIYA

PRASHASAN

...Petitioner

Vs.

SATYA NARAIN

...Respondent

A. Industrial Disputes Act (14 of 1947), Section 25-B(2)(a) and Minimum Wages Act (11 of 1948), Section 13(1)(b) - Computation of duty period - National holidays & weekly rests are to be treated as

duty period.

(Paras 7 to 9)

क. औद्योगिक विवाद अधिनियम (1947 का 14), धारा 25-बी(2)(ए) एवं न्यूनतम मजदूरी अधिनियम (1948 का 11), धारा 13(1)(बी) - कर्तव्य कालावधि की संगणना - राष्ट्रीय अवकाश एवं साप्ताहिक विश्राम को कर्तव्य कालावधि माना जाना चाहिए।

B. Industrial Disputes Act (14 of 1947), Section 25-F - Back wages - Refused while reinstating - Employee failed to prove that he was unemployed, during period of retrenchment - Employee, not entitled for back wages.
(Para 13)

ख. औद्योगिक विवाद अधिनियम (1947 का 14), धारा 25-एफ - पिछला वेतन - बहाल किये जाते समय अस्वीकार किया गया - कर्मचारी सिद्ध करने में असफल रहा कि छुट्टी की कालावधि के दौरान वह बेरोजगार था - कर्मचारी, पिछले वेतन का हकदार नहीं।

Cases referred :

AIR 1986 SC 458, 2006 (110) FLR 767, (2013) 2 SCC 751, (2013) 10 SCC 324.

Anup Shrivastava, for the petitioner.

(Supplied: Paragraph numbers)

ORDER

SANJAY YADAV, J. :- Heard on admission.

2. Award dated 15.11.2006 passed by Labour court Bhopal, in an Industrial Dispute Reference Case No.23/2004 is being assailed vide this petition under Article 227 of the Constitution of India.

3. Dispute was raised by respondent/workman against his alleged retrenchment on the ground that, having worked for a period from 5.10.1998 to 23.12.2003 management could not have been dispensed with his services without adhering to the provisions of Section 25 F or without any inquiry. It is contended that being an illegal retrenchment, the workman is entitled for retrenchment with backwages. The dispute was referred to the Labour Court for adjudication by the appropriate Government on 19.08.2004-

“क्या श्री सत्यनारायण तिवारी पिता श्री जगन्नाथ तिवारी का सेवा प्रथकीकरण वैध एवं उचित है. यदि नहीं तो वह किस सहायता का पात्र है तथा

इस संबंध में नियोजक को क्या निर्देश दिये जाना चाहिये."

4. Parties led their evidence before the Labour Court. Labour Court on a finding that between the period from January 2003 to 23.12.2003 the workman was found having worked for 212 days without counting for the national holidays and having found that no retrenchment compensation was paid to the petitioner when his services were dispensed with, directed for retrenchment of the workman without backwages by Award dated 15.11.2006.

Labour Court found-

"7- श्रमायुक्त द्वारा न्यूनतम वेतन का जो निर्धारण किया जाता है उसमें भी पूरे माह का जो वेतन निर्धारित किया जाता है उसमें चार विश्राम दिवसों का वेतन भी सम्मिलित रहता है प्रथमपक्ष ने जनवरी 2003 से दिसंबर 2003 के मध्य 212 दिन तक कार्य किया है और इसमें साप्ताहिक अवकाश व अन्य सार्वजनिक अवकाश सम्मिलित किये जाते हैं तो निश्चित ही प्रथमपक्ष ने द्वितीयपक्ष संस्थान में एक वर्ष में 240 दिन से अधिक कार्य किया है एक वर्ष में लगभग 52 साप्ताहिक अवकाश होते हैं और उपरोक्त साप्ताहिक अवकाश की अवधि प्रथमपक्ष के कार्य दिवसों में जोड़ी जाती है तो प्रथमपक्ष ने 240 दिन से अधिक कार्य किया है।

8. इस प्रकार प्रथमपक्ष ने द्वितीयपक्ष संस्थान में निर्धारित एक वर्ष की अवधि में सेवासमाप्ति के पूर्व 240 दिन से अधिक कार्य कर लिया था और द्वितीयपक्ष साक्षी ने प्रतिपरीक्षण में यह स्वीकार किया है कि प्रथमपक्ष को कार्य से बंद करने के पूर्व कोई सूचनापत्र नहीं दिया गया. कोई सुनवाई का अवसर नहीं दिया गया, न ही छटनी मुआवजा दिया गया क्योंकि इसकी आवश्यकता नहीं थी. प्रथमपक्ष द्वितीयपक्ष संस्थान में लगातार एक वर्ष की अवधि में 240 दिन से अधिक कार्यरत रहा है इस कारण से प्रथमपक्ष की सेवायें द्वितीयपक्ष द्वारा बिना वैधानिक प्रक्रिया का पालन किये, बिना सुनवाई का अवसर दिये औद्योगिक विवाद अधिनियम 1947 की धारा 25 (एफ) में वर्णित विधिक आज्ञात्मक सिद्धांतों के विपरीत द्वितीयपक्ष द्वारा प्रथमपक्ष की सेवायें बिना छटनी संबंधी प्रावधानों का पालन किये, समाप्त की गयी हैं. प्रथमपक्ष की सेवासमाप्ति अवैधानिक छटनी की श्रेणी में जाती हैं।"

5. Petitioner question the finding by the Labour Court construing 212 days as 240 days by adding the period of national holidays, and weekly rests. Apparently, labour Court has taken into consideration the provisions contained under Section 13 (1) (b) of the Minimum Wages Act, 1948 which stipulates-

"13(1) (b)- provide for a day of rest in every period of seven days which shall be allowed to all employees or to any specified

class of employees and for the payment of remuneration in respect of such days or rest;

6. Provisions contained in Rule 24 of M. P. Minimum Wages Rules 1958 which requires-

“24- Bar of suits- No Court shall entertain any suit for the recovery of wages in so far as the sum so claimed-

(a) forms the subject of an application under Section 20 which has been presented by or on behalf of the plaintiff; or

(b) has formed the subject of a direction under that section in favour of the plaintiff; or

(c) has been adjudged in any proceeding under that section not to be due to the plaintiff; or

(d) could have been recovered by an application under that selection.”

7. Thus while computing the wages the period as find mention under Section 13 and Rule 24 is treated as the duty period.

8. Section 25 B of Industrial Dispute Act, 1948 (sic:1947) stipulates-

“25B. 2 Definition of continuous service.- For the purposes of this Chapter,-

(1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock- out or a cessation of work which is not due to any fault on the part of the workman;

(2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer--

(a) for a period of one year, if the workman, during a period of twelve calendar months preceding the date with reference to

which calculation is to be made, has actually worked under the employer for not less than-

(i) one hundred and ninety days in the case of a workman employed below ground in a mine; and

(ii) two hundred and forty days, in any other case;

(b) for a period of six months, if the workman, during a period of six calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than--

(i) ninety- five days, in the case of a workman employed below ground in a mine; and

(ii) one hundred and twenty days, in any other case.
Explanation.- For the purposes of clause (2), the number of days on which a workman has actually worked under an employer shall include the days on which--

(i) he has been laid- off under an agreement or as permitted by standing orders made under the Industrial Employment (Standing Orders) Act, 1946 (20 of 1946), or under this Act or under any other law applicable to the industrial establishment;

(ii) he has been on leave with full wages, earned in the previous years;

(iii) he has been absent due to temporary disablement caused by accident arising out of and in the course of his employment; and

(iv) in the case of a female, she has been on maternity leave; so, however, that the total period of such maternity leave does not exceed twelve weeks."

9. Interpreting sub-Section (1) of Section 25 B of 1948 (sic:1947) Act it is held by the Supreme court in *Workmen of American Express International Banking Corporation v. Management of American Express International Banking Corporation* AIR-1986 SC 458-

“5. Section 25-F of the Industrial Disputes Act is plainly intended to give relief to retrenched workmen. The qualification for relief Under Section 25-F. is that he should be a workman employed in an industry and has been in continuous service for not less than one year under an employer. What is continuous service has been defined and explained in Section 25-B of the Industrial Disputes Act. In the present case, the provision which is of reliance is Section 25-B(2)(a)(ii) which to the extent that it concerns us, provides that a workman who is not in continuous service for a period of one year shall be deemed to be in continuous service for a period of one year if the workman, during a period of twelve calendar months preceding the date with reference to which the calculation is to be made, has actually worked under the employer for not less than 240 days. The expression which we are required to construe is 'actually worked under the employer'. This expression, according to us, cannot mean those days only when the workman worked with hammer, sickle or pen, but must necessarily comprehend all those days during which he was in the employment of the employer and for which he had been paid wages either under express or implied contract of service or by compulsion of statute, standing orders etc. The learned counsel for the Management would urge that only those days which are mentioned in the Explanation to Section 25-B(2) should be taken into account for the purpose of calculating the number of days on which the workmen had actually worked though he had not so worked and no other days. We do not think that we are entitled to so constrain the construction of the expression 'actually worked under the employer'. The explanation is only clarificatory, as all explanations are, and cannot be used to limit the expanse of the main provision. If the expression 'actually worked under the employer' is capable of comprehending the days during which the workman was in employment and was paid wages-and we see no impediment to so construe the expression-there is no reason why the expression should be limited by the explanation. To give it any other meaning then what we have done would bring the object of Section 25-F very close to frustration. It is not necessary to

give examples of how 25 F may be frustrated as they are too obvious to be stated.”

Since Section 25 F (1) stipulates that-

“25F- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until.

(a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:

(b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay [for every completed year of continuous service] or any part thereof in excess of six months; and

(c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette.”

10. The emphasis being “in continuous service for not less than one year” and the workman in the case at hand having continuously worked for one year with paid holidays, the conclusion arrived at by the Labour Court cannot be faulted. Furthermore, in the given facts of present case the proposition of law laid down in *HUDA v. Jagmal Singh*: 2006 (110) FLR 767 and in *Rajkumar v. Jalagaon Municipal Corporation*: (2013) 2 SCC 751, are of no assistance to the petitioner.

11. As to decision in *HUDA v. Jagmal Singh* (Supra) the observation in paragraph 4 is in the context of the given facts of said case wherein the workman was found to have worked for 204 days and no case under Section 25 B (1) of 1947 Act was made out.

12. In a recent decision in *Deepali Gundu Surwase vs. Kranti Junior Adhyapak Mahavidyalaya* : (2013) 10 SCC 324 it has been held paragraph 38.1 “in case of wrongful termination of service, reinstatement with continuity of service and backwages is the normal rule.”

13 In the case at hand, since the termination of workman is held to be illegal and in violation of section 25 F of the 1947 Act, the trial Court was well justified in reinstating him on a finding that the workman did not prove that he was not given employment during the period when he was not in service declined to grant backwages cannot be faulted with as would warrant any interference in a petition under Article 227 of the Constitution of India.

Consequently, petition fails and is dismissed. No costs.

Petition dismissed.

I.L.R. [2016] M.P., 414

WRIT PETITION

Before Mr. Justice Sujoy Paul

W.P. No. 4635/2011(Gwalior) decided on 26 September, 2014

NARSINGH & ors.

...Petitioners

Vs.

SHRIPAT SINGH & ors.

...Respondents

Evidence Act (1 of 1872), Section 63 - Secondary Evidence - Held - One has to establish that the photocopy is of a document which actually existed - There must be sufficient proof of the search for the original to render secondary evidence admissible. (Para 8)

साक्ष्य अधिनियम (1872 का 1), धारा 63 - द्वितीयक साक्ष्य - अभिनिर्धारित - किसी को यह स्थापित करना होगा कि प्रतिलिपि एक ऐसे दस्तावेज की है जो वास्तविक रूप से अस्तित्व में था - द्वितीयक साक्ष्य को ग्राह्य बनाने के लिये, मूल दस्तावेज की खोज का पर्याप्त सबूत होना चाहिए।

Cases referred :

AIR 1955 Rajasthan 179, AIR 1959 AP 568, AIR 1958 AP 418, AIR 1968 Calcutta 532, 2009 (III) MPJR 211, (2013) 10 SCC 758.

Santosh Agrawal, for the petitioners.

S.S. Kushwaha, for the respondents.

ORDER

SUJOY PAUL, J. :- This petition filed under Article 227 of the Constitution is directed against the order dated 25.4.2011 passed by 4th Civil Judge, Class-II, Bhind in Case No. 42-A/2009, whereby the application of

the petitioners/defendants preferred under Section 65 and 66 of the Evidence Act is rejected by the Court below.

2. In a suit for declaration and permanent injunction, the petitioners entered appearance and filed their written statements. Thereafter, they preferred application under Section 65 and 66 of the Evidence Act stating that on 12.6.2004 the meeting of Gram Panchayat, Ehrolighat was convened. A resolution was passed in the said meeting whereby the partition between parties was accepted. By placing photocopy of the said resolution, it is stated that the original of said resolution has been removed from concerned register of the Gram Panchayat and, therefore, this photocopy be treated as secondary evidence.
3. The plaintiffs filed its reply dated 5.4.2011. It is stated that the plaintiffs have never signed any partition deed. The photocopy is a fabricated document. It is prayed by the plaintiffs that photocopy is not admissible in evidence and the same be rejected.
4. Shri Santosh Agrawal, learned counsel for the petitioners relied on Section 63 and 65(c) of the Evidence Act. It is argued that the photocopy is admissible in evidence in the case where the original has been removed by the officers of said Panchayat with the connivance of plaintiffs.
5. Per contra, Shri S.S.Kushwaha, learned counsel for the plaintiffs supported the order. He relied on the statement of Secretary, Gram Panchayat (PW-1), who stated that on 12.6.2004 no meeting of said Panchayat had taken place, nor any resolution was passed. He stated that when the existence of original is not established, the photocopy cannot be admitted as secondary evidence. No other points are pressed by the parties.
6. I have bestowed my anxious consideration on the rival contentions of the parties and perused the record.

Section 63 of Evidence Act reads as under:-

“Secondary Evidence means and includes--

Certified copies given under the provisions hereinafter contained;

Copies made from the original by mechanical processes
which in themselves insure the accuracy of the copy, and copies

compared with such copies;

Copies made from or compared with the original;

Counterparts of documents as against the parties who did not execute them;

Oral accounts of the contents of a document given by some person who has himself seen it.”

Section 65 (c) reads as under:-

“When the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;”

7. Section 63 makes it clear that only such copies which are made from the original by mechanical process and which were compared with the original can be treated as secondary evidence. The secondary evidence itself must be of the nature described in Section 63. The photocopy of a document will not be admissible under Section 63 unless it is shown that it had been made from or compared with the original. Another aspect emanates from Section 65 (c) on which heavy reliance is placed by Shri Santosh Agrawal. A plain reading of the said provision shows that secondary evidence is permissible when original has either been 'destroyed' or 'lost'. This aspect is dealt with in Halsbury law in the following manner:-

“Where a document has been lost or destroyed, secondary evidence of its contents is admissible. The court must be satisfied that the document existed, that the loss or destruction has in fact taken place and that reasonable explanation of this has been given. Thus, a bona fide and diligent search must have been made in the place where the instrument would most properly be found, but not necessarily in every possible place; nor need the search have been made recently or for the purpose of the cause.”

8. Thus, one has to establish that the photocopy is of a document which actually existed. For this purpose, there must be sufficient proof of the search for the original to render secondary evidence admissible. It must be established

that the party has exhausted all resources and means in search of the documents which were available to him. In the present case, the petitioner has not made any efforts to obtain certified copy of the resolution dated 12.6.2004 from the Gram Panchayat. No copy under the Right to Information Act, 2005 is also prayed for. No complaint regarding alleged loss of said document to the higher authorities is placed on record.

9. The Rajasthan High Court in AIR 1955 Rajasthan 179 (*Poonamchand v. Motilal and others*) opined as under:-

“Appellant's learned counsel has also referred to a few other documents which are marked Exs.P.3 to P.7. Regarding these documents, it would suffice to say that they are not the original documents. They are only copies. The original documents have not been proved in any manner and, therefore, they are inadmissible in evidence.”

10. In AIR 1959 AP 568 (*Smt. Bobba Suramma v. Smt. Peddireddi Chandramma*), the High Court considered an earlier judgment reported in AIR 1958 AP 418 (*Ananta Raghuram v. Rajah Bommadevara*) and opined that there must be sufficient proof of the search for the original to render secondary evidence admissible. It must be established that the party has exhausted all resources and means in the search of the document which were available to him. In order to claim the benefits of section 65 of the Indian Evidence Act, there should be credible evidence of the loss of the original.

11. The same view is taken by Calcutta High Court in AIR 1968 Calcutta 532 (*M/s Parekh Brothers v. Kartick Chandra Saha and others*). This Court in 2009 (III) MPJR 211 (*Rajesh Kumar v. Rakesh Kumar & Anr.*) opined that in the case at hand no evidence is brought on record to prove the existence of original on which the document dated 14.12.2000 has been prepared and in absence of such evidence, the same cannot be proved by secondary evidence. (para 12).

12. The Apex Court (2013) 10 SCC 758 (*Kaliya v. State of Madhya Pradesh*) opined that, the secondary evidence of an ordinary document is admissible only and only when the party desirous of admitting it has proved before the court that it was not in his possession or control of it and further, that he has done what could be done to procure the production of it. Thus, the party has to account for the non-production in one of the ways indicated

in the section. The party further has to lay down the factual foundation to establish the right to give secondary evidence where the original document cannot be produced.

13. In the instant case, the petitioner has miserably failed to prove the existence of the original document. No efforts were made to procure the certified copy of the resolution dated 12.6.2004. In absence of establishing the existence of original, the photocopy cannot be treated as secondary evidence.

14. On the basis of aforesaid analysis, no fault can be found in the order passed by the Court below. The Court below has taken a plausible view which warrants no interference in this petition filed under Article 227 of the Constitution.

15. The petition fails and is hereby dismissed. No cost.

Petition dismissed.

I.L.R. [2016] M.P., 418

WRIT PETITION

Before Mr. Justice B.D. Rath

W.P. No. 6603/2010 (Gwalior) decided on 20 November, 2014

RAMIT KUMAR PATHAK

...Petitioner

Vs.

PAWAN KUMAR PATHAK & ors.

...Respondents

Civil Procedure Code (5 of 1908), Order 1 Rule 10(2) - Court may strike out and add parties - Held - It cannot be laid down as an absolute proposition that a third party can never be impleaded in the suit but where the third party can show a fair semblance of title or interest he can certainly file an application for impleadment and ought to be impleaded as a party.
(Para 15)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 1 नियम 10(2) - न्यायालय पक्षकारों को हटा और जोड़ सकता है - अभिनिर्धारित - इसे आत्यंतिक प्रतिपादन के रूप में अधिकथित नहीं किया जा सकता कि एक तृतीय पक्षकार को वाद में कमी भी अभियोजित नहीं किया जा सकता परंतु जहां तृतीय पक्षकार हक या हित की उचित सदृश्यता दर्शा सकता है, वह निश्चित रूप से पक्षकार बनाये जाने हेतु आवेदन प्रस्तुत कर सकता है और उसे पक्षकार के रूप में अभियोजित किया जाना चाहिए।

Case referred :

1997(1) JLJ 252.

Mohan Babu Mangal, for the petitioner.

Respondent No.1 in person.

Nawal Gupta, for the respondent No. 2.

Prashant Sharma, for the respondent No. 3/LRS.

ORDER

B.D. RATHI, J. :- This writ petition under Article 227 of the Constitution of India has been preferred before this court on being aggrieved by the order dated 18/3/2010 passed by Fifth Additional District Judge, Gwalior (M.P.) in Civil Suit No.11A/09 (Ramit Kumar Pathak Vs. Pawan Kumar Pathak & others) whereby the application filed by the Intervenor-Ramkishan Dubey under Order 1 Rule 10 of C.P.C. with the aid of section 151 of C.P.C. has been allowed by the court-below and the plaintiff/petitioner was directed to implead the intervenor-Ramkishan as respondent No.3 in the suit proceedings and the case was fixed for 26/3/2010 for filing written statement by the intervenor.

2. It is pertinent to mention here that the proceedings of the trial court are stand still because of the order of the stay passed by Division Bench of this court on 9/11/2010.

3. The facts, necessary for adjudication of this petition are as under:

A civil suit bearing No.11A/09 was instituted by the plaintiff-Ramit Kumar against his father-respondent No.1-Pawan Kumar Pathak s/o late Shri Heeralal Pathak and respondent No.2-Bank of Maharashtra for declaration of title and permanent injunction. The petitioner claims himself to be the son of respondent No.1-Pawan Kumar and grandson of late Shri Heeralal Pathak. It is asserted in the plaint that the petitioner and respondent No.1-Pawan Kumar owned a joint family property bearing House No.43/1816 situated in Topi Bazar, lashkar Gwalior which was mortgaged by his father-respondent No.1-Pawan Kumar without taking prior permission from the plaintiff. It is stated that respondent No.1-Pawan Kumar is involved in anti-social activity and therefore in order to fulfill his un-lawful demand the property was mortgaged by him (Pawan Kumar) with-respondent No.2-Bank of Maharashtra.

4. In the said civil suit one intervention application was moved under Order 1 Rule 10 C.P.C. read with section 151 of C.P.C. by intervenor-Ramkishan Dubey, who had died during the pendency of the present writ petition and his legal representative Mohan Prasad Dubey has been brought on record. In the said application marked as Annexure-P/4 (page 21), it was pleaded that intervenor-Ramkishan was the legal heir of Heeralal, who had executed one registered Will (Annexure-P/6) on 20/12/1989 in favour of intervenor- Ramkishan Dubey. In that Will all the facts were mentioned that Heeralal had died issue-less. The brother of Heeralal and wife of both (Heeralal's wife and his brother's wife) had also died issue-less, therefore, with a view to take care of all the movable and immovable properties intervenor Ramkishan Dubey who was non else but son of the sister of Heeralal was adopted by Heeralal during the span of his lifetime. The adoption deed (Annexure-P/7 at page 30 of reply) was also executed to this effect.

5. At this stage it may be mentioned here that against the order dated 18/3/2010 passed on the application under Order 1 Rule 10 C.P.C., preferred by the intervenor-Ramkishan Dubey (since deceased), the review petition was filed by the petitioner/plaintiff before the trial court which was dismissed vide order dated 17/9/2010. Under these circumstances, present has moved this court challenging the orders dated 18/3/2010 as well as 17/9/2010.

6. It is submitted by the counsel for the petitioner that intervenor was nowhere in picture nor has at any concern with the suit property. He was not legal heir of Heeralal and in the alleged Will (Annexure-P/6) dated 20/12/1989 disputed property was not described, therefore, according to the learned counsel for the petitioner Ramkishan was in fact a new person who could not be permitted to be joined/added in the suit proceedings against the wishes of the plaintiff. In support of his argument, learned counsel relied on the decision in the case of *Anokhelal Vs. Radhamohan Bansal & others* 1997(1) J.L.J. 252. It is therefore submitted that the orders passed by the courts-below are against the settled principles of law and are liable to be set aside by allowing his petition.

7. Respondent No.1-Pawan Kumar more or less raised the same grounds as urged by the petitioner-plaintiff and contended that the orders are absolutely wrong on facts on the record and the petition deserves to be dismissed.

8. On the other hand, learned counsel Shri Nawal Gupta, appearing for

the respondent No.2-Bank pleads no objection to the orders passed by the courts-below.

9. Now, this court is going to examine the grounds raised by the learned counsel for respondent No.3- Mohan Prasad Dubey (legal heir of intervenor-Ramkishan) in support of his arguments countering the submissions of the petitioner's learned counsel.

10. It is submitted by the learned counsel appearing for the respondent No.3-Mohan Prasad Dubey that in the application preferred under Order 1 Rule 10 of C.P.C. it was specifically pleaded that Ramkishan Dubey was the legal heir of Heeralal and therefore right stood vested to the intervenor-Ramkishan Dubey in respect of interest of the property left by the deceased Heeralal by virtue of the registered Will. Though property under dispute was not mentioned in the Will but even then being son of the sister of Heeralal, Ramkishan was the legal heir as specified in Class II IV (2) of the Schedule appended to Hindu Succession Act, 1956. It is also submitted by the learned counsel that in the plaint the facts have been suppressed by the petitioner and his father respondent No.1-Pawan Kumar that respondent No.1 Pawan Kumar was not the natural son of Heeralal but in fact Pawan Kumar was the natural son of Radhakrishna Pathak. It is also submitted that one civil suit bearing No.30A/07 was also filed by Pawan Kumar against the intervenor/respondent No.3-Ramkishan and the same is pending before the court of Fifth Additional District Judge, Gwalior. That suit was filed by Pawan Kumar showing himself to be natural son of Heeralal but in that suit, when counter claim was filed by the intervenor/defendant Ramkishan Dubey, the plaintiff moved an amendment application under Order VI Rule 17 C.P.C. that he was not the natural son of Heeralal but adopted son of Heeralal. That amendment application was not accepted by the trial court and was dismissed vide order dated 19/11/2010. Against the dismissal order of the application, the petitioner filed W.P.No.7500/10 before this court which was also dismissed as per the order dated 17/1/2011. Copies of the aforesaid orders have been filed by the intervenor alongwith the reply to the petition. It is thus submitted by the learned counsel that intervenor-Ramkishan was the legal heir of Heeralal and he was having right and interest over the suit property left by the deceased Heeralal. In such premises, it is prayed that the trial court has not committed any illegality and the petition deserves to be dismissed.

11. I have given my thoughtful consideration to the contentions of the

learned counsel for the respective parties and with their assistance, have gone through the record and pleadings of the case.

12. Before reaching on the right and just conclusion to answer the controversy on the point of impleadment of the intervenor being necessary party to the suit, it would be relevant to reproduce the provisions given under Order 1 Rule 10(2) of C.P.C.

Order I

Parties to Suits

Rule 10. Suit in name of wrong plaintiff.-

(1) xxx xxx xxx xxx

(2) **Court may strike out or add parties**— The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person **who ought to have been joined**, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

13. Having gone through the case, as discussed above, in the present case, the property in dispute was mortgaged by Pawan Kumar (respondent No.1) claiming himself to be son of deceased Heeralal. In another civil suit No. 30A/07 filed by the plaintiff Pawan Kumar (respondent No.1 herein) against the intervenor-Ramkishan showing by that Pawan Kumar was the natural son of Heeralal, when counter claim was filed and objection was raised in regard to paternity of Pawan Kumar by the intervenor Ramkishan Dubey (defendant of that civil suit), the plaintiff-Pawan Kumar moved an amendment application under Order VI Rule 17 C.P.C., to demonstrate that he was not the natural son of Heeralal but adopted son of Heeralal. Aforesaid application was dismissed up to the stage of this court whereas the intervenor-Ramkishan Dubey since very beginning pleaded that he was the legal heir of deceased Heeralal as per Class II IV (2) of the Schedule appended to Hindu Succession Act 1956. This fact prima facie appears to be correct on perusal of the Will

(Annexure-P/6), dated 20/12/1989 Admittedly, in the present civil suit it was nowhere mentioned by the plaintiff/petitioner- Ramit Kumar that his father Pawan Kumar was the adopted son of Heeralal Pathak nor it was mentioned that Heeralal had adopted Pawan Kumar from his natural father namely, Radhakrishna Pathak.

14. It is true that the plaintiff in a suit is dominus litus and he cannot be forced, against his consent, to fight a third party other than the defendant impleaded by him but this is only the normal and general and not invariable rule, therefore, in an appropriate case a third party can be impleaded as a party.

15. As discussed above, the intervenor-Ramkishan was the legal heir in whose favour the Will was executed. The petitioner/plaintiff-Ramit Kumar was fully aware of this fact because in Civil Suit No.30A/07 filed by his father Pawan Kumar, this fact was disclosed by the intervenor- Ramkishan Dubey, who happened to be defendant but the petitioner/plaintiff-Ramit Kumar did not disclose the same thing in his plaint averments. In the opinion of this court, it was proper and necessary for the petitioner to have impleaded the intervenor as the defendant in the present suit as without giving an opportunity of hearing to him just and fair adjudication of the civil suit is impossible. So, it cannot be laid down as an absolute proposition that a third party can never be impleaded in the suit but where the third party can show a fair semblance of title or interest he can certainly file an application for impleadment and ought to be impleaded as a party. In other sense it would avoid and prevent multiplicity of proceedings. The second part of sub-rule (2) Order 1 Rule 10 of the CPC empowers the trial court to add a person who ought to have been joined or whose presence before the Court may be necessary in order to enable the court to adjudicate upon and settle all the questions involved in the suit. This is actually the aim and object of the provision contemplated in sub-rule (2) of Rule 10 of Order 1 of C.P.C. Hence, the decision in the case of *Anokhelal Vs. Radhamohan Bansal & others* 1997(1) J.L.J. 252 cited by the learned counsel for the petitioner would not render any assistance to him.

16. In view of the aforesaid decisions, this court is of the considered opinion that intervenor-Ramkishan Dubey (now respondent No.3-Mohan Prasad Dubey, legal heir of intervenor-deceased Ramkishan) was a necessary party to the suit and under such circumstances, the trial court has not committed any mistake of law in allowing his application. Consequently, by

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vacating the stay order dated 9/11/2010, the trial court is directed to proceed with the Civil Suit No.11A/09 and decide the case in accordance with law.

17. The petition has therefore no substance and is hereby dismissed with no order as to costs.

18. A copy of this order be sent to the concerned trial court for compliance.

Petition dismissed.

I.L.R. [2016] M.P., 424

WRIT PETITION

Before Mr. Justice Sujoy Paul

W.P. No. 6479/2013 (Gwalior) decided on 24 November, 2014

NIRBHAY SINGH PAL

...Petitioner

Vs.

M.P. POLICE HOUSING CORPORATION

& anr.

...Respondents

Service Law - Termination - Contractual appointment -
Petitioner in reply to show cause notice admitted that he is not staying in headquarter - Petitioner himself admitted that he had flouted the condition of appointment - The service conditions of contractual employees are governed by the terms of contract - Where on admitted or indisputable facts only one conclusion is possible, the court may not compel the observance of natural justice. (Paras 5, 8 & 9)

सेवा विधि - सेवा समाप्ति - संविदात्मक नियुक्ति - याची ने कारण बताओ नोटिस के जवाब में स्वीकार किया कि वह मुख्यालय में नहीं रह रहा है - याची ने स्वयं स्वीकार किया है कि उसने नियुक्ति की शर्त की अवहेलना की थी - संविदात्मक कर्मचारियों की सेवा शर्तें, संविदा के निर्बंधनों द्वारा शासित होती हैं - जहाँ स्वीकृत या अविवादित तथ्यों पर केवल एक निष्कर्ष संभव है, न्यायालय, नैसर्गिक न्याय का अनुपालन करने के लिए विवश नहीं कर सकता।

Cases referred :

(1991) 1 SCC 212, (2001) 9 SCC 180, (1977) 2 SCC 256, (1980) 4 SCC 379.

Vivek Jain, for the petitioner.

Kumar Gaurav Sharma, for the respondents.

ORDER

SUJOY PAUL, J. :- This petition filed under Article 226 of the Constitution challenges the order dated 14.8.2013, whereby the petitioner's contractual appointment was cancelled by the respondents.

2. The petitioner was appointed on contract basis as Sub-Engineer by order dated 21.2.2013 (Annexure P-2). A contract was entered into between the petitioner and the employer on 12.2.2013 (Annexure P-3). The petitioner was directed to supervise the construction work of certain police stations at Datia by order dated 18.3.2013. The respondents issued order dated 30.4.2013 and directed one Shri Pramod Kumar Nakhate, Sub Engineer to look into the construction work of two police stations at Datia. He was directed to supervise that work and remain posted at Datia. In the same order, the petitioner was directed to hand over his charge to said Shri Nakhate. The petitioner, in turn, submitted the charge to said person on 3.5.2013. The petitioner was served with a show cause notice dated 17.7.2013. In the said notice it is mentioned that the petitioner is not taking interest in his work and his work is not satisfactory. He was directed to supervise the construction work but is not obeying the said instructions. The petitioner's headquarter was fixed at Datia but he is residing at Gwalior.

3. The petitioner, in turn, submitted his detailed reply dated 5.8.2013 (Annexure P-8). The respondents passed the impugned order dated 14.8.2013 and terminated the contractual appointment by giving one month's notice. The order is passed by taking assistance of Clause 15 of Contract and Clause 12 of the appointment order.

4. Shri Vivek Jain assailed this order on the ground that the order is non-speaking. It does not deal with the detailed reply of the petitioner and, therefore, principles of natural justice are not followed. He relied on (1991) 1 SCC 212 (*Srilekha Vidyarthi Vs. State of U.P*) and judgment of Apex Court in (2001) 9 SCC 180 (*O.K.Bharadwaj Vs. Union of India and others*).

5. *Per contra*, Shri Kumar Gaurav Sharma, learned counsel for the respondents supported the order. He submits that condition 5 of the contract makes it clear that petitioner was required to stay at the headquarter itself. By taking this Court to the reply of the petitioner, it is submitted that petitioner has admitted that he is not residing in the headquarter. On the contrary, he is asking a question to the employer as to why he should remain present in the

headquarter. Thus, he violated the condition of appointment order and contract and, therefore, the employer has rightly passed the order impugned.

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

7. It cannot be doubted that even in cases of contractual appointment, the principles of natural justice are applicable. The requirement of natural justice can be molded in order to take care of two basic facets of this principle. (1) to make known the nature of acquisition and (2) to give opportunity to state the case. The respondents have given opportunity to the petitioner to put-forth his defence. Condition No. 5 of appointment/contract makes it clear that petitioner was required to remain in the headquarter. The petitioner in his reply (page 22) has stated that his charge was given to Pramod Nakhate and, hence, he stood relieved from the work of Datia and, therefore, why it is compulsory to remain at the headquarter? The order dated 18.3.2013 shows that petitioner was directed to remain at his headquarter, i.e., Datia. He was given charge of supervision work of three police stations viz., (1) Kotwali Datia, (2) Kotwali Chiroola, District Datia, (3) Kotwali Goraghat, District Datia. The order dated 30.4.2013 shows that work of Chiroola and Goraghat was entrusted to Shri Nakhate. Thus, the supervision work regarding Police Station Kotwali Datia was still with the petitioner and it was not entrusted to Shri Nakhate. There is no order which shows that petitioner's headquarter was changed from Datia. The charge list Annexure P-6 also shows that he had handed over the work of Chiroola and Goraghat, Datia only to Shri Nakhate. In view of petitioner's reply, it is clear that he was fully aware about the accusation against him. He made it clear in the reply that he on his own treated himself as relieved. No relieving order related to petitioner is shown. It is strange that petitioner posed a question as to why he should remain at the headquarter. This act of the petitioner is clearly contrary to the condition of contract/appointment order. In this factual backdrop, it is to be seen whether order needs to be interfered with for alleged violation of principles of natural justice.

8. In the opinion of this Court, it is clear that no prejudice is caused to the petitioner if detailed order is not passed by the respondents because petitioner's own stand in the return shows that he flouted the condition of the contract/appointment. Thus, his appointment could be cancelled in view of Clause 15 of the contract, which in clear terms prescribes that in the event petitioner violates any condition of contract, his service could be terminated.

So far reliance on *O.K.Bharadwaj* (supra) is concerned, it is not a case of contractual employee. It is a case of a civil post holder. For civil post holders the disciplinary action needs to be taken in consonance with statutory Discipline and Appeal Rules. The service conditions of contractual employees are governed by the terms of contract. As discussed above, as per petitioner's own reply, it is clear that he has violated condition No.5 of the appointment/contract, which is sufficient to invoke termination/cancellation of appointment clause. Thus *O.K.Bharadwaj* (supra) is of no assistance to the petitioner.

9. It cannot be forgotten that natural justice is after all "no unruly horse, no lurking land mine" as characteristically stated by *Krishna Iyer, J. in Chairman, Board of Mining Examination and Chief Inspector of Mines v. Ramjee*, [(1977) 2 SCC 256]. Its unnatural expansion without reference to these realities can be 'exasperating' as observed by the learned Judge. It is also worthwhile to remember, as stated in para 24 of *S.L. Kapoor v. Jagmohan* [(1980) 4 SCC 379] that where on admitted or indisputable facts only one conclusion is possible, the Court may not compel the observance of natural justice, as it would be futile to do so.

10. As analyzed above, in my opinion, in view of clear accusation and specific stand of the petitioner, no interference is warranted in the discretionary jurisdiction of this Court under Article 226 of the Constitution. I find no illegality which warrants interference by this Court in exercise of writ jurisdiction.

11. Petition fails and is hereby dismissed. No cost.

Petition dismissed.

I.L.R. [2016] M.P., 427

WRIT PETITION

Before Mr. Justice K.K. Trivedi

W.P. No. 13764/2014 (Jabalpur) decided on 27 January, 2015

PRATIBHA KUSHRAM (SMT.)

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

A. Constitution - Article 226 - Writ Petition - Suppression of facts - Suppression of facts would amount to abuse of process of law and a party guilty of such suppression of material facts is not entitled

to grant of any relief in such writ petition, which is based on suppression of material facts - Petition dismissed. (Paras 9 to 11)

क. संविधान - अनुच्छेद 226 - रिट याचिका - तथ्यों का छिपाव - तथ्यों का छिपाव किया जाना विधि की प्रक्रिया के दुरुपयोग की कोटि में आयेगा और तात्त्विक तथ्यों के उक्त छिपाव का दोषी पक्षकार ऐसी रिट याचिका जो तात्त्विक तथ्यों के छिपाव पर आधारित है, में कोई अनुतोष प्रदान किये जाने के लिए हकदार नहीं - याचिका खारिज।

B. *Service Law - Transfer* - Respondent no. 5 was substantially appointed on contract basis as Hostel Superintendent - Being a woman, she was required to be posted in a girls hostel but by mistake she was posted in boys hostel - This mistake was corrected by impugned order - Petitioner was only given the charge of Hostel Superintendent and was never appointed/promoted to the said post - Petitioner has to make room for respondent no. 5 - Petition dismissed. (Para 7)

ख. सेवा विधि - अंतरण - प्रत्यर्थी क्रमांक 5 को संविदा आधार पर छात्रावास अधीक्षक के रूप में मूलतः नियुक्त किया गया था - महिला होने के नाते, उसे बालिका छात्रावास में पदस्थ किया जाना अपेक्षित था परंतु मूलवश उसे बालक छात्रावास में पदस्थ किया गया - इस मूल को आक्षेपित आदेश द्वारा सुधारा गया था - याची को केवल छात्रावास अधीक्षक का पदभार दिया गया था और उसे कभी भी उक्त पद पर नियुक्त/पदोन्नत नहीं किया गया था - याची को प्रत्यर्थी क्र. 5 के लिए जगह बनानी/देनी पड़ेगी - याचिका खारिज।

Cases referred :

(2005) 6 SCC 149, (2007) 10 SCC 635, (2008) 12 SCC 481.

Rashid Suhail Siddiqui, for the petitioner.

Sanjay Dwivedi, G.A. for the respondents.

ORDER

K.K. TRIVEDI, J. :- This writ petition under Article 226 of the Constitution of India is directed against the order dated 10.07.2014 as also the order dated 5.08.2014 by which the respondent No.5 is posted in place of the petitioner and by subsequent order the representation made by the petitioner against that order is rejected on the ground that the petitioner was substantially appointed on the post of Assistant Teacher, was promoted on the post of Superintendent of Hostel and was made to work as Hostel

Superintendent in Scheduled Caste Pre-Metric Girls Hostel, Nainpur. Since the petitioner was substantively holding the post, which was vacated by one Smt. Sangeeta Kawde, without making any posting order in respect of the petitioner, the respondent No.5 could not have been posted on the said post. A representation was made by the petitioner but the same was not being considered, therefore, she was required to approach this Court by way of filing W.P. No.10558/2014, which writ petition was disposed of vide order dated 22.07.2014 with a direction to the respondents to consider and decide the representation of the petitioner expeditiously. The interim protection was granted to the petitioner directing that status quo with respect to the posting shall be maintained till the representation is decided. By the subsequent impugned order dated 25.08.2014 since the representation made by the petitioner has been rejected, she is now left with no option but to file this writ petition.

2. While entertaining the writ petition, this Court granted an interim protection on 19.09.2014 directing that status quo with respect to the posting of the petitioner be maintained. Since this order was passed, the petitioner was allowed to continue on the post and even when after service of notice of this writ petition, the respondent No.5 filed her reply and an application for vacating stay, the I.A. filed by the respondent No.5 was rejected and opportunity was granted to the State to file a return and if necessary, to move appropriate application for vacating stay. The respondents No.1 to 4 and 6 have filed their return categorically contending that the petitioner has not come with clean hands before this Court inasmuch as she has made a wrong statement in her writ petition regarding her appointment as Hostel Superintendent. It is contended by the respondents that the petitioner was appointed as an Assistant Teacher and was posted in Govt. Naveen Middle School, Nainpur. The charge of the post of Hostel Superintendent was given in addition to the petitioner and there is no channel of promotion provided from the post of Assistant Teacher to the post of Hostel Superintendent. Therefore, the petitioner is not a regular incumbent holding the post of Hostel Superintendent. It is contended that the respondent No.5 though was appointed on contract basis but her appointment is specifically against the post of Superintendent of the Tribal Hostel and, therefore, the petitioner cannot say that the respondent No.5 is not eligible to be posted in place of the petitioner. It is contended that these facts the petitioner was knowing fully well but has deliberately concealed to mislead this Court for obtaining an interim stay. Even if no posting order is

issued in respect of the petitioner, she is to continue on her substantive post of Assistant Teacher in the school where she has been posted on regular basis. There would not be any problem in drawing the salary of the petitioner as she is not getting the salary from the post of Hostel Superintendent, which post is not substantially held by the petitioner. In view of this, it is contended that the writ petition is liable to be dismissed. An application for vacation of the interim order is also made on these grounds by the aforesaid respondents.

3. The respondent No.5 has filed independent return and has contended that the entire claim made by the petitioner is misconceived. It is the policy of the State Government that in a girls hostel a lady teacher is to be posted as Superintendent. Though the respondent No.5 was appointed on contract as Hostel Superintendent, yet she was posted in a boys hostel. This posting was in violation of the policy of the State, therefore, when the fact was found that the petitioner is holding the current charge/additional charge of the post of Hostel Superintendent in the girls hostel, the respondent No.5 was posted on regular basis and no posting order was required to be issued in respect of the petitioner, who will continue to work on her post of teacher in the school within the same place. In view of this, it is contended that the entire writ petition is misconceived and is liable to be dismissed. In proof of the fact that the petitioner is getting salary as Assistant Teacher, annual pay slip for the month of July, 2014 to September, 2014 is filed by the respondent No.5.

4. Though rejoinders have been filed by the petitioner firstly meeting out the allegations made by the respondent No.5 in her return and secondly meeting out the allegations made by the respondents No.1 to 4 and 6 in their return but except placing on record an order of appointment of the respondent No.5 and order passed by this Court in one of the writ petition, nothing more is stated. In the additional rejoinder a circular of the State Government has been placed on record to show that in the girls hostels only the aged Scheduled Caste/Tribal Teacher is required to be posted. Nothing much is said in the rejoinders.

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

6. First of all the claim made by the petitioner is to be examined whether she has any statutory right to be posted on the post of Hostel Superintendent or not. The petitioner though has averred in the writ petition that she was subsequently promoted on the post of Hostel Superintendent in the year 2007

but not a single order in that respect has been placed on record. The petitioner has not described as to how she was considered to be promoted on a post of Hostel Superintendent, whether such a post was in the channel of promotion of an Assistant Teacher or not. Nothing has been pointed out from the statutory rules that such a promotion is permissible as per the rules. Secondly the petitioner has contended that she is getting the salary against the post of Hostel Superintendent but not a single document in that respect is placed on record by the petitioner. It cannot be accepted from such averments made in the writ petition in paragraph 5.9 that the salary of the petitioner is being drawn from the post of Hostel Superintendent, specially when a document is placed on record by respondent No.5 indicating that the salary of the petitioner is being drawn from the post of Assistant Teacher (LDT) and her drawing and disbursing authority is the Principal, Nainpur Higher Secondary School, New Nainpur. This particular document is also not denied by the petitioner. It is the contention of learned Counsel for the petitioner that the respondent No.5 is ineligible to be posted in place of the petitioner as in her order of appointment a condition is imposed that the post on which appointment is made would not be transferable. From these facts, it is clear that the petitioner has not stated the right facts deliberately though she was fully aware of such facts. At the time of arguments learned Counsel for the petitioner has shown an order dated 15.02.2007 issued in respect of one Smt. Sangeeta Kawde by which the said Assistant Teacher was transferred to work as Superintendent of the Girls Hostel in same capacity and similar pay. This order further indicates that since the incumbent holding the post of Superintendent on current charge was transferred, the petitioner was given the current charge of the said post. This order cannot be termed to be an order of promotion in any manner and, therefore, it cannot be said that the petitioner was substantially posted on the post of Hostel Superintendent after promotion on the said post.

7. From the documents available on record, relied by the petitioner herself, it is clear that the respondent No.5 was substantially appointed on contract basis as a Hostel Superintendent. From the order passed by the Commissioner it is clear that in a girls hostel only a lady Superintendent is to be posted to function as Warden of the said hostel. The fact that respondent No.5 was appointed as a Hostel Superintendent, is not disputed. Even if such an appointment was on contract basis, it has to be treated as a substantive appointment. This fact is not disputed that the respondent No.5 though was appointed as a Hostel Superintendent and being a woman, was required to

be posted in a girls hostel, was made to work in a boys hostel. If these facts are taken into consideration together, it would be clear that only in terms of the policy made by the State Government, the error in posting of respondent No.5 was corrected and she was posted in the girls hostel by the order impugned. Since the petitioner was working in the said hostel in her capacity as incharge Hostel Superintendent, until further orders, she was to make room for respondent No.5 to comply with the order issued on 10.07.2014 by handing over charge of the said hostel. There was no occasion for the petitioner to assail the said order as the petitioner was never posted in the hostel in her capacity as Hostel Superintendent in substantive manner. She was only working in incharge capacity and as such was not to be allowed to continue when the regular incumbent appointed on the post of Hostel Superintendent was posted in her place.

8. Yet another aspect is that since the substantive posting of the petitioner is in the school which too is situated within the very same city, there was no need to make any posting of the petitioner elsewhere. The petitioner was to continue on her post on which she was substantively posted in the school. At any rate the petitioner was not required to shift anywhere and except working in the hostel, she was to work in the school. That being so, challenge to the order impugned is not acceptable and cannot be countenance.

9. Learned Govt. Advocate appearing for the respondents-State has contended that there were material suppression of facts by the petitioner which has weighed this Court for grant of interim relief to the petitioner. Placing reliance in the case of *State of A.P. and another vs. T. Suryachandra Rao*, (2005) 6 SCC 149, it is contended by learned Govt. Advocate that misrepresentation by misleading facts or suppression of material facts amount to fraud and when such a fact is taken note of by the Court, the party guilty of committing such fraud is not entitled to any relief. It is contended that in such circumstances the petitioner who too is guilty of misrepresentation of facts would not be entitled to any such relief as claimed in the writ petition.

10. In the case of *T. Suryachandra Rao* (supra), the Apex Court while dealing with the interpretation of word 'fraud' has explained that even when such suppression of material facts is done, the same is to be treated as fraud. The interpretation of word 'fraud' has been done by the Apex Court in paragraph 11, which reads thus :

"11. Fraud" and collusion vitiate even the most solemn proceedings in any civilized system of jurisprudence. It is a concept descriptive of human conduct. Michael Levi likens a fraudster to Milton's sorcerer, Comus, who exulted in his ability to, 'wing me into the easy-hearted man and trap him into snares'. It has been defined as an act of trickery or deceit. In *Webster's Third New International Dictionary* "fraud" in equity has been defined as an act or omission to act or concealment by which one person obtains an advantage against conscience over another or which equity or public policy forbids as being prejudicial to another. In Black's *Legal Dictionary*, "fraud" is defined as an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or surrender a legal right. A false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury. In *Concise Oxford Dictionary*, it has been defined as criminal deception, use of false representation to gain unjust advantage; dishonest artifice or trick. According to *Halsbury's Laws of England*, a representation is deemed to have been false, and therefore a misrepresentation, if it was at the material date false in substance and in fact. Section 17 of the Indian Contract Act, 1872 defines "fraud" as act committed by a party to a contract with intent to deceive another. From dictionary meaning or even otherwise fraud arises out of deliberate active role of representator about a fact, which he knows to be untrue yet he succeeds in misleading the representee by making him believe it to be true. The representation to become fraudulent must be of fact with knowledge that it was false. In a leading English case i.e. *Derry v. Peek* what constitutes "fraud" was described thus:

"Fraud" is proved when it is shown that a false representation has been made (i) knowingly, or (ii) without belief in its truth, or (iii) recklessly, careless whether it be true or false".

11. In the case of *Raj Kumar Soni and another vs. State of U.P. and another*, (2007) 10 SCC 635, again suppression of material facts has been held to be abuse of process of law and it has been categorically held that party guilty of not disclosing the right facts is not to be granted any benefit as it has to be held that such a party has not come to the Court with clean hands. In the case of *K.D. Sharma vs. Steel Authority of India Limited and others*, (2008) 12 SCC 481, even testing the maintainability of a writ petition in view of such suppression of facts the Apex Court has held that the writ courts should not entertain such writ petition, if are based on misleading facts or reliefs are based on suppression of material facts. Again it has been reiterated by the Apex Court that such suppression of facts would amount to abuse of process of law and a party guilty of such suppression of material facts is not entitled to grant of any relief in such writ petition, which is based on suppression of material facts.

12. As has been pointed out herein above, the facts which were well within the knowledge of the petitioner were not rightly stated by her. Though she was knowing it fully well that she is not substantially appointed on the post of Hostel Superintendent nor the order issued in her respect on 28.02.2007 could be treated as an order of promotion, yet boldly such statements were made in the writ petition. The documents in support of such submissions were not placed on record. Even when such a document of posting is shown to the Court, it became crystal clear that the petitioner was given only the current charge on temporary basis on the post of Hostel Superintendent till further orders. Even in that order the designation of the petitioner was shown to be Assistant Teacher. From this it is clear that facts as stated in the writ petition by the petitioner were not correct to her own knowledge. It is also seen that on first occasion when the order dated 10.07.2014 was assailed by the petitioner, matter was relegated to the competent authority to decide the representation of the petitioner and in that representation also fact was found that the respondent No.5 was posted as substantively appointed Hostel Superintendent in a boys hostel whereas she being a lady, was to be posted in a girls hostel. Even when such an order was called in question, the right of petitioner to continue on the post of Hostel Superintendent was to be shown in the writ petition. Had it been pointed out that the petitioner was given the current charge only on the post of Hostel Superintendent, the writ petition of the petitioner would have been dismissed at the threshold and, therefore, deliberately suppression of material facts was done by the petitioner stating

that she was substantially appointed on the post of Hostel Superintendent by way of promotion. For these reasons, it has to be held that the petitioner is not entitled to any relief in the present writ petition.

13. In view of the discussion made herein above, the writ petition fails and is hereby dismissed. However, there shall be no order as to cost.

Petition dismissed.

I.L.R. [2016] M.P., 435

WRIT PETITION

Before Mr. Justice K.K. Trivedi

W.P. (S) No. 760/2004 (Jabalpur) decided on 27 January, 2015

RAJKUMAR RACHANDANI

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

A. Civil Services (Classification, Control and Appeal) Rules, M.P. 1966, Rule 14, 16 & 27 - Order imposing penalty of withholding of increment with cumulative effect and recovery of Rs. 1,02,349/- assailed on the ground that if a major penalty is required to be imposed, a detailed enquiry as provided under Rule 14 should have been conducted whereas no enquiry was conducted and the assessment of loss was not also done in accordance with circular issued in that regard - Held - Rule 14 & 16 - Procedure for imposing penalty - Authority's intention was to impose major penalty which is evident from show cause notice - A charge sheet should have been issued and detailed enquiry was to be conducted in accordance with Rule 14 - Procedure adopted to impose major penalty cannot be sustained. (Paras 10 & 11)

क. सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 14, 16 व 27 - संचयी प्रभाव से वेतन वृद्धि रोकने और रु. 1,02,349/- की वसूली की शास्ति अधिरोपित करने के आदेश को इस आधार पर चुनौती दी गई कि यदि कोई मुख्य शास्ति अधिरोपित की जाना अपेक्षित है, विस्तृत जांच संचालित की जानी चाहिए जैसा कि नियम 14 के अंतर्गत उपबंधित है, जबकि कोई जांच संचालित नहीं की गई थी और इस संबंध में जारी परिपत्र के अनुसार हानि का निर्धारण भी नहीं किया गया - अभिनिर्धारित - नियम 14 व 16 - शास्ति अधिरोपित करने की प्रक्रिया - प्राधिकारी का आशय मुख्य शास्ति अधिरोपित करने का था जो कि कारण बताओ नोटिस से प्रकट होता है - आरोप पत्र जारी किया जाना चाहिए

था और नियम 14 के अनुसार विस्तृत जांच संचालित की जानी चाहिए थी - मुख्य शास्ति अधिरोपित करने के लिये अपनाई गई प्रक्रिया को कायम नहीं रखा जा सकता।

B. Civil Services (Classification, Control and Appeal) Rules, M.P. 1966, Rule 14, 16 & 27 - Assessment of shortage in the stock and recovery - Since there was no proper assessment of loss caused to the State and the petitioner was also not afforded an opportunity to cross examine the authority who has conducted physical verification, the same was not to be made foundation of penalty on the petitioner - Recovery of the amount of the loss from the petitioner cannot be sustained - Petition allowed. (Paras 13, 14 & 15)

ख. सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 14, 16 व 27 - स्टॉक में कमी का निर्धारण एवं वसूली - चूंकि राज्य को कारित हानि का उचित निर्धारण नहीं किया गया था और प्राधिकारी जिसने उक्त का प्रत्यक्ष सत्यापन किया है, के प्रतिपरीक्षण का अवसर भी याची को प्रदान नहीं किया गया था, इसे याची पर शास्ति अधिरोपित करने का आधार नहीं बनाया जाना चाहिए था - याची से हानि की रकम की वसूली को कायम नहीं रखा जा सकता - याचिका मंजूर।

Case referred :

1991 Supp (1) SCC 504.

R.C. Tiwari, for the petitioner.

Rahul Jain, G.A. for the respondents.

O R D E R

K.K. TRIVEDI, J. :- The petitioner, who was working as Forest Range Assistant at the relevant time, has approached this Court by way of filing this writ petition under Article 226 of the Constitution of India, ventilating his grievance against the order dated 6.7.2002 (Annexure P/6) by which the Divisional Forest Officer, respondent No.4, has imposed a penalty of withholding of increment of pay with cumulative effect and directed recovery of Rs.1,02,349/- from the monthly salary bills of the petitioner. An appeal was preferred by the petitioner against the said order, which has been dismissed on 16.12.2013 by the Conservator of Forest, respondent No.3. Hence, this writ petition was filed.

2. It is the case of the petitioner that when he was working as Forest Range Assistant a show cause notice was issued to him by the respondent

No.4 on 14.9.2000 asking him to show cause as to why the physical verification report of the Dy. Divisional Forest Officer, Lanjhi be not accepted and since the shortage in the wood stock was found, why not to recover 75% loss caused to the State, from the petitioner and the two increments of pay of the petitioner should not be withheld with cumulative effect. The petitioner on receipt of the said show cause notice filed his reply stating that such physical verification of the stock was not properly done and the report was not drawn in accordance to the instructions issued by the State Government. It was pointed out by the petitioner that no weigh bridge was available and a presumptory weight of every log was assessed and thereby a loss of wood was found. It was pointed out that if proper assessment is done in terms of the instructions issued by the Chief Conservator of Forest of Government of M.P. on 22.8.1996, it would be clear that no loss was caused by the petitioner to the State Government and neither any recovery was to be made from the petitioner nor penalty of withholding of increments of pay was required to be imposed.

3. It is the case of the petitioner that after receipt of the reply to the said show cause notice, no enquiry whatsoever was conducted by the respondent No.4 and by the impugned order dated 6.7.2002 the penalty of recovery as also withholding of two increments of pay with cumulative effect was imposed on the petitioner. Since the petitioner was not satisfied with the said order of penalty, he preferred an appeal before the competent appellate authority detailing the reasons as to how and why the order of penalty was unjustified. The appeal preferred by the petitioner was not considered in terms of the provisions of rules, more particularly Rule 27 of the Madhya Pradesh Civil Services (Classification, Control and Appeal) Rules, 1966 (hereinafter referred to as 'the Rules') and was dismissed by the order impugned. Hence, this writ petition was required to be filed.

4. It is contended by the petitioner that in fact withholding of increments of pay with cumulative effect is a major penalty as has been held by the Apex Court in the case of *Kulwant Singh Gill vs. State of Punjab*, 1991 Supp (1) SCC 504 . If a major penalty is required to be imposed, the detailed enquiry as required under Rule 14 of the Rules aforesaid should have been conducted and then only any order could have been issued against the petitioner. The authorities have not looked into these requirements of law and have passed the order in such derogatory manner. As such the orders are bad in law and liable to be quashed.

5. Upon service of notice of the writ petition, the respondents have filed their return. It is contended by the respondents that in fact a report was submitted by the competent authority after physical verification of the stock of the depot where the petitioner was posted and it was found that the said stock was not retain in appropriate manner and, there was shortage of the fuel wood as also the other woods. The complete assessment was done in presence of various persons, *panchnamas* were prepared and a report was submitted. After giving a show cause notice, the reply submitted by the petitioner was examined and the same was not found satisfactory. Though initially while directing the recovery of loss caused to the State Government a penalty of withholding of two increments of pay with cumulative effect was imposed on the petitioner, but in appeal, though initially the appeal was dismissed, but exercising power of review the appellate authority changed the order of withholding of two increments of pay with cumulative effect to one withholding of increments of pay without cumulative effect. It is thus contended that action was rightly taken and the order was rightly passed. No infirmity was committed by the respondents in conducting the enquiry against the petitioner and as such the order passed by the respondents need not be interfered with. Though a rejoinder was filed by the petitioner to the return, but nothing much has been said.

6. Learned counsel for the petitioner contended that looking to the fact that there was a dispute with respect to the conducting of the physical verification of the wood stock, it was necessary on the part of the respondents to adhere to the instructions issued by the superior authority. Pointing out that the circular was issued by the Forest Department, it was contended that assessment of loss was required to be done in the manner indicated in the said circular. Respondents have not conducted the physical verification of the wood stock in terms of the said circular. Further it is pointed out that the State Government has issued a circular on 25th March, 2003 prescribing percentage of natural decay of the wood stock and if that particular aspect is taken into account, there was be no loss caused to the State Government. As such the recovery of any alleged loss was not to be made from the petitioner. Apart from this, it is contended by the learned counsel for the petitioner that the disputed facts could be proved only by recording evidence in a departmental enquiry and a summary procedure for imposition of minor penalty was not required to be resorted to. Even otherwise, if the penalty was to be treated as minor, while examining the reply to the show cause notice issued under Rule

16 of the Rules, the disciplinary authority was required to adjudge whether a detailed enquiry was required to be conducted or not. This too was not done and as such the petitioner was not afforded a fair opportunity of hearing in the enquiry.

7. The other submission made by the learned counsel for the petitioner is that since the proposed penalty itself was major penalty, in fact, instead of a show cause notice, a charge sheet should have been issued to the petitioner and merely because the penalty is subsequently converted into a minor penalty, the procedural defect in the departmental enquiry would not be cured. Still the order of penalty is liable to be quashed.

8. Per contra, it is contended by the learned Government Advocate appearing for the respondents that no prejudice is caused to the petitioner inasmuch as withholding of increment without cumulative effect is a minor penalty which is ultimately imposed on the petitioner. Admittedly, the penalty of recovery of loss is a minor penalty and for that, a charge sheet was not required to be issued to the petitioner. Reading as a whole, the order passed by disciplinary authority, learned Government Advocate has contended that each and every fact was taken into consideration by the disciplinary authority while holding the petitioner guilty of causing loss to the State Government and, therefore, rightly the penalty was imposed on him, which orders are not required to be interfered with by this Court in exercise of powers under Article 226 of the Constitution of India as this Court cannot sit as a Court of Appeal in such departmental enquiry.

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

10. Undisputedly the show cause notice indicates that a major penalty was to be imposed on the petitioner as the proposed (sic:proposed) penalty was withholding of two increments of pay with two cumulative effect. Even when the appeal was preferred by the petitioner, the appellate authority had not considered this aspect that a major penalty was imposed on the petitioner in the garb of conducting a summary departmental enquiry in terms of the rule 16 of the Rules as while passing the order in the appeal of the petitioner, the Conservator of Forest has not converted that penalty into a minor penalty as is clear from the order dated 16.12.2003 passed in appeal of the petitioner. The modification in this order is done by the respondent Conservator of Forest only when the writ petition was filed by the petitioner and notice was issued

to the respondents. This fact is apparent from the order dated 18.4.2004 placed on record as Annexure R/2. Even if this power was to be exercised to review the order passed by the appellate authority in terms of the provisions of Rule 29 of the Rules, such a power was exercised after a period of six months from the date of order passed in appeal and, therefore, such power was not available to the respondent No.3. Therefore, merely on this count it cannot be said that since a minor penalty was ultimately imposed on the petitioner no fault is to be found in the procedure adopted by the respondents in conducting the enquiry against the petitioner.

11. In fact, the initiation of the proceedings itself against the petitioner was not in accordance to the provisions of the Rules as if the intention was of imposing a major penalty, a charge sheet should have been issue to the petitioner and not mere a show cause notice as provided under Rule 16 of the Rules. Distinction in the charge sheet under Order 14 of the Rules and a show cause notice issued under Rule 16 of the Rules is writ large. The charge sheet should contain the imputation of charges and definite allegations forming the charges against delinquent employee. There must be a list of witnesses and list of documents appended to the charge sheet to propose evidence to prove the charges against the delinquent employee. The show cause notice does not contain all these documents and in absence of such document, it is not possible for a delinquent employee to participate in such enquiry in detail in appropriate manner. Therefore, initiation of the departmental enquiry against the petitioner by resorting to the procedure not applicable to the major penalty cannot be sustained.

12. Yet another aspect is that the petitioner disputed the fact relating to assessment of shortage in the wood stock. In reply to the show cause notice, he gave in detail the reasons why he was not accepting the report of physical verification of the stock. He further pointed out the fact that loss of wood because of the decoy (sic:decay) was not taken not (sic:note) of. All these aspects could not be dealt with without recording the evidence of the witnesses who were present on the spot when the physical verification of the wood stock was done. More particularly the stock was old one, the physical verification was done at a later point of time and at that time the presence of the petitioner was not solicited. Had he been asked to remain present at the time of physical verification, he would have pointed out various factors, which the physical verification authority could have taken note of.

13. That being so merely because a physical verification report was given which was not put for cross-examination by the petitioner, the same was not to be made foundation of imposition of penalty on the petitioner. The order passed by the disciplinary authority indicates that only physical verification report, sent on 16.5.2000, relating to the physical verification conducted on 30th June, 1999 was made the basis for imposition of penalty on the petitioner. Without putting such physical verification report for examination of the petitioner and without granting him an opportunity to cross-examine the authority, who has conducted the physical verification of the wood stock, such a report alone was not enough for holding the petitioner guilty of any loss caused to the State Government on account of shortage of wood stock. All these aspects though the petitioner has raised in his appeal were not taken note of by the appellate authority and, therefore, the order passed by the appellate Authority converting the penalty imposed on the petitioner to a minor penalty will not water down the entire claim made by the petitioner in the writ petition.

14. Lastly, it is to be seen that Rule 16 of the Rules itself prescribes that where the disciplinary authority is of the opinion that looking to the defence raised by any delinquent employee, who has been given a show cause notice, a detailed enquiry is required to be conducted to strictly prove the allegations of loss against the delinquent employee, the said authority is required to initiate a regular departmental enquiry in terms of Rule 14 of the Rules. Not a single word is said about the said fact as to how the disciplinary authority was satisfied with the charges made against the petitioner and the proof thereof and why the defence taken by the petitioner was assessed and was not found sufficient to warrant any regular departmental enquiry against the petitioner. These aspects were neither considered by the disciplinary authority nor tested by the appellate authority and, therefore, conducting of a summary enquiry in these given circumstances against the petitioner was not justified. True it is that the Courts are not required to function as appellate authority, but if the procedural defects are found patent illegalities are shown in conducting the disciplinary enquiry, the courts are competent enough to exercise their power of judicial review and pass appropriate orders in respect of the departmental enquiry.

15. Notably, in the present case no interim relief was granted to the petitioner. The order of penalty itself prescribes that loss caused to the State Government was to be recovered from the petitioner in installments i.e. first

installment of Rs.1308/- and 79 installments of Rs.1279/-. It further appears that this amount has been recovered from the salary of the petitioner while he was in the service. However, as has been pointed out hereinabove, looking to the facts as stated by the petitioner since there was no proper assessment of loss caused to the State, the said amount was not to be recovered from the salary of the petitioner. It is also not clear whether the petitioner is still in service or not as he was 49 years of age in the year 2004 and would have attained the age of superannuation by now. If that is so, there would be a hurdle in the way of the respondents in conducting a *de novo* enquiry against the petitioner if the orders of penalty are quashed. Since the order of penalty of withholding of increments of pay was made with non-cumulative effect, at least that much loss the petitioner may continue to suffer, but since there is no definite finding that actually the shortage in the wood stock was found on account of alleged misconduct of the petitioner as there is no report to that effect, the recovery of the amount of loss from the petitioner cannot be sustained. If the petitioner is now retired from service, it would not be open for the respondents to initiate a *de novo* departmental enquiry against him in the appropriate manner as the alleged misconduct of the petitioner is beyond the limitation prescribed under Rule 9 of the Madhya Pradesh Civil Services (Pension) Rules, 1976. In any case, the petitioner has suffered much as the amount was already recovered from his salary, which he could not utilize in his service career. His increments of pay were withheld for a period of two years and thereby financial loss was caused to the petitioner. Therefore, it would not be appropriate to leave it open to the respondents-State to initiate a *de novo* enquiry against the petitioner. In any case, the orders impugned cannot be sustained in view of the fact that the same are found to be grossly violative of Rules aforesaid as also the rules of natural justice.

16. Consequently, the writ petition is allowed. The order dated 6.7.2002 (Annexure P/6) and the order dated 16.12.2003, as modified vide order dated 16.9.2004, stand quashed. The petitioner would be entitled to the consequential benefits of refund of amount recovered from him and restoration of his increments of pay.

17. The writ petition is allowed to the extent indicated hereinabove. There shall be no order as to costs.

Petition allowed.

I.L.R. [2016] M.P., 443

WRIT PETITION

Before Mr. Justice S.C. Sharma

W.P. No. 938/2015 (Indore) decided on 13 March, 2015

ASHISH GUPTA (DR.)

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

(Alongwith W.P. No. 1573/2015)

Examination - Cancelling the examination - No opportunity of hearing was given to the candidates who had appeared in the examination - Held - Paper was sold for a premium of Rs. 6 to 20 lakhs by the examiner/moderators - STF registered a crime in respect of same examination - Later on, based upon the material available, Public Service Commission cancelled the entire examination in order to maintain the sanctity of the examination and also in order to give further chance to the candidates who have participated in the earlier examination - Question of grant of opportunity of hearing does not arise - No illegality in the decision making process followed by Public Service Commission - Decision of the Public Service Commission does not warrant any interference - Public Service Commission is free to proceed with the process of selection by holding a fresh examination. (Paras 8 & 9)

परीक्षा - परीक्षा निरस्त की जाना - अभ्यर्थीगण जो परीक्षा में उपस्थित हुये थे, को सुनवाई का कोई अवसर नहीं दिया गया - अभिनिर्धारित - परीक्षक/माडरेटर द्वारा रु. 6 से 20 लाख के अधिमूल्य पर पर्चा बेचा गया था - एस.टी.एफ. ने उसी परीक्षा के संबंध में अपराध पंजीबद्ध किया - बाद में, उपलब्ध सामग्री के आधार पर, लोक सेवा आयोग ने परीक्षा की गरिमा बनाये रखने के उद्देश्य से तथा पूर्वतर परीक्षा में जो अभ्यर्थीगण सहभागी हुये थे उन्हें अतिरिक्त अवसर देने के लिये भी संपूर्ण परीक्षा निरस्त की - सुनवाई का अवसर प्रदान करने का प्रश्न उत्पन्न नहीं होता - लोक सेवा आयोग द्वारा अपनाई गई निर्णय लेने की प्रक्रिया में कोई अवैधता नहीं - लोक सेवा आयोग द्वारा लिये गये निर्णय में हस्तक्षेप की आवश्यकता नहीं - लोक सेवा आयोग नये सिरे से परीक्षा आयोजित करके प्रक्रिया को आगे बढ़ाने के लिये स्वतंत्र है।

Case referred :

2015 (1) MPLJ 138.

A.K. Sethi with *Rahul Sethi*, for the petitioner in W.P. No. 938/2015.

Akash Rathi, for the petitioner in W.P. No. 1573/2015.

V.P. Khare, for the respondent/MP P.S.C.

ORDER

S.C. SHARMA, J. :- Regard being had to the similitude in the controversy involved in the matter, the above mentioned cases were heard analogously together and a common order is being passed. The fact of W.P. No.938/15 are being narrated as under :

2. The petitioner before this court has filed this writ petition being aggrieved by order dated 28/5/2014 issued by Madhya Pradesh Public Service Commission by which the examination in respect of Ayurved Medical Officer, has been cancelled. The petitioner's contention is that pursuant to the advertisement issued on 23/9/13, the petitioner did apply for the post of Ayurved Medical Officer and the date of examination was notified on 28/5/14. The contention of petitioner is that he had appeared in the examination, however, without granting any opportunity of hearing to the petitioner, the impugned order has been passed.
3. Learned senior counsel arguing the matter has vehemently argued before this court that the case of petitioner is covered by the judgment delivered by the Division Bench of this Court in the case of *Shishuvendra Singh Tomar & others Vs. State of MP and others*, reported in 2015 (1) MPLJ 138 and in similar circumstances this court has set aside the decision taken by the Professional Examination Board by which the candidature of certain candidates was cancelled. Various grounds have been raised and argued before this court challenging the cancellation of examination. The first ground raised by learned senior counsel is that no opportunity of hearing was given to the petitioner. The second ground is that the cancellation has been done based upon the FIR and no independent enquiry was conducted by the Public Service Commission and therefore, in the light of the judgment delivered in the case of *Shishuvendra Singh Tomar* (supra) the order passed by the Public Service Commission is bad in law. It is also argued that no report by the STF which is investigating the matter, was made available to the petitioner or to this Court and therefore, the action of respondents in cancelling the examination based upon the report of Special Task Force (STF) is bad in law. Another ground is that the petitioner has neither used any unfair means or there are any allegation with respect to mass copying against the petitioner and merely on the basis of report of STF

the impugned order has been passed. It has also been argued that based upon the enquiry / investigation by the STF the respondent has cancelled the examination and therefore, the order cancelling the examination is bad in law.

4. A reply has been filed in the matter and the stand of respondents is that after issuing advertisement, the examination was held and thereafter it was published in the newspaper that the question papers were sold by charging a premium of Rs. 6-6 lakhs. It has been further submitted that crime was registered at Crime No. 13/14 by STF at Bhopal and the persons who were involved / responsible in selling the question papers have been arrested. It has further been stated that the matter was reviewed by the Public Service Commission and the Public Service Commission in the meeting which was presided over by the Chairman, Public Service Commission including three Members of the Public Service Commission has resolved to cancel the examination itself and thereafter the examination has been cancelled and fresh notification has been issued for holding the examination on 15/3/2015. Public Service Commission has prayed for dismissal of the writ petition.

5. Heard learned counsel for the parties at length and perused the record. The matter is being disposed of with the consent of both the parties at the motion hearing stage itself.

6. In the present case, it is not in dispute that an advertisement was issued on 23/9/2013 inviting applications for post of Ayurved Medical Officer. The examination also took place on 18/5/14. No Call Letter was issued to the candidates for interview, but while all this was going on it was reported in various newspapers that examination papers were sold by charging premium by the paper sellers/moderators. It was reported in various newspapers that papers were sold to as many as 65 candidates and thereafter First Information Report was also lodged with the STF. A copy of the FIR is also on record filed by Public Service Commission. Large number of persons have been arrested by the STF and the matter is being investigated by Special Investigation Agency i.e. STF. The petitioner is also an accused in the crime registered by the STF. The Public Service Commission, as confidentiality of examination itself was at stake, in order to generate confidence in the candidates and also in order to maintain the transparency, has cancelled the entire examination. A High Level Committee comprising of the Chairman, Public Service Commission alongwith three Members based upon the material which was placed before them, has arrived at a conclusion that fresh

examination has to be conducted and Ayurved Medical Officer Examination 2013 Examination has been cancelled.

7. This court has carefully gone through the judgment delivered by the Division Bench of this Court in the matter of *Shishuvendra Singh Tomar* (supra). In the aforesaid case, examination of some of the candidates was cancelled. It was not the case of cancellation of the entire examination. In that case since no proper opportunity of hearing was given to the candidates, therefore, the Division Bench has allowed the writ petition with liberty to the Professional Examination Board therein i.e. VYAPAM to commence an independent enquiry on the basis of the information received from the Investigating Agency (Special Task Force) and to proceed in the matter on the basis of the view formed in that inquiry. The Division Bench of this court in paragraphs 18 to 27 has held as under:-

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

19. Be that as it may, we find that neither the note-sheets nor the communications exchanged between the officials of VYAPAM and of Special Task Force, even remotely suggest that subjective satisfaction or conclusion of the appropriate Authority of VYAPAM, about the existence of facts constituting commission of organised unfair means by the concerned candidate or to be a case of mass copying or mass malpractice has been recorded. Instead, the note-sheets make it amply clear that VYAPAM merely went by the opinionated remark of the Investigating Agency and mistook its recommendation of taking action against the concerned candidates as sufficient,

without conducting any independent inquiry of its own. A priori, it is a clear case of non-application of mind by VYAPAM, if not abdication of its duty before exercising the drastic power of cancellation of examination results of the petitioners.

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

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

conduct independent inquiry before taking final decision. We would agree to the limited extent that depending on the outcome of the said inquiry it may be open to VYAPAM to consider whether to give personal hearing to the concerned candidate or otherwise. In that, if it is a case of mass copying or mass malpractice, in law, there would be no obligation to give personal hearing to the concerned candidate.

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

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

24. The respondents have then relied on the observations of

the Apex Court in paragraph 8 in the case of *B. Ramanjini and others vs. State of A.P. and others*, which dealt with the issue of mass copying or leakage of question paper. The observations in this judgment may be useful during the independent inquiry to be conducted by VYAPAM before taking any final decision. Reliance was then placed on the decision in the case of *Biswa Ranjan Sahoo and others vs. Sushanta Kumar Dinda and others*. In paragraph 3 of this judgment the Court after taking into account the factual position, opined that it was a case of enormity of mass malpractices in the selection process and therefore, issuance of individual notices to all the candidates was not necessary.

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

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

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

8. This Court has carefully gone through the judgment delivered by the Division Bench and is of the considered opinion that the present case is certainly

distinguishable on facts. It is a case where it was reported in the newspapers that the paper was sold for a premium of Rs. 6 to 20 lakhs by the examiner/moderators. STF has registered a crime at Crime No. 13/14 in respect of same examination and later on based upon the material available before the Public Service commission, the Public Service Commission has cancelled the entire examination in order to maintain the sanctity of the examination and also in order to give further chance to the candidates who have participated in the earlier examination.

9. This court is of the considered opinion that the ground raised by learned senior counsel for petitioner that no opportunity of hearing was given to the candidates who had appeared in the examination, is of no significance and the question of grant of opportunity does not arise. This court has carefully gone through the decision making process followed by the Public service Commission and there is no illegality in the decision making process followed by Public Service Commission and sufficiency or insufficiency of material cannot be looked into by this court and therefore, in the considered opinion of this court the decision of the Public Service Commission does not warrant any interference and the Public Service Commission is free to proceed with the process of selection by holding a fresh examination. No case for interference in the impugned order is required. The admission is declined.

Certified copy today itself.

Order accordingly.

I.L.R. [2016] M.P., 450

WRIT PETITION

Before Mr. Justice Prakash Shrivastava

W.P. No. 7701/2014 (Indore) decided on 6 May, 2015

KALUSINGH & anr.

...Petitioners

Vs.

SMT. NIRMALA & ors.

...Respondents

A. Civil Procedure Code (5 of 1908), Order 18 Rule 4 & Order 19 Rule 1 & 2, Evidence Act (1 of 1872), Sections 1 & 3 and General Clauses Act (10 of 1897), Section 3(3) - Exhibiting affidavit as document - Exhibition of affidavit as document is not permitted by the Court.

(Para 9)

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 18 नियम 4 व आदेश 19 नियम 1 व 2, साक्ष्य अधिनियम (1872 का 1), धाराएं 1 व 3 एवं साधारण खण्ड अधिनियम (1897 का 10), धारा 3(3) – शपथपत्र को दस्तावेज के रूप में प्रदर्शित किया जाना – शपथपत्र को दस्तावेज के रूप में प्रदर्शित करना, न्यायालय द्वारा अनुज्ञात नहीं।

B. General Clauses Act (10 of 1897), Section 3(3) - Question of exhibit affidavit as document - Exhibition of affidavit as document is not permitted by the Court. (Para 9)

ख. साधारण खण्ड अधिनियम (1897 का 10), धारा 3(3) – शपथपत्र को दस्तावेज के रूप में प्रदर्शित करने का प्रश्न – शपथपत्र को दस्तावेज के रूप में प्रदर्शित करना, न्यायालय द्वारा अनुज्ञात नहीं।

Cases referred :

AIR 1953 Nagpur 135, (1988) 3 SCC 366, (1977) 1 SCC 102, AIR 1967 Assam and Nagaland 74.

M.L. Pathak, for the petitioners.

D.K. Sharma, for the respondents.

(Supplied: Paragraph numbers)

O R D E R

PRAKASH SHIRIVASTAVA, J. :- This writ petition under Article 227 of the Constitution of India is at the instance of the defendants in the suit challenging the order of the trial court dated 29/9/14, whereby the trial court has permitted the respondents/plaintiffs to exhibit the affidavits as documents.

2. Learned counsel appearing for the petitioners submits that affidavits are not documents and they are not covered by the Evidence Act therefore, the respondents cannot be permitted to exhibit the same as documents.

3. As against this counsel for respondents has submitted that these affidavits have evidentiary value therefore, they have rightly been allowed to be exhibited.

4. Having heard the learned counsel for the parties and on perusal of the record, it is noticed that Section 1 of Evidence Act, excludes the applicability of the Act to the affidavits presented to any court. Section 1 reads as under:

“1. Short title, extent and commencement.-This Act may

be called the Indian Evidence Act, 1872.

It extends to the whole of India [except the State of Jammu and Kashmir] and applies to all judicial proceedings in or before any Court, including Courts-martial, [other than Court-martial convened under the Army Act,] (44 & 45 Vict.c.58) [the Naval Discipline Act (29 & 30 Vict.,c. 109) of the Indian navy (Discipline) Act, 1934 (34 of 1934) [or the Air Force Act] (7 Geo.5c. 51) but not to affidavits presented to any Court or Officer, not to proceedings before an arbitrator.

And it shall come into force on the first day of September, 1872.”

5. Evidence has been defined under Section 3 of Act to include all oral and documentary evidence. Section 1 read with Section 3 of the Act makes it clear that affidavit is not considered to be evidence under the Act. (See: *Gopikabai and others Vs. Narayan & others* reported in AIR 1953 Nagpur 135). Under Order 19 Rule 1 of CPC, the court has power to order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, therefore unless the court passes an order under Order 19 Rule 1 CPC, the affidavit cannot be taken as evidence. Even in the case under Order 19 Rule 2 the cross examination of the deponent is permitted and under Order 19 Rule 3 such affidavits are confined to be specified facts. Nagpur High court in that matter of *Gopikabai* (supra) has held that Evidence Act is not a fragmentary enactment but a consolidatory one and if affidavit is not evidence under the Act it cannot be taken as evidence unless it is permitted by Order 19 of CPC.

6. The above view is supported by the judgment of the Supreme court in the matter of *Sudha Devi Vs. M.P. Narayanan*, reported in (1988) 3 SCC 366 wherein it has been held that affidavits are not included in the definition of evidence in Section 3 of the Act and can be used as evidence only if for sufficient reason court passes an order under Order 19 Rule 1 or 2 CPC. Supreme court in the matter of *Chhotan Prasad Singh Suchan Devi Vs. Hari Dusadh, Bihari Manjhi*, reported in (1977) 1 SCC 102 referring to Section 3(3) of the general Clauses Act has held that the affidavits sworn or affirmed before the Magistrate who are not in seisin of the case are inadmissible in evidence.

7. The Division Bench of Assam High court in the matter of *Niranjana Lal Ratankumar Vs. River Steam Navigation Co.Ltd. And another*, reported in AIR 1967 Assam and Nagaland 74 has expressed that the contents of the affidavit cannot be taken in evidence and affidavit of a person not produced for examination in court is no evidence.

8. In the present case though the trial court has noted that the affidavits are proposed to be filed by respondents as documents still it has allowed the same referring to Order 18 Rule 4 CPC without appreciating that under Order 18 Rule 4 CPC the examination-in-chief of the witness is on affidavit and there is right to cross examine the person swearing the affidavit but in the present case respondents had tried to file the affidavits not as examination-in-chief of the witness under Order 18 Rule 4 but as documents.

9. Thus, the trial court has committed clear error of law in permitting exhibition of affidavits as documents. Hence the impugned order of the trial court cannot be sustained and is hereby set aside.

C.c. as per rules.

Order accordingly.

I.L.R. [2016] M.P., 453

WRIT PETITION

***Before Mr. Justice A.M. Khanwilkar, Chief Justice &
Mr. Justice K.K. Trivedi***

W.P. No. 8810/2015 (PIL) (Jabalpur) order passed on 09 July, 2015

PARAS SAKLECHA

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

(Alongwith W.P. No. 9892/2015, W.P. No. 10859/2015 &
W.P. No. 10860/2015)

***Constitution - Article 226 - Entrance Examination by APDMC
- Scanning of OMR sheets after examination - Complete procedure -
Explained. (Paras 2 to 12)***

***सविधान - अनुच्छेद 226 - ए.पी.डी.एम.सी. द्वारा प्रवेश परीक्षा - परीक्षा
उपरांत ओ.एम.आर. शीट की स्कैनिंग - पूर्ण प्रक्रिया - स्पष्ट की गयी।***

Parties through their counsel.

ORDER

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

Today we are limiting the consideration of the interim arrangement to be provided during the examination scheduled on 12th July, 2015.

2. In the writ petitions, filed as Public Interest Litigation, it is mentioned that keeping in mind the past experience and the situation emanating therefrom which was avoidable, has inevitably affected the fortunes of large number of candidates and aspirants intending to pursue medical course. The *modus operandi* in commission of unfair means during the examination was that the OMR Sheets submitted by the concerned candidate, after the examination, was later on tampered in connivance with the officials to benefit the candidate appearing in the examination.
3. In this context, it has been submitted by the petitioners that as a precautionary measure to obviate possibility of such attempt being repeated, is to capture the information /image of the OMR sheet submitted by the candidate immediately after the examination – by scanning and creating soft copy thereof and which must be secured by making it uneditable in PDF form. Any attempt to tamper the same, can be immediately detected and concerned source attempting to do so, can be identified.
4. After having considered this submission, in our opinion, to ensure that examination is conducted in free and fair manner and no unfair means is permitted during the said examination or for that matter, after the examination is over and until the declaration of the result by the Competent Authority, the suggestion made by the petitioner is not only appropriate but can be acted upon without much difficulty. That can be done by providing high resolution/ high speed Scanners at the concerned examination centres, which are not exceeding nine in the State of Madhya Pradesh. Considering the limited number of examination centres in the State, we were of the view that there should be no difficulty for the Authority responsible to conduct the examination in fulfilling this additional security measure.
5. In that context, we had suggested to the counsel appearing for the Association of Private Dental & Medical Colleges of M.P. (APDMC) to take

instructions as to why such arrangement cannot be done at least in the examination centres within the State of Madhya Pradesh, keeping in mind the past experience which is peculiar to the State of Madhya Pradesh.

6. Counsel appearing for the APDMC, on instructions, submits that the Authority has already nominated an independent agency of repute to conduct the said examination scheduled on 12th July, 2015. Further, due to paucity of time it may not be possible for the Agency to arrange for Scanners at the respective examination centres across the Country.

7. As noted earlier, we were more concerned about the examinations conducted in examination centres within the State of Madhya Pradesh in the context of the past experience in the State. Therefore, we had also called upon the State counsel to ascertain whether it will be feasible for the State Government to provide logistical support to the Agency appointed by the Authority for conducting the examination in this behalf, which, indeed, is required to be done under the supervision of the representatives of the Admission and Fee Regulatory Committee (AFRC). The State Government, we must place our appreciation on record, has responded favourably in this regard. The State Government is willing to take the responsibility of providing high speed/ high resolution Scanners at the respective examination centres in the State of Madhya Pradesh (in all nine). If need be, more than one Scanner with technical persons to operate the same will be provided depending on the requirement of the concerned examination centre.

8. Learned counsel for the Authority submits that if such facility is made available, the Authority will take the responsibility of all the expenses or outgoings in relation to that activity and reimburse the State Government or any agency to be appointed by the State Government, as the case may be, as and when such demand of expenses is submitted.

9. We appreciate the fair stand taken by the Authority and its commitment of taking the financial burden with regard to this additional arrangement to ensure conduct of free and fair examinations at the respective examination centres, particularly, in the State of Madhya Pradesh.

10. We have no manner of doubt, that resorting to the mechanism of contemporaneous scanning and securing the image of OMR sheets of respective candidates Centre wise will completely rule out the possibility of

tampering the same at a later stage before declaration of results. That will also instill confidence in public about the examination process which is the need of the hour, keeping in mind the contemporary situation unfolding with regard to the examinations conducted by the other Agencies in the State of Madhya Pradesh, in the recent past.

11. The counsel appearing for the AFRC submits that necessary cooperation and coordination will be done with the Agency nominated by the Authority for holding the examinations at the respective examination centres within the State of Madhya Pradesh. Even the Authority (APDMC) through counsel has assured that whatever assistance is offered by the State Government or Agency appointed by the State Government, will be availed without any hesitation and necessary coordination between the different Agencies will be done and instructions will be issued to all concerned to ensure that there is full coordination between all the Agencies on the day of examination so that the process of scanning of answer sheets contemporaneously after the examination is over; and to seal the answer sheets for submitting it to the appropriate Authority for further action and declaration of results.

12. The scanned data (soft copy) of the respective examination centres (candidate-wise) shall be preserved by the Secretary of AFRC but also by the President of Authority (APDMC) and one set by the Principal Secretary, Home (Police) or Medical Education Department, Govt. of M.P.

13. Needless to observe that before declaring the results of the examination, the Appropriate Authorities (officials) must verify the position on case to case basis with reference to the data contained in the soft copy secured on the day of examination.

14. The main writ petition may now proceed for hearing on 18th August, 2015.

15. Issue notice to the newly added respondents. Returnable on 5th August, 2015. Reply-affidavit, if any, be filed before 7th August, 2015. Rejoinder on or before 14th August, 2015.

C.C. today.

Order accordingly.

I.L.R. [2016] M.P., 457

WRIT PETITION

*Before Mr. Justice A.M. Khanwilkar, Chief Justice &
Mr. Justice K.K. Trivedi*

W.P. No. 8810/2015 (PIL) (Jabalpur) order passed on 28 July, 2015

PARAS SAKLECHA

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

(Alongwith W.P. No. 9892/2015, W.P. No. 10859/2015 & W.P. No.
10860/2015)

***Constitution - Article 226 - Medical Entrance Examination -
Suggestions on certain security measures invited from Principal and
Monitoring agencies i.e. APDMC and AFRC. (Para 3)***

*संविधान - अनुच्छेद 226 - चिकित्सा प्रवेश परीक्षा - प्रधानाचार्य एवं
अनुश्रवण एजेंसी अर्थात् ए.पी.डी.एम.सी एवं ए.एफ.आर.सी. से कतिपय सुरक्षा उपायों
के सुझाव आमंत्रित किये गये।*

*A.M. Trivedi with Ashish Trivedi, for the petitioner in W.P. No.
8810/2015.*

Aditya Sanghi, for the petitioner in W.P. No. 9892/2015.

R.N. Singh with Ajay V. Gupta, for the respondent No. 31.

Samdarshi Tiwari, Dy. A.G. for the respondents/State.

Amalpushp Shrotri, for the intervenor.

(Supplied: Paragraph numbers)

ORDER

The Order of the Court was delivered by :
A.M. KHANWILKAR, C.J. :- We appreciate the stand taken by the applicant
APDMC that the applicant is committed to conducting transparent, free and
fair examination.

2. Keeping in mind the rival submissions and suggestions given on the
previous date of hearing and also after perusing the name of the Agency who
is likely to be entrusted with the Online Examination to be conducted for and
on behalf of APDMC, in our considered opinion, it may be appropriate to
provide for dispensation which may assuage the concern of all the stakeholders

and also instill credibility and confidence in the entire process of online examination.

3. The measures to be adopted as indicated hereinafter are not only regarding the minimum technical compliance to be fulfilled by the concerned Agency but also about the logistical compliances to be done by the principal (APDMC) and the monitoring agency (AFRC). We may consider of issuing directions to provide for following security measures :-

“Planning to secure Online Examination System Process

Normally online examination systems must consist of following sections.

- (a) Central Examination Server (In which database of all examinee, Question Paper and answer sheet etc.) – 2 Nos. (APDMC and AFRC)
- (b) Examination server at each Examination centre
- (c) Examinee computers connected with Examination server through LAN.
- (d) Network used for communicating with each other.
- (e) Monitoring Server - 2 Nos. (APDMC and AFRC)
- (f)

Proposed system to enhance security.

The Database Administrator must be appointed from an independent agency such as NIC not below the rank of Scientist C.

A. Central Examination Server :-

- (1) Should be physically secure. No **unauthorized** and **unauthenticated** access should be given.
- (2) **Biometric technology** alongside with traditional password based technology should be used for securing server.
- (3) A **replica** of same server should be available with

geographically changed location.

- (4) Communication between the server should be **encrypted** with best possible technique like RES/MD5 etc .
- (5) The owner which has access to each server should be different. Owner of one server should not be able to access the second replica server.
- (6) A Monitor server should also be configured in same manner as of examination server but to store monitoring data such as audio/video/images/biometric data collected from each examination centre.

B. Examination server at each examination centre.

- (1) Each Examination centre should have **fingerprint reader at main gate** so that only those examinees are allowed whose fingerprint is stored on Examination server in Examination centre. User biometric information (**Fingerprint/face recognition**) may be register at the time of enrollment/form filling through authorized centre or kiosk only.
- (2) Each examinee should be validated by his/her own credential (id and password) through the server.
- (3) Exam Hall must have auto generated encrypted code for paper. This auto generated code (id) must be distributed randomly. The first candidate who comes in exam room shall have first code, second shall get second code and likewise.
- (4) The password of each user stored in the database should be in encrypted form.
- (5) As soon as the exam gets over and data is submitted to database on Examination server at each examination centre, immediately the **DML (Data manipulation Language) get locked for the database** so that the data could not be changed at any situation. (Database access time must be limited upto exam period only, whatever it may be 2 hrs or 3 hrs and after examination it must be blocked immediately and no command

or deletion, addition, alteration shall be allowed. It is to ensure that the test is taken in a certain amount of time. Some automated testing programs allow this feature). The auto generated id is **for the internal use only** and not be opened to anyone except Examination In-charge having exclusive password.

- (6) Each examination hall should have at least two CCTV cameras with audio recording facility to the monitoring server not less than 5 Mhz frequency. The camera must have sufficient electricity back up through UPS, so that the movement and activity of Examinee can be recorded in case of power failure. This data should be uploaded to monitoring server on real time basis.
- (7) The recording of desktop of each Examinee computer should also be uploaded to monitoring server on real time basis which in turn to be secured at the monitoring server contemporaneously.
- (8) The local server installed at Examination Centre should be connected through VPN to the master server. The internet connectivity on the local server to be disconnected. No possibility of hacking is possible in this configuration.
- (9) The Examination Centre must have ISO 27001 certification.
- (10) The Result be declared within prescribed time or within 15 minutes.
- (11) The tentative answer keys for the objective type examinations should be hosted on the website of APDMA (sic:APDMC) and AFRC immediately after the examination is over and candidates will be given days' time to file claims and objections, if any to the examination authority.
- (12) The same will be placed before the Experts committee of which Database Administrator from independent agency such as NIC is also a member for scrutiny and the corrected final answers be published on the website again. Candidates can self-

evaluate their answers with answer keys.

C. Measures to be taken at Examination Centre

(1) A firewall like software should be installed to each examinee computer. The task of this software is to remove vulnerabilities present in examinee computer. The tasks are listed as below:-

- i. Sync Examinee computer time with server time for effective log maintaining.
- ii. All ports except those required for the online exam are disabled and the ports used can be chosen randomly for each examinee; the ports to be used have only to be sent to the examination server at examination centre with the IP of the exam client. Therefore, manipulation through a fixed port can be avoided.
- iii. All other programs except the online exam client are deactivated by controlling the inputs of the examinees. By cutting off electronic communications and disabling other computer programs or inputs (including USB ports) on the examinees' computers, the examinees can be prohibited from manipulating their local computer or the Internet. Only mouse should be enabled. The proprietary application software should be used and not to be used the open source software. (It must be ensured that use of google Docs, screen share and opening new window in a separate tab to excess Google must be made impossible. The student cannot use offline material during online examination.)
- iv. Desktop recording software is suggested to record all the activity done starting from the exam till the ending of exam on real time basis. (This is very important in the future for cross checking with the answer in main server with actual examinee done at his computer).
- v. Online exam access should use **Respondus Lockdown Browser or its equivalent**. The proposed browser module presents to the user at startup a full-screen

application window that encases a browser window. However, no address bar is provided, nor are there any menus, toolbars, buttons, or other controls that would be seen on a generic browser. The application window is locked in full-screen mode and cannot be resized or minimized until the application is terminated. Third party software like VNC viewer must be completely prohibited.

- vi. **Students id (specific auto generated id link) can work only one question at a time and cannot access completed questions.**
- vii. An exam should randomize (scramble) question sequence and answer choices for every id link differently.
- viii. **One (students) auto generated id link can access the online exam only one time.**
- ix. The exam should close when the allotted time period for work expires. It is suggested that the exam end should be **triggered by Examination server to all of the examinee computers at once** and not the local time of Examinee computer / browser script should be used.

D. Network used for communicating with each other.

- i. Communication between the server and Examinee computer should be encrypted with best possible technique like RES/MD5 etc .
- ii. Communication between the Central server and Examination Hall server should be encrypted.
- iii. The server at examination centre should send the exam data to both of Central Servers on real time basis. (This step is required to prevent fraud at Central Server end or any other Source.)
- iv. Every log (Both Database and access log with client unique ID/Timestamp) of each communication between server and Examinee computer should be stored on real time basis

for future reference.

(Database log is a log which is created every time when the data (Answer in this case) is inserted into the database with timestamp. Access log is a log which is created every time when the examinee computers access any page of Web server).

Main Feature of proposed system.

- (1) A conspiracy/fraud can be detected by cross verifying the answer Sheets thrice through following.

By data available in central server and replica server.

By seeing Desktop recording of particular examinee.

By seeing CCTV video/audio recording of examination room.

- (2) As Examinee is being identified by biometric data (fingerprint and face or more) therefore only genuine examinee can attend the examination. It is also verified through examinee credentials."

4. We are inclined to give some time to both the parties to examine the efficacy of the security measures indicated hitherto and to offer their counter proposal, if any, so that appropriate directions can be issued on the next date of hearing.

5. We make it clear that if there is any issue about appointing Database Administrator by NIC, the parties may suggest any other independent agency (Government Undertaking) or even names of former Officers of such undertaking not below the rank of Scientist C in NIC or equally qualified.

We accordingly, defer the matter till **03.08.2015** to be taken up at **10:30 AM**.

Order accordingly.

I.L.R. [2016] M.P., 464

WRIT PETITION

*Before Mr. Justice A.M. Khanwilkar, Chief Justice &
Mr. Justice K.K. Trivedi*

W.P. No. 8810/2015 (PIL) (Jabalpur) order passed on 26 August, 2015

PARAS SAKLECHA

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

(Alongwith W.P. No. 9892/2015, W.P. No. 10859/2015, W.P. No. 10860/2015 (PIL), W.P. No. 11320/2015 (PIL) & W.P. No. 14143/2015)

A. Constitution - Article 226 - Admission - Entrance examination by APDMC - Common Entrance Test - For free and fair conduct of examination, scanning of OMR sheets was directed by order dt. 09.07.2015 - However, subsequently by order dt. 28.07.2015, on the application of Association of Private Dental & Medical Colleges of Madhya Pradesh, certain security measures were suggested - Terms of order dated 28.07.2015 are modified and additional parameters like use of one computer, provision for auto generated real time alert, directions with regard to second attempt after the question is already attempted etc. issued.
(Para 9)

क. संविधान - अनुच्छेद 226 - प्रवेश - ए.पी.डी.एम.सी. द्वारा प्रवेश परीक्षा - सामान्य प्रवेश परीक्षा - परीक्षा के स्वतंत्र और निष्पक्ष संचालन हेतु, आदेश दिनांक 09.07.2015 द्वारा ओ.एम.आर. शीट की स्कैनिंग के निदेश दिये गये - परंतु, बाद में आदेश दिनांक 28.07.2015 द्वारा, म.प्र. के प्राइवेट डेंटल एवं मेडिकल कॉलेज संघ के आवेदन पर, कतिपय सुरक्षा उपाय सुझाये गये - आदेश दिनांक 28.07.2015 की शर्तों में संशोधन किया गया और अतिरिक्त मानक जैसे कि एक संगणक का उपयोग, स्व-उत्पन्न वास्तविक समय सचेतक, प्रश्न को पहले ही हल किये जाने के पश्चात् द्वितीय प्रयास इत्यादि के संबंध में निदेश जारी किये गये।

B. Constitution - Article 226 - PIL - Entrance examination by APDMC - Future examination - Obtaining of finger prints at the time of enrollment - Verification of finger prints & photos to be done at the time of entry in the Examination Hall, during counseling and at the time of admission.
(Para 6)

ख. संविधान - अनुच्छेद 226 - लोक हित वाद - ए.पी.डी.एम.सी. द्वारा

प्रवेश परीक्षा – मावी परीक्षा – नामांकन के समय अंगुलियों की छाप अभिप्राप्त की जाना – अंगुलियों की छाप एवं फोटो का सत्यापन परीक्षा कक्ष में प्रवेश के समय, परामर्श के दौरान और प्रवेश के समय, किया जाये।

A.M. Trivedi with Ashish Trivedi, for the petitioner in W.P. No. 8810/2015 (PIL).

Aditya Sanghi, for the petitioner in W.P. No. 9892/2015.

P. Vishwanath Shetty with Amalpushp Shrotri and Ajay V. Gupta, for the respondent No. 31-APDMC.

Samdarshi Tiwari, Dy. A.G. for the respondents/State.

P.K. Kaurav, for the AFRC.

Sanjay Kumar Verma, as *amicus curiae* in W.P. No. 10859/2015.

O R D E R

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

These matters were listed on 09.07.2015 when prayer for interim relief asked by the petitioners was considered. By a speaking order, the Court moulded the interim relief by issuing directions to the respondents (APDMC and AFRC), in particular, to ensure that the OMR sheets are contemporaneously scanned and the soft copy thereof preserved by the Secretary, Home (Police) or Medical Education Department, Government of Madhya Pradesh. The written examination was scheduled to be held on 12.07.2015, however, according to the respondent No.31 due to unavoidable circumstances the examination could not be held on the scheduled date. Instead, the respondent No.31 moved application before this Court to permit them to conduct the examination online on such terms and conditions as the Court may direct.

2. That application was initially considered on 28.07.2015 and once again a speaking order passed by this Court, the respondent No.31 was allowed to explore the possibility of conducting the entrance examination online, but on complying with the technical and logistical issues delineated in the said order. The respondent No.31, thereafter, reverted back with the names of the Agencies who were willing to undertake the work of online examination and comply with the measures delineated by this Court in the order dated 28.07.2015. However, the Agencies identified by the respondent No.31 had

made counter proposals which were duly considered by the Court; and finally on 10.08.2015, it was noted that atleast two Agencies amongst the five Agencies identified by respondent No.31 can be considered for assigning the task of Common Entrance Test to be conducted online. The Court further directed the respondent No.31 to ascertain whether the officials of the said Agency are willing to file undertaking in this Court to ensure complete compliance of the technical and logistical parameters specified in the order dated 28.07.2015. The respondent No.31 continued with the exercise of finalizing the Agency, but, at the same time, approached the Supreme Court to question the orders passed by this Court on 09.07.2015, 28.07.2015, 03.08.2015, 10.08.2015 and 12.08.2015 by way of SLP (Civil) Nos.23565 to 23569 of 2015. That SLP was however disposed of on 20.08.2015. The order passed by the Supreme Court reads thus:-

“O R D E R

Taken on Board.

Precisely, the petitioner is aggrieved by the following direction in the impugned order(s):

“The said respondent may take instructions from the concerned Agency, which will be appointed for conducting online examination as to whether the Secretary and the Managing Director of that Company is willing to submit affidavit of undertaking before this Court about full compliance of the technical and logistical matters mentioned in our previous order without any exception, if the Court so directs.”

In our opinion, if for any reason an outside agency is not in a position to give such an undertaking as wished by the High Court, the petitioner can certainly bring those facts to the notice of the High Court and if such a request is made by the petitioner to modify that portion of the order, the High Court

would look into the grievance that is made out by the petitioner and pass appropriate orders thereon.

With these observations, the Special Leave Petitions are disposed of.”

3. Besides the aforesaid Special Leave Petition, the Transfer Petition (Criminal) No.327 of 2015 pending before the Supreme Court, which has been filed by the writ petitioner in the leading writ petition, was also mentioned before the Supreme Court on 24.08.2015, for seeking clarification with reference to the issue noted in our order dated 21.08.2015. The order passed by the Supreme Court reads thus:-

“O R D E R

It is brought to our notice by Shri P. Vishwanatha Shetty, learned senior counsel that because of the pendency of some matters before this Court, the High Court is not proceeding with the Writ Petition (Crl.) No.8810 of 2015, pending before it.

2. If that is so, we now request the High Court to proceed and decide the Writ Petition (Crl.) No.8810 of 2015. Needless to say that the Division Bench of the High Court would consider the request for interim relief(s) also. List the petitions along with the connected matters on 4th September, 2015.”

4. In the backdrop of the abovesaid order of the Supreme Court dated 24.08.2015, the counsel appearing for the parties have filed joint statement/memo before this Court duly signed by Advocate for the petitioner and the respondent No.31 as well as petitioner in W.P. No.8810/2015 (PIL); and which statement has been orally supported by the counsel appearing for the petitioners in companion writ petitions as well as by the counsel appearing for the respondents in the concerned writ petitions including Shri Ajay V. Gupta, Advocate who had invited our attention to the fact noted in order dated 21.08.2015. It is stated that the Court may now consider the question regarding grant of interim relief on its own merits and including the request of the respondent No.31 to dispense with or modify some of the parameters

mentioned in order dated 28.07.2015 and including to provide for further measures as may be necessary to instill confidence about the conduct of free and fair entrance examination by APDMC.

5. Accordingly, we have considered the submissions made by the counsel appearing for the respective parties, in particular, regarding the necessity to reconsider the parameters specified in clauses B(1), B(7), B(9) and C(1) (iv) as noted in the order dated 28.07.2015.

6. As regards Clause B(1), the Agency now finalized by the respondent No.31 (whose name has been disclosed to the Court, but is kept confidential), to conduct the examination has expressed its reservation on the ground that the process of taking fingerprints at the time of enrollment/submission of form may not be possible as that process has already been completed long back. The counsel for APDMC has also expressed difficulty in repeating the same process at this belated stage, as it would only further delay the holding of examination - which process must be completed before the end of September, 2015. **The APDMC through counsel has, however, assured the Court that in future the requirement spelt out in clause B(1) of obtaining fingerprints at the time of enrollment/submission of form will be followed. At the same time, APDMC has assured the Court that the verification of the fingerprints (biometric) and photos would be done at the time of entry in the Examination Centres by the concerned examinee and also thereafter during counseling and at the time of admission.**

7. This assurance given on behalf of APDMC, in our opinion, for the time being, in respect of the ensuing examination (2015), may have to be accepted. Even the counsel appearing for the petitioners have no serious objection to modify this parameter indicated in our order dated 28.07.2015. Accordingly, the said condition (B(1)) stands modified to the above extent and the assurance given by APDMC to observe the same for future examinations; and also the limited assurance with regard to present examination of strict verification of identity of the examinee at the entry point of the Examination Centre and thereafter till the stage of admission and to comply with other conditions, is accepted.

8. That takes us to the request for dispensing Clause No.B(7) and C(1)(iv) which in one sense are linked and dependent on each other. With reference to

the said conditions, the counter proposal given by APDMC is that instead of uploading the data to monitoring server on real time basis, the Agency is willing to record every click of candidate and capture it on local server. Even if the candidate has not attempted any answer, the idling status will be captured every two minutes. This information/data can be used for audit trial. In response to this counter proposal of the respondent No.31, counsel for the petitioners submitted that two minutes time gap is too much and there is likelihood of misuse of the said time space in a given situation. That time space must be reduced to not more than 30 seconds.

9. To assuage this apprehension, however, it was eventually agreed by the respondent No.31 that further precautionary measures can be taken by the APDMC as also by the Agency conducting online examination in the following terms, which would be in addition to the parameters already delineated in the order dated 28.07.2015 – except to the extent modified in terms of this order [clauses B(1), B(7), B(9) and C(1)(iv) respectively]. The said additional parameters are as follows:-

Before declaring results, the Monitoring Agency (AFRC) and the independent Supervising Authority (official of NIC) must reassure that:

- (i) Every candidate has attempted the examination from the recognized Examination Centre and has used only one Computer (MAC address and also same IP address) throughout the examination time.
- (ii) The Software must provide for auto generated real time alert/ report to the Monitoring Agency (AFRC) and independent Supervising Authority (official of NIC), if second entry (attempt to modify, alter, change the answer already marked), to enable them to verify on the basis of CCTV footage whether the second action has been done by the same candidate.

Alternatively, once question is attempted by the candidate, he should not be able to revert back to the previous question for making any changes.

- (iii) Similarly, real time auto. generated alert/report must be

generated by the Software marked to the Monitoring Agency (AFRC) and the independent Supervising Authority (official of NIC), if the original entry/markings is changed, modified or altered from the different MAC address computer with same or different IP.

- (iv) The Monitoring Agency and the independent Supervising Authority must verify the authenticity and genuineness of every discrepancy noticed from the auto generated alert/report, before declaring the results of the concerned candidate.
- (v) In case of malfunctioning of computer of any candidate, at the given Examination Centre, it can be changed in the same Examination Centre during the Examination time, only after written prior permission of the Authority at the Examination Centre allowing him to operate second (another) computer, for the reasons to be recorded contemporaneously therefor.
- (vi) Results of candidates with any of the abovesaid discrepancy should be withheld till the verification process is complete. The verification to be completed not later than one week.
- (vii) After examination time is complete, the Software must be able to undertake auto-analysis of matching of the data of both the servers. If any discrepancy is found in the statistics of any particular roll number, then the result of such candidate should be withheld.
- (viii) Examinee computer, local exam server and central server times should be synced through a mechanism.
- (ix) When examinee is giving the exam the complete back-end activities and all the ports of the system should be disabled. The keyboard should be disabled while the examinee giving the exam.
- (x) All other programs except the Online exam clients should be deactivated by controlling the inputs of the examinees. Only Mouse should be enabled.

10. The APDMC has no objection whatsoever in complying with these additional parameters. The counsel for the APDMC has also, on instructions, stated before us that the Agency to be appointed by respondent No.31 for conducting the online examination has also agreed and committed to comply with all the technical and logistical requirements including the additional requirements specified today.

11. The counsel appearing for the petitioners on instructions submits that if these additional measures are observed during the conduct of online examination, most of the issues that have been raised by the petitioners in the petitions or otherwise would be redressed.

12. As a result, the conditions specified in clause B(1), B(7), B(9) and C(1)(iv) of the order dated 28.07.2015 are modified to the extent mentioned hitherto on acceptance of the assurance given by APDMC to fulfill all other conditions including the additional conditions.

13. As regards Clause No.B(9) specified in the order dated 28.07.2015, it was brought to our notice even during the previous hearing that the Agency may not be able to provide for Examination Centres having ISO 27001 certification at such short notice. **Instead, the Agency as well as APDMC would ensure that the Examination Centres will be AICTE or NAAC accredited Colleges only.** If that condition is fulfilled and the other conditions specified in order dated 28.07.2015 including the additional parameters, now specified, the condition in clause No.B(9) can be modified accordingly.

14. The other relaxation requested by APDMC is to dispense with the requirement of filing affidavit of undertaking of the Managing Director of the Agency to be engaged by the respondent No.31 for conducting the online examination. Considering the assurance given by APDMC through counsel across the Bar which we have already placed on record and accepted, it may not be necessary to insist for the affidavit of the third party who may be unwilling to give such affidavit. The measures now proposed being comprehensive and would address all the apprehensions; and that the APDMC has given undertaking to fulfill all the conditions in its letter and spirit; coupled with the fact that AFRC being the Monitoring Agency has also undertaken through Counsel that it shall ensure that APDMC fulfills all the conditions mentioned in order dated 28.07.2015 including the modified conditions and the additional

parameters specified above and if any discrepancy is noticed, would be immediately brought to the notice of the Court for seeking further direction, as may be required, the requirement of undertaking of Agency is hereby dispensed with.

15. In addition to the oral assurance given on behalf of respondent No.31-APDMC, we direct the Secretary and President of APDMC to file affidavit of undertaking to comply with all the parameters specified in order dated 28.07.2015 and as modified in terms of this order. That affidavit be filed by Friday (28.08.2015).

16. We once again make it clear that the respondent No.31 has volunteered to comply with this arrangement to ensure free and fair conduct of entrance examination so as to instill public confidence in the dispensation and larger public interest, but without prejudice to the rights and contentions available to respondent No.31 including to resist this petition on all aspects and in particular on the issue of maintainability thereof.

17. We appreciate the effort put in by APDMC to ensure that a proper mechanism is put in place for conducting the entrance examination which will not only be free and fair but transparent and also observe complete confidentiality. Providing for this arrangement, is, obviously, no reflection on the respondent No.31 in any manner. As aforesaid, respondent No.31 has agreed for this arrangement in larger public interest.

18. We may place on record statement made by the counsel for respondent No.31 that jammers will be arranged at the Examination Centres during the examination period to ensure that no unfair practice is resorted to by any examinee. We also place on record the statement made by the counsel for the respondent No.31 that ordinarily the ratio of Invigilators and candidates maintained at the Examination Centre is 1:20, to ensure free and fair examination.

19. It is made clear that this modification and clarification is only in respect of examination conducted by respondent No.31 under monitoring of AFRC, because of paucity of time and to be concluded before end of September, 2015.

20. As indicated in our order dated 28.07.2015, we direct APDMC to immediately interact with NIC for nomination of Database

Administrator not below the rank of Scientist "C" for overall supervision of the technical operations and other matters referred to in the said order. If no response is received from NIC, that position be brought to the notice of the Court immediately for passing appropriate orders in that behalf or for replacement of independent person/agency to oversee the technical operations during the relevant period whilst the examination (DMAT - 2015) is conducted.

21. The papers handed over by the counsel for respondent No.31 concerning the profiles of Agencies and other material be kept in sealed cover, in the custody of the Principal Registrar (Judicial).

22. List these matters on 3rd September, 2015 under caption "Direction" to consider the affidavit of undertaking. Writ Petition No.14143/2015, however, be listed tomorrow (27.8.2015) before this Bench.

Order accordingly.

I.L.R. [2016] M.P., 473

WRIT PETITION

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

W.P. No. 11902/2015 (Jabalpur) decided on 9 September, 2015

SHAKTI TRADERS (M/S)

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

Constitution - Article 226 - Mining lease - Auction process - Petitioner was the highest bidder - As per clause 6 of auction notice he was required to obtain environmental clearance certificate - State Authority directed to approach Central Authority for seeking environmental permission - Whether amounts to rejection of permission - Held - No, clause 6 will get activated only when rejection of permission for grant of environmental clearance certificate is made by authority competent to issue such certificate and not by any other authority - Petitioner can approach the Central Authority - Accordingly, petition disposed of.
(Paras 7 to 9 & 12)

संविधान - अनुच्छेद 226 - खनन पट्टा - नीलामी प्रक्रिया - याची, सर्वोच्च

बोली लगाने वाला – नीलामी नोटिस के खंड 6 के अनुसार उसे पर्यावरण अनापत्ति प्रमाणपत्र अभिप्राप्त करना अपेक्षित था – राज्य प्राधिकरण ने पर्यावरण अनुमति चाहने हेतु केन्द्रीय प्राधिकारी के समक्ष जाने के लिये निदेशित किया – क्या अनुमति अस्वीकृत करने की कोटि में आता है – अभिनिर्धारित – नहीं, खंड 6 केवल तब प्रभावी होगा जब पर्यावरण अनापत्ति प्रमाणपत्र प्रदान किये जाने हेतु अनुमति की अस्वीकृति, उक्त प्रमाणपत्र जारी करने के लिए सक्षम प्राधिकारी द्वारा दी गई हो और न कि किसी अन्य प्राधिकारी द्वारा – याची, केन्द्रीय प्राधिकारी के समक्ष जा सकता है – तदनुसार, याचिका का निपटारा किया गया।

Siddharth Gulatee, for the petitioner.

Amit Seth, for the respondents/State.

ORDER

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

Although this writ petition has been filed under Article 226 of the Constitution of India, the relief claimed is of refund of security amount deposited by the petitioner being sum of Rs.1,12,80,000/- with interest at the rate of 18% per annum w.e.f. 12.06.2015 till the date of actual payment.

2. The petitioner in response to the auction notice participated in the bidding process. The condition in the auction notice unambiguously provides that the highest bidder must obtain environmental clearance certificate from the appropriate/competent Authority, which is made condition precedent for execution of the agreement.

3. The petitioner, no doubt, submitted application for grant of such permission, but, it was before the State Authority, who in turn informed the petitioner that the application can be processed only by the Central Authority in view of the category of land to be allotted/granted to the petitioner for the purpose of mining.

4. Admittedly, the petitioner has not resorted to that option. Instead, the petitioner has approached this Court by way of present writ petition after making unsuccessful attempt to persuade the Authority to refund the security amount deposited by the petitioner.

5. The petitioner is relying on Clause 6 of additional conditions specified in the auction notice. The same reads thus:-

“6. यदि किसी खदान में सिया द्वारा पर्यावरण संबंधी अनुमति नहीं दी जाती है तब सफल बोलीदार द्वारा जमा राशि को 15 दिवस में वापिस किया जावेगा ।

नोट :-.....”

6. On a bare reading of this condition it is amply clear that the petitioner would be entitled for the refund of the security deposit amount within 15 days if the Authority was to reject the request for issuance of environmental clearance certificate. The petitioner, as aforesaid, had approached the said Authority (SEIAA) which in turn vide order dated 09.06.2015 informed the petitioner to approach the Central Authority for the said relief, being the Competent Authority in that behalf. This, the petitioner is construing as rejection of permission by State Authority (SEIAA) entitling the petitioner for refund of the security deposit amount in terms of Clause 6 of additional conditions within 15 days from the date of intimation of that position to the respondent Authority vide communication dated 17.06.2015.

7. The argument though attractive at the first blush deserves to be stated to be rejected. In the first place, the communication received by the petitioner is not one of rejecting his request for grant of clearance. It only informs the petitioner to approach the Competent Authority. Further, additional condition No.6 cannot be read in isolation. It will have to be conjointly read with the main condition no.10 which obligates the petitioner to obtain environmental clearance certificate from the “Competent Authority”. This condition does not absolve the person having applied to the State Authority. On the other hand, it refers to the notification issued by the Central Government dated 14.09.2006 and obligates to apply to the Competent Authority referred to therein.

8. Considering the fact that the land to be granted for the purpose of mining to the petitioner is covered by the category in respect of which environmental clearance certificate can be issued only by the Central Authority, the application made by the petitioner to the State Authority will be of no avail. Instead the meaning to be ascribed to additional condition no.6, must necessarily be understood in the context of the Authority mentioned in main clause 10 of the auction notice - which means the Central Authority in the present case. Unless the petitioner's request is rejected by the said Authority, the additional clause No.6, entitling the petitioner for refund of the security deposit amount will not come into play at all. Additional Clause No.6, in other words, will get activated only if it is a case of rejection of the permission for grant of environmental clearance certificate by the Authority

competent to issue such certificate and not by any other response given by any other Authority.

9. As a result, additional condition No.6 of the auction notice which is pressed into service, will be of no avail to the petitioner. If so understood, the security deposit amount deposited by the petitioner cannot be construed as a debt payable by the State to the petitioner, as such. It would assume the form of a debt only if the Authority competent to issue environmental clearance certificate were to reject the application for permission made by the interested person who has participated in the auction process for grant of mining lease.

10. Thus understood, the provisions of the Interest Act, 1978, will be of no avail, as the petitioner has not become entitled for refund of the amount - which would be possible only if it is a case covered by additional condition no.6 in the auction notice.

11. The consequences of non compliance of the other conditions in the auction notice must follow, as per law. We are not expressing any opinion on those aspects in the present proceedings. That can be examined as and when occasion arises.

12. We further clarify that it is still open to the petitioner to approach the Central Authority and explore the possibility of obtaining environmental clearance certificate, if so advised.

13. Petition disposed of accordingly.

Petition disposed of.

I.L.R. [2016] M.P., 476

WRIT PETITION

Before Ms. Justice Vandana Kasrekar

W.P. No. 19866/2014 (Jabalpur) decided on 10 September, 2015

HIMMAT SINGH PARIHAR

...Petitioner

Vs.

STATE OF M.P.

...Respondent

Civil Services (Leave) Rules, M.P. 1977, Rule 24 - Absence after expiry of leave - Adverse Entry - Petitioner working on the post of Sub-Inspector of Police - Adverse entry was made in his confidential report

on being remained unauthorizedly absent from duty - Rule 24 of Rules, 1977 provides for taking action for absence after expiry of leave - No action under Rule 24 was taken - Adverse entry made in confidential report without making any enquiry is unwarranted - Adverse entry quashed - However, respondents given liberty to take action against the petitioner as per Rule 24 of Rules, 1977. (Paras 3 and 11 to 14)

सिविल सेवा (अवकाश) नियम, म.प्र. 1977, नियम 24 - अवकाश समाप्ति पश्चात् अनुपस्थिति - प्रतिकूल प्रविष्टि - याची, पुलिस उप-निरीक्षक के पद पर कार्यरत - कर्तव्य से अनाधिकृत रूप से अनुपस्थित रहने पर उसके गोपनीय प्रतिवेदन में प्रतिकूल प्रविष्टि की गई - नियम 1977 का नियम 24, अवकाश समाप्ति पश्चात् अनुपस्थिति हेतु कार्यवाही करने के लिए उपबंधित करता है - नियम 24 के अंतर्गत कोई कार्यवाही नहीं की गई - कोई जांच किये बिना गोपनीय प्रतिवेदन में की गई प्रतिकूल प्रविष्टि अनुचित - प्रतिकूल प्रविष्टि अभिखंडित की गई - किंतु, प्रत्यर्थी को याची के विरुद्ध नियम 1977 के नियम 24 के अनुसार कार्यवाही करने की स्वतंत्रता दी गई।

Case referred :

1983 MPLJ 775.

Praveen Dubey and Neeraj Dubey, for the petitioner.

Vandana Shrivastava, P.L. for the respondents.

(Supplied: Paragraph numbers)

ORDER

VANDANA KASREKAR, J. :- With the consent of the parties, matter is heard finally at motion stage.

2. The petitioner has filed the present petition for issuance of a writ in the nature of certiorari to expunge the adverse entry from the confidential report for the period from 26/07/2012 to 13/03/2013 as well as for quashing the orders dated 29/03/2014 (Annexure P/1) and 20/05/2014 (Annexure P/2).

3. Brief facts of the case are that the petitioner was initially appointed on the post of Sub-Inspector in the police department in the year 1982. From the date of his initial appointment, he has been performing his duty with utmost sincerity, devotion and upto the satisfaction of his superior and he has not received any warning or punishment during his entire service career. The

petitioner further alleges that when he was due for his promotion, he was communicated with the adverse entry in the confidential report for the period between 26/07/2012 to 13/03/2013. When the petitioner was posted in District Dindori, he was communicated with the adverse entry of confidential report and awarded very poor category and make entry as indiscipline officer and unauthorizedly absentee from the duty for the period from 26/07/2012 to 13/03/2013.

4. Against the said adverse entry, petitioner has filed a first appeal before the authorities for expunging the adverse entry. The said first appeal was dismissed vide order dated 29/03/2014 (Annexure P/1). After rejection of the First Appeal, petitioner has submitted his second appeal before the Director General of Police (MP)/Respondent No.2. The said appeal was also rejected by the respondent mechanically without entering the facts and record of the case. The mercy appeal preferred by the petitioner was also dismissed vide order dated 14/03/2014.

5. Being aggrieved by these orders, the petitioner has filed the present writ petition.

6. The respondents have filed their return and submits that the petitioner has remained unauthorizedly absence (sic:absent) from the duty from 26/07/2012 to 13/03/2013 and despite giving notice to the petitioner by the SP District Dindori, he remained unauthorizedly absence (sic:absent) from the duty for 30 days and, thereafter he again remained unauthorizedly absence (sic:absent) from duty. The petitioner being a member of disciplinary force shown his indiscipline conduct and to save himself, he took shelter to medical certificate. Under such circumstances, there was no occasion for the authorities to delete the adverse entry or to upgrade the same.

7. On the basis of the report of the SDOP, it was found that there was no medical certificate produced by the petitioner in support of his absence. Accordingly the charge for remaining unauthorisedly absence (sic:absent) from the duty found to be proved against him.

8. The learned counsel for the petitioner argues that the orders passed by the respondents are not justified as under the Leave Rules which are applicable to the petitioner. He further argues that the order is passed under Rule 24 of the Leave Rules, under which an appropriate action could have been taken and under Rule 24 the only action could have been taken was to.

treat this leave whichever was available to the petitioner either half pay or other leave and in case no leave is available then it could have been treated as extra-ordinary leave and he contends that in any case the respondents should not have recorded the adverse entry in the confidential report of the petitioner regarding the unauthorizedly absence from duty. He further relied on the judgment passed by this Court in the case of *Ali Hussain vs. State of Madhya Pradesh* reported in 1983, MPLJ 775.

9. On the other hand, learned Panel Lawyer appears on behalf of the respondents justifies the action taken by the respondents. She argues that as the petitioner remains unauthorizedly absence (sic:absent) from duty, the impugned adverse entry was communicated to the petitioner. She further argues that the reasons assigned by the authority after appreciating all material aspect of the matter was proper and there is no scope for any change in the same, no interference be called for because the petitioner fails to show any special circumstances under which observation made by the authority, can be said to be illegal, arbitrary and contrary to the law. She, therefore, prays for dismissal of the petition.

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

11. The Rule 24 of the Madhya Pradesh Leave Rules 1977, reads as under :-

"24. Absence after expiry of leave - (1) Unless the authority competent to grant leave extends the leave, Government servant who remains absent after the end of leave is entitled to no leave salary for the period of such absence and that period shall be debited against his leave account as though it were half pay leave to the extent such leave is due, the period in excess of such leave due being treated as extra-ordinary leave."

12. From perusal of the Sub-Rule (1) of the said Rules, it is clear that :-

"Sub-rule (1) provides that when a Government servant remains absent after expiry of leave he is entitled to no leave salary but it has been further provided that such period shall be debited against his leave account as though it were half pay leave to the extent such leave is due and the period in excess

of such leave due being treated as extra-ordinary leave. Sub-rule (2) further provides that wilful absence from duty after the expiry of leave renders a Government servant liable to disciplinary action."

13. In the present case, the respondents instead of taking any action against the petitioner as Rule 24 of the Rules, have made adverse entry in the confidential report of the petitioner that too without making any enquiry which is unwarranted. The appellate authority while rejecting the appeal of the petitioner has not taken into consideration the grounds raised by the petitioner and rejected the appeal mechanically. In the case of *Ali Hussain* (supra), this Court in para 6 of the judgment has held as under :-

"It is, therefore, clear that on the facts as they stand that the petitioner remained absent without the leave being sanctioned to him, and the only course open to the Government was either to act under sub-rule (1) or under sub-Rule (2) of Rule 24. It could not be contended that the orders which were passed could be passed under sub-rule (1) and the learned Government Advocate could not refer to any rule which could justify an order as has been passed in this case, i.e. the order dated 21/07/1979. It is also not in dispute that if the State Government has chosen to act under sub-rule (2) of Rule 24, then it was necessary to follow the procedure of inquiry, which admittedly has not been done in this case. If it was chosen to act under sub-rule (2) then disciplinary action could only be taken after following the proper procedure. Admittedly, before passing of this order dated 21/07/1979 even a notice was not issued to the petitioner to pass such an order. It is, therefore, plain that this order which was passed by the State Government against the petitioner could not be justified under any of the rules framed under Article 309 of the Constitution of India."

14. Thus, in view of the aforesaid facts and the judgment passed by this Court, this petition deserves to be allowed. The orders passed by the respondents vide orders dated 29/03/2014 (Annexure P/1) and 20/05/2014 (Annexure P/2) are hereby quashed. Consequently, the adverse entry in the confidential report for the period from 26/07/2012 to 13/03/2013 are expunged. However, the respondents are free to take action against the

petitioner as per Rule 24 of the Leave Rules.

15. In view of the aforesaid, the petition stands allowed and disposed of, with no order as to costs.

Certified copy as per rules.

Petition allowed.

I.L.R. [2016] M.P., 481

WRIT PETITION

Before Mr. Justice R.S. Jha

W.P. No. 18598/2006 (Jabalpur) decided on 29 September, 2015

RAGHUVVEER SINGH & ors.

...Petitioners

Vs.

STATE OF M.P. & ors.

...Respondents

A. Constitution - Article 226 - Appointment - Delay and Laches - Petitioners appeared in competitive examination held by M.P. Junior Service Selection Board in the year 1984-85 for appointment for posts of Lower Division Teachers - They were declared successful however appointment orders were not issued - One similarly placed candidate filed O.A. before State Administrative Tribunal which was allowed and the order was affirmed by Supreme Court - The present petition is being filed after 20 years seeking parity - No explanation furnished by the petitioners for delay in filing the petition - Persons who file belated petitions claiming similar and identical relief which has been granted to those similarly situated persons are not entitled to any relief on the ground of delay and laches -
Petition dismissed. (Para 7)

क. संविधान - अनुच्छेद 226 - नियुक्ति - विलंब और गफलत - याचीगण म.प्र.कनिष्ठ सेवा चयन मंडल द्वारा वर्ष 1984-85 में निम्न श्रेणी शिक्षकों के पद पर नियुक्ति हेतु आयोजित प्रतियोगिता परीक्षा में सम्मिलित हुये - उन्हें सफल घोषित किया गया परंतु नियुक्ति आदेश जारी नहीं किये गये - समान रूप से स्थित एक अभ्यर्थी ने राज्य प्रशासनिक अधिकरण के समक्ष ओ.ए. प्रस्तुत की जिसे मंजूर किया गया और उच्चतम न्यायालय द्वारा आदेश की अभिपुष्टि की गई - वर्तमान याचिका समानता चाहते हुए 20 वर्ष पश्चात् प्रस्तुत की जा रही है - याचीगण द्वारा याचिका प्रस्तुत करने में विलंब के लिये कोई स्पष्टीकरण पेश नहीं किया गया - व्यक्ति जिन्होंने समान रूप से स्थित व्यक्तियों को प्रदान किया गया समान एवं सदृश्य अनुतोष का दावा करते हुये विलंबित याचिकाएँ प्रस्तुत की हैं, वे विलंब और गफलत के आधार पर किसी अनुतोष

के हकदार नहीं — याचिका खारिज।

B. Constitution - Article 226 - Consideration of representation - Delay and Laches - Practice to direct for consideration of representation even in cases of long delay and laches and thereby reopening the cases which are dead due to lapse of time is not proper and should not be done.
(Para 8)

ख. संविधान - अनुच्छेद 226 - अभ्यावेदन का विचार - विलंब और गफलत - दीर्घ विलंब और गफलत के प्रकरणों में भी अभ्यावेदन का विचार करने के लिये निदेशित करने और इसके द्वारा समय व्यपगत हो जाने के कारण मृत प्रकरणों को पुनर्जीवित करने की पद्धति उचित नहीं और नहीं किया जाना चाहिए।

Cases referred :

(2006) 11 SCC 464, (2010) 2 SCC 59, 2010 (3) MPHT 349, (2006) 4 SCC 322, (2007) 9 SCC 278.

M. Chanduarkar, for the petitioners.

Pramod Kumar Pandey, G.A. for the respondent/State.

(Supplied: Paragraph numbers)

O R D E R

R.S. JHA, J. :- Inspite of several opportunities, no return has been filed by the respondent/State, in the circumstances, the matter is heard on the question of admission.

2. The petitioners have filed this petition for appointment on the post of Lower Division Teacher claiming parity with one Shri Pradeep Mehta whose petition was allowed by the State Administrative Tribunal, which order was confirmed upto the Supreme Court.

3. The brief facts leading to the filing of the present petition are that the petitioners had appeared in the competitive examination held by the M.P. Junior Service Selection Board in the year 1984-85 for selection and appointment for posts of Lower Division Teachers and being successful their names were mentioned in the list of selected candidates at Serial nos. 477 and 490 published in the news paper Rojgar and Nirman dated 10.4.1986, inspite of being selected, no orders of appointment in respect of the petitioners were issued.

4. It is stated by the learned counsel for the petitioners that one similarly situated candidate Shri Pradeep Mehta had filed an application before the State Administrative Tribunal at Indore Bench which was registered as OA No. 120/1993 which was allowed in view of the orders passed by this Court in MP No. 928/1987 and TA No. 56528/1998. The order passed by the State Administrative Tribunal in the case of Shri Pradeep Mehta was assailed by the State before the High Court by filing W.P. No. 533/2000 which was dismissed on 15.9.2004 and the SLP filed by the State also suffered dismissal vide order dated 7.3.2005, a copy of which has been filed by the petitioners as Annexure P/4.

5. It is submitted by the learned counsel for the petitioners that after the decision of the Supreme Court in the case of Shri Pradeep Mehta, the petitioners have approached this Court claiming parity and similar relief as granted by this Court to Shri Pradeep Mehta. It is stated that Shri Pradeep Mehta's name appeared at serial no. 1873 in the select list of successful candidates published for Ratlam District and in such circumstances the petitioners being better placed, are entitled to similar relief as granted to Shri Pradeep Mehta.

6. Having heard the counsel for the parties, it is observed that the selection was undertaken by the M.P. Junior Service Selection Board on 4.4.1985 and the select list was published on 10.4.1986 whereas the present petition has been filed by the petitioners in the year 2006 after a long lapse of 20 years. In view of the aforesaid undisputed and un-denied facts, the petitioners cannot be permitted to claim parity with Shri Pradeep Mehta as the petitioners have slept over the matter for a long period of 20 years.

7. In the circumstances, it is apparent that the petition filed by the petitioners suffers from tremendous delay and laches on their part and there is no explanation furnished by them in that regard. The Supreme Court in the case of *U.P. Jal Nigam and another v. Jaswant Singh and another*, (2006) 11 SCC 464 has held that the persons who file belated petitions claiming similar and identical relief which has been granted to those similarly situated persons who were vigilant and approached the Court in time are not entitled to any relief on the ground of delay and laches in the following terms :-

“5. So far as the principal issue is concerned, that has been settled by this Court. Therefore, there is no quarrel over the legal proposition. But the only question is grant of relief to

such other persons who were not vigilant and did not wake up to challenge their retirement and accepted the same but filed writ petitions after the judgment of this Court in *Harwindra Kumar v. Chief Engineer, Karmik*, (2005) 13 SCC 300 : 2006 SCC (L&S) 1063. Whether they are entitled to same relief or not? Therefore, a serious question that arises for consideration is whether the employees who did not wake up to challenge their retirement and accepted the same, collected their post-retirement benefits, can such persons be given the relief in the light of the subsequent decision delivered by this Court?

6. XXXX XXXX XXXX XXXX

7. Learned Senior Counsel for the appellants has invited our attention to various decisions to impress upon that persons who are guilty of such laches and acquiesced with the situation should not be granted any relief because it is going to cost the Nigam a heavy financial burden to the tune of Rs.17,80,43,108. Therefore, relief should be confined to those persons who were continuing in service and filed their writ petitions in time but not to all and sundry who woke up to file the writ petitions much after their retirement. In this connection, our attention was invited to a decision of this Court in *Rup Diamonds v. Union of India*, (1989) 2 SCC 356 wherein their Lordships observed that those people who were sitting on the fence till somebody else took up the matter to the court for refund of duty, cannot be given the benefit. In that context, their Lordships held as follows : (SCC pp. 356-57)

“Petitioners are reagitating claims which they had not pursued for several years. Petitioners were not vigilant but were content to be dormant and chose to sit on the fence till somebody else’s case came to be decided. Their case cannot be considered on the analogy of one where a law had been declared unconstitutional and void by a court, so as to enable persons to recover monies paid under the compulsion of a law later so declared void. There is also an

unexplained, inordinate delay in preferring the present writ petition which is brought after almost a year after the first rejection. As observed by the Court in *Durga Prashad v. Chief Controller of Imports and Exports*, (1969) 1 SCC 185, the exchange position of this country and the policy of the Government regarding international trade varies from year to year. In these matters it is essential that persons who are aggrieved by orders of the Government should approach the High Court after exhausting the remedies provided by law, rule or order with utmost expedition. Therefore, these delays are sufficient to persuade the Court to decline to interfere. If a right of appeal is available, this order rejecting the writ petition shall not prejudice petitioners' case in any such appeal."

8. Our attention was also invited to a decision of this Court in *State of Karnataka v. S.M. Kotrayya*, (1996) 6 SCC 267 : 1996 SCC (L&S) 1488. In that case the respondents woke up to claim the relief which was granted to their colleagues by the Tribunal with an application to condone the delay. The Tribunal condoned the delay. Therefore, the State approached this Court and this Court after considering the matter observed as under: (SCC p.268)

"Although it is not necessary to give an explanation for the delay which occurred within the period mentioned in sub-sections (1) or (2) of Section 21, explanation should be given for the delay which occasioned after the expiry of the aforesaid respective period applicable to the appropriate case and the Tribunal should satisfy itself whether the explanation offered was proper. In the instant case, the explanation offered was that they came to know of the relief granted by the Tribunal in August 1989 and that they filed the petition immediately thereafter. That is not a proper explanation at all. What was required of them to explain under sub-sections (1) and (2) was as to why they could not avail of the remedy of redressal of

their grievances before the expiry of the period prescribed under sub-section (1) or (2). That was not the explanation given. Therefore, the Tribunal was wholly unjustified in condoning the delay.”

9. Similarly in *Jagdish Lal v. State of Haryana*, (1997) 6 SCC 538 : 1997 SCC (L&S) 1550 this Court reaffirmed the rule if a person chose to sit over the matter and then woke up after the decision of the court, then such person cannot stand to benefit. In that case it was observed as follows: (SCC p.542)

“The delay disentitles a party to discretionary relief under Article 226 or Article 32 of the Constitution. The appellants kept sleeping over their rights for long and woke up when they had the impetus from *Union of India v. Virpal Singh Chauhan*, (1995) 6 SCC 684 : 1996 SCC (L&S) 1 : (1995) 31 ATC 13. The appellants’ desperate attempt to redo the seniority is not amenable to judicial review at this belated stage.”

10. In *Union of India v. C.K. Dharagupta* (1997) 3 SCC 395 : 1997 SCC (L&S) 821- it was observed as follows: (SCC p. 398, para 9)

“9. We, however, clarify that in view of our finding that the judgment of the Tribunal in *R.P. Joshi v. Union of India*, OA No. 497 of 1986 decided on 17-3-1987 gives relief only to Joshi, the benefit of the said judgment of the Tribunal cannot be extended to any other person. The respondent C.K. Dharagupta (since retired) is seeking benefit of *Joshi case*. In view of our finding that the benefit of the judgment of the Tribunal dated 17-3-1987 could only be given to Joshi and nobody else, even Dharagupta is not entitled to any relief.”

11. In *Govt. of W.B. v. Tarun K. Roy* (2004) 1 SCC 347 : 2004 SCC (L&S) 225- their Lordships considered delay as serious factor and have not granted relief. Therein it was

observed as follows: (SCC pp. 359-60, para 34)

“34. The respondents furthermore are not even entitled to any relief on the ground of gross delay and laches on their part in filing the writ petition. The first two writ petitions were filed in the year 1976 wherein the respondents herein approached the High Court in 1992. In between 1976 and 1992 not only two writ petitions had been decided, but one way or the other, even the matter had been considered by this Court in *State of W.B. v. Debdas Kumar*, 1991 Supp (1) SCC 138 : 1991 SCC (L&S) 841 : (1991) 17 ATC 261 . The plea of delay, which Mr Krishnamani states, should be a ground for denying the relief to the other persons similarly situated would operate against the respondents. Furthermore, the other employees not being before this Court although they are ventilating their grievances before appropriate courts of law, no order should be passed which would prejudice their cause. In such a situation, we are not prepared to make any observation only for the purpose of grant of some relief to the respondents to which they are not legally entitled to so as to deprive others therefrom who may be found to be entitled thereto by a court of law.”

12. The statement of law has also been summarised in *Halsbury's Laws of England*, para 911, p. 395 as follows:

“In determining whether there has been such delay as to amount to laches, the chief points to be considered are:

- (i) acquiescence on the claimant's part; and
- (ii) any change of position that has occurred on the defendant's part.

Acquiescence in this sense does not mean standing by while the violation of a right is in progress, but assent after the violation has been completed and the claimant has become

aware of it. It is unjust to give the claimant a remedy where, by his conduct, he has done that which might fairly be regarded as equivalent to a waiver of it; or where, by his conduct and neglect, though not waiving the remedy, he has put the other party in a position in which it would not be reasonable to place him if the remedy were afterwards to be asserted. In such cases lapse of time and delay are most material. Upon these considerations rests the doctrine of laches.”

8. The Supreme Court in the case of *Union of India and others v. M.K.Sarkar*, (2010)2 SCC 59 held that the practice of the High Courts in directing to consider representation even in cases of long delay and laches and thereby reopening the cases which are dead due to lapse of time is not proper and should not be done in the following terms :-

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

9. This Court in the case of *Qadeer Mohd. v. State of M.P. and others*, 2010 (3) MPHT 349 has taken the same view on the basis of the aforesaid law laid down by the Supreme Court .

10. In the facts and circumstances of the case it is also undisputed that the petitioners have approached this Court after a long lapse of 20 years and, therefore, I am of the considered opinion that the petition filed by the petitioners also suffers from delay and laches in view of the decisions rendered by the Supreme Court in the cases of *Karnataka Power Corporation Ltd., Chairman and Managing Director and another Vs. K. Thangappan and another*, (2006) 4 SCC 322, *Union of India and Others vs. M. K. Sarkar*,

I.L.R.[2016]M.P. Netaji G.N.S.S. Maryadit Vs. State of M.P. (DB) 489
(2010) 2 SCC 59 and *The New Delhi Municipal Council Vs. Pan Singh and others* (2007) 9 SCC 278.

11 In the circumstances, in view of the law laid down by the Supreme Court in the aforesaid cases, the petition filed by the petitioners being misconceived is, accordingly, dismissed.

Petition dismissed.

I.L.R. [2016] M.P., 489

WRIT PETITION

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

W.P. No. 444/2007 (Jabalpur) decided on 14 October, 2015

NETAJI GRIH NIRMAN SAHKARI

SAMITI MARYADIT

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

A. *Mines and Minerals Rules, 1996, Rule 53 and Land Revenue Code, M.P. (20 of 1959), Section 257 - Appropriate Authority is fully competent to pass order under Section 247(7) of the Code as also under Rule 53 of Rules, 1996.* (Paras 9 & 10)

क. खान और खनिज नियम, 1996, नियम 53 एवं मू. राजस्व संहिता, म.प्र. (1959 का 20), धारा 257 - समुचित प्राधिकारी संहिता की धारा 247(7) के अंतर्गत और साथ ही नियम 1996 के नियम 53 के अंतर्गत भी आदेश पारित करने के लिये पूर्णतः सक्षम है।

B. *Land Revenue Code, M.P. (20 of 1959), Section 247(7) - Penalty - Permission was granted to the Petitioner to level the land by removing Murom and soil and to use it for filling the pits in the same land and in case of surplus, to transport it for specified use with prior permission - At the end of term of permission, Panchnama was drawn and it was found that unauthorized extraction was done contrary to restricted permission granted for levelling of land and panchnama clearly indicates that extraction was done to the extent of 120 metres wide and 15 metres deep which means that petitioner had extracted minor mineral to the extent of 7200 cubic metres for some other purpose - Findings recorded by Addl. Collector does not call for interference -*

**Fine amount double the value of the mineral was rightly imposed by
Appropriate Authority.** (Paras 11 to 16)

ख. भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 247(7) - शास्ति - याची को मुरम और मिट्टी हटाकर भूमि को समतल करने के लिये और उसी भूमि में गड्ढों को भरने के लिये उसका उपयोग करने तथा अतिशेष की स्थिति में पूर्व अनुमति से किसी विनिर्दिष्ट उपयोग के लिये परिवहन की अनुमति प्रदान की गई थी - अनुमति की अवधि की समाप्ति पर पंचनामा बनाया गया और यह पाया गया कि भूमि को समतल करने के लिये प्रदान की गई सीमित अनुमति के विपरीत अप्राधिकृत निकासी की गई थी और पंचनामा स्पष्ट रूप से दर्शाता है कि 120 मीटर चौड़ाई एवं 15 मीटर गहराई की सीमा तक निकासी की गई थी जिसका अर्थ है कि याची द्वारा गौण खनिज को 7200 घनमीटर की सीमा तक किसी अन्य प्रयोजन हेतु निकासी की गई थी - अतिरिक्त कलेक्टर द्वारा अभिलिखित किये गये निष्कर्षों में हस्तक्षेपों की आवश्यकता नहीं - समुचित प्राधिकारी द्वारा खनिज के मूल्य की दोगुना अर्धदण्ड की राशि उचित रूप से अधिरोपित की गई।

Ashok Lalwani, for the petitioner.

Amit Seth, G.A. for the respondents.

ORDER

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

This writ petition under Article 226 of the Constitution of India takes exception to the order passed by the State Government dated 27.09.2006 (Annexure P-14) and dated 28.01.2005 (Annexure P-11) passed by the Additional Collector, Bhopal.

2. The petitioner is a registered Cooperative Society. The petitioner made an application to the Gram Panchayat, Akbarpur on 13.11.2000 for removing Murom (*Kopra*) and Soil. The Gram Panchayat responded vide communication dated 13.11.2000 (Annexure P-1) as under:-

“Ph. : 793158

“ग्राम पंचायत अकबरपुर

विकास खण्ड फन्दा, जिला भोपाल

मंगल सिंह यादव
सरपंच

कार्या.: अकबरपुर, कोलार रोड,
भोपाल (म.प्र.)

दिनांक - 13/11/2000

अनापत्ति प्रमाण पत्र

प्रमाणित किया जाता है कि नेताजी हाऊसिंग सोसायटी प.ह.नं. 39 खसरा नं. 18/1/2/2/1 रकबा 10.86 एकड़ में समतलीकरण के दौरान जो कोपरा एवं मिट्टी निकली है कोपरा/मिट्टी की शासन द्वारा निर्धारित रायल्टी भुगतान करने के उपरान्त कोपरा/ मिट्टी कहीं ले जाने में ग्रा.पं. को कोई आपत्ति नहीं है। बशर्ते कोपरा/मिट्टी ले जाने की अनुमति जिला प्रशा. द्वारा दी जावे।

सही/-

सरपंच

ग्राम पंचायत अकबरपुर

विकास खण्ड फन्दा, भोपाल

3. The Mining Officer vide order dated 23.11.2000 permitted petitioner-Society to level the land by removing Murom (*Kopra*) and Soil in land Patwari Halka No.39, Khasra No.18/1/2/2/1, area 10.86 acres and to use it for filling the pits in the same land and in case of surplus, to transport it for specified use with prior permission. The said communication Annexure P-2 reads thus:-

“कार्यालय कलेक्टर (खनिज शाखा) भोपाल

क्रमांक / / खनिज / 2000

भोपाल, दि०-

प्रति,

मुख्य कार्यपालन अधिकारी,

जनपद पंचायत - फन्दा

भोपाल।

विषय:- कोपरा/मिट्टी परिवहन की अनुमति बावत्।

— X X X —

उपरोक्त विषयांतर्गत लेख है कि आवेदक पी० राजू निवासी- सुख शांति अपार्टमेंट, सर्वधर्म कालोनी, बी सेक्टर, कोलार रोड, भोपाल द्वारा आवेदन पत्र कर निवेदन किया है कि नेताजी गृह निर्माण सहकारी समिति मर्या० भोपाल भूमि जो कि ग्राम-दामखेड़ा वीरान, प.ह.नं. 39, खसरा क्रमांक 18/1/2/2/1, रकबा- 10.86 एकड़ भूमि का समतलीकरण का कार्य दिया

गया है। उक्त समतलीकरण के कार्य में कुछ मिट्टी/कोपरा वहीं गड्ढों को भरने में उपयोग हो जावेगी पर अतिरिक्त मिट्टी/कोपरा ट्रकों से बाहर ले जाकर डालनी होगी। जिसके लिए परिवहन के अनुमति की आवश्यकता है। समतलीकरण के कार्य में अतिरिक्त कोपरा/मिट्टी ट्रकों से बाहर ले जाने में प्रति ट्रक जो भी रायल्टी राशि होगी वह जमा करने को तैयार हूँ।

म0प्र0 गौण खनिज नियम- 1996, जो दिनांक -1, अप्रैल 1996 से लागू हुए जिसके अनुसार मुम (कोपरा) मिट्टी, पत्थर बोल्टर एवं रेत खनिजों के उत्खनन अनुज्ञापत्र एवं अस्थाई अनुज्ञापत्र (परमिट) जारी करने के अधिकार त्रि-स्तरीय पंचायतों को सौंपे गये हैं।

अतः आवेदक का आवेदन पत्र दिनांक-20/11/2000 एवं सरपंच ग्राम पंचायत अकबरपुरा का अनापत्ति प्रमाणपत्र मूलतः संलग्न कर लेख है कि पंचायत की आय को दृष्टिगत रखते हुए आवेदक पी0 राजू को उक्त कार्य हेतु नियमानुसार अनुमति देने का कष्ट करें एवं निकल रहे खनिज एवं उसके परिवहन हेतु जो रबन्ना बुक जारी की जावेगी, उसकी अग्रिम रायल्टी राशि जमा करावें। एवं आवेदक को यह भी निर्देश देवें की खनिज परिवहन किये जाने वाले प्रत्येक ट्रीप में रबन्ना करें।

सही/-

प्रभारी खनि. अधिकारी
वास्ते कलेक्टर, भोपाल

पृ. क्र 1942/खनिज/ 2000

भोपाल दिनांक 23.11.2000

प्रतिलिपि:-

(1) सरपंच, ग्राम पंचायत-अकबरपुरा, विकास खण्ड फन्दा,
भोपाल की ओर सूचनार्थ।

सही/-

प्रभारी खनि अधिकारी
वास्ते कलेक्टर, भोपाल”

(emphasis supplied)

4. The Chief Executive Officer, Janpad Panchayat, Fanda, Bhopal vide order dated 23.12.2000 permitted the petitioner to remove the additional Murom (*Kopra*) and to transport the same. The said order, Annexure P-3, reads thus:-

“कार्यालय जनपद पंचायत फन्दा जिला भोपाल म0प्र0

क्रमांक 2289/पंचा/खनिज/2000

भोपाल दिनांक 23-12-2000

// आदेश //

कार्यालय कलेक्टर खनिज जिला भोपाल के पत्र क्र. 1941/खनिज/2000 दिनांक 23.11.2000 तथा इस कार्यालय के आदेश क्र 2012/खनिज 2000 भोपाल दि. 23.11.2000 द्वारा समतलीकरण खसरा क्र. 18-1-2-1 रकबा 10.86 संस्थागत भूमि नेताजी गृह निर्माण सहकारी समिति मर्या. भोपाल के अनुबन्धित ठेकेदार श्री पी. राजू भोपाल को अतिरिक्त कोपरा उठाने अस्थाई अनुज्ञा अवधि 30 दिन के लिये नवीनीकृत की जाती है । खनिज परिवहन किये जाने वास्ते प्रत्येक ट्रिप पर रबन्ना जारी करें ।

सही/-

पृ. क्र...../पंचा /खनिज/ 2000

मुख्य कार्यपालन अधिकारी
जनपद पंचायत फन्दा भोपाल
भोपाल दिनांक 23.12.2000

प्रतिलिपी : -

- 1 खनिज अधिकारी भोपाल ।
- 2 सरपंच ग्राम पंचायत अकबरपुर ।
- 3 सहायक लेखाअधिकारी जनपद पंचायत फन्दा ।
- 4 अध्यक्ष नेताजी गृ0नि0सह0समिति भोपाल ।
- 5 संबधित श्री पी0 राजू भोपाल आवेदक को सूचनार्थ ।

मुख्य कार्यपालन अधिकारी
जनपद पंचायत फन्दा भोपाल”

5. The petitioner asserts that the permission was valid till September, 2004. At the end of the term of permission, Panchnama was drawn by the local officials on 27.09.2004 which reads thus:-

“पंचनामा

आज दिनांक 27.09.2004 को ग्राम दामखेड़ा के ख. क्रं. 18/1/2/2/1 रकबा 10.86 एकड़ संस्था नेताजी गृह निर्माण सहकारी समिति मर्या. भोपाल की निजी भूमि का स्थल निरीक्षण खनि निरीक्षक श्री मुमताज खान तथा खनि सर्वेयर श्री एस.एन. श्रीवास्तव एवं खनि सर्वेयर श्री एम.के. मिश्रा द्वारा किया गया जांच के समय संस्था के अध्यक्ष अथवा उनके प्रतिनिधि मौके पर उपस्थित नहीं पाये गये। जांच मे पाया कि उक्त भूमि पहाड़ीनुमा है तथा यह स्थान दानिस हिल्स से लगा

हुआ है। मौके पर इस क्षेत्र में कोपरा/मुरम का गड़ड़ा पाया गया गड़ड़े का नाप किया गया जो निम्नानुसार है:-

लम्बाई 120 मीटर चौड़ाई 15 मीटर तथा औसतन गहराई 4 मीटर है। इस गड़ड़े से मुरम (कोपरा) खनिज की 7200 घ.मी. मात्रा का उत्खनन होकर परिवहन होना पाया गया है। मौके पर उत्खनन कार्य तथा परिवहन का कार्य बन्द पाया गया जांच के समय कोई मशीनरी अथवा मजदूर मौके पर नहीं पाये गये संस्था के अध्यक्ष श्री एन.व्ही. आचार्य हैं। संस्था का महावली नगर कोलार रोड भोपाल है, तथा अध्यक्ष का निवास ई 7/7 अरेरा कालोनी भोपाल है। उपरोक्त पंचनामा लिखाया पढ़कर सुना समझा सही पाया सो हस्ताक्षर किए।

हस्ता/-”

(emphasis supplied)

6. With reference to this Panchnama, report was submitted to the Collector by the Mining Officer on 27.09.2004, Annexure P-6, which reads thus:-

“प्रति,

कलेक्टर,

जिला भोपाल।

विषय: अवैध खनिज उत्खनन ग्राम दामखेड़ा, तहसील हुजूर जिला भोपाल दिनांक 27.09.04 दोपहर 3.00 बजे।

मेरे द्वारा भ्रमण के दौरान उक्त दिनांक व समय में ग्राम से अवैध खनिज मुरम (कोपरा) उत्खनन परिवहन करते पाया गया उक्त उत्खनिकर्ता से संबंधित 40प्र0 गौण खनिज नियम 1996 की धारा 53 के अंतर्गत प्रकरण की जानकारी :-

1(अ)	उस व्यक्ति का नाम पता जो मौके पर अवैध खनिज परिवहन कर रहा है।	श्री एन. नेताजी गृह निर्माण सह. समिति मर्या. भोपाल द्वारा
(ब)	उस व्यक्ति का नाम पता जिसके द्वारा अवैध खनिज का उत्खनन किया जा रहा है।	श्री एन.व्ही.आचार्य, अध्यक्ष, ई 7/7 अरेरा कालोनी, भोपाल
2	खनिज परिवहन स्थान का विवरण ग्राम का नाम तहसील खनिज उत्खनन के स्थान का सर्वे नं. क्षेत्र	दामखेड़ा, ख.क. 18/1/2/2/1 रकबा 10.86 एकड़

3	औसतन कितने समय में अवैध उत्खनन/परिवहन किया जा रहा है।	लगभग एक सप्ताह
4	अवैध खनिज परिवहन की मात्रा घनमीटर	7,200 घनमीटर मुसम (कोपरा)
5	म0प्र0 गौण खनिज नियम 1996 के शेड्यूल अनुसार उत्खनन परिवहन खनिज की रायल्टी राशि	1,0,8000=00
6	अवैध परिवहन उत्खनन का बाजार मूल्य	5,40,000=00 (पांच लाख चालीस हजार केवल)
7	बाजार मूल्य की दुगुनी उत्खनन खनिज की राशि।	10,80,000=00 (दस लाख अस्सी हजार केवल)
8	परिवहन खनिज का किस उपयोग व उद्देश्य के लिये किया गया।	
9	मौके पर परिवहन खनिज की मात्रा	7,200 घ0मी0 मुसम (कोपरा)

गवाह :

1. सही/—
2. सही/—

सही/—
खनि. निरीक्षक
कार्यालय कलेक्टर, भोपाल

संलग्न :

1. स्थल पंचनामा
2. नजरी नक्शा

प्रकरण मूलतः अग्रिम कार्यवाही हेतु अपर कलेक्टर महोदय को प्रेषित किया जा रहा है।

सही/—”

7. On receipt of the said report, the Additional Collector issued show cause notice to the petitioner on 15.10.2004, which reads thus:-

“न्यायालय अपर कलेक्टर जिला भोपाल (म0प्र0)

ब्रमांक 08/ए-67/04-05/29

भोपाल, दिनांक 15-10-2004

// कारण बताओ सूचना पत्र //

प्रति,

श्री एन.व्ही. आचार्य,
अध्यक्ष, नेताजी गृह निर्माण सह. समिति,

ई-7/7 अरेरा कालोनी,
भोपाल।

विषय: ग्राम दामखेड़ा के भूमि ख0क0 18/1/2/2/1 पर अवैध उत्खनन।

खनिज निरीक्षक, भोपाल द्वारा प्रतिवेदित किया गया है कि आपके द्वारा ग्राम दामखेड़ा, तहसील हुजूर के ख.नं. 18/1/2/2/1 रकबा 10.86 एकड़ में से लगभग क्षेत्रफल 120 मीटर क्षेत्र संस्था की भूमि से 7200 घनमीटर मुरम (कोपरा) खनिज का अवैध उत्खनन किया गया है। आपका यह कृत्य म0प्र0भू0रा0 संहिता 1959 की धारा 247(7) के अंतर्गत दंडनीय है।

2. अवैध उत्खनित खनिज 7200 घनमीटर मुरम (कोपरा) की रायल्टी रुपये 1,08,000=00 होती है तथा इसका बाजार मूल्य रु.5,40,000=00 होता है।

अतः आपके उक्त कृत्य के लिये एतद् द्वारा आपको सूचित किया जाता है कि क्यों न आपको बाजार मूल्य की दुगुनी राशि 10,80,000=00 (रुपये दस लाख अस्सी हजार) रुपये अर्थदण्ड से दंडित किया जावे। इस संबंध में आप अपना उत्तर दिनोंक 26/10/04 को इस न्यायालय के समक्ष स्वयं अथवा अपने अभिभाषक के माध्यम से प्रस्तुत करें। अनुपस्थिति की दशा में प्रकरण में एक पक्षीय निर्णय लिया जावेगा।

आज दिनोंक 15/10/2004 को मेरे हस्ताक्षर एवं न्यायालय की मुद्रा से जारी किया गया।

सही/—
अपर कलेक्टर
भोपाल

सादर रिपोर्ट प्रस्तुत

श्रीमान् खनिज अधिकारी महोदय द्वारा मेरे को नोटिस तामिली के लिये दिया था मैं उक्त पते पर गया था उस मकान में रहने वालों ने बताया है कि वे यहां से मकान खाली करके कोलार रोड पर रहते हैं। यहाँ पर किराये से रहते थे। इसलिए नोटिस तामिल नहीं हो पाया है। कोलार रोड का पता मालूम नहीं है।

श्रीमान् जी को रिपोर्ट पेश।

सैनिक बेनी प्रसाद
नं0 33
20/10/04 ”

(emphasis supplied)

8. The petitioner submitted his response, which, however, did not find favour with the Additional Collector and the Additional Collector concluded on the basis of the Panchnama and other record that the petitioner had extracted 7200 cubic metres of Murom (Kopra) and pit created due to such extraction was to the extent of 120 metres wide and 15 metres deep. The Additional Collector, therefore, concluded that such extraction was unauthorized and contrary to the restricted permission granted for levelling of the said land; and also transportation of such illegally extracted Murom (Kopra) was unauthorized, for which he invoked provisions of Section 247(7) of the Madhya Pradesh Land Revenue Code and Rule 53 of the Mines and Minerals Rules, 1996 – to impose fine twice the amount of the value of the illegally extracted Murom (Kopra). This decision, Annexure P-11, was carried in appeal before the State Government, which has reiterated the view taken by the Additional Collector and dismissed the revision application vide order dated 27.09.2006, Annexure P-14.

9. The first contention canvassed before us is that the Collector misdirected himself in invoking the powers under Section 247(7) of the Code as well as Rule 53 of the Rules of 1996. The two actions pertaining to the same act of commission and omission was not permissible. The argument though attractive, at the first blush, deserves to be stated to be rejected. Indeed, the order passed by the Additional Collector refers to the two provisions as mentioned above. However, it is not open to the petitioner to contend that the Additional Collector is not the Competent Authority to pass order under the respective provisions. In other words, the Additional Collector was fully competent to pass order under Section 247(7) of the Code as also under Rule 53 of the Rules of 1996. No provision has been brought to our notice which provides to the contrary.

10. On the other hand, Rule 247(7) of the Code empowers the Collector so as the Rule 53 of the Rules of 1996, to pass order in cases where situation so warrants. For the purposes of the Code as well as the Rules of 1996, Additional Collector is deemed to be discharging the duties of the Collector and is authorized to do so by the State Government. Thus, it would make no difference if the Additional Collector has referred to the relevant provisions in the impugned order.

11. It is not in dispute that the show cause notice issued to the petitioner expressly refers to the action to be initiated against the petitioner under Section

247(7) of the Code. It is not the case of the petitioner that the order as passed by the Additional Collector could not have been passed under the aforesaid provision. It is also not the case of the petitioner that the order makes no reference to Section 247(7) of the Code. Thus, it makes no difference if the show cause notice refers to Section 247(7) of the Code, which power in any case has been exercised by the Additional Collector while passing the impugned order dated 28.01.2005 (Annexure P-11).

12. The core question is : whether the Additional Collector in the facts of the present case could have passed the impugned order, for the reasons stated in the impugned order. The argument of the petitioner is that the petitioner had a valid permission for extraction. This argument, however, does not commend to us. The permission as was sought and granted by the Gram Panchayat was only for the restricted purpose. Primarily, the permission was for levelling the land in question. In that, the Mining Officer granted permission for the limited purpose of leveling of land and filling of pits in the said land, out of the Murom (Kopra) and Soil to become available from the same land. It was not a permission for extraction of minor minerals and for commercial use as such, at all. It was for the limited purpose of captive use and for leveling of the land. The *Panchnama*, however, prepared at the end of the license period, clearly indicates that the extraction was done to the extent of 120 metres wide and 15 metres deep, which means that the petitioner had extracted minor mineral to the extent of 7200 cubic metres for some other purpose than for levelling the land in question. The *Panchnama*, in no way, supports the case of the petitioner. The argument of the petitioner that the *Panchnama* does not mention that the extraction was in progress on the relevant date, also cannot be countenanced because the permission to the petitioner was only for leveling of land by cutting the corners and taking soil for leveling of the pits for captive use.

13. Counsel for the petitioner faintly suggested that the 120 metres wide and 15 metres deep pit was created for providing a septic tank. No such plea was taken earlier, nor can be countenanced. We fail to understand as to why petitioner society would require such a large pit for a septic tank.

14. Suffice it to observe that the *Panchnama* clearly establishes that extraction of minor mineral has been done not limited for the purpose of leveling of land and filling of the pits in the land for captive use but for other purposes not permitted. That finding of the Appropriate Authority does not merit interference. The Appropriate Authority has also determined the quantum of extraction done by the petitioner and has imposed fine on that basis.

15. In our opinion, the show cause notice gives clear indication of the proposed action to be taken against the petitioner. Neither any observation in the Panchnama will be of any avail to the petitioner nor the report submitted by the Mining Inspector, Annexure P-6, which mentions that the extraction work was not in progress for the past week. None of that would make any difference to the finding recorded by the Appropriate Authority. The factual position has been ascertained by the Appropriate Authority and the conclusion reached on that basis, being his subjective satisfaction and upon appreciation of the record - no interference in exercise of writ jurisdiction qua that finding is possible.

16. The last question is : whether the fine amount of double the value of the mineral, imposed by the Appropriate Authority is just and proper. Even on this count, we have no difficulty in rejecting the argument of the petitioner. Inasmuch as, the provisions of the concerned enactment and in particular Section 247(7) of the Code providing for fine as applicable at the relevant time, was for double the amount, till amended. Hence, no fault can be found even with that order passed by the Authority.

17. Taking any view of the matter, this petition is devoid of merits and is dismissed.

Petition dismissed.

I.L.R. [2016] M.P., 499

WRIT PETITION

***Before Mr. Justice A.M. Khanwilkar, Chief Justice &
Mr. Justice K.K. Trivedi***

W.P. No. 8810/2015 (PIL) (Jabalpur) order passed on 16 October, 2015

PARAS SAKLECHA

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

(Alongwith W.P. No. 9892/2015, W.P. No. 10859/2015, W.P. No. 10860/2015 (PIL), W.P. No. 11320/2015 (PIL), W.P. No. 14365/2015 & W.P. No. 14367/2015)

A. Constitution - Article 226 - Medical Entrance Examination by APDMC - Admission beyond 30th September - Regulation on Graduate Medical Education 1997 postulates that no admission of student in respect of any academic session beyond 30th

September should be permitted - Prohibition is against the Authorities - It is open to Writ Court to issue directions to Authorities which must bind the Authorities to permit admission and registration of student even beyond 30th September, in case the Court records its satisfaction and just reasons therefor. (Para 9)

क. संविधान - अनुच्छेद 226 - ए.पी.डी.एम.सी. द्वारा चिकित्सा प्रवेश परीक्षा - 30 सितम्बर के बाद प्रवेश - स्नातक चिकित्सा शिक्षा 1997 पर विनियमन मान्य करता है कि किसी शैक्षणिक सत्र के संबंध में विद्यार्थी को 30 सितम्बर के बाद प्रवेश की अनुमति नहीं दी जानी चाहिए - प्राधिकारियों के विरुद्ध प्रतिषेध है - रिट न्यायालय के लिए प्राधिकारियों को निदेश जारी करने का मार्ग खुला है, जो प्राधिकारों को 30 सितम्बर के बाद भी विद्यार्थी को प्रवेश और पंजीयन की अनुमति देने के लिए बाध्य करेगा, यदि ऐसा करने हेतु न्यायालय अपनी संतुष्टि एवं न्यायोचित कारण अभिलिखित करता है।

B. Constitution - Article 226 - Permission to grant admission beyond 30th September - On apprehension expressed in PIL, Court directed to immediately scan and digitize the answer papers - Written Examination could not be conducted and it stood postponed - Subsequently, online examination was announced on 20-9-2015 however, due to several technical faults which occurred during examination period, the examination was to be abandoned - Subsequently, the examination was conducted on 8th October, 2015 - Situation was not created by Institutions intentionally nor the students who would be taking admission are responsible for the same - Date of admission extended till 14-10-2015 - Union of India, MCI and Dental Medical Council and Universities directed to recognize the admission process for academic year 2015-16 completed by 14-10-2015 and to register the students so admitted and allow them to pursue their medical course in respective colleges treating them having been admitted within prescribed period. (Paras 12 to 17)

ख. संविधान - अनुच्छेद 226 - 30 सितम्बर के बाद प्रवेश प्रदान करने की अनुमति - लोकहित वाद में अभिव्यक्त आशंका पर, न्यायालय ने तुरंत रूप से उत्तर पुस्तिकाओं को स्कैन और डिजीटाइज करने के लिए निदेशित किया - लिखित परीक्षा आयोजित नहीं की जा सकी और उसे स्थगित किया गया - तत्पश्चात्, 20.09.2015 को ऑनलाईन परीक्षा घोषित की गई किन्तु, कई तकनीकी त्रुटियाँ/कमियाँ जो परीक्षा की अवधि के दौरान कारित हुई थी, के कारण परीक्षा का परित्याग करना पड़ा - तत्पश्चात्, 8 अक्टूबर 2015 को परीक्षा आयोजित की गई - संस्थाओं द्वारा यह स्थिति जानबूझकर

निर्मित नहीं की गई थी और न ही विद्यार्थीगण जो प्रवेश लेंगे, वे इसके लिए जिम्मेदार हैं – प्रवेश की तिथि 14.10.2015 तक बढ़ाई गई – भारत के संघ, भारतीय चिकित्सा परिषद् एवं दंत चिकित्सा परिषद् तथा विश्वविद्यालयों को 14.10.2015 तक पूर्ण की गई शैक्षणिक वर्ष 2015-16 के लिये प्रवेश प्रक्रिया को मान्यता देने के लिए और इस तरह प्रवेश दिये गये विद्यार्थियों का पंजीयन करने के लिये तथा उन्हें विहित अवधि के भीतर प्रवेश दिया जाना मानते हुए, उन्हें संबंधित महाविद्यालयों में अपना चिकित्सा पाठ्यक्रम जारी रखने की अनुमति देने के लिए निदेशित किया गया।

Cases referred :

(2006) 6 SCC 268 (Para 5 and 6), (2012) 7 SCC 389 (para 29 to 31 & 38.2 and 40.4), 2015 SCC Online SC 770 (para 15), (1998) 6 SCC 131, (1999) 7 SCC 120.

A.M. Trivedi with Ashish Trivedi, for the petitioner in W.P. No. 8810/2015 (PIL).

Aditya Sanghi and Ajay Shukla, for the petitioner in W.P. No. 9892/2015.

Sanjay Kumar Verma, as *amicus curiae* in W.P. No. 10859/2015.

Nidhesh Gupta with Amal Pushp Shroti, for the respondent-APDMC.

Samdarshi Tiwari, Dy. A.G. for the respondents/State.

P.K. Kaurav with Kapil Duggal, for the respondent/AFRC and respondent No. 33/M.P. Medical Science University in W.P. No. 8810/2015 (PIL).

Vikram Singh, for the Union of India.

Anoop Nair, for the Medical Council of India.

Mohan Sausarkar, for the respondent No. 32 in W.P. No. 8810/2015 (PIL).

Madhur Shukla, for the respondent No. 34 in W.P. No. 8810/2015 (PIL).

ORDER

The Order of the Court was delivered by :
A.M. KHANWILKAR, C.J. :- We have heard the learned counsel for the parties and the learned *Amicus Curiae*.

2. Two reports have been received from Shri C.L.M. Reddy, Database Administrator, appointed by the Court to supervise the technical aspects

regarding the online examination to be conducted by APDMC.

3. The first report is dated 08.10.2015, which is about the events unfolded on the day of examination. The second report is dated 09.10.2015, which is in continuation of the first report.
4. AFRC has also placed its observation report through the counsel. Both the reports, more or less, deal with the same matter and there is unanimity about the events unfolded on the day of examination until the declaration of results. By and large, satisfaction has been recorded, both, by the Court appointed Database Administrator as well as by AFRC - except the abrasion at two Examination Centers in Delhi.
5. We were also informed that admission process on the basis of the results generated after the conclusion of the examination also commenced and completed till 14.10.2015, as directed in the previous order of this Court.
6. Considering the reports of the Court appointed Database Administrator Shri C.L.M. Reddy, as also of the AFRC, there is nothing to doubt about the manner in which the online examination was conducted. The abovesaid reports received are thus placed on record and accepted.
7. The question that may have to be first dealt with to ensure that the admission process is completed in all respects is: whether it would be open to the Court to issue direction to all concerned to permit admission process to be completed after 30.09.2015 for academic year 2015-16.
8. We are called upon to answer this core issue as to why : the Court must intervene to mitigate the situation which, essentially, has occurred due to the insistence of the Court in this PIL to conduct free and fair Medical Entrance Examination by APDMC.
9. Indisputably, the Regulation on Graduate Medical Education 1997, as amended on 25.02.2004, postulates that no admission of student in respect of any academic session beyond 30th September under any circumstance should be permitted nor the Universities shall register any student beyond the said date. However, from the Supreme Court decisions, which have been pressed into service by the learned counsel for the parties and the *Amicus Curiae*, it is permissible to hold that the prohibition is against the Authorities – such as, Union of India, Medical Council of India, Dental Council of India,

State Government, Universities and Medical & Dental Colleges and Management of the respective Universities or Dental and Medical Colleges. It is, however, open to the Writ Court to issue directions to the above said Authorities, which, must bind the Authorities to permit admission and registration of student even beyond 30th September. Provided, however, the Court records its satisfaction and just reasons therefor. This view can be discerned from the decisions of the Supreme Court in *Romil B. Shah (Dr.) and Others vs. State of Gujarat and Others* (2006) 6 SCC 268 (para 5 and 6) and in particular, *Asha vs. Pt. B.D. Sharma University of Health Sciences and Others* (2012) 7 SCC 389 (para 29 to 31 & 38.2 and 40.4) and *Padmashree Dr. D.Y.Patil Medical College v. Medical Council of India & Anr.* (2015 SCC Online SC 770 (para 15).

10. The counsel for the MCI and UOI, relied on the other decisions of the Supreme Court, in the case of *Medical Council of India Vs. State of Karnataka and others* (1998) 6 SCC 131 and *Dr. Preeti Srivastava and another Vs.State of M.P. and others* (1999) 7 SCC 120, to contend that the cut off date prescribed by the Regulation for completing admissions is inviolable. We agree with this argument, but, as aforesaid, that prohibition would operate against the stated Authorities. That does not denude the Writ Court from issuing directions to the Authorities, if the situation so warrants – for tangible and exceptional reasons to do complete justice and in larger public interest.

11. The counsel appearing for the two Universities have submitted that they would be bound by the Regulation/ Ordinance and directions issued by the Medical Council of India and Union of India. However, they would abide by the directions as may be given by this Court.

12. The real issue is whether : the facts of the present case would permit us to take such a view. It is noticed from the record that this Public Interest Litigation was filed in this Court on 17.06.2015 to question the methodology followed by APDMC in conducting entrance examination, which for this academic year was scheduled to be held on 12.07.2015. In the context of apprehensions expressed, on 08.07.2015, this Court opined that after the written examination was completed, arrangements should be made by APDMC to immediately scan and digitize the answer papers. On 09.07.2015, a formal order in this behalf was passed after recording assurance of the

State Government that complete logistical support will be extended in that behalf.

13. For reasons noted in the subsequent orders, the written examination could not be conducted by APDMC on 12.07.2015, instead, it stood postponed. Thereafter, APDMC came with the suggestion to permit it to conduct the examination online. That proposal commended to the Court. However, once again due to logistical issues including appointment of Agency for outsourcing the job of conducting online examination, the examination could not be organized immediately. Realizing the complexity of the issues and since not being an adversarial litigation, we thought it appropriate to appoint *Amicus Curiae* on 21.08.2015. The hearing of the case progressed. On every date, new suggestions and counter-suggestions were made, as difficulty was expressed by APDMC to fulfill the criteria set by the Court for adopting impregnable security measures. Eventually, the Court had to appoint an independent observer as Database Administrator to supervise and provide guidance. That order was passed on 16.09.2015. The APDMC was able to arrange for an Agency - who could conduct the online examination and also ready to fulfill the security conditions specified by the Court, which were made subject to the approval of Shri C.L.M. Reddy, Court appointed Database Administrator.

14. Finally, the date for conducting the online examination (postponed examination) was announced as 20.09.2015. However, on that date, the online examination had to be abandoned by APDMC, due to several technical faults that occurred during the examination period. After that experience, to ensure that such faults and errors are not repeated, further firm measures were adopted as per the guidance given by Shri C.L.M. Reddy, Court appointed Database Administrator. Although, there was allegation about the officials of APDMC regarding the manner in which they conducted themselves, the Court decided to keep those issues aside for the time being and focus on ensuring that free and fair examination is conducted without any further delay to meet the cut off date of 30.09.2015. However, for the reasons recorded in the order dated 28.09.2015, it is noticed that due to reasons beyond the control of APDMC, as it was fully dependent on an outside Agency for conducting online examination; coupled with the strict technical norms specified by the Court and as suggested by Shri C.L.M. Reddy, Court appointed Database Administrator, compliance whereof, became a challenge for the outsourced

Agency. The date of re-examination was, therefore, required to be scheduled as 8th October, 2015. This was permitted after due consideration of all aspects and including the actual loss of only few working days, which APDMC had assured on behalf of all the member Colleges that they would take extra lectures for the students to make-up the loss of working days/hours of such students.

15. Suffice it to note that the situation has not been created by the Institutions intentionally nor the students who would be taking admission are responsible for the same. The situation has arisen because of intervention of the Court in this PIL, for ensuring free and fair entrance examination to be conducted by APDMC. That goal has, more or less, been achieved. It is not a case of midstream admission being given to the students, nor a case of intentional violation of the schedule. As a matter of fact, it is a case of re-examination in lieu of examination, which was originally scheduled to be held on 12.07.2015, to ensure that admission process is completed before 30.09.2015. It is also not a case of merit being compromised. Whereas, by refusing permission by not extending the timeframe, it would be against larger public interest. Inasmuch as, about 2000 medical seats in the Private Medical Colleges of the State of Madhya Pradesh will remain unfilled for whole one academic year. That would inevitably, result in denying opportunity to such a large body of students community to pursue their medical education. Resultantly, their merits would become causality.

16. Taking overall view of the matter, we have no hesitation in holding that it is not only a case for adjusting equities in larger public interest and to do complete justice - *ex debito justitiae*, which we must on all counts do, as no meritorious and deserving student should become the victim of the circumstances, which have been created for reasons beyond his control and for which he is not responsible in any manner. Not intervening in this exceptional situation would be overlooking and disregarding the position that no one should suffer because of the initial intervention by the Court for ensuring free and fair entrance examination in this PIL. The finalization of date for conducting online examination took more time than what the APDMC could have otherwise arranged, because of the firm stipulations by the Court on different dates of hearing to instil confidence of the public and for observing complete confidentiality and security and provide impregnable method for conducting free and fair examination.

17. A priori, in exercise of our powers to issue writ of continuing mandamus, we direct the Union of India, Medical Council of India, Dental Medical Council of India and the Universities concerned, to recognize the admission process for academic year 2015-16 – completed by the member Private Medical Colleges of APDMC until the Court extended date i.e. 14.10.2015; and to register the students so admitted and allow them to pursue their medical course in the respective Colleges treating them as having been admitted within the prescribed time, subject to the fulfillment of the undertaking given by APDMC, of conducting extra classes to make-up the deficit or loss of working days/hours.

18. We place on record, our appreciation for the services rendered by Shri C.L.M. Reddy, Court appointed Database Administrator. All the stakeholders – be it, AFRC, APDMC or for that matter the petitioner and the *Amicus Curiae*, were all in praise for Shri Reddy for his integrity, sincerity, impartiality, competence and industry. They said this in one voice - but for him, it was not possible to successfully complete the online examination in such a short time and with such precision and perfection.

19. We direct the Registrar General to immediately get in touch with Shri Reddy, not only to communicate our appreciation for the invaluable services rendered by him at such a short notice given by the Court, but also to request him to submit his final professional bill of expenses and allowances, which will have to be honoured by APDMC, as was assured to the Court.

20. This order only governs the action of completion of online entrance examination under the supervision of the Court appointed Database Administrator.

21. We make it clear that the other issues – such as, irregularity in the actual admissions made by the respective Private Medical Colleges and the extent of involvement of APDMC in that behalf; also regarding non-cooperation by APDMC officials to the Court appointed Database Administrator during the re-examination conducted on 20.08.2015; and about any irregularity noticed in respect of any specific case concerning the online examination held on 08.10.2015 and other related issues will be examined independently. For that, we defer this matter to 23rd November, 2015.

Ordered accordingly.

Order accordingly.

I.L.R. [2016] M.P., 507

REVIEW PETITION

Before Mrs. Justice S.R. Waghmare

Review Pet. No. 67/2015 (Indore) decided on 9 April, 2015

ALLAUDDIN

...Petitioner

Vs.

SMT. SAYRABI & ors.

...Respondents

Civil Procedure Code (5 of 1908), Section 107, Order 9 Rule 13, Order 43 Rule 1(d) & Order 47 Rule 1 - Setting aside of ex parte decree - Review - MJC was dismissed by trial Court primarily on the ground of limitation - High Court in appeal by way of clemency (since the respondent was a pardanashin woman and dependent on her lawyer for conducting her case), and by imposing cost of Rs. 3,000/- condoned the delay and also allowed the application under Order 9 Rule 13 and set aside the ex parte decree - Held - Power of the High Court in a review are very much limited and the errors have to be apparent on the face of record - Once the Court consciously come to the conclusion that there was sufficient cause shown by the respondent - Then it was definitely clothed with the jurisdiction to consider the effect of setting aside the impugned order - Therefore, Review Petition dismissed as being without merit. (Paras 2, 6 & 8)

सिविल प्रक्रिया संहिता (1908 का 5), धारा 107, आदेश 9 नियम 13, आदेश 43 नियम 1(डी) व आदेश 47 नियम 1 - एकपक्षीय डिक्ली अपास्त की जाना - पुनर्विलोकन - विचारण न्यायालय द्वारा एम.जे.सी. को प्राथमिक रूप से परिसीमा के आधार पर खारिज किया गया - अपील में उच्च न्यायालय ने दया के रूप में (चूंकि प्रत्यर्थी पर्दानशी महिला थी और अपना प्रकरण संचालित करने के लिये अपने वकील पर निर्भर थी) रु. 3,000/- व्यय अधिरोपित करते हुये विलंब माफ किया एवं आदेश 9 नियम 13 के अंतर्गत आवेदन भी मंजूर किया तथा एकपक्षीय डिक्ली अपास्त की - अभिनिर्धारित - पुनर्विलोकन में उच्च न्यायालय की शक्ति बहुत अधिक सीमित है तथा त्रुटियां अभिलेख पर प्रकट रूप से दर्शित होनी चाहिये - एक बार जब न्यायालय सचेत रूप से इस निष्कर्ष पर पहुंचता है कि प्रत्यर्थी द्वारा पर्याप्त कारण दर्शाया गया था - तब वह निश्चित रूप से आक्षेपित आदेश अपास्त किये जाने के प्रभाव को विचार में लेने के लिये अधिकारिता प्राप्त था - इसलिये पुनर्विलोकन याचिका गुणदोष विहीन होने के कारण खारिज।

Cases referred :

AIR 1995 SC 455, AIR 1998 Rajasthan 302, 2010 (I) MPWN 27, (2015) 2 SCC 390.

Tosif Warsi, for the petitioner.

Sunil Jain with Aviral Vikas, for the respondent No.1.

Vinay Zelawat with A.S. Parihar, for the respondents No. 2 to 4.

ORDER

S.R. WAGHMARE, J. :- This review petition has been filed under Section 11 of the M.P. High Court Rules, 2008 for reviewing the order dated 21.01.2015 passed by this Hon'ble Court in M.A. No.887/2014.

2. Counsel for the petitioner has vehemently urged the fact that the respondent Sayra Bi had filed the aforesaid appeal and had only prayed for setting aside the order dated 06.03.2014 in MJC No.13/13 by First A.D.J., Sendhwa, Distt. Barwani. Counsel contended that the MJC had been filed by respondent Sayra Bi because an ex-parte decree had been passed against her in Civil Suit No.3B/11 by the 02nd Additional District Judge, Sendhwa and the MJC had been filed for setting aside the ex-parte decree under Order 9 Rule 13. Unfortunately however this MJC had also resulted in a dismissal primarily on the ground of limitation since Sayra Bi had failed to take prompt action for setting aside the ex-parte decree. Counsel candidly admitted that by the order dated 21.01.2015 passed in Miscellaneous Appeal No.887/2014, this Court had by way of clemency (since the respondent Sayra Bi was a Pardanashin woman and dependent on her lawyer for conducting her case) by imposing costs of Rs.3,000/- had condoned the delay and set aside the order purely on humanitarian grounds. However, Counsel has vehemently urged before this Court that while allowing the appeal, this Court has in the impugned paragraph held thus:-

“In this light, (if) the delay is condoned and the Trial Court is directed to re-hear the matter. However, by remanding the same, loss shall be caused to the respondent No.1. And hence, it is directed that the impugned judgment decree is set aside and the matter is remanded to the trial Court for a fresh decision in the matter.”

And Counsel submitted that such an order was adversely affecting the

right of the petitioner plaintiff. Counsel submitted that a valuable right had been accrued to the plaintiff by the judgment and decree passed in COS No.3B/11 as already stated above and this Court had failed to consider that the respondent Sayrabi was only seeking setting aside of the order passed in MJC No.13/13 and that would at the most restore the MJC but the judgment and decree could not have been setting aside in COS No.3-B/11 and it is in this sense Counsel urged that this Court lacked the jurisdiction to set aside the judgment and decree while exercising powers under Order XLIII Rule 1 of the CPC. Counsel also vehemently urged that such an relief was not sought even by the respondent Sayra Bi in the Miscellaneous Appeal No.887/14 and Counsel vehemently urged that this review petition be allowed and the impugned order dated 21.01.2015 be set aside and the fresh order be passed in the interest of justice.

3. Per contra Counsel for the respondents has vehemently urged the fact that this review petition was also delayed by period of 11 days and sufficient explanation has not been given by the petitioner as required under the provisions of law. Illness and routine old age cannot be a ground for condonation of delay. Coming to the main objection Counsel urged that a review petition should be allowed when the error is apparent on the face of the record and such an error, therefore, must be patent and should not require consideration and assessment of materials and evidences recorded in the case. Both the parties according to the Counsel for the respondents were heard on the occasion and the discretion exercised by the Court after hearing both the parties cannot be challenged only on the ground that one out of two views could be taken by the Court. And the petitioner has failed to make out any case warranting review of order. Counsel relied on *Smt. Meera Bhanja Vs. Nirmala Kumari Choudhary* [AIR 1995 SC 455] and *Ishwar Dutt v. Gyan Chand* [AIR 1998 Rajasthan 302].

4. Counsel for the respondents also urged the fact that once the appeal had been filed under Order 43 Rule 1(d) of CPC by Sayrabi, this Court would have ample jurisdiction under Section 107 of the CPC. Counsel submitted that dismissal of the application of the respondent Sayra Bi under Order 9 Rule 13 should be considered as a dismissal simpliciter and should not be compared with a dismissal on merits. The appellate Court i.e. the present Court, therefore, had the jurisdiction to consider the case for remand either after hearing the matter afresh on the application or it can also set aside

the ex-parte decree on being satisfied that the appellant was prevented by a sufficient cause to appear before the Court as required under Order 9 Rule 13 of CPC. Counsel vehemently urged that both the parties were heard at length and this Court was satisfied about the sufficiency of the cause which prevented respondent Sayra Bi from appearing in the main suit also and hence the ex-parte decree was set aside.

5. Counsel also submitted that the word “shall” as used in Order 9 Rule 13 of CPC casts a duty on the Court that on being satisfied about the sufficiency of the cause for non-appearance it had to set aside the ex-parte decree also. Besides Counsel submitted that merely remanding the matter for a fresh decision in the MJC and for considering the application under Order 9 Rule 13 all over again on remand, would certainly defeat the purpose of Order 43 Rule 1-D of the CPC and the trial Court would again go through the sufficiency of the cause for non-appearance before the trial Court in the Civil Suit No.3B/11. Counsel submitted that the cardinal principle i.e. “procedure is hand maid of justice” and should not be used to abuse the process of Court. Merely raising technical objections would not do substantial justice between the parties, besides Counsel urged that the petitioner has wrongly stated that relief was not claimed by the respondent Sayra Bi in the appeal. The relief clause in the appeal is reproduced for convenience thus:-

“appeal may kindly be allowed and after setting aside the impugned order passed by the learned Trial Court, the application filed by the appellant under Order IX Rule 13 of CPC may kindly be allowed.”

6. On considering the above submissions, I find that the powers of this Court in a review are very much limited and the errors have to be apparent on the face of the record. Once the Court has consciously comes to the conclusion that there was sufficient cause shown by the respondent Sayrabi then it was definitely clothed with the jurisdiction to consider the effect of setting aside the impugned order. In this light it is important to consider the explanation of Order 9 Rule 13 of CPC. The Order 9 Rule 13 of CPC clearly indicates that if any appeal against ex-parte decree has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under Order 9 Rule 13 of the CPC for setting aside the ex-parte decree and hence the Court could not have passed inconsequential or ineffective orders which would serve no purpose or cannot be implemented

under the provisions of law. Just setting aside the impugned order passed in MJC No.13/13 would have been of no use to the present respondent Sayrabi.

7. The same contention could not have been raised by the appellant in the First Appeal in case she could have appeal against the ex-parte judgment and decree passed in Civil Suit No.3B/11 and having considered this, the Court has passed the impugned order and it cannot be said that this Court has not considered the effect of simply restoring the MJC. Besides the important fact that should not be lost sight of is that by way of clemency and the fact that the respondent was a Pardanashin lady who was solely dependent on her lawyer the appeal had been allowed and the judgment and decree passed in the Civil Suit had also been set aside. On this ground alone, the Court had very well considered the fact that reverting the matter to the MJC would again result in a dismissal since the lower Court was not satisfied with the sufficiency of the cause shown by the appellant and to do substantial justice between the parties as already stated in the order this Court had set aside the judgment and decree passed in Civil Suit No.3B/11.

8. Thus placing reliance on *Heeralal & others v. Shiv Kumar and another* [2010(I) MPWN 27] the Court had held that the review powers are very limited and the Court cannot, therefore, act as an appellate Court. The jurisdiction of this Court cannot be invoked even if the order is erroneous and even if the grounds under Order 47 Rule 1 are not existing, the review is not maintainable. This Court also feels that the complaint of the petitioner pertains to a purely procedural error if at all and cannot be remedied under the review jurisdiction.

9. Also placing reliance on a very recent judgment of the Apex Court in the matter of *D.R. Somayajulu Vs. Attili Appala Swamy and others* [(2015) 2 SCC 390] the Apex Court had held that the High Court had erred in exercising of its review jurisdiction and it was not justified in setting aside its own order and the High Court order had been set aside and thus I find that it would be improper to pass orders which cannot be implemented in its truest spirit and do not give substantial justice to both the parties. In this view also the review must fail. The petition is, therefore, **dismissed** as being without merit. No costs.

CC as per rules.

Petition dismissed.

I.L.R. [2016] M.P., 512

APPELLATE CIVIL

Before Mr. Justice U.C. Maheshwari

S.A. No. 762/2013 (Jabalpur) decided on 22 January, 2014

KISHORILAL TIWARI

...Appellant

Vs.

KANDHILAL

...Respondent

A. Land Revenue Code, M.P. (20 of 1959), Sections 109 & 110 - Mutation of record - Agreement to sale - No mutation could be carried out by authority. (Para 7)

क. मू राजस्व संहिता, म.प्र. (1959 का 20), धाराएं 109 व 110 - अभिलेख का नामांतरण - विक्रय का करार - प्राधिकारी द्वारा नामांतरण नहीं किया जा सकता।

B. Land Revenue Code, M.P. (20 of 1959), Sections 109 & 110 - Mutation of record is permissible only on the basis of sale deed or other admissible documents under the law. (Para 7)

ख. मू राजस्व संहिता, म.प्र. (1959 का 20), धाराएं 109 व 110 - अभिलेख का नामांतरण, केवल विक्रय विलेख या विधि अंतर्गत ग्राह्य अन्य दस्तावेजों के आधार पर अनुज्ञेय है।

C. Transfer of Property Act (4 of 1882), Section 54 - Contract for sale - Does not confer any right and title - Not a document of acquisition of title and possession. (Para 8)

ग. सम्पत्ति अन्तरण अधिनियम (1882 का 4), धारा 54 - विक्रय के लिए संविदा - कोई अधिकार एवं स्वत्व प्रदान नहीं करती - स्वत्व या कब्जे के अर्जन का दस्तावेज नहीं।

D. Civil Procedure Code (5 of 1908), Section 9 and Land Revenue Code, M.P. (20 of 1959), Section 257 - Bar of civil suit - Contract for sale - Validity thereof - Could only be examined by Civil Court and not by revenue Court. (Para 10)

घ. सिविल प्रक्रिया संहिता (1908 का 5), धारा 9 एवं मू राजस्व संहिता, म.प्र. (1959 का 20), धारा 257 - सिविल वाद का वर्जन - विक्रय के लिए संविदा - इसकी विधिमाम्यता - केवल सिविल न्यायालय द्वारा परीक्षण किया जा सकता है और न कि राजस्व न्यायालय द्वारा।

Case referred :

2009 (2) SCC 532.

R.K. Verma and Sourabh Shrivastava, for the appellant.

ORDER

U.C. MAHESHWARI, J. :- The appellant/defendant has filed this appeal under Section 100 of the CPC, being aggrieved by the judgment and decree dated 31.07.2013 passed by Additional Judge to the Court of District Judge Sihora, District Jabalpur, in Civil Regular Appeal No.61-A/2013 whereby, dismissing his appeal, the judgment and decree dated 28.08.2009, passed by IIIrd Civil Judge Class-II Sihora, in Civil Original Suit No.31-A/08, decreeing the suit of the respondent/plaintiff against him for declaration and perpetual injunction with respect of the agricultural land described in the plaint, has been affirmed.

2. The facts giving rise to this appeal in short are that, the respondent herein has filed the impugned suit for declaration and permanent injunction against the appellant with respect of the agricultural land bearing No. 34/4 Area 1.416 Hectare, (renumbered in the fresh settlement as Khasara No.55 area 1.41 Hectar) situated in Patwari Halka No.7 at village Nigwani, contending that he being title holder is in possession of such land on the strength of the registered sale deed dated 10.09.1970 (Ex.D.1) executed by appellant in his favour. The appellant did not have any authority to keep or continue his name as Bhoomiswami in the revenue record on such land. The order dated 06.10.2012 passed by Naib Tahsildar in revenue case No.22.A/6/98-99, directing the mutation of such land in the name of appellant is ab-initio void. As per further averment that the alleged transaction of the sale was neither the transaction of mortgage nor had taken place with the agreement to sale again to the appellant. It is also stated that with malafide intention, the appellant on the basis of forged and fabricated agreement to sale, has got mutated such land in his name by the aforesaid order of the Naib Tahsildar. The agreement was not only forged and fabricated document but the same had not given any right or title to the appellant. In any case, the agreement on which the mutation order was obtained itself, had not given any right or title of the land in favour of the appellant and in such premises, the impugned suit was filed with the relief mentioned above.

3. In the written statement of the appellant by admitting the execution of the aforesaid registered sale deed by him in favour of the respondent, the other facts stated regarding title and possession of the respondent are denied. In addition to it, in special pleadings, it is stated that the respondent/plaintiff has not come with clean hands. The respondent was the money lender and the appellant was in need of money and due to that, in the month of August, 1967, he obtained Rs.700/- as loan on interest @ 3% per month from the respondent so the interest sum has become Rs.756/- in three years and to carry out the aforesaid sale deed vide dated 10.09.1970, Rs.800/- was spent by the respondent. Accordingly, the total sum of the loan had become (Rs.700+756+800) total Rs.2,256/- and that's why on execution of the sale deed Rs.2,300/- was shown the remaining consideration. As the respondent was the money lender, the appellant had mortgaged his land with him in consideration of the sum of the loan in the shape of the aforesaid sale deed dated 10.09.1970, therefore, simultaneously, they also entered into an agreement on the same day whereby, the term to re-sale the aforesaid land in favour of the appellant was finalized. According to it, the respondent had agreed to return the land and execute the sale deed in favour of appellant on repayment of the sum of the loan. On the terms of such agreement, the appellant went to the respondent to pay the aforesaid sum with a prayer to execute the sale deed in his favour, but the respondent refused to take such sum and also denied to execute the sale deed of such land in favour of the appellant. Beside the impugned case, the respondent had also kept the land of Neema Bai and the house of some Mahila Kotwar under the mortgaged in the shape of registered sale transaction and lateron, did not redeem the same and become the owner of such property contrary to the rights of such mortgagers. Accordingly, the respondent is used to snatch the property of others. In further averments, it is stated that the respondent being money lender had not taken any license to carry out such business and the alleged sale deed dated 10.09.1970 being executed on the expenses of the appellant, to secure the repayment of the loan had not conferred any right or title to the respondent in the disputed land. The possession of the same was never remained with the respondent even after execution of the sale deed. Only with intention to snatch the property of the appellant, the impugned suit after passing the mutation order by the revenue authorities in favour of appellant and dismissing the appeal of the respondent filed against such order by the sub-Divisional Officer, instead to file further appeal in the Court of Commissioner, the respondent has filed the impugned suit to snatch the property of the appellant. It is further stated

that the order of the mutation passed by revenue Court could not be declared to be ab-initio void as the same is out of the territorial jurisdiction of the Civil Court. With these averments, the prayer for dismissal of the suit is made.

4. In view of the aforesaid pleadings, as many as four issues were framed by the trial Court on which the evidence was adduced by the parties. On appreciation, the suit of the respondent was decreed by holding him to be the Bhoomiswami and title holder of the land with possession. The abovementioned mutation order dated 6.10.2012 was also declared to be ab-initio void and the decree of perpetual injunction restraining the appellant to interfere in title and possession of such land was passed. Being dissatisfied with such judgment and decree of the trial Court, the appellant approached the appellate Court but on consideration by affirming the judgment and decree of the trial Court, the same was dismissed on which the appellant/defendant has come to this Court with this appeal.

5. Shri R.K. Verma along with Shri Sourabh Shrivastava, learned appearing counsel of the appellant's after taking me through the record of the Courts below along with impugned judgments argued that any of the Courts below have not considered the actual legal question involved in the matter and without considering the same with proper approach, the suit of the respondent has been decreed by the trial Court and on term of the appellate Court, such decree was affirmed under the wrong premises. In continuation he said that, it is undisputed and admitted fact that initially the impugned land was belonging to the appellant/defendant as Bhoomiswami and the alleged sale deed dated 10.09.1970 was executed by the appellant in favour of the respondent but in fact, it was not a outright sale, but was a loan transaction. The appellant was in need of the money and the respondent being money lender, he took the loan from him and as a security of such loan and it's interest, the aforesaid sale deed was executed and it's expenses also afforded by the respondent, but the same was a part of loan transaction and there was intention of the parties to return the aforesaid land by the respondent to the appellant by executing the sale deed on repayment of entire sum of the loan and, therefore, the possession of the disputed land was not given to the respondent despite stating the delivery of the same in the sale deed the same was remained with the appellant and in that respect an agreement to sale (Ex.D.1) had also taken place independently with the terms that on repayment, the respondent will execute the sale deed of such land in favour of the appellant. Pursuant to such agreement, to perform the part of his contract, the respondent

went to the appellant to pay such sum, but the same was not accepted by him and was also not prepared to execute the sale deed in favour of the appellant. On which on the strength of the aforesaid agreement to sale the appellant approached the revenue authorities to get mutated the disputed land again in the name of the appellant by scoring out the name of the respondent recorded on the strength of the aforesaid sale deed. Such mutation proceedings was duly contested by the parties and ultimately by the aforesaid order of the revenue Court by allowing the application of the appellant, the land was directed to be mutated in his name. On filing the appeal before the Sub-Divisional Officer by the respondent, the same was dismissed. Such dismissal was challenged before the Commissioner in the first inning of the revenue case, but on consideration by setting aside the order of Tahsildar as well as of the SDO, the case was remitted back to the Tahsildar with some direction to decide afresh. In the light of such direction of the Commissioner, again the case was decided by the Naib Tahsildar by order dated 6.10.2012 in favour of the appellant and such mutation order was again challenged in appeal before the Sub-Divisional Officer by the respondent but on consideration such appeal was also dismissed. Thereafter, such order of the revenue Court was not challenged by the respondent before the Commissioner, the superior revenue authorities and has filed the suit. Firstly, he said that against the order of the revenue Court which was passed in accordance with law, the Civil Court did not have jurisdiction to entertain the suit and set aside such order of revenue Courts, secondly said that in view of the loan transaction of the parties, the decree of declaration as prayed by the respondent/plaintiff in the suit could not have been passed. In continuation he said that the Courts below concurrently committed error in holding the above-mentioned agreement to sale (Ex.D-1) is inadmissible in the lack of registration. As per such findings, the registration of such agreement dated 10.9.1970, was necessary under the law and in the lack of such registration, the same could not be looked into for any purpose while, in view of the then provision of Section 17 of the Registration Act, the registration of the agreement to sale was not required and in such premises, the unregistered agreement was permissible and, therefore, the Courts below have committed grave error in giving the aforesaid finding contrary to the law applicable to the aforesaid agreement. In continuation he said that, on the basis of aforesaid agreement, it is apparent that on the date of the sale deed dated 10.09.1970 (Ex.P.1) there was a condition and understanding between the parties to resell the property to the appellant, then the findings of the Court below, that such condition being not inserted in the

sale deed (Ex.P/1), such transaction of sale could not be deemed to be transaction of mortgage on the basis of separate agreement, is not sustainable. As such, in view of such agreement to sale, the suit of the respondent should not have been decreed by any of the Courts below and, therefore, it is a case in which the Courts below have apparently ignored the then provision of Section 17 of the Registration Act so also other related provision of Transfer of Property Act and, therefore, the substantial question of law as proposed in the appeal memo requires answer at this stage under Section 100 of the CPC., and prayed to admit the appeal on such proposed substantial questions of law. He also placed his reliance on a decision of the apex Court in the matter of *Avinash Kumar Chauhan vs. Vijay Krishna Mishra* reported in 2009(2) SCC 532.

6. Keeping in view the arguments advanced, I have carefully gone through the record of the Courts below along with the impugned judgments.

7. It is undisputed fact in the matter that the sale deed dated 10.09.1970 (Ex.P.1) with respect of the land in dispute was executed by the then Bhoomiswami, the appellant/defendant, after taking the consideration, in favour of the respondent. As per averments of such sale deed Ex.P.1, the possession of the land was also given to the respondent and it is also apparent from the available revenue record that on the strength of such sale deed, the name of the respondent was also mutated as Bhoomiswami in the revenue record by the revenue authorities and subsequent to such mutation, at any point of time either independently or on the strength of the aforesaid agreement, no registered sale deed for resell of the property by the appellant to the respondent had taken place. Only on the strength of alleged agreement dated 10.09.1970 (Ex.D.1) for which no averments were made in the sale deed Ex.D.-1, the appellant had filed the application for mutation of his name in the revenue record by scoring out the name of the respondent. Although, the execution of such agreement has been denied by the respondent. In any case, for the sake of argument if it is deemed that such agreement had taken place between the parties then on the basis of only such agreement Ex.D.1, the appellant did not have any authority to get mutated the land in his name. It is trite law that unless the property is acquisitioned through admissible document like sale deed or otherwise permissible under the law mere on the basis of the agreement or it's term, no mutation could be carried out by the revenue authorities at the place of recorded Bhoomiswami. The contract to sale is defined in last part of Section 54 of the Transfer of Property Act. The same is read as under:-

“54. “Sale” defined.- “Sale” is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

.....

.....

Contract for sale.- A contract for the sale of immoveable property is a contract that a sale of such property shall take place on terms settled between the parties.

It does not, of itself, create any interest in or charge on such property.”

8. In view of the aforesaid definition of contract for sale, for the sake of the arguments the alleged agreement (contract) to sale (Ex.D.1) projected by the respondent is taken into consideration as admissible document even then it was only the document contending the terms and conditions on which the sale was to take place in future. But such contract itself had not given any right and title to the respondent in the property. So in such premises, in view of the then existing provision of Section 17 of the Registration Act if such agreement was not necessary to get registered in the year 1970 even then, it had not given any right title to the appellant, and the same could not be treated to be valid document for acquisition of the title and the possession of the property in dispute to the appellant to get mutated the same in his name unless according to it's terms, the sale deed had taken place. As such the agreement (Ex.D/1) was not sufficient to pass the order of mutation in favour of the appellant by Tahsildar and it is apparent fact that only on the basis of such agreement, mutation order was passed by the Tahsildar and on filing the appeal by the respondent against such order, the same was dismissed by the Sub-Divisional Officer and again on filing the second appeal before the Commissioner, without considering such aspect, the order of the Tahsildar as well as of SDO were set aside and the case was remitted back to the Tahsildar with some direction to enquire the facts of the loan transaction and decide the matter afresh. But even after remanding the matter to Naib Tahsildar, such authority without considering the aforesaid aspect, again passed the mutation order 6.12.2000 on the basis of aforesaid agreement (Ex.D/1) in favour of the appellant. The same being contrary to the aforesaid mandatory provision of the definition of contract to sale, is not sustainable. In such premises, for the sake of arguments

if the findings of the trial Court as well as of the appellate Court holding the aforesaid agreement in the lack of registration as per requirement of Section 17 of the Registration Act, is not admissible by framing the substantial questions of law, is set aside even then, on the basis of such agreement (Ex.D/1) in view of the foresaid discussions based on the provision of Section 54 of the Transfer of Property Act, the impugned suit of the respondent based on the strength of registered sale deed (Ex.P/1) could not be dismissed by setting aside the impugned judgments of the Courts below in toto. It is settled proposition of law that no case could be entertained by the Court to decide any academic question if even on deciding such question, no fruitful purpose is solved in the matter. In such premises, I have not found any material circumstance in the matter giving rise to any question of law rather than the substantial question of law requires any consideration under Section 100 of the CPC.

9. Apart the aforesaid, on going through the entire record, I have found that subsequent to the aforesaid agreement dated 10.09.1970 till filing the impugned suit by the respondent for declaration and permanent injunction, the appellant did not take any steps to file the suit for Specific Performance on the strength of such agreement to sale against the respondent stating that inspite his readiness and willingness to fulfill his part of the contract, the respondent has failed to perform his part of the agreement. So, in the lack of such suit also, the approach of the Courts below based on the registered sale deed dated 10.09.1970 (Ex.P.1) could not be said to be contrary to any law or the procedure and in such premises also, this appeal is not involving any substantial question of law at this stage.

10. It is settled proposition of law that the validity of the contract to sale could only be examined by the Civil Court, if the matter brought before such Court in accordance with the procedure and within limitation and not by the revenue Court. In such premises, it could be said that unless after giving recognition to the impugned agreement Ex.D.1, the decree for Specific Performance is passed by the Civil Court, the revenue Court did not have any authority to draw the inference in favour of such party like the appellant that on the strength of the agreement to sale, he has acquired the right and title over the property in dispute and entitled to get mutated such property in his name in the revenue record. So in such premises also, I have not found any substance to frame any proposed substantial questions of law.

11. So far as the case law of the apex Court in the matter of *Avinash Kumar*

Chauhan (supra) is concerned, this Court did not have any dispute regarding the principle laid down in such case, but in view of the abovementioned factual matrix of the case at hand, the same being distinguishable on facts, is not helping to the appellant. Such case was decided by the apex Court taking into consideration the question of admissibility of the concerning documents in the light of available factual matrix of such cited case and, therefore, before applying such principle to the present case, this Court is also bound to examine the matter in the available scenario of the case at hand. On examining the same, in view of the abovementioned circumstances of the case at hand even after holding the impugned agreement dated 10.9.1970 (Ex.D.1) to be admissible, the impugned concurrent decree of declaration in favour of the respondent based on a registered sale deed executed by the appellant could neither be set aside nor the suit could be dismissed by this Court.

12. In view of the aforesaid discussions, I have not found any perversity, illegality, irregularity or anything against the propriety of law in the impugned judgments of the Courts below giving rise to any question of law rather than the substantial question of law in the matter. Consequently, this appeal being devoid of any merit, deserves to be and is hereby dismissed at the initial stage of motion hearing.

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

Appeal dismissed.

I.L.R. [2016] M.P., 520

APPELLATE CIVIL

Before Mr. Justice Rohit Arya

S.A. No. 374/2012 (Gwalior) decided on 9 July, 2014

NOORBAKSH KHAN

Vs.

SALIM KHAN & ors.

... Appellant

... Respondents

Transfer of Property Act (4 of 1882), Section 3 - Attesting witness
- Held - The scribe appends his signature on the 'will' as scribe - He is not a witness to the 'will' but a mere writer of the 'will' - The element of the animus to attest is missing i.e., intention to attest is missing - His signature is only for the purpose of authenticating that he was a scribe of the 'will'.

(Para 10)

सम्पत्ति अन्तरण अधिनियम (1882 का 4), धारा 3 - अनुप्रमाणक साक्षी -

अभिनिर्धारित – लेखक 'वसीयत' पर अपने हस्ताक्षर लेखक के रूप में करता है – वह 'वसीयत' का साक्षी नहीं बल्कि मात्र 'वसीयत' का लेखक है – अनुप्रमाणित करने के आशय (animus) के तत्व का अभाव है अर्थात्, अनुप्रमाणित करने के आशय का अभाव है – उसके हस्ताक्षर का प्रयोजन केवल यह अधिप्रमाणित करने का है कि वह 'वसीयत' का लेखक था।

Cases referred :

AIR 1969 SC 1147, AIR 2001 SC 2802.

Prashant Sharma, for the appellant.

Rishikesh Bohre, for the respondents No. 1 to 10 & 13 to 17.

J U D G M E N T

ROHIT ARYA, J. :- This appeal under section 100 CPC by the plaintiff is directed against the concurring judgment and decree dated 29/06/2012 passed in civil appeal No.14A/2011 (old No.4A/2009) by II Additional District Judge (Fast Track Court), Mungawali, District Ashok Nagar affirming the judgment and decree passed by the trial Court dated 04/05/2009 in civil suit No.4A/2008, plaintiff's suit for declaration and permanent injunction has been dismissed.

2. Facts necessary for disposal of the appeal in narrow compass are to the effect that plaintiff, defendants No.1, 2 and 3 are real brothers and defendant No.4 is real sister of these persons. There was another sister who had died on 16/03/1999. Plaintiff and defendants are sons and daughter of late Noor Mohammad. Noor Mohammad died on 03/03/1988 and his wife, Gulshanbi died on 15/11/1996. The suit property is an agricultural land falling in survey No.52 area 0.408 hectare village Kasba Range Mungawali (hereinafter referred to as 'the suit land'). The suit property was purchased in the name of Noor Mohammad from one Dhyan Mohammad vide registered sale deed dated 03/10/1973. During pendency of the suit, two sons of late Noor Mohammad, namely; Bhure Khan and Ismail Khan have died. Heirs of Bhure Khan are respondents No.2 & 3 and heirs of another son, Ismail Khan are respondents No.4 to 8. During pendency of the first appeal, Munna Khan/respondent No.1/defendant No.1 has also died and his legal heirs have been further added in the memo of appeal as A, B, C, D, E, F, G, H, I, J.

3. As per plaint allegations, 38 years ago, late Noor Mohammad had partitioned the immovable property, a house amongst his 04 sons and they

are living independently in their respective portions of the house. As during that time, the plaintiff was minor, he has been living with his parents. Plaintiff claimed to be in possession over the suit land since the time of his father and doing cultivation. According to plaintiff, adjacent to the suit land, an area of 1.045 hectare out of 4.306 hectare falling in survey No.51 was purchased by the plaintiff by registered sale deed 05/06/1979 and marked (*Batakan*) division No.51/2. Late Noor Mohammad during his life time has executed a 'will' dated 05/02/1987 primarily in favour of his wife, Gulshanbi. The aforesaid suit land was bequeathed in her favour with further stipulation that after her death, the same shall devolve upon the plaintiff. Defendants' in collusion with the revenue authorities got their names mutated in the revenue record as regards suit land without knowledge to Gulshanbi. The plaintiffs' mother came to know the fact of mutation after obtaining certified copy from Patwari on 21/08/1995. Therefore, against the aforesaid mutation order, an appeal No.86/9495 was filed before the Sub-Divisional Officer and during pendency (sic:pendency) of the appeal, Gulshanbi died. The plaintiff's name has been substituted as per the 'will' executed by late Noor Mohammad. However, the appeal was dismissed by an order dated 04/02/1999 on the ground that the original 'will' was not produced in support of claim of the plaintiff. Being aggrieved thereof, the plaintiff has filed the suit for declaration and permanent injunction.

4. Defendants' No.1 and 3 have filed written statement and denied plaintiff allegations. It was submitted that no partition had ever been effected by late Noor Mohammad amongst his 04 sons. All brothers are living in the same house in different portions and are jointly ploughing the suit land.

5. Trial Court framed as many as 09 issues. Relevant for the purpose of appeal are two issues to the effect firstly; as to whether Noor Mohammad had effected partition amongst four sons and defendants No.1 to 3 had separated with their shares during his life time, secondly; as to whether late Noor Mohammad had executed a 'will' date 05/02/1987. As regards issue No.1, the trial Court recorded a finding in the affirmative to the effect that during his life time, Noor Mohammad effected partition amongst his four sons and separated them with their shares. Second issue, as regards factum of execution of the 'will' it is found that none of the attesting witnesses have been examined as plaintiff asserted that attesting witnesses have died. However, plaintiff has examined scribe of the 'will', Jai Babu (P.W.2) to prove the factum of execution of the 'will'. No other evidence was led with reference to and in the context to the existence of the 'will' by the plaintiff.

6. For a valid 'will' in terms of section 63 of Succession Act (39 of 1925), it is to be attested by two witnesses. Further, to prove factum of execution of 'will', in terms of section 68 of the Evidence Act, it is to be proved at least by one of the attesting witnesses.

7. Section 3 of the Transfer of Property Act defines the word "attested" and the meaning of the definition clause is well explained by the Hon'ble Apex Court reported in AIR 1969 SC 1147, *M.L.Abdul Jabbar Sahib Vs. H.V.Venkata Sastri & Sons* to the following effect:

"8. It is to be noticed that the word "attested", the thing to be defined, occurs as part of the definition itself. To attest is to bear witness to a fact. Briefly put, the essential conditions of valid attestation under S.3 are: (1) two or more witnesses have seen the executant sign the instrument or have received from him a personal acknowledgment of his signature; (2) with a view to attest or to bear witness to this fact each of them has signed the instrument in the presence of the executant. It is essential that the witness should have put his signature *animo attestandi*, that is, for the purpose of attesting that he has seen the executant sign or has received from him a personal acknowledgment of his signature. If a person puts his signature on the document for some other purpose, e.g., to certify that he is as scribe or an identifier or a registering officer, he is not an attesting witness."

8. In AIR 2001 SC 2802, *N. Kamalam (dead) and another Vs. Ayyaswamy and another*, Hon'ble Supreme Court has again elaborately and lucidly explained the scope, meaning and consequences of attestation in the context of factum of execution of 'will'. Significant requirements are found to be two fold; (1) that, the attesting witness should witness the execution which implies his presence; and (2) that, he should certify or mark for execution by subscribing his name as a witness; which implies a conscious intention to attest, i.e., attesting witness as *animus* to attest.

9. Subscribing of signatures on the 'will' by the scribe cannot be equated with the signatures of attesting witnesses as signatures of the attesting witnesses are for a specific purpose of having witnessed the execution and for fulfillment of the statutory requirements.

10. The scribe appends his signatures on the 'will' as scribe. He is not a witness to the 'will' but a mere writer of the 'will'. The element of the *animus* to attest is missing, i.e., intention to attest is missing. His signatures are only for the purpose of authenticating that he was a scribe of the 'will'.
11. In view of the aforesaid enunciation of law holding the field, the evidence of the scribe, P.W.2, Jai Babu in the case in hand cannot substitute for that of attesting witnesses.
12. Even otherwise, upon perusal of the deposition of P.W.2, Jai Babu, in the opinion of this Court, it is worth discredit for the reasons:
- (a) According to him, late Noor Mohammad by the alleged 'will' dated 05/02/1987 had bequeathed the house by the aforesaid 'will' in favour of his wife, Gulshanbi whereas on perusal of exhibit P/2C, the same is passed to be only in respect of the suit property, i.e., agricultural land admeasuring 0.408 hectare falling in survey No.52 situated in village Kasba Range Mungawali reflects falsity or ignorance of the substance of the 'will' in his deposition; and
 - (b) On criminal charges of having prepared a document fraudulently, he was prosecuted and convicted and sentenced though he states that he was acquitted by the appellate Court.
13. As such, deposition of P.W.2, Jai Babu cannot be substituted to that of attesting witnesses and the 'will' cannot be said to have been proved. His deposition leads to suspicion as regards not only factum of its execution but also contents thereof.
14. The trial Court and the first appellate Court have rightly recorded concurrent findings of fact answering the issue as regards factum of execution of the 'will' in negative and dismissed the suit of the plaintiff.
15. The aforesaid findings have been recorded after critically evaluating the evidence on record. Findings so recorded are pure findings of fact and impregnable in nature. No question of law, much less substantial question of law arises warranting interference under section 100 of the Code.
16. The appeal sans merit and is accordingly dismissed.

Appeal dismissed.

I.L.R. [2016] M.P., 525

APPELLATE CIVIL

Before Mr. Justice S.K. Gangele & Mr. Justice S.K. Palo

F.A. No. 297/2010 (Gwalior) decided on 4 September, 2014

BASUDEV JATAV

...Appellant

Vs.

SMT. REKHA JATAV

...Respondent

A. *Hindu Marriage Act (25 of 1955), Section 13(1)(i)(i-a) - Cruelty* - Obligation of social status of the persons involved and the economic conditions and other matters varies from time to time, place to place and individual to individual - It is antithesis to natural love and affection between husband and wife - Destructive of soft feeling of concern for each other and sense of togetherness which is bed rock of matrimonial relations. (Para 11)

क. हिन्दू विवाह अधिनियम (1955 का 25), धारा 13(1)(i)(i-ए) - क्रूरता - संबंधित व्यक्तियों के सामाजिक दायित्व, आर्थिक स्थितियां एवं अन्य मुद्दे समय, स्थान एवं व्यक्ति विशेष के आधार पर परिवर्तनशील होते हैं - यह पति-पत्नी के मध्य नैसर्गिक प्रेम एवं स्नेह के प्रतिकूल है - एक दूसरे के प्रति कोमल भावना एवं साहचर्य की संवेदना जो कि वैवाहिक संबंधों का मूल आधार है, का विनाशक है।

B. *Hindu Marriage Act (25 of 1955), Section 13(1) (i)(i-a) - Cruelty - Meaning* - Willful refusal to fulfill matrimonial obligations in certain circumstances amounts cruelty. (Para 12)

ख. हिन्दू विवाह अधिनियम (1955 का 25), धारा 13(1)(i)(i-ए) - क्रूरता - अर्थ - कतिपय परिस्थितियों में वैवाहिक दायित्वों का निर्वहन करने से जानबूझकर इंकार करना क्रूरता की कोटि में आता है।

C. *Hindu Marriage Act (25 of 1955), Section 13(1) (i)(i-b) - Desertion - Means* - Negation of living together which is essence of matrimony - Unjustifiable withdrawal from company of the other - Findings of factum of desertion and animus of desertion are essential. (Para 14)

ग. हिन्दू विवाह अधिनियम (1955 का 25), धारा 13(1)(i)(i-बी) - अमित्यजन - अर्थात् - साथ-साथ रहना जो कि वैवाहिकी का सार है, से इंकार करना - अन्य के साहचर्य से अनुचित रूप से हट जाना - अमित्यजन की कथ्यता एवं अमित्यजन के आशय के संबंध में निष्कर्ष आवश्यक है।

D. Hindu Marriage Act (25 of 1955), Section 13(1) (i)(i-b) - Desertion - Wife's employment at a place other than husband - Per-se - Not constitute desertion. (Para 16)

घ. हिन्दू विवाह अधिनियम (1955 का 25), धारा 13(1) (i)(i-बी) - अभित्यजन - पति के नियोजन के स्थान से भिन्न स्थान पर पत्नी का नियोजन - स्वमेव - अभित्यजन गठित नहीं करता।

E. Hindu Marriage Act (25 of 1955), Section 13(1) (i)(i-b) - Animus deserendi - Proved - Wife deserted the husband to live at her parents house prior to joining job - Wife took away her jewellery and articles - Refused to come back - Living separately for four years. (Para 16)

इ. हिन्दू विवाह अधिनियम (1955 का 25), धारा 13(1)(i)(i-b) - अभित्यजन का आशय - सिद्ध - पत्नी ने नौकरी का सेवामार ग्रहण करने के पूर्व ही अपने माता-पिता के साथ रहने हेतु अपने पति का अभित्यजन किया - पत्नी अपने आभूषण एवं अन्य वस्तुएं अपने साथ ले गई - वापस आने से इंकार - चार वर्षों से पृथक् रह रही है।

Cases referred :

(2000) 1 DMC 477, AIR 1994 SC 710.

Sunil Jain, for the appellant.

None for the respondent though represented.

J U D G M E N T

The Judgment of the Court was delivered by :
S.K. PALO, J. :- Appellant/husband has filed this appeal under Section 28 of Hindu Marriage Act, 1955 aggrieved by the judgment dated 21.09.2010 passed by the District Judge, Shivpuri, in case No.73/09 (HMA) by which the District Judge, Shivpuri, has refused to allow the application under Section 13(1)(A) and (1-B) of Hindu Marriage Act, 1955, for decree of divorce against the respondent/wife.

2. It is not disputed that the appellant and respondents are husband and wife. Their marriage was solemnized on 02.06.2002 at village Padora, district Shivpuri.

3. The appellant/husband has filed an application for divorce against respondent/wife on the ground of 'cruelty' and 'desertion'. Applicant has alleged

before the Trial Court that after their marriage they lived peacefully for some time but after two years the respondent/wife changed her behaviour. She was not cooperating in the domestic work, she used to leave the matrimonial home and used to visit her maternal home without informing the applicant. On her request, the applicant got her admission in the Shivpuri College. She refused to cohabit with the applicant. She has been leaving the house of Shivpuri to go to her parental home. On 22.2.2006, she left her matrimonial home and took away the ornaments etc. The appellant/husband lodged a report at Police Chowki Physical, Shivpuri. The non-applicant has joined as Shikshya (sic:Shiksha) Karmi at village Chak Kitondha where her maternal home is situated.

4. Per contra, the non-applicant has denied all the allegations and submitted that she has been living with the applicant, performing the marital obligations. She never refused to cohabit. She herself wanted to be a mother of child. The non-applicant also submitted that she has been good in studies, therefore, she got the job of Shikshya (sic:Shiksha) Karmi Grade III. Despite all these she wants to live with the applicant. She has never deserted him. The report lodged by the applicant is false and she did not take away the ornaments etc. with her, as has been alleged. She alleges that because of "acne" in her face and due to her colour the applicant dislikes her and is not prepared to keep her with him. He has always been cursing his parents for getting him married to the non-applicant.

5. The learned Trial Court on the basis of the averments framed issues and adduced evidence. The learned Trial Court held that the appellant/husband could not prove his case of cruelty, desertion and by the impugned judgment, disallowed the application under Section 13(1)(1-A) and (1-B) of Hindu Marriage Act, 1955.

6. The appellant/husband assailed the judgment on several grounds and suggested that the respondent is serving in a school as Shikshya (sic:Shiksha) Karmi, Grade III and do not want to live with the appellant. She has been playing double standards living separately intentionally and not wanted to perform her duties. It is contended that the learned Trial Court did not consider the grounds of torturing the appellant therefore, the impugned judgment passed by the learned District Judge, Shivpuri, is liable to be set-aside.

7. We have heard the counsel for the appellant at length and perused the

record.

8. No doubt, the non-applicant/wife has expressed her willingness to live with the applicant, in the manner he wants her to live; but this submission seems to have been made to make the applicant's case weak. The conduct of the non-applicant/wife does not match with this statement. She left the matrimonial home on 22.02.2006. A report Exhibit D-1 was lodged by the applicant/husband on 24.02.2006. Since 2006, she has not returned to the applicant/husband clearly indicates her intentions. It is not the case of the non-applicant that the applicant/husband thrown her out from the matrimonial home. At the other hand, the applicant/husband himself got her admitted into the college at Shivpuri. A relative Shrilal Jatav, AW-3 has made it clear that despite several efforts, the non-applicant wife did not come to her matrimonial home. He further has stated that the non-applicant's father on being asked said that, they do not want to send the non-applicant as her husband is not doing any job. The non-applicant has said that they have no children. The non-applicant wife has been alleging that the applicant himself never wanted to live with her whereas, she used to visit her parents house, herself.

9. Smt. Ramrati Chaudhary, PW-2 supported the applicant's version. As per her statement, the non-applicant/ wife used to quarrel with the applicant/husband. She often over heard them for fighting with each other. She also indicates that the non-applicant/wife often used to leave the house of the applicant.

10. The applicant/husband claimed that after their marriage, he came to live at Shivpuri and got the non-applicant admitted into College. The non-applicant/ wife admits the same. That means had these been any dis-likeliness for the non-applicant, the applicant could not have taken so much of pain for the non-applicant/wife. The non-applicant/wife is now serving as a Shikshya (sic:Shiksha) Karmi, Grade III. She has also admitted that it is the appellant/husband who got her admission in the College. The father of the non-applicant Dayaram Jatav (NA-2), also admits that after their marriage, the applicant/husband treated the non-applicant/ wife very well and it is the applicant who got her admission in the College. The feelings of the applicant indicated thereby. The non-applicant's version that because she is not good looking, the applicant/husband is, therefore, not liking her and wanted to desert her does not hold good.

11. "Cruelty" is a ground that matrimonial relief has been provided in the statute. The concept of "cruelty" has varied from time to time, from place to place, from individual to individual in its obligation of social status of the person involved and the economic conditions and other matters. It is the antithesis to the natural love and affection between husband and wife. It is destructive of the soft feeling of concern for each other and sense of togetherness which is the bedrock of the normal matrimonial relationship.

12. Willful refusal to fulfill matrimonial obligations in certain circumstances can also amount to "cruelty."

13. In the present case, as has been complained by the applicant and can be inferred from the evidence adduced, the non-applicant wife has deprived of the company of the applicant/husband. In *Joshna Mukherji Vs. Utpal Mukherji* (2000) 1 DMC 477, the Division Bench of Calcutta High Court has observed that "Deprivation of the company and denial of enjoyment of the married is cruelty on the physique and mind of the forsaken person. The Apex Court reiterated that the relief to the party cannot be denied on the ground that there has been no deliberate or willful ill-treatment. It has been held in *V. Bhagat Vs. D. Bhagat* reported in AIR 1994 S.C.710 in which it is held that,

"If bitter waters are flowing, it is not necessary to enquire from which source they spring... It is sufficient that if the cruelty is of the type which indicates that the relations between the spouses had deteriorated to such an extent due to the conduct of one or the other that it has become impossible for them to live together without mental agony."

14. In this regard, the other ground raised by the applicant/respondent can also be considered. "Desertion" is the negation of living together, which is the essence of matrimony. If it is unjustifiable, it constitutes a ground for matrimonial relief. When a spouse unjustifiably withdrawn from the company of the other, it is a case of abandonment. The question whether a spouse is guilty of desertion or not is especially a question of fact. In order to establish a finding of desertion, there has to be clear cut finding of both factum as well as the animus of desertion.

15. In the present case, the non-applicant/wife left her matrimonial home

on 22.02.2006. A report has been lodged by the applicant /husband in this regard which is marked as Exhibit D-1. At the other hand, the non-applicant/ wife, if has ever been treated with cruelty as has been alleged by her, has not reported anything against her husband/applicant. But she stayed with her parents and has joined as a Shikshya (sic:Shiksha) Karmi; she never bothered to go to her husband, though she says that she wants to live with her husband these actions of the non-applicant/wife is just opposite to her pleadings.

16. In this context, the wife's employment at a place other than her husband, *per se* may not, and should not be construed as "desertion" for the reason that in the changing times equal opportunities and respect for wife's ambition and desertion for intellectual satisfaction cannot be ruled out either. But the husband is still considered, and in fact, is to a large extent the prime earning member, however, woman are fast moving ahead. The similar fact of her job cannot become a ground for immediately discord for her husband's relief. At the same time, in the present case, it is evident that the non-applicant deserted the applicant/husband to live at her parents house prior to her joining as a Shikshya (sic:Shiksha) Karmi. The non-applicant/ wife took away her jewellery and articles, refused to come back and she is living separately for almost four years (on the date of filing of the Suit), it may be safely held that animus deserandi on her part is proved.

17. As that it may be, marriage today is no longer a celestial bond, it used to be a few decades back. Realizing the futility of retaining a bond legally which has in fact become a bondage and source of agony, the law makers have provided the way out by enabling parties to seek dissolution of marriage of certain specified ground. Therefore, in the present context we hold that the applicant/husband is proved his case and we are inclined to observe that on the ground of "cruelty" under Section 13(1)(1-A) and on the ground of "desertion" under Section 13(1)(1-B) have been proved are inclined to grant relief.

18. Consequently, we set-aside the impugned judgment dated 21.09.2010 passed by the learned District Judge, Shivpuri and allowing this appeal under Section 28 of the Hindu Marriage Act, 1955 granting dissolution of marriage between the appellant and respondent which was solemnized on 2.06.2002.

No order as to costs.

Appeal allowed.

I.L.R. [2016] M.P., 531

APPELLATE CIVIL

Before Mr. Justice M.C. Garg

S.A. No. 1041/2005 (Gwalior) decided on 23 January, 2015

HAR PRASAD YADAV

...Appellant

Vs.

MAHAVEER PRASAD JAIN & ors.

...Respondents

A. Civil Procedure Code (5 of 1908), Section 100 & Order 7 Rule 11 and Cooperative Societies Act, M.P. 1960 (17 of 1961), Section 64 - Held - Suit for declaration filed in contravention of Section 64(2) of Co-operative Societies Act is not maintainable - Appellant could have approached Tribunal. (Paras 2 & 6)

क. सिविल प्रक्रिया संहिता (1908 का 5), धारा 100 व आदेश 7 नियम 11 और सहकारी सोसाइटी अधिनियम, म.प्र. 1960 (1961 का 17), धारा 64 - अभिनिर्धारित - सहकारी सोसाइटी अधिनियम की धारा 64(2) के उल्लंघन में प्रस्तुत घोषणा हेतु वाद पोषणीय नहीं है - अपीलार्थी, अधिकरण के समक्ष जा सकता था।

B. Cooperative Societies Act, M.P. 1960 (17 of 1961), Section 64 - Issues raised in this matter are covered by the provisions of Section 64 of the M.P. Cooperative Societies Act - Co-operative Society Tribunal would have jurisdiction to go into the issues - Dispute can be raised before the Tribunal even by a person who is not a member of the society and the Tribunal would decide it - Appeal is dismissed. (Paras 7 & 8)

ख. सहकारी सोसाइटी अधिनियम, म.प्र. 1960 (1961 का 17), धारा 64 - इस मामले में उठाये गये विवादक मध्यप्रदेश सहकारी सोसाइटी अधिनियम की धारा 64 के उपबंधों द्वारा आच्छादित हैं - सहकारी सोसाइटी अधिकरण को विवादकों का विचारण करने की अधिकारिता होगी - विवाद को अधिकरण के समक्ष किसी ऐसे व्यक्ति द्वारा भी उठाया जा सकता है जो सोसाइटी का सदस्य नहीं तथा अधिकरण इसे निर्णीत करेगा - अपील खारिज।

S.K. Sharma, for the appellant.

O.P. Mathur, for the respondent No. 1.

Vilas Tikhe, for the respondent No. 2.

(Supplied: Paragraph numbers)

O R D E R

M.C. GARG, J. :- In this case, the plaintiff filed a suit for declaring the sale deed executed by respondent No.1 of the suit property, in which the respondent No.2 became the successful owner on the ground that the aforesaid sale deed was invalid for the reason that after the death of the father of the appellant, who was the owner of the property, he had taken loan from the Cooperative Society, still cannot be ordered without issuing the notice to the appellant who is legal heir of his father.

2. The respondents moved an application under Order 7 Rule 11 of CPC for rejecting the plaint on the ground that the relief sought for by the appellant could have been obtained only under the provision of Section 64(2) of the Madhya Pradesh Cooperative Societies, Act. Since the appellant did not approach those authorities, the suit filed by him was not maintainable. The application filed on behalf of the respondents under Order 7 Rule 11 of CPC was allowed by the lower Court.

3. An appeal was filed against that order before the first appellate Court registered as Appeal No.181-A/2004. The said appeal was also dismissed by the first appellate court reiterating the decision of the lower Court. The relevant observations made in the first appellate Court's order are in para 9 and 10 which are reproduced here as under:-

"9. वाद पत्र के अवलोकन से यह स्पष्ट होता है कि भूमि विकास बैंक ने वादी के पिता के कर्ज के आधार पर वादग्रस्त भूमि को नीलाम कर विक्रय प्रतिवादी क. 2 के पक्ष में अंतिम कर दिया है। श्री जाटव अधिवक्ता का अपीलांत की ओर से तर्क यह है कि अपीलांत के पिता ने कोई भूमि बंधक नहीं रखी जबकि श्री गिरीश गुप्ता अधिवक्ता का तर्क यह है कि वादी के पिता राजाराम ने 9,950/- रु. का ऋण लिया था और वादग्रस्त भूमि बैंक में बंधक रखी थी जिसकी अदायगी न होने पर 20.6.89 को सार्वजनिक घोषणा विक्रय पत्र के द्वारा नीलाम की गई और नीलाम की पुष्टि 12.1.90 को सहायक पंजीयक सहकारी समिति ने कर दी है। भूमि का पंजीकृत विक्रय पत्र भी संलग्न किया गया है।

10.म.प्र. सहकारी अधिनियम की धारा 64 के तहत विक्रय पत्र अंतिम हो जाने के आधार पर स्वत्व घोषणा का दावा प्रचलन योग्य नहीं है इस संबंध में उनके द्वारा न्याय दृष्टान्त रामेश्वर दयाल विरुद्ध सहकारी भूमि विकास बैंक 1996 राजस्व निर्णय 205 इस आशय का पेश किया है कि सहकारी भूमि विकास बैंक अधिनियम 1966 की धारा 18,19,20,21,27 के तहत यदि विक्रय अंतिम हो चुका है तो स्वत्व घोषणा का दावा दीवानी न्यायालय में नहीं चलेगा। इसके अलावा म.प्र. सहकारी

संस्था अधिनियम 1960 की धारा 64 के तहत दीवानी न्यायालय का क्षेत्राधिकार वर्जित किया गया है और माननीय गुजरात उच्च न्यायालय हरब्रान कॉर्पोरेटिव हाउसिंग सॉसायटी विरुद्ध मीनाक्षी बहिन ए.आई.आर. 2002 गुजरात 163 में यह मत व्यक्त किया गया है कि यदि किसी अधिनियम में दीवानी न्यायालय का क्षेत्राधिकार वर्जित किया गया हो और उसकी उपचार की व्यवस्था उस अधिनियम में दी गई है तो दीवानी न्यायालय को सुनवाई का क्षेत्राधिकार नहीं रह जाता । और इस प्रकार में भी सहकारी संस्था का विवाद था । आरै माननीय सर्वोच्च न्यायालय ने भी चन्द्रकान्त विरुद्ध मुनेसीपल कारपुरेशन ए.आई.आर.2002 सुप्रीमकोर्ट 997 में यह मत व्यक्त किया है कि यदि दीवानी न्यायालय का क्षेत्राधिकार वर्जित किया गया है और उस अधिनियम में उपचार की व्यवस्था है तो दीवानी न्यायालय को सुनवाई का क्षेत्राधिकार नहीं रहेगा । यदि उक्त अधिनियम में दीवानी न्यायालय का क्षेत्राधिकार वर्जित किया गया हो । ”

4. It is submitted on behalf of learned counsel for the appellant that the sale deed was null and void and could not have been maintained by the Cooperative Society Tribunal and in fact jurisdiction raised before the Civil Court and therefore direction given by the Courts below holding that the suit filed by the appellant was not in accordance with law.

5. I have taken note of Section 64 of the Cooperative Societies Act which reads as under:-

64. Disputes: - (1) Notwithstanding anything contained in any other law for the time being in force, any dispute touching the constitution, management or business, or the liquidation of a society shall be referred to the Registrar by any of the parties to the dispute if the parties there to are among the following:-

(a) a society, its committee, any past committee, any past or present officer, any past or present agent, any past or present servant or a nominee, heirs or legal representatives of any deceased agent or deceased servant of the society, or the liquidator of the society ;

(b) a member, past member or a person claiming through a member, past member or deceased member of a society or of a society which is a member of the society ;

(c) a person other than a member of the society who has been granted a loan by the society or with whom the society has or had business transactions and any person claiming through such

a person.

(d) a surety of a member, past member of deceased member or a person other than a member who has been granted a loan by the society, whether such a surety is or is not a member of the society.

(e) any other society or the liquidator of such a society; and

(f) a creditor of a society.

(2) For the purposed of sub-section (1), a dispute shall include

(i) a claim by a society for any debt or demand due to it from a member , past member or the nominee, heir or legal representative of a deceased member, whether such debt or demand be admitted or not;

(ii) a claim by a surety against the principal debtor where the society has recovered from the surety any amount in respect of any debt or demand due to it from the principal debtor as a result of the default of the principal debtor, whether such debt or demand be admitted or not;

(iii) a claim by a society for any loss caused to it by a member, past member or deceased member, any officer, past officer or deceased officer, any agent, past agent or deceased agent, or any servant , past servant or deceased servant or its committee, past or present , whether such loss be admitted or not ;

(iv) a question regarding rights, etc., including tenancy rights between a housing society and its tenants or members; and

¹ [(v) any dispute arising in connection with the election of any officer of the society or of composite society;

Provided that the Registrar shall not entertain any dispute under this clause announcement of the election programmed till the declaration of the results].

(3) If any question arising whether a dispute referred to the Registrar is a dispute, the decision thereon of the Registrar shall be final and shall not be called in question in any court.

6. It is not in dispute that the property which has been auctioned and has been purchased by the respondent No.2 in the auction held by the respondent No.1 was the property which was subject matter and on the basis of which the father of the appellant had taken loan and the loan was not paid. It is for recovery of the loan the property of father was sold. Even though factum of issuing notice to the appellant may be relevant for the reason that according to the appellant his father was no more. When these facts came into the knowledge of the appellant he could have always approached Cooperative Society Tribunal and would have brought these facts to their notice and thereafter proceedings could have been proceeded in accordance with law. However, the appellant instead of approaching the Cooperative Society Tribunal under the Cooperative Societies Act chose appropriate to file civil suit and then during in this process more than 13 years have passed and still we are at the stage of the initial proceedings.

7. Considering the provision of section 64 and nature of the case if recovery of certain dues which can be recovered under the Cooperative Societies Act, the insistence of the appellant to keep proceedings in the civil court instead to approach Cooperative Society Tribunal cannot be justified. In any case, the second appeal filed by the appellant under section 100 of CPC, in the facts of the present case otherwise is not maintainable as issues raised in this matter are covered by the provision of Section 64 of the M.P. Cooperative Societies Act. Moreover, there are rules framed under the aforesaid Act which deal with the attachment and sale of even the immovable property which would certainly property in question. It therefore cannot be said that the Cooperative Society Tribunal would have no jurisdiction to go into the issues which are raised by the appellant since the appellant has already been given liberty to approach the appropriate forum.

8. Considering the aforesaid provision, it is apparent that even if a person which is not a member of the Society but wants to raise dispute about the rights of liability of the ex-member he can always approach Cooperative Society for the purpose raising their dispute and the tribunal would decide it within its jurisdiction to pass appropriate orders.

Consequently, I do not find any good reason to entertain the appeal.

In view of the aforesaid, the appeal is, therefore, dismissed.

Appeal dismissed.

I.L.R. [2016] M.P., 536

APPELLATE CIVIL

Before Mr. Justice M.C. Garg

S.A. No. 639/2005 (Gwalior) decided on 3 February, 2015

STATE OF M.P.

...Appellant

Vs.

KAMAL SINGH & ors.

...Respondents

Land Revenue Code, M.P. (20 of 1959), Section 50 - Revision -
Suo motu powers - Limitation - Suo motu proceedings started after
five years - Expression "at any time" - Held - Suo motu proceedings
are not within time as the expression "at any time" denotes within
'reasonable time'.
(Paras 1 & 2)

भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 50 - पुनरीक्षण - स्वप्रेरणा से शक्तियाँ - परिसीमा - पांच वर्ष पश्चात् स्वप्रेरणा से कार्यवाहियाँ आरंभ की गई - अभिव्यक्ति "किसी भी समय पर" - अभिनिर्धारित - स्वप्रेरणा से कार्यवाहियाँ समय के भीतर नहीं हैं क्योंकि अभिव्यक्ति "किसी भी समय पर", "युक्तियुक्त समय" के भीतर सूचित करती है।

Cases referred :

AIR 1969 SC 1297, 2000 Rajasva Nirnaya 16, 2010 (5) MPHT 137 (FB).

B. Raj Pandey, G.A. for the appellant/State.

(Supplied: Paragraph numbers)

ORDER

M.C. GARG, J. :- In this case the lower Court dismissed the suit filed by the respondent No.1 by assailing the order of Tehsildar dated 29.9.68, whereby in suo moto revision the patta granted to the respondent was cancelled. The first appellate Court has reversed the aforesaid findings relying upon the judgment of Hon'ble Supreme Court delivered in the case of *State of Gujrat vs. Patel Raghavnath & anr.* AIR 1969 S.C.1297 as well as *Ravinarayan vs. State of M.P. and anr.* 2000 Rajasva Nirnaya 16. Paragraphs 19 & 20 of the appellate Court judgment are reproduced here as under:-

(19) अगला प्रश्न यह उत्पन्न होता है कि अनुविभागीय अधिकारी ने तहसीलदार के आदेश दिनांक 29.9.68 को युक्तियुक्त समय में पुनरीक्षण में सुनवाई हेतु

लिया था । आदेश दिनांक 31.3.83 के अवलोकन से स्पष्ट है कि अनुविभागीय अधिकारी के उक्त आदेश को पुनरीक्षण वर्ष 1978-79 में प्रकरण दर्ज कर लिया था । इस प्रकार अनुविभागीय अधिकारी के आदेश दिनांक 31.3.83 को लगभग 10 वर्ष पश्चात पुनरीक्षण में लिया था । प्रश्न यह है कि क्या 10 वर्ष की अवधि को युक्तियुक्त समय कहा जा सकता है । म.प्र.भूर.स. की धारा 50 में पुनरीक्षण हेतु समयावधि निर्धारित नहीं की गई है, मात्र युक्तियुक्त समय में पुनरीक्षण करने की शक्तियां दी गयी है । सर्वोच्च न्यायालय ने स्टेट आफ गुजरात वि. पटेल राघवनाथ एवं अन्य, ए.आई.आर.1969 एस.सी.1297 में यह मत प्रतिपादित किया है कि — “जहाँ पर स्व-प्रेरणा से किसी आदेश को पुनरीक्षण में लेने हेतु युक्तियुक्त समय दिया गया है, वहाँ पर युक्तियुक्त समय का तात्पर्य कुछ माह से है । ” यही अभिमत म.प्र.उच्च न्यायालय ने रविनारायण वि. म.प्र. राज्य व अन्य 2000, राजस्व निर्णय 16, के मामले में भू. रं.सं. की धारा 50 में उपरोक्त युक्तियुक्त समय की व्याख्या करते हुए अनुसरित किया ।

(20) . माननीय सर्वोच्च न्यायालय ने मो. कवि वि.फातिमाबाई इब्राहिम, 1998 (1) एम.पी.वी. नोटस-826 में यह मत प्रतिपादित किया है कि म.प्र.भूर.स. की धारा 50 के अन्तर्गत कोई स्व-प्रेरणा से एक वर्ष की अवधि ले लेना अयुक्तियुक्त है । प्रस्तुत प्रकरण में अनुविभागीय अधिकारी ने तहसीलदार के आदेश दिनांक 29.9.68 को लगभग 10 वर्ष पश्चात पुनरीक्षण में लिया है । उपरोक्त न्याय दृष्टांतों में प्रतिपादित अभिमत को देखते हुए अनुविभागीय अधिकारी के द्वारा 10 वर्ष पश्चात तहसीलदार के आदेश दिनांक 29.9.68 का पुनरीक्षण करना अयुक्तियुक्त है । ”

2. As per the appellant, the proceeding to recall the patta started in the year 1978-79 which itself shows that the proceeding started after five years and that was not within time. Even otherwise, the action taken by S.D.O. suo moto (sic: motu) as in the revision is contrary to a judgment of this Court delivered in the case of *Ranveer Singh and others vs. State of M.P.* reported in 2010 (5) M.P.H.T. 137 (FB).

3. According to the appellant, 180 days would start from the date of knowledge but there is nothing on record as to when the S.D.O came to know about the impugned order.

4. No substantial question of law is involved for consideration in the appeal. Hence, the appeal is hereby dismissed with no order as to the cost.

Appeal dismissed

I.L.R. [2016] M.P., 538

APPELLATE CIVIL

Before Mrs. Justice S.R. Waghmare

M.A. No. 2194/2013 (Indore) decided on 24 April, 2015

KARANSINGH

...Appellant

Vs.

OMPRAKASH & ors.

...Respondents

Motor Vehicles Act (59 of 1988), Section 166 - Compensation - Rash and negligent - Accident - Claim for damages jointly and severally from owner, driver and insurance company - Plea of insurance company that the driver of the vehicle did not have a valid driving license and loading rickshaw has been driven without the fitness certificate - Conditions of insurance policy were found proved - Insurance company exonerated.

(Paras 3 & 4)

मोटर यान अधिनियम (1988 का 59), धारा 166 - प्रतिकर - उतावलापन एवं उपेक्षा - दुर्घटना - स्वामी, वाहन चालक तथा बीमा कंपनी से संयुक्त रूप से एवं पृथक् रूप से क्षतिपूर्ति हेतु दावा - बीमा कंपनी का अभिवाक् है कि वाहन के चालक के पास वैध वाहन अनुज्ञप्ति नहीं थी और लोडिंग रिक्षा को उपयुक्तता प्रमाणपत्र के बिना चलाया जा रहा था - बीमा पॉलिसी की शर्तों को सिद्ध पाया गया - बीमा कंपनी को उत्तरदायित्व से मुक्त किया गया।

Cases referred :

2014 ACJ 2873, 2013 ACJ 1944, SLP (C) No. 22444 of 2009, 2010 ACJ 1605.

R.N. Dave, for the appellant.

Sanjay Guha on behalf of *C.P. Singh*, for the respondent No.3/HDFC Agro General Insurance Company Limited.

ORDER

S.R. WAGHMARE, J. :- Present appeal has been filed by the petitioner Karansingh under Section 173/1 of the Motor Vehicles Act 1988 being aggrieved by the award dated 01/10/2013 passed by 9th M.A.C.T, Indore in claim case No.06/11.

2. Briefly stated the facts of the case are that the applicant Karansingh was travelling on his scooter bearing registration No. M.P.09/J.P./9889 on 11/09/2010 from his house towards Rajkumar Bridge. When nearing the Malwa Mill Chowki a

loading rickshaw bearing No. M.P.09/L.N./1256 being rashly and negligently driven by respondent No.2 Arvind Arya came from behind and dashed his scooter. As a result of which he fell down and received injuries on both the hands, legs and waist and other parts of the body. He was admitted in M. Y. Hospital, Indore for treatment and a report was filed on Police Station Pardesipura, Indore. As a result of the injuries resulting in the accident, he suffered a permanent disability and therefore, filed the claim under Section 166 of the Motor Vehicle Act, stating that he was working as a cycle repairer as well as seller of cycle parts and earning Rs.7,000/per month and claimed a damage for Rs.1.00 lakh jointly and severally from all the three respondents.

3. Counsel for the non-applicant No.3/HDFC Ergo (sic:Agro) General Insurance Company Limited resisted the claim stating that neither the accident had taken place by loading rickshaw bearing No.M.P.09/L.N./1256 or that the applicant was earning Rs.7000/- as claimed. He also denied the injuries and also raised the said plea that the driver of the vehicle did not have a valid driving licence and loading rickshaw was being driven without the fitness certificate. He also submitted that the driver had a non transport vehicle licence and therefore, he could not drive a transport vehicle and there was violation of conditions of insurance policy. The intimation was also not given to the insurance company regarding the accident and the accident has taken place due to negligence of the applicant himself. The owner and driver of the impugned vehicle, however, remained ex-parte.

4. The Trial Court on considering the evidence passed the award that Rs.29,000/- be awarded to the applicant/claimants by respondent No.1 & 2 owner and driver but completely exonerated the insurance company. It held that the driving licence of the respondent No.1 driver was that of light motor vehicle and could not be used for a vehicle which was used for transportation and commercial vehicle and since the driver did not have a valid licence, there was violation of conditions of the insurance policy and the violations were found to be proved and the insurance company was exonerated.

5. Being aggrieved the applicant has filed the present appeal. Learned Counsel for the appellant has argued only a single point before this Court that the case cited by the appellant in the Trial Court were completely ignored by the Trial Court holding that it cannot make a direction to the insurance company to pay first and recover the amount from the driver and owner of the disputed vehicle. Counsel submitted that the appellant would be satisfied if only such a direction is given to the respondent No.3/ Insurance Company to pay and recover the money from the owner and driver.

6. Counsel placed reliance on *Kulwant Singh and Others vs. Oriental*

Insurance Co. Ltd [2014 ACJ 2873] and *S. Iyappan vs United India Insurance Co. Ltd and another* [2013 ACJ 1944] to state that under similar circumstances the Apex Court has considered liability of the company when disputed since the driver had only a licence to drive light motor vehicle but he was driving a goods vehicle. The Tribunal mulcted liability on the insurance company. Counsel submitted that in both the cases, the Courts had held that if there was violation of the conditions of the insurance policy regarding the driving license even then the company may proceed against the insurer for recovery of the amount but it had to pay the award at the first instance. Counsel submitted that in the present case also he would be satisfied if such a direction is made.

7. On considering the above submissions, I find that the learned Judge of the Lower Court, however, has drawn objection that the Apex Court may direct the payment of the award by the insurance company. However, the High Court or Lower Court cannot do so. And on pursuing the case of *National Insurance Company Limited vs Parvathneni & Anr.* [SLP (C) No.22444 of 2009], the Apex Court categorically held that when the non-liability of the Insurance Company was proved and there was no valid insurance coverage on the date of the accident then the insurer cannot be compelled to pay compensation and recover the same from the owner. The Apex Court, in several matters, has considered this fact. Even in the matter of *Divisional Manager, New India Assurance Co. Ltd vs Vinayaga Moorthi and others* [2010 ACJ 1605], the Apex Court has categorically held that whether the claims Tribunal followed any directions issued by the Supreme Court:—

“Therefore, the decision of the Tribunal to follow a direction issued by the Apex Court in exercise of its extraordinary jurisdiction under Article 142 of the Constitution of India, to the present claim petitions is not in accordance with law and therefore, I have no hesitation to hold that there is an excess of jurisdiction. In the light of the decisions of the Supreme Court on the issue, the finding of the Tribunal fastening the liability on the appellant insurance company to pay compensation to all the victims and to recover the same from the owner is liable to be set aside and accordingly, set aside. Insured, respondent No.3 is liable to compensate each of the victims. It is for the respondents-claimants to take up appropriate proceedings before the Tribunal to recover the compensation from the insured. The amount deposited by the

appellant insurance company in respect of each of the claim petitions shall be refunded to the insurance company within two weeks from the date of receipt of this order. The common judgment and decree of the Tribunal in M.C.O.P.Nos.277 of 2003, etc., dated 14.08.2007 are set aside. The civil miscellaneous appeals are allowed. No Costs”

The Apex Court also specifically held that:-

“Article 136 read with Article 142 of the Constitution of India, confers an extraordinary jurisdiction on the highest Court in the country to issue any direction and exercise their power to do complete justice and Tribunals do not have any such power, similar to that conferred under Article 142 and any attempt to follow the exercise would lead to incongruous and disastrous results.”

8. I find that the prayer of the appellant cannot be allowed since no other point was argued before this Court. The appeal is, therefore, **dismissed** as being without merit.

C.C. as per rules.

Appeal dismissed.

I.L.R. [2016] M.P., 541

APPELLATE CRIMINAL

Before Mr. Justice S.K. Gangele & Mr. Justice S.K. Palo

Cr.A. No. 119/2002 (Gwalior) decided on 1 October, 2014

STATE OF M.P.

...Appellant

Vs.

RAMKISHAN & anr.

...Respondents

(Alongwith Cr.A. No. 198/2001)

A. Penal Code (45 of 1860), Sections 304-B & 498-A - Acquittal - No evidence of cruelty soon before death - No definite evidence of ill treatment having immediate proximity with date of death of deceased. (Para 12)

क. दण्ड संहिता (1860 का 45), धाराएं 304-बी व 498-ए - दोषमुक्ति

— मृत्यु के तुरंत पूर्व क्रूरता का कोई साक्ष्य नहीं — दुर्व्यवहार का कोई निश्चित साक्ष्य नहीं जो मृतिका की मृत्यु की तिथि के साथ तत्काल निकटता रखता हो।

B. Evidence Act (1 of 1872), Section 113-B - Presumption - Requires - Existence of proximate and live link between the effect of cruelty based on dowry demand and concerned death, and, reasonable time gap between cruelty inflicted and death in question. (Para 13)

ख. साक्ष्य अधिनियम (1872 का 1), धारा 113-बी — उपधारणा — अपेक्षा — दहेज की मांग पर आधारित क्रूरता का प्रभाव और संबंधित मृत्यु के बीच सीधा संबंध एवं निकटता की विद्यमानता, तथा, की गई क्रूरता और प्रश्नगत मृत्यु के बीच युक्तियुक्त समय का अंतर।

C. Penal Code (45 of 1860), Sections 304-B & 498-A and Evidence Act (1 of 1872), Section 113-B - Dowry death - The cruelty, harassment and demand of dowry should not be so ancient, whereafter the couple and family members have lived happily - Such demand or harassment may not strictly and squarely fall within the provisions - Unless definite evidence led to show contrary. (Para 14)

ग. दण्ड संहिता (1860 का 45), धाराएं 304-बी व 498-ए एवं साक्ष्य अधिनियम (1872 का 1), धारा 113-बी — दहेज मृत्यु — क्रूरता, उत्पीड़न एवं दहेज की मांग इतनी पुरानी नहीं होनी चाहिए कि जिसके पश्चात् दंपत्ति एवं परिवार के सदस्य राजी-खुशी से रहे हो — उक्त मांग या उत्पीड़न कठोर रूप से एवं संपूर्ण रूप से उपबंधों के भीतर नहीं आ सकता — जब तक कि इसके विपरीत दर्शाने का कोई निश्चित साक्ष्य पेश नहीं होता।

D. Penal Code (45 of 1860), Sections 304-B & 498-A and Evidence Act (1 of 1872), Section 113-B - Acquittal - Ground - Dowry demand - Four years back - Reiterated seven months back - Thereafter no allegation of dowry demand or cruelty till incident - Held - "Soon before her death she was subjected to cruelty or harassment by her husband or any of his relative" is lacking. (Paras 15 & 21)

घ. दण्ड संहिता (1860 का 45), धाराएं 304-बी व 498-ए एवं साक्ष्य अधिनियम (1872 का 1), धारा 113-बी — दोषमुक्ति — आधार — दहेज की मांग — चार वर्ष पूर्व — पुनः सात माह पहले दोहराई गई — तत्पश्चात् घटना होने तक दहेज की मांग या क्रूरता का कोई अभिकथन नहीं — अभिनिर्धारित — "मृत्यु के तुरंत पूर्व उसके साथ उसके पति या उसके किसी रिश्तेदार द्वारा क्रूरता या उत्पीड़न" का अभाव है।

Cases referred :

AIR 2003 SC 2865, (2010) 12 SCC 350, (2014) 2 SCC 240, (2003) 8 SCC 80.

Bhagwan Raj Pandey, P.P. for the appellant in Cr.A. No. 119/2002 & for respondent in Cr.A. No. 198/2001.

Madhukar Kulshreshtha, for the respondents in Cr.A.No. 119/2002 & for appellant in Cr.A.No. 198/2001.

J U D G M E N T

The Judgment of the Court was delivered by :
S.K. PALO, J. :- Criminal Appeal No. 198/2001 and Criminal Appeal No. 119/2002 have arisen out of the same judgment dated 30th March, 2001 passed by the Sessions Judge, Bhind in S.T. No. 13/92, whereby the learned trial Court has convicted appellant Manoj under Section 304-B and 498-A of IPC. At the same time acquitted the accused Ramkishan and Sharda Devi on the same charges.

2. Feeling aggrieved by the judgment of conviction, appellant, Manoj has filed appeal under Section 374 of Cr.P.C assailing and requesting for setting aside the judgment. Whereas, the State of Madhya Pradesh has filed Criminal Appeal No. 119/2002 under Section 378 of Cr. P.C challenging the judgment of acquittal of respondents Ramkishan and Sharda Devi.

3. It is not disputed that Rajni Saxena was married to appellant Manoj Shrivastava in June 1987 and respondents Ramkishan and Sharda Devi are the parents of the appellant Manoj Shrivastava. It is also not disputed that the accused persons are taken into custody on 22nd September, 1997 by memo of arrest Ex. P/23.

4. The facts transpired before the learned Trial Court are that on 10.9.1991 an information was sent by the District Hospital, Bhind to the Police Chowki of the District Hospital that Smt. Rajni Saxena wife of Manoj Shrivastava aged about 24 years, resident of Jain Mandir, Bhind has been brought dead to the Hospital. Merg No. 36/91 was registered under Section 174 of Cr.P.C. Dead body was sent for postmortem. Viscera received by police was sent for chemical examination.

5. During investigation, it was found that on 30.6.1987 marriage of Rajni

Saxena was performed with accused Manoj Shrivastava. The accused Manoj Shrivastava was demanding scooter from the father of the deceased Rajni since the time of marriage. As the demand was not fulfilled, accused Manoj, his father and mother were harassing Rajni and she was subjected to cruelty. They have threatened her that she will be divorced, if the demand is not fulfilled. Despite the fact that several persons tried to resolve but the accused persons did not pay any heed. Because of this, deceased Rajni Saxena died in suspicious circumstances on 10.9.1991. Then, father of the deceased was sent a message about her death. Police City Kotwali, Bhind registered a case under Sections 498-A and 304-B read with Section 34 of IPC. After due investigation, charge sheet has been filed against accused persons.

6. Charges framed and explained to the accused persons under Sections 498-A and 304-B read with Section 34 of IPC. Accused persons abjured guilt. In their examination under Section 313 of Cr.P.C they contended that they have been falsely implicated. Accused / appellant, Manoj claimed that the deceased Rajni Saxena died due to illness and on that day he was not at home. They claimed that, father of the deceased Ramprakash claimed the expenses borne by him, at the time marriage, from the accused persons. When this demand was not met, he lodged the report on false ground.

7. The learned Trial Court after adducing the evidence, pronounced the impugned judgment, acquitted the respondents Ramkishan and Sharda Devi and convicted appellant, Manoj Shrivastava under Section 498-A and 304-B of IPC. He is sentenced 7 years RI under Section 304-B IPC and under Section 498-A, he has been sentenced to undergo two years RI with fine of Rs. 1000/-. In lieu of fine, he has to undergo RI for another period of six months.

8. Appellant, Manoj has assailed the judgment on the grounds that the impugned judgment is not in accordance with law. The evidence has not been evaluated and analyzed properly. There was no demand of dowry. The deceased Rajni Saxena and the appellant had gone to her parent's place to attend marriage of her younger brother Rajiv they stayed there 10 to 15 days. No such demand was ever made by him. The finding of the learned trial Court is, therefore, erroneous. The letters Ex. P/2 to Ex. P/12 on which the Trial Court based its conviction are merely photo copies. The original letters were not produced. The expert, who examined the letters and viscera were not examined. Witnesses Ramprakas and Laxmi Devi, the father and mother of

the deceased exaggerated the prosecution story and there is not an iota of evidence regarding treatment of cruelty.

9. In Criminal Appeal No. 119/2002, just contrary to the above. The State of Madhya Pradesh has assailed the judgment and requested for conviction of accused Ramkishan and Sharda Devi. It is contended that Rajni Saxena died within seven years of her marriage by consuming sulphas a kind of insecticide.

10. We have gone through the record of the learned trial Court. It would be pertinent to mention here that the learned Trial Court relied on the letters Ex. P/4 to Ex. P/12. These documents are exhibited, whereas these letters have not been examined by any Handwriting Expert. Original letters have also not been produced. Photo copies of these documents have been exhibited. From the record, it does not show that the original documents are placed before the trial Court. During investigation also prosecution has not obtained permission of the trial Court for taking these documents as secondary evidence.

11. Before the document can be allowed to be led, as secondary evidence, two things have to satisfy-

1. That original document is admissible in evidence.
2. That one of the condition enumerated in Section 65 of the Evidence Act entitling to secondary evidence has been established.

Secondary evidence by document can be given if failure to produce the original document is supported by proper reasons. But in the present case the same is not followed. At least, judgment does not express so.

12. It would be pertinent to mention here that the marriage of the deceased was solemnized with accused Manoj Shrivastava in the year 1987 and incident took place on 10.9.1991. There is no allegation of demand of scooter as dowry earlier. But it is stated by the witnesses that the deceased visited her parental house on 17th February, 1991 to attend marriage of her younger brother Rajiv, but at that time also, it is alleged that the accused persons placed their demand of scooter before Rajni, who in turn told her parents to give a scooter. It would be appropriate to mention here that the death of the deceased Rajni occurred in the month of September 1991 ie almost after seven months. There is no evidence as to so-called subjective of cruelty soon

before the death. There is no definite evidence of ill-treatment, having immediate proximity date of death of deceased.

13. As to presumption under Section 113-B of Evidence Act the Hon'ble Supreme Court has stated that proximate test applies and expression soon before the death occurring in this section does not indicate any fixed period. But it means that there must be existence of a proximate and live link between the effect of cruelty based on dowry demand and concerned death. In this regard the reference can be made to the judgment of Supreme Court in *Hira Lal Vs. State of (NCT) of Delhi*, AIR 2003 SC 2865. That means there should be reasonable, if not direct nexus between her death and the dowry related cruelty or harassment inflicted on her. There is to be reasonable time gap between cruelty inflicted and death in question.

14. Thus, the cruelty, harassment and demand of dowry should not be so ancient, whereafter the couple and family members have lived happily as that it would result in abuse of said protection. Such demand or harassment may not strictly and squarely fall within the scope of these provisions unless definite evidence led to show to the contrary. *Ashok Kumar Vs. State of Haryana* (2010) 12 SCC 350.

15. In the present case, dowry demand was made as early as four years back, even if presumed that the demand was reiterated at the time of marriage of Rajiv, brother of the deceased, that too was made, almost seven months back when the deceased and her husband stayed at her parent's house for 10 to 15 days during the marriage. After this demand there has been no allegation of demand of dowry or treatment of cruelty till the incident took place.

16. The action of respondents Ramkishan and Sharda Devi has not been clearly stated. The deceased died on 10th September, 1991. Merg was lodged on the same day, but the statements of the father and mother of the deceased were recorded on 22nd September, 1991. That means, almost after 12 days their statements are recorded. Till then they remained silent. In this regard the judgment rendered by the Supreme Court can be referred in *Tkummala Venkateswar Rao Vs. State of Andhra Pradesh* (2014) 2 SCC 240, the Apex Court has held that:

“Soon before death” does not mean “at any time before” nor “immediately before” - It has been used with reference to cruelty or harassment which were meted in proximity to death that

has to be considered as cause of death”.

17. Postmortem was conducted by Dr. R.K. Gandhi (PW-3). He has not found any bodily injury on the person of the deceased. No definite opinion about death has been given. The chemical test report received from the Forensic Laboratory has been shown to this witness, who has not examined the same. According to the report death has been caused due to consuming of “aluminum phosphide”, which is a pesticide.

18. Ex. D-1 is the letter dated 5.4.1988, father of the deceased Ramprakash admitted that this letter was written by her daughter and she has mentioned that she was not keeping well, but her treatment is being done properly. She is not taking medicines but used to throw the medicines. This also creates suspicious in the prosecution case, so as to give rise to probability that the deceased might have consumed poison because of other reasons.

19. In Ex. P/4, P/5, P/6, P/8, there is neither mention of any demand of scooter nor that she was subjected to cruelty. In Ex. P/10 there is no mention of scooter. In Ex. P/11 there is mention of scooter but that was done at the instance of brother-in-law Vinod. There is no mention of Ramkishan or Sharda Devi or her husband appellant Manoj regarding demand of scooter or so called harassment.

20. The Hon'ble Supreme Court expressed in case of *Hira Lal Vs. State of (Govt. of NCT), Delhi* (2003) 8 SCC 80 (Supra)

“A Conjoint reading of Section 113-B of the Evidence Act and Section 304-B IPC shows that there must be material to show that soon before her death the victim was subjected to cruelty or harassment. The prosecution has to rule out the possibility of a natural or accidental death so as to bring it within the purview of 'death occurring otherwise than in normal circumstances'. The expression 'soon before' is very relevant where Section 113-B of the Evidence Act and Section 304-B IPC are pressed into service. The prosecution is obliged to show that soon before the occurrence there was cruelty or harassment and only in that case presumption operates. Evidence in that regard has to be led by the prosecution. 'soon before' is a relative term and it would depend upon the circumstances of each case and no straitjacket formula can be

laid down as to what would constitute a period of soon before the occurrence. It would be hazardous to indicate any fixed period, and that brings in the importance of a proximity test both for the proof of an offence of dowry death as well as for raising a presumption under Section 113-B of the Evidence Act is present with the idea of proximity test. No definite period has been indicated and the expression 'soon before' is not defined. A reference to the expression 'soon before' used in Section 114 illustration (a) of the Evidence Act is relevant. It lays down that a Court may presume that a man who is in the possession of goods 'soon after the theft, is either the thief or has received the goods knowing them to be stolen, unless he can account for their possession'. The determination of the period which can come within the term 'soon before' is left to be determined by the courts, depending upon facts and circumstance of each case. Suffice, however, to indicate that the expression 'soon before' would normally imply that the interval should not be much between the cruelty or harassment concerned and the death in question. There must be existence of a proximate and live link between the effect of cruelty based on dowry demand and the death concerned. If the alleged incident of cruelty is remote in time and has become state enough not to disturb the mental equilibrium of the woman concerned, it would be of no consequence."

21. With the above observations, we find the ingredients "soon before her death she was subjected with cruelty or harassment by her husband or any of his relative" is lacking in this case. We allow the appeal filed by appellant Manoj Shrivastava (Cr. Appeal No. 198/2001). Consequently, disallow the Appeal filed by the State (Appeal 119/2002).

22. Accordingly, the impugned judgment dated 30th March, 2001 is hereby set aside and the appellant, Manoj Shrivastava is acquitted for the offence under Sections 304- B and 498-A of IPC. His bail bonds and surety bonds discharged. If fine amount is deposited by him, the same be refunded to appellant Manoj Shrivastava. Bail bonds of respondents Ramkishan and Sharda are also discharged.

Order accordingly.

I.L.R. [2016] M.P., 549

APPELLATE CIVIL

Before Mrs. Justice S.R. Waghmare

M.A. No. 2095/2013 (Indore) decided on 24 April, 2015

DHARMENDRA SINGH & anr.

...Appellants

Vs.

NAGGA JI

...Respondent

Civil Procedure Code (5 of 1908), Order 9 Rule 13 - Setting aside ex-parte decree against the defendants - No notice were received by the appellants - Since proper opportunity of hearing has not been given to the appellants, ex-parte judgment would be against the principles of natural justice - Sufficient cause is to be made out, to do substantial justice - Ex-parte award is set aside subject to condition that the appellant shall deposit 50% of the awarded amount in the Trial Court, and Rs. 5,000/- cost to be paid to claimant. (Para 6)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 9 नियम 13 - प्रतिवादीगण के विरुद्ध एकपक्षीय डिक्री अपास्त की जाना - अपीलार्थीगण द्वारा कोई नोटिस प्राप्त नहीं किया गया - चूंकि अपीलार्थीगण को सुनवाई का उचित अवसर नहीं दिया गया है, एकपक्षीय निर्णय, नैसर्गिक न्याय के सिद्धांतों के विरुद्ध होगा - सारवान न्याय करने के लिए पर्याप्त कारण बनना चाहिए - एकपक्षीय अवार्ड को इस शर्त के अधीन अपास्त किया गया कि अपीलार्थी, अवार्ड की गई रकम का 50% विचारण न्यायालय में जमा करेगा और दावाकर्ता को रु. 5,000/- व्यय अदा करेगा।

Cases referred :

(2000) 3 SCC 54, 2006 (1) J.L.J. 119.

Dharmendra Yadav, for the appellants.*(Supplied: Paragraph numbers)***ORDER**

S.R. WAGHMARE, J. :- By this Miscellaneous Appeal under Order 43 Rule 1 read with Section 151 of the CPC, appellants Dharmendra Singh and Mahesh have challenged the Award dated 4/9/2013 passed by the First Additional Member, M.A.C.T. Ratlam in Claim Case No.3/2013.

2. Briefly stated the facts are that the application had been filed under

Order 9 Rule 13 of the CPC before the trial Court for setting aside the ex-parte order passed by it. However, the same has been rejected and hence, the present appeal.

3. Brief facts of the case in the nutshell are that in the original claim case respondent Naggaji has filed a claim for compensation without issuing any legal notices by the registered A.D. or by giving any notices to the other side. The matter had been decided by ex-parte and Award for Rs.33,000/- as compensation has been awarded to the claimant.

4. Counsel for the appellant has submitted that such an Award was liable to be set aside since the notices were never received by the appellant Dharmendra Singh (P.W.1) because he was living separately from his father Mahesh Singh resident of 50/3 Sanvid Nagar, Kanadiya Road, Indore and notices were never served on the appellant No.2. Similarly appellant No.2 Mahesh Singh has remained absent and it could be said that the notices have not been effected to the appellant No.2. In this light, Counsel for the appellants prayed that the impugned order be set aside. Counsel further submitted that the appellants are willing to abide by any condition that may be imposed by this Court. Counsel placed reliance on *G.P. Srivastava vs. R.K. Raizada and others* (2000)3 SCC 54, stating that the Apex Court had directed that; the expression, "was prevented by any sufficient cause" from appearing should be construed liberally and the Court had wide discretion for setting aside the ex-parte orders if sufficient cause was shown under Order 9 Rule 13 of CPC. The Apex Court had levied cost of Rs.5000/- and remanded the matter holding that if the defendant was found negligent then the other side shall be paid costs of Rs.5,000/-. Placing reliance on *Anil vs. Soimta Tar Product and others* 2006 (1) J.L.J 119 Counsel submitted that this Court had also directed to setting aside the ex-parte decree to do complete justice between the parties and sufficient cause for non-appearance was enough to set aside the order. And the Court had held that even if appellant is found to be negligent, the other party can be compensated by paying costs.

5. Counsel submitted that in the present case also since there is no effective service on the appellant No.2 and the impugned order be set aside and costs as this Court may deem proper under the circumstances be levied.

6. On considering the above submissions and the fact that the respondents never appeared before the Lower Court. The impugned order passed ex-

parte needs to be set aside since proper opportunity of hearing has not been given to the present appellants. On such an ex-parte judgment would be against the principles of natural justice. Placing reliance on *G.P. Shrivastava* (supra), I find that sufficient causes is made out to the defendant and to do substantial justice between the parties the ex-parte award is set aside subject to condition that the appellants shall deposit 50% of the awarded amount in the Trial Court before contesting the case. However, in the interest of justice cost of Rs.5,000/- is awarded to the claimants, which is to be paid by the present appellants within a period of two weeks' from the date of receipt of the certified copy of this order. It is also further directed that 50% of the awarded amount that is deposited in the trial Court shall be subject to the final outcome of claims case and shall not be disbursed to the claimants till the final order is passed.

7. The Trial Court is directed to restore the claims case to its original number and notices be issued to the claimants afresh. Let the entire exercise be completed within a period of one month from today. Needless to say that this Court is not making any observation on the merits of the case.

8. The present appeal is allowed to the extent herein above indicated.

C.c. as per rules.

Appeal allowed.

I.L.R. [2016] M.P., 551

ARBITRATION CASE

Before Mr. Justice Alok Aradhe

Arb. Case No. 5/2011 (Jabalpur) decided on 20 May, 2015

K.N. SINGH INFRATECH PVT. LTD. (M/S.)

...Applicant

Vs.

M/S. MONTECARLO CONSTRUCTION LTD.

...Non-applicant

Arbitration and Conciliation Act (26 of 1996), Section 11(6) - Appointment of an arbitrator - Since petitioner has not received the amount in full and final settlement of the dues - He sent a notice for appointment of an Arbitrator but the same was not done by the respondent - Held - The question whether the payment received by the petitioner is towards full and final settlement which binds and precludes him from making any other claim for damages arising out of the breach

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of contract, is a matter which is within the realm of Arbitrator - Petition allowed. (Paras 9 & 10)

माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 11(6) – मध्यस्थ की नियुक्ति – चूँकि याची ने देयकों के पूर्ण और अंतिम निर्धारण की रकम प्राप्त नहीं की – उसने मध्यस्थ की नियुक्ति हेतु नोटिस भेजा किन्तु प्रत्यर्थी द्वारा मध्यस्थ की नियुक्ति नहीं की गई – अभिनिर्धारित – प्रश्न कि क्या याची द्वारा पूर्ण और अंतिम निर्धारण की ओर प्राप्त भुगतान जिससे वह बाध्य है और संविदा के भंग से उत्पन्न क्षतिपूर्ति हेतु कोई अन्य दावा करने से उसे प्रवारित करता है, एक ऐसा मामला है जो मध्यस्थ के क्षेत्राधिकार के भीतर है – याचिका मंजूर।

Cases referred :

1980 MPLJ 722, 2014(4) MPLJ 41, 2007 Arb. W.L.J. 11, 2015 AIR SCW 67, (2009) 1 SCC 267.

V.R. Rao with Rohit Taneja, for the applicant.

Brian D'Silva with Ishant Soni, for the non-applicant.

ORDER

ALOK ARADHE, J. :- By means of this petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act, 1996'), the petitioner seeks appointment of an Arbitrator.

2. Facts giving rise to filing of this petition briefly stated are that the petitioner as well as respondent are the Companies incorporated under the provisions of Companies Act. The respondent was awarded contract by the Executive Engineer on turn key basis for construction of Nagod Branch Canal from RD 0.00 Kms. to 33.175 Kms. including distribution system of Bargi Division Project. The petitioner approached the respondent for some work and had agreed to give work including earthwork, concrete lining work of Nagod-Satna Branch Canal including distribution system from RD 0.00 Km. to 33.175 Kms. The work was to be executed by the petitioner by using its machinery and resources and the value of the contract was Rs.36 Crores. Admittedly, the parties entered into an agreement on 9.7.2009 and clause 34 of the said contract contains an arbitration clause, which provides for reference of any dispute or differences between the parties to an Arbitration Tribunal comprising three Arbitrators.

3. On 24.2.2010, the contract in question was rescinded. Thereafter, the amount of final bill was paid to the petitioner on 9.11.2009, 19.2.2010,

29.3.2010, 14.6.2010 and 19.7.2010, respectively. After having accepted the amount of final bill, the petitioner by communication dated 27.8.2010, requested the respondent to release the security deposit. In the aforesaid communication, it was stated that this may be treated as final payment against the work executed by the petitioner. Thereafter, the petitioner sent a notice on 22.11.2010 for appointment of an Arbitrator. Since, the respondent did not appoint an Arbitrator, as per the arbitration clause, the petitioner has approached this Court.

4. Learned senior counsel for the petitioner has submitted that the petitioner had not received the amount in full and final settlement of the dues. The petitioner has merely received the amount of final bill, which does not show that the petitioner has no other pending claim against the respondent. It is further submitted that there is no material on record to show that the petitioner has received the amount towards full and final settlement and has not given any certificate that it has no claim against the respondent. Therefore, the dispute still exists between the parties, which has arisen on account of breach of contract which is required to be referred for arbitration as provided under Clause 34 of the contract. In support of aforesaid submission, learned senior counsel for the petitioner has placed reliance in the cases of *Ramsharan and Ramdayal Dau Co. Vs. Hindustan Steel Ltd., Bhilai*, 1980 MPLJ 722, *Today Homes and Infrastructure Pvt. Ltd., Vs. Ludhiana Improvement Trust and another*, 2014(4) MPLJ 41 and a decision of Supreme Court in the case of *M/s. Ambica Construction Vs. Union of India*, 2007 Arb.W.L.J. 11.

5. On the other hand, learned senior counsel for the respondent has submitted that the petitioner has accepted the amount of final bill without any demur. Learned senior counsel has invited the attention of this Court to communication dated 27.8.2010 and has submitted that the petitioner in unequivocal terms has stated that the payment of balance amount of security deposit be treated as final payment against the work executed by it. It is also urged that the petitioner has accepted the payment in full and final settlement of his claim and, therefore, there is no dispute existing between the parties, which can be referred for arbitration. In support of aforesaid submission, learned senior counsel for the respondent has placed reliance on a decision of the Supreme Court in the case of *New India Assurance Company Ltd., Vs. Genus Power Infrastructure Ltd.*, 2015 AIR SCW 67.

6. I have considered the submissions made by learned counsel for the parties. The Division Bench of this Court in the case of *Ramsharan and Ramdayal Dau Co.* (supra) has held that the question whether there was infact payment in full and final settlement binding on the Contractor, was a matter which had to be decided by the Arbitrator being a question arising from and in relation to and in connection with the contract. The Supreme Court in the case of *National Insurance Company Limited Vs. Boghara Polyfab Private Limited*, (2009) 1 SCC 267, in para 26, has held as under:-

“When we refer to a discharge of contract by an agreement signed by both the parties or by execution of a full and final discharge voucher/receipt by one of the parties, we refer to an agreement or discharge voucher which is validly and voluntarily executed. If the party which has executed the discharge agreement or discharge voucher, alleges that the execution of such discharge agreement or voucher was on account of fraud/coercion/under influence practised by the other party and is able to establish the same, then obviously the discharge of the contract by such agreement/voucher is rendered void and cannot be acted upon. Consequently, any dispute raised by such party would be arbitrable.”

The aforesaid decision has been referred to with approval by the Supreme Court in the case of *New India Assurance Co. Ltd., Vs. Genus Power Infrastructure Ltd.*, (supra). In the case of *Today Homes and Infrastructure Pvt. Ltd., Vs. Ludhiana Improvement Trust and another*, (supra), the Supreme Court has held that while deciding the application under Section 11(6) of the Act, the designated Judge is not required to undertake a detailed scrutiny of merits and demerits of the case.

7. In view of aforesaid well settled legal position, facts of the case may be seen. Clause 21 of the agreement, which is relevant for the purposed of controversy involved in the instant case, reads as under:-

“The **FIRM** shall submit monthly bill of the work done to **MCL** by the 5th of next month and the **MCL** shall make the payment of the bill after 10 days of the bill is passed by the **Executive Engineer, Narmada Development Division No.7, Satna, Distt. Satna (M.P.)**”

8. Clause 34, which deals with the Arbitration, reads as under:-

“Arbitration :

Any dispute or differences between the parties arising out of or in connection with this agreement or its performance shall be settled amicably through consultation between the representative of the parties.

If after consultation, the parties fail to reach an amicable settlement on any dispute or differences arising out of or in connection with this Agreement or its performance, the dispute shall be referred to Arbitration Tribunal composed of three arbitrators, one Arbitrator appointed by each party and the third Arbitrator (as the case may be) shall be selected by both the Arbitrators and where such third Arbitrator has not been selected on account of a difference of opinion among the Arbitrators, the third Arbitrator shall be appointed in accordance with the provisions of the Arbitration and Conciliation Act, 1996. The award rendered shall be final and binding both the parties.”

Thus, the clause which contains the arbitration is widely worded and it embraces within its ambit all the disputes or differences arising out of or in connection with the agreement.

9. In the instant case, the petitioner in communication dated 27.8.2010 has demanded balance payment of security deposit and has stated that - “this may be treated as final payment against the work executed by us.” The petitioner has thus received the final payment in respect of the work done by it under the agreement. It is pertinent to mention here that there is no material on record that the petitioner has either furnished no claim certificate in favour of the respondent or anywhere has stated that it has no further claim pending against the respondent. The claim of the petitioner is in respect of the damages which arises out of the breach of the contract. Therefore, the question whether the payment which has been received by the petitioner is in full and final settlement and binds the Contractor, is the question which has to be decided by the Arbitrator, in the facts of the case.

10. The decision relied upon by the respondent in the case of *New India*

Assurance, (supra), is clearly distinguishable, as in the said case, the respondent had signed a detailed letter of subrogation. Similarly, in the case of *National Insurance Co. Ltd.*, (supra), full and final discharge voucher/receipt was executed by one of the parties to the contract, which is not the case in hand. Thus, the aforesaid decision also does not apply to the fact situation of the case. As stated supra, the question whether the payment received by the petitioner is towards full and final settlement which binds and precludes it from making any other claim for damages arising out of the breach of contract, is a matter which is within the realm of Arbitrator, which has to be adjudicated by him.

11. In view of preceding analysis, I am inclined to allow the application. During the course of hearing, learned counsel for the parties had agreed that if the instant application is allowed, they would have no objection to appointment of retired Judge of High Court/ Supreme Court as the sole Arbitrator. It is further stated by learned counsel for the parties that the venue of the arbitration would be Jabalpur. Keeping in view submissions made by learned counsel for the parties, Hon'ble Mr. Justice D.M. Dharmadhikari, retired Judge of Supreme Court is appointed as an Arbitrator to adjudicate the dispute between the parties. Office is directed to send a copy of this order to Hon'ble Mr. Justice D.M. Dharmadhikari.

In the result, the application filed by the petitioner under Section 11(6) of the Act is allowed

Application allowed.

**I.L.R. [2016] M.P., 556
ARBITRATION APPEAL**

Before Mr. Justice Alok Aradhe

Arb. Appeal No. 3/2012 (Jabalpur) decided on 28 July, 2015

M.P. STATE CIVIL SUPPLIES CORPORATION LTD. ...Appellant
Vs.

M/S. K.D. TRANSPORT ...Respondent

(Alongwith Arb.A. No. 4/2012)

A. Arbitration and Conciliation Act (26 of 1996), Section 34 - Setting aside of award - Award can be set aside (i) if it is contrary to fundamental policy, (ii) against interest of India; justice or morality, (iii) if it is patently illegal arbitrary.

(Para 4)

क. माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 34 – अवार्ड को अपास्त किया जाना – अवार्ड अपास्त किया जा सकता है (i) यदि वह मूलमूल नीति के विपरीत है, (ii) भारत के हित, न्याय या नैतिकता के विरुद्ध है, (iii) यदि वह प्रत्यक्ष रूप से अवैध मनुमाना है।

B. Arbitration and Conciliation Act (26 of 1996), Section 34(2)(b)(ii) - Awards - Trial Court set aside the award only on the ground that appellant had no authority to deduct amount without getting the dispute adjudicated - This finding was contrary to clause 9.4 of agreement - Additional District Judge while passing the impugned judgments exceeded its jurisdiction while dealing with the objections preferred u/s 34 of the Act - Judgments passed by the trial Court suffer from jurisdictional infirmity - Impugned judgments are set aside - Awards passed by the Arbitrator are restored - Appeals allowed. (Paras 8, 10 & 11)

ख. माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 34(2)(बी)(ii) – अवार्ड – विचारण न्यायालय ने केवल इस आधार पर अवार्ड अपास्त किया कि अपीलार्थी को विवाद न्यायनिर्णीत कराये बिना रकम की कटौती करने का प्राधिकार नहीं था – यह निष्कर्ष, करार के खंड 9.4 के विपरीत था – अतिरिक्त जिला न्यायाधीश, आक्षेपित निर्णयों को पारित किये जाते समय अधिनियम की धारा 34 के अंतर्गत प्रस्तुत आक्षेपों का निराकरण करते समय अपनी अधिकारिता से परे गये – विचारण न्यायालय द्वारा पारित निर्णय, अधिकारिता की कमी से ग्रस्त है – आक्षेपित निर्णय अपास्त – मध्यस्थ द्वारा पारित अवार्ड पुनःस्थापित – अपील मंजूर।

Cases referred :

AIR 1987 SC 1359, AIR 1974 SC 1265, 2007 (4) MPLJ 641, (2006) 11 SCC 181, 1994 Supp (1) SCC 644, (2003) 5 SCC 705, (2006) 11 SCC 245, (2015) 3 SCC 49.

Shobhitaditya, for the appellant.

Sankalp Kochar, for the respondent.

J U D G M E N T

ALOK ARADHE, J. :- These appeals have preferred under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act'), being aggrieved by the judgments dated 19.09.2011 passed by the Additional District Judge, Bhopal by which the objections preferred by the respondent under Section 34 of the Act have been allowed. As common question of law and facts arise in both these appeal, they were heard analogously

and are being decided by this common judgment. In order to appreciate the appellant's challenge to the impugned judgment, few facts need mentioned, which are stated infra:

2. The parties had entered into an agreement on 30.11.2005 for long route transportation of food grains for financial year 2006-07. The respondent did not adhere to the schedule prescribed in the agreement, as a result of which the appellant issued notice to the respondent by which it was informed that alternate arrangement of the transportation at its risk and cost shall be made. After assessment of the expenses incurred by the appellant for making arrangement for alternative transportation, the appellant issued an order of recovery for a sum of Rs.7,16,148/- on 01.03.2007 in Arbitration Appeal No.3/2012 whereas in Arbitration Appeal No.4/2012 a sum of Rs.2,71,974/- (Two Lakh Seventy One Thousand and Nine Hundred and Seventy Four Rupees Only) was directed to be recovered from the respondent. The respondent thereupon on 09.01.2009 invoked clause-14.1 of the agreement and preferred claims before the Arbitrator which were registered as Case Nos.1080/2009 and 1081/2009. The appellant submitted a written statement with details of the notices and orders issued to the respondent. The respondent on 17.02.2002 submitted the rejoinder. The Arbitrator vide awards dated 08.04.2009 dismissed the claims preferred by the respondent. The respondent thereupon filed objections under Section 34 of the Act which were registered as Arbitration Case Nos.46/2009 and 55/2009. The appellant submitted its reply to the objections preferred by the respondent under Section 34 of the Act. The Additional District Judge, Bhopal vide judgments dated 19.09.2011 allowed the objections preferred by the respondent and set-aside the awards dated 08.04.2009 passed by the Arbitrator. In the aforesaid factual backdrop that the appellant has approached this Court.

3. Learned counsel for the appellant while inviting the attention of this Court to various clauses of the agreement, submitted that trial Court exceeded its jurisdiction in setting aside the awards passed by the Arbitrator. Learned counsel for the appellant referring to paragraph-11 of the judgment submitted that trial Court grossly erred in holding that the appellant had no authority to deduct the amount from the bills of the respondent until and unless there is adjudication by the Arbitrator. The aforesaid finding has been recorded in contravention of the terms and conditions of the agreement. It is further submitted that the Additional District Judge grossly erred in setting aside the

awards on the grounds that the objections preferred by the respondent fall within the purview of section 34 (2) of the Act. On the other hand, learned counsel for the respondent has supported the judgments passed by the Additional District Judge. In support of his submission, learned counsel for the respondent has placed reliance on the decisions in *State of Karnataka Vs. Rameshwara Rice Mills, Thirthahalli* AIR 1987 SC 1359, *Union of India Vs. Raman Iron Foundry* AIR 1974 SC 1265 and *B.B. Verma Vs. State of M.P.* 2007 (4) MPLJ 641.

4. I have considered the respective submissions made by learned counsel for the appellant and have perused the record. The Supreme Court in *McDermott International Inc. v. Burn Standard Co. Ltd.*, (2006) 11 SCC 181 while taking note of the decision rendered by it in *Renusagar Power Co. Ltd. v. General Electric Co.*, 1994 Supp (1) SCC 644 wherein it was held that an arbitral award can be set aside if it is contrary to fundamental policy of Indian law; the interests of India; or justice or morality, held that public policy is a matter dependent upon the nature of transaction and the nature of statute. However, subsequently, in the case of *ONGC Ltd. v. Saw Pipes Ltd.*, (2003) 5 SCC 705, the Supreme Court added another ground for exercise of courts' jurisdiction for setting aside the award i.e. if it is patently arbitrary. In *Centrotrade Minerals & Metals Inc. v. Hindustan Copper Ltd.*, (2006) 11 SCC 245 it was held by the Supreme Court that if an award suffers from patent illegality, which goes to the root of the matter, the court can interfere with the award passed by the arbitrator. In a recent decision, in the case of *Associate Builders v. Delhi Development Authority*, (2015) 3 SCC 49, the Supreme Court after taking note of various previous judgments rendered by it with regard to scope of interference with the arbitral award held that none of the grounds contained in Section 34 (2) (a) of the Act deals with the merits of the decision rendered by an arbitrator. It is only when the award is in conflict with the public policy of India as prescribed in Section 34 (2) (b) (ii) of the Act that the merits of an arbitral award are to be looked into under certain specified circumstances. It was further held that the Court would interfere with an award passed by an arbitrator if it is in violation of statute, interest of India, justice or morality, patent illegality, contravention of the Act or terms of the contract. It was also held that the court hearing an appeal does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass

muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus, an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score.

5. In the backdrop of aforesaid well settled legal position, the facts of the cases at hand may be seen. Admittedly under the agreement, respondent was under an obligation to transport the foodgrains from Maksi Base Depot. The relevant clauses of agreement are reproduced below for the facility of reference:-

"Cl.9.2(a)- The contractor shall be liable for transportation in respect of the proposed district/districts during the period of contract as per the base depot/storage centres and districts mentioned in the schedule 1A to 1C of the tender.

Cl.9.2(b)- If the contractor fails to perform as per the program of district manager, then appellant corporation shall be entitled to impose a penalty of Rs.2 per quintal, per day of such delayed work.

Cl.9.4- If the contractor fails to perform as per the program of district manager, then appellant corporation shall be entitled to complete such work through any other transporter or a state agency, without terminating the agreement at the risk & cost of the transporter."

6. From perusal of the relevant clause of agreement, it is evident that under the terms and conditions of the agreement, the appellant had authority to get the work completed through any other transporter or a State agency or make arrangement for transporting the same without terminating the agreement at the risk & cost of the transporter.

7. From perusal of the claim preferred by the respondent before the Arbitrator, it is evident that the respondent raised had an objection with regard to authority of District Manager of Rajgarh to recover the amount in question. The Arbitrator for the reasons assigned in paragraph-8 of the awards has held that alternative arrangement of transportation of foodgrains was rightly made under the provisions of the agreement at the risk and cost of the respondent and the same has rightly been recovered from the respondents. The Arbitrator

further held that under the terms and conditions of the agreement District Manager, Rajgarh had authority to recover the amount in question from the respondent.

8. However, the trial Court in a perfunctory manner and in violation of the well settled legal position with regard to scope of section 34 of the Act as has been delineated by the Supreme Court in catena of decisions, has set-aside the awards passed by the Arbitrator holding that the appellant had no authority to deduct the amount in question from the bills of the respondent without adjudication of the dispute. While recording the aforesaid finding, the Additional District Judge, Bhopal has not taken into account the clause-9.4 of the agreement which confers authority on the appellant to make alternative arrangement in case of default by the transportation at it's risk & consequences the same can be recovered and in ignorance of the same in a cavalier manner set-aside the awards passed by the Arbitrator.

9. The damages may be of two types, namely, liquidated damages and unliquidated damages. Liquidated damages means an amount contractually stipulated as a reasonable estimation of actual damage to be recovered by one party if the other party breaches. The expression 'unliquidated damages' means the amount of damages not specified or determined or ascertained, the amount of damages which are to be determined by a court rather than specified by a contract. [See: Advanced Law Lexicon by P. Ramanatha Aiyar, 3rd Edition] Thus, it is apparent that in order to ascertain liquidated damages no adjudication is required whereas in order to ascertain unliquidated damages, adjudication is required. Therefore, the decisions relied by the respondent are of no assistance to it in the fact situation of the case as the same deals with cases of unliquidated damages which require adjudication. In the instant case under clause 9.4 of the agreement the appellant has authority to recover liquidated damages.

10. Thus, the Additional District Judge while passing the impugned judgments exceeded its jurisdiction while dealing with the objections preferred under Section 34 of the Act. The judgments passed by the trial Court suffer from jurisdictional infirmity as well as error apparent on the face of the record

11. In view of preceding analysis the impugned judgments dated 19.09.2011 passed by the Additional District Judge, Bhopal are hereby setaside. In the result, the awards passed by the Arbitrator are restored.

Accordingly, the appeals are allowed with costs.

Appeal allowed.

**I.L.R. [2016] M.P., 562
CRIMINAL REVISION**

Before Mr. Justice U.C. Maheshwari

Cr.Rev. No. 702/2012 (Jabalpur) decided on 23 January, 2014

SHYAMA (SMT.)

...Applicant

Vs.

LAXMI NARAYAN

...Non-applicant

A. Criminal Procedure Code, 1973 (2 of 1974), Section 125 - Ad-interim maintenance - Relationship of husband and wife in question - Prima facie evidence - Comparison of ration card, education certificate vis-a-vis Voter I.D. card - Held - Ration card, education certificate will prevail over voter I.D. card - Application for ad-interim maintenance allowed. (Para 5)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 125 - अंतरिम भरण पोषण - पति और पत्नी का संबंध प्रश्नाधीन - प्रथम दृष्ट्या साक्ष्य - राशन कार्ड, शिक्षा प्रमाणपत्र के मुकाबले में मतदाता पहचान पत्र की तुलना - अभिनिर्धारित - राशन कार्ड, शिक्षा प्रमाणपत्र, मतदाता पहचान पत्र पर अभिभावी होगा - अंतरिम भरण पोषण हेतु आवेदन मंजूर।

B. Criminal Procedure Code, 1973 (2 of 1974), Section 125 - Ad interim maintenance - Husband retired as a lineman from M.P.E.B. - Pension of Rs. 8,000/- per month - Held - Wife entitled for Rs. 2,500/- per month keeping in view the market price index of food stuffs and other essential things. (Para 6)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 125 - अंतरिम भरण पोषण - पति म.प्र. विद्युत मंडल से लाईनमैन के पद से सेवानिवृत्त - रु. 8,000/- प्रति माह की पेंशन - अभिनिर्धारित - खाद्य पदार्थ एवं अन्य आवश्यक वस्तुओं का बाजार मूल्य सूचकांक दृष्टिगत रखते हुये पत्नी रु. 2,500/- प्रतिमाह की हकदार।

C. Criminal Procedure Code, 1973 (2 of 1974), Section 125 - Interim maintenance - Adult son - Whether entitled for interim maintenance - Held - Not entitled either himself or through his mother. (Para 7)

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 125 - अंतरिम भरण पोषण - वयस्क पुत्र - क्या अंतरिम भरण पोषण के लिये हकदार है - अभिनिर्धारित - या तो स्वयं या अपनी माता के जरिये हकदार नहीं।

Shweta Gupta, for the applicant.

None for the non-applicant.

(Supplied: Paragraph numbers)

ORDER

U.C. MAHESHWARI, J. :- It being an admitted revision vide order dated 16.04.2012, is listed today for consideration of I.A. No.7907/2012, applicant's application for grant of ad-interim maintenance till disposal of impugned case before the Family Court. It is apparent fact on record that in response to aforesaid application, no reply has been filed on behalf of the respondent. In such premises, unrebutted factual matrix of the application are on record.

2. The applicant wife has preferred this revision against the respondent being aggrieved by the order dated 02.03.2012 passed by the Family Court, Rewa in Case No.224/2011 whereby her application for appropriate direction to the respondent to give her the sum of interim maintenance till the disposal of impugned case has been dismissed, by stating that there is no prima facie evidence on record showing that the applicant is wedded wife of the respondent. In support of such contention, it is also stated by the Family Court that in the Voter I.D. Card of the present applicant, the name of some other person "Tejbhan" has been stated as her husband.

3. Applicant's counsel after taking me through the averments of the application along with impugned order so also the ration card, in which the name of the applicant is stated with the respondent as his wife, so also the certificate of her son of examination of primary class of District Primary Board, of the year 2005, argued that in view of such prima facie evidence to draw inference that applicant was the wedded wife of the respondent, mere on the basis of some Voter I.D. Card, which was not prepared at the instance of the applicant or in any case in the lack of any appropriate evidence in the record to show that such card was prepared at the instance of the applicant, the Family Court has committed error in holding that the applicant was not the wedded wife of the respondent and in such premises, committed grave error

in dismissing her application for grant of interim maintenance. She further stated that the respondent is a retired person from the post of Lineman of the Electricity Board and in such premises, he is getting the pension near about Rs.10,000/- per month and he is in position to pay the interim maintenance to the applicant. In continuation, she said that applicant did not possess any source of income and in such premises, she is in need of the sum to meet the expenses of her livelihood and prayed to allow this interim application with appropriate direction to the respondent to pay the applicant the reasonable sum as maintenance till the disposal of this revision.

4. In spite of service of notice, no one is present on behalf of the respondent to assist the Court. Hence, keeping in view the arguments advanced by the learned Counsel for the applicant and taking into consideration the available record of this revision as well as the record of the Trial Court, which has already been requisitioned, this I.A. is being decided.

5. On perusing the photocopy of the ration card issued by the Gram Panchayat in the name of the respondent, it is apparent that in such ration card, along with the respondent the second name of the applicant "Belakali" is stated as his wife and such ration card was issued by such Gram Panchayat on 09.06.2005 and petition is preferred by the applicant before the Trial Court on 23.12.2011. So on the date of issuing such ration card, there was no matrimonial dispute between the respondent and the applicant. At present I have not found any prima facie circumstance to disbelieve the ration card. Apart this, along with this revision a certificate of the District Primary Board of the year 2005 has been filed, according to which the son of the applicant and respondent, namely Ravi Kumar Pandey, has passed out the Primary Board Examination. In such certificate, the applicant's name has been mentioned as his mother along with the name of Laxmi Narayan Pandey as her husband and in the available circumstances, such certificate could not be disbelieved at this stage. It is a matter of experience that ration card is always prepared at the request of the person in whose name the same is issued. It is also apparent from the ration card that the same is having the signature of the respondent on the requisite declaration at the back side of the ration card. In the certificate of the student, information is filled up on the basis of the scholar register and the examination form, in which the informations are supplied by the parents or by the student himself, while Voter I.D. Card is prepared on the information collected by the deployed persons of the Election Commission and sometime

while preparing the voters list and the Voter I.D. Card, elaborate verification of the person is not carried out and that is why the descriptions of some voters in such voters list are not found correct. Sometime it is corrected by the authority in accordance with the procedure, sometime it remains as it is. So in such premises, in comparison of ration card and education certificate, the Voter I.D. Card could not be treated to be prima facie evidence to draw any inference regarding non-existing marital relation between the parties, whether they are married or not but in any case the ration card and the certificate of education of the son shall prevail over the Voter I.D. Card. In view of such prima facie evidence, without expressing any final opinion, I am of the considered view that the applicant being the wife of the respondent, has filed this impugned petition under Section 125 of the Code of Criminal Procedure and during pendency of the same, for her livelihood and also to see the fate of the matter, she is entitled to get the interim maintenance from the respondent.

6. So far the quantum of interim maintenance is concerned, it appears to be undisputed fact on record that the respondent is a retired person from the Electricity Board, from the post of Lineman, and in such premises he is a pensioner and in any case probably he is receiving near about Rs.8,000/- per month as pension. So in such premises, the applicant also has right to move and live her life of equal status of the respondent. In view of aforesaid, I am of considered view that till disposal of the impugned case by the Family Court, the applicant deserves for interim maintenance of Rs.2,500/- from the respondent. Such quantum has been fixed keeping in view the market index price of food stuffs and other essential things for the human being.

7. So far the prayer of the applicant for appropriate direction to the respondent to pay the maintenance for son is concerned, according to the aforesaid certificate of the District Primary Board, his date of birth is 20.01.1992 and in such premises, he appears to be the age of near about 21 years and such adult son either himself or through mother is not entitled to get any interim maintenance. So at present, such prayer is not being considered. Such question could be considered by the Family Court at the time of final adjudication of the impugned matter.

8. In view of the aforesaid, the I.A. is allowed till the extent of the applicant and respondent is directed to pay her Rs.2,500/- per month from

the date of the impugned order dated 02.03.2012. The earlier arrears shall be paid by the respondent in three different equal installments with the interval of two months from each other, out of them first installment shall be payable on or before 31.03.2014. Apart this, regular interim maintenance shall be paid by the respondent to the applicant within 10 days after expiry of the earlier Gregorian calendar month and in such premises, such interim maintenance of the month of January shall be paid by the respondent to the applicant between 1st to 10th day of February, 2014.

9. This revision could be adjudicated even in the lack of the record of the Trial Court because parties are in position to file the requisite documents and papers on record, on which they rely and, therefore, instead to keep the record of the Family Court here with the revision, I deem fit to send back the same to such Court with direction to proceed with the matter on merit and decide the same on some early date, probably within six months, from the date of receiving the record under intimation to this Court. Hence, office is directed to send back the record immediately along with the copy of this order to the Family Court within 15 days from today.

10. Now this matter be listed for final hearing by fixing a date in the month of August, 2014.

11. Certified copy as per rules.

Order accordingly.

I.L.R. [2016] M.P., 566

CRIMINAL REVISION

Before Mr. Justice B.D. Rathi

Cr.Rev. No. 56/2014 (Gwalior) decided on 1 December, 2014

SUNITA DUBEY (SMT.)

...Applicant

Vs.

HUKUM SINGH AHIRWAR

...Non-applicant

(Alongwith Cr.Rev. No. 59/2014)

Negotiable Instruments Act (26 of 1881), Section 20 - Inchoate stamped instruments - This section declares that inchoate instruments are also valid and legally enforceable - Respondent admitted having signed blank cheque - In case of a signed blank cheque, the drawer

gives authority to the drawee to fill up the agreed liability - Further held, an individual is authorized to complete the inchoate instruments deliver to him by filling up the blanks. (Paras 11 & 12)

परक्राम्य लिखत अधिनियम (1881 का 26), धारा 20 - अपूर्ण स्टॉम्पित लिखत - यह धारा घोषित करती है कि अपूर्ण लिखत भी विधिमान्य एवं वैध रूप से प्रवर्तनीय है - प्रत्यर्थी ने निरंक/कोरे चैक पर हस्ताक्षर करना स्वीकार किया है - हस्ताक्षरित निरंक/कोरे चैक के मामले में, लेखीवाल तय दायित्व को भरने का प्राधिकार उपरवाला को देता है - आगे अभिनिर्धारित किया गया कि एक व्यक्ति उसे परिदत्त किये गये अपूर्ण लिखत को निरंक/कोरे स्थान भरकर पूरा करने के लिये प्राधिकृत है।

Cases referred :

2011(4) MPHT 178, 2010(5) MPHT 104, 2007(1) MPLJ 84, AIR 1954 SC 455.

P.S. Raghuvanshi, for the applicants in both the revisions.

V.D. Sharma with Monika Mishra, for the non-applicants in both the revisions.

ORDER

B.D. RATHI, J. :- As the grievance raised in the aforesaid two cases is identical and of similar nature, heard together and disposed of by this common order.

2. Both the revisions have been preferred under Section 397/401 of the Code of Criminal Procedure 1974 in short the 'Code' against an order dated 17/12/2013 passed by the Fourth Additional Sessions Judge Vidisha district Vidisha (M.P.), in Criminal Revision Nos. 118/2013 & 119/2013 whereby the applications of the respondents/ accused under Section 45 of the Indian Evidence Act were allowed by setting aside the orders of dismissal passed by the trial court dated 6/8/2013 in Criminal Case Nos. 232/12 and 475/12.

3. For facility of reference, the facts are being taken from Cri.Rev. No.56/14. As per the case of the petitioner/complainant, she advanced a sum of Rs. 2,00,000/- to the respondent/accused and in turn the respondent-Hukum Singh issued a cheque No.892743 dated 12/9/2011 in favour of the complainant/petitioner drawn on State Bank of India Branch Vidisha. When the petitioner presented the said cheque at the concerning Bank same came to be dishonoured for want of sufficient fund in the account of the holder of

the cheque. The complainant then issued notice to the accused, demanding payment within fifteen days from the receipt of the notice failing which the respondent/accused was liable to be prosecuted for having committed offence punishable under section 138 of the Negotiable Instruments Act, but as the respondent/accused refused to pay even after receipt of the notice, a complaint under section 138 of the Negotiable Instruments Act was filed by the petitioner in the Court of the Judicial Magistrate, against him.

4. During the course of proceedings of the trial in the complaint case, the accused moved an application under section 45 of the Evidence Act. The gist of the application is to the effect that the accused had taken only a sum of Rs. 1,50,000/- on credit out of which Rs. 96,000/- was paid by him to the complainant and he was further ready to pay balance amount of Rs. 54,000/-. He denied to have taken a sum of Rs. 2,00,000/- from the complainant. He also denied to issue a cheque against the debt of Rs. 2,00,000/- in favour of the complainant on 12/9/2011. On the other hand, he stated that the complainant had taken two blank cheques from him as a security bearing No.221478 and 892743 and same were signed by him as account holder. It is submitted that the complainant after filling the date of 12/9/2011 and the amount of Rs. 2,00,000/- in Cheque No. 892743 presented at the bank for encashment. Under these circumstances in order to verify the correctness of the alleged act of the complainant the respondent/accused moved an application under section 45 of the Evidence Act before the trial court for seeking the relief to examine insertion of the entries in the cheque through Handwriting Expert. Said application was rejected vide order dated 6/8/2013 passed in Criminal Case No.232/12. Against the dismissal order dated 6/8/2013, the accused preferred Cri.Rev.No.119/13 before the Revisional Court. The learned Revisional Court after considering the arguments of both the sides, allowed the prayer of the accused vide impugned order, assailed herein, hence, the revision before this court.

5. Similarly, same application under section 45 of the Evidence Act was filed in Cri. Case No. 475/12 by the respondent-accused Devkishan by alleging that Cheque No.540211 was signed by him but other entries were full filled by the complainant, therefore, to verify the alleged act of the complainant an expert opinion may be called. The application was dismissed against which Cri. Rev. No.118/13 was preferred. Same was allowed and the impugned order was passed.

6. Learned counsel for the petitioner contended that in the application filed under section 45 of the Evidence Act it was admitted by the accused that the cheque was signed by him, therefore, the revisional court was in error to allow the application after setting aside the order of the trial court whereby application of the accused was dismissed. It is also submitted by the counsel that as per section 20 of the Negotiable Instruments Act, 1881 when incomplete cheque was issued by the accused it means accused gives *prima facie* authority to the holder thereof to make or complete the cheque and in such a situation if any further entry was made by the complainant then same cannot be examined through opinion by the Handwriting Expert. It is therefore contended that the order impugned is liable to be quashed. In support of the arguments, learned counsel for the petitioner placed reliance on the decisions in the case of *Bhadauria Tiles Vs. Ramkumar Singh Kushwah* 2011(4) MPHT 178 and *Satyendra Upadhyaya Vs. Omprakash Rathore @ Japan Singh* 2010(5) MPHT 104.

7. On the other hand, learned counsel for the respondent contended that the revisional court has not committed any illegality in passing the order. The order was necessitated to bring out the truth in the prosecution case, but unfortunately, prayer of the accused was rejected by the trial court which mistake was corrected by the revisional court. It is therefore prayed that this revision be dismissed. It is also submitted by the learned counsel that when complainant Sunita Dubey (PW-1) was examined during her cross-examination in para 18, it was admitted by her that the accused signed the cheque by using blue ink but remaining entries were written in black ink. It is also pointed out by the learned counsel for the respondent/accused that complainant Sunita Dubey (PW-1) in her cross-examination denied the suggestion that blank space of the cheque was filled by herself by using black ink or through anybody else. In this connection learned counsel submitted that because blank portion of the cheque was not completed by the accused therefore, in such circumstances presumption cannot be drawn under section 20 of the NI Act and to rebut the same if opportunity is given by the revisional court, the order cannot be said to be faulted with. It is also submitted by the counsel for the respondent that any kind of presumption is rebuttable and in that view granting of opportunity by the revisional court to examine the entries by the Handwriting Expert is in accordance with law and no interference is warranted. In support of her arguments, learned counsel placed reliance on the decisions in the cases

of *Nandlal S/o Dayaram Dewani & others Vs. State of Maharashtra* 2007(1) MPLJ 84 and *Ronald Wood Mathams Vs. State of West Bengal* (AIR 1954 SC 455).

8. Having regard to the arguments advanced, the entire case has been examined.

9. To arrive at just conclusion, it would be profitable to reproduce provisions of section 20 of the NI Act. Section 20 of the Negotiable Instruments Act reads as follows:-

"20.Inchoate stamped instruments- Where one person signs and delivers to another a paper stamped in accordance with the law relating to negotiable instruments then in force in India, and either wholly blank or having written thereon an incomplete negotiable instrument, he thereby gives prima facie authority to the holder thereof to make or complete, as the case may be, upon it a negotiable instrument, for any amount specified therein and not exceeding the amount covered by the stamp. The person so signing shall be liable upon such instrument, in the capacity in which he signed the same, to any holder in due course for such amount: provided that no person other than a holder in due course shall recover from the person delivering the instrument anything in excess of the amount intended by him to be paid thereunder."

10. A bare perusal of the provisions shows that there is a clear mandate under section 20 of the Negotiable Instruments Act to the effect that such an instrument can be negotiated by the maker thereof by simply signing and delivering the same to the holder in due course giving thereby ample authority to the latter to fill up the content of the instrument as intended by the maker thereof. Once the execution is admitted, it shall be taken that the cheque was issued by the accused in favour of the complainant towards the discharge of the liability.

11. In the present case, it is admitted position that the cheques were signed by the accused persons. The provisions given in section 20 of the NI Act extracted above makes it clear that the instrument may be wholly blank or incomplete in any particular; in either case, the holder has the authority to make or complete the instrument as a negotiable one. The authority implied

by a signature to a blank instrument is so wide that the party so signing is bound to a holder in due course even though the holder was authorised to fill for a certain amount. Section 20 of the Act declares that inchoate instruments are also valid and legally enforceable. In the case of a signed blank cheque, the drawer gives authority to the drawee to fill up the agreed liability.

12. Now coming to the facts of the present case, though the respondent/accused had admitted that the signed cheque was issued by him but it was denied that the same was issued voluntarily by him in favour of the petitioner against due payment. On the other hand, it was sought to be contended that the cheque had been issued for the security purposes but was misused by the petitioner/complainant after having filled up the details by herself. But as discussed above, as per Section 20 of the NI Act, an individual is authorised to complete the inchoate instrument deliver to him by filling up the blanks. Moreover, a blank cheque could be filled up by the 'Holder thereof', which will be a valid instrument in the eye of Law.

13. As regards the plea taken on behalf of the respondent by his learned counsel that in para 18 of cross-examination the complainant-Sunita Debey (PW-1) denied the suggestions made to her that blank space was filled by herself it means blank space of the cheque was not filled by the holder, therefore, benefit of section 20 of the NI Act cannot be given to the complainant/petitioner. This submission of the learned counsel is not tenable because it is a case of the respondent/accused himself that the blank space of the cheque was filled by the complainant/petitioner (holder of the cheque), and being so, proposal was made by the accused in cross-examination of the complainant. It makes no difference whether proposal was accepted or denied but when case itself was of accused that the cheques were filled by the complainant then in view of defence of the accused-persons certainly, the complainant/petitioner has right to get benefit under section 20 of the NI Act and there is no need to examine the Handwriting Expert to verify whether the contents of the cheques were written by the complainant or not.

14. That apart it is not a case of presumption but it is a case of "authority", therefore, the arguments advanced by the counsel for the respondent and decisions cited in support thereof are not acceptable. Hence, in the considered opinion of this court, the revisional court committed an error to allow the

applications under section 45 of the Evidence Act. The impugned orders passed by the revisional court dated 17/12/2013 in Criminal Revision Nos.118/2013 & 119/2013 are therefore not sustainable in law and are set aside. Accordingly, both the revisions are allowed in confirmation with the orders passed by the trial court dated 6/8/2013 in Criminal Case Nos. 232/12 and 475/12.

15. A copy of this order be sent to the trial court for proceeding further as per law.

Revision allowed.

I.L.R. [2016] M.P., 572

CRIMINAL REVISION

Before Mr. Justice Alok Verma

Cr.Rev. No. 1180/2014 (Indore) decided on 5 February, 2015

KASTURNATH & ors.

...Applicants

Vs.

STATE OF M.P.

...Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Section 397/401 - Transportation of Explosive substance - Explosive substance was being transported to Bhilwara - Trucks entered into the State of Madhya Pradesh - Offence was registered merely on the ground that specific route passing from State of M.P. was not mentioned in statutory forms - Held - Licensee is only required to inform the Superintendent of Police and Collector of respective district were to be given information which was done - No provision in statutory form to specify the route - Company is a licensed manufacturer - Truck was having National Permit and authorised to transport explosive - No sufficient ground was present for proceeding against the applicants u/s 9 (B)(1-B) of Explosive Act 1884 and Section 5 of Explosive Substances Act and other relevant rules - Applicants no. 2 & 3 are discharged - Revision allowed. (Paras 3 & 8)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 397/401 - विस्फोटक पदार्थ का परिवहन - विस्फोटक पदार्थ का भीलवाड़ा परिवहन किया जा रहा था - ट्रकों ने मध्यप्रदेश राज्य में प्रवेश किया - मात्र इस आधार पर अपराध पंजीबद्ध किया गया कि कानूनी प्रपत्रों में मध्यप्रदेश राज्य से गुजरने का विनिर्दिष्ट मार्ग उल्लिखित नहीं था - अभिनिर्धारित - अनुज्ञप्तिधारी द्वारा केवल संबंधित जिले के

पुलिस अधीक्षक एवं कलेक्टर को सूचना दिया जाना अपेक्षित था जो सूचना दी गई थी - मार्ग विनिर्दिष्ट करने के लिए कानूनी प्रपत्रों में कोई उपबंध नहीं - कंपनी एक अनुज्ञप्तिधारी निर्माता है - ट्रक को राष्ट्रीय परमिट प्राप्त था और विस्फोटकों का परिवहन करने के लिए प्राधिकृत था - आवेदकगण के विरुद्ध विस्फोटक अधिनियम 1884 की धारा 9(बी)(1-बी) एवं विस्फोटक पदार्थ अधिनियम की धारा 5 तथा अन्य सुसंगत नियमों के अंतर्गत कार्यवाही करने के लिए कोई पर्याप्त आधार उपस्थित नहीं था - आवेदकगण क्र. 2 व 3 को आरोपमुक्त किया गया - पुनरीक्षण मंजूर।

A.S. Garg with Satish Jain, for the applicant.

R.S. Parmar, P.L. for the non-applicant/State.

ORDER

ALOK VERMA, J. :- This criminal revision under section 397 r/w section 401 of Cr.P.C. is directed against the order passed by the learned 2nd Additional Sessions Judge, Neemuch in Session Trial No.23/2013 dated 30.06.2014 by which the learned Additional Sessions Judge framed charges under sections 9(B)(1-B) and in alternative 9(B)(1-B) r/w section 12 of Explosive Act 1884 and section 5 and in alternative section 5 r/w section 6 of Explosive Substances Act.

2. Before proceeding with the order, it may be mentioned here that the revision in respect of applicant No.1 was withdrawn by the counsel for the applicants on 21.01.2015 and, therefore, this revision relates only in respect of applicants No.2 and 3. Applicant No.2 is Director of M/s Super Shiv Shakti Chemicals and applicant No.3 is Manager of this company. The company possessed license for production of explosives. As per the facts stated in the application, the company sold 600 cartons to M/s Shiv Shakti Enterprises, Bhilwara, Rajasthan and Shiv Kripa Enterprises, Chittorgarh, Rajasthan. 300 cartons each containing power blast Jelatin rods were sold to these two customers and at the relevant time the cartons were being transported to these consignees while the vehicle which was authorized to transport explosive substance by competent authority entered into the State of Madhya Pradesh and the vehicle was intercepted by Police Singoli, District Neemuch. As per the prosecution story, the statutory forms RE-6 and RE-12 specific route passing through the State of Madhya Pradesh was not mentioned and, therefore, it was the prosecution case that explosive substance was brought

illegally into the State of Madhya Pradesh with a view to supply it for some illegal activity.

3. After charge-sheet is filed, the learned Magistrate framed the charges as aforesaid and, therefore, aggrieved by which, this application is filed on the ground that :-

(i) No sufficient grounds were present for proceeding against the present applicants under section 9 (B)(1-B) of Explosive Act 1984 (sic:1884) and section 5 of Explosive Substances Act and other relevant rules.

(ii) The company was having a license for the production and sale of explosives and the license is valid till 31.03.2017.

(iii) The consignees were also having license for purchasing and transportation of explosive substances which were also valid till 31.03.2017 and 31.03.2016 respectively.

(iv) Explosive was being transported under valid documents and, therefore, no illegality or violation of any provision of law was committed by the present applicants and the learned Court below erred in framing the charges against them.

4. According to applicants, no route is prescribed in statutory forms which are mandatory for transportation of such explosives. The present applicants were only under obligation to inform the Superintendent of Police and District Magistrate of the District from where the consignment commence its journey and the same authorities of the district of destination. On these grounds, inter-alia, the applicants pray that the impugned order be set aside and they be discharged from charges under the Sections as aforesaid.

5. Learned counsel for the applicants draw attention of the Court towards form RE-12 at page 79 which is in prescribed form and there is no column for route by which the explosive shall be transported to their destination. The Superintendent of Police and District Magistrate of respective District were given information of transportation of explosive. Similarly, in form RE-6 also

there is no column for specific route by which the explosive would be carried.

6. It is admitted fact that the vehicle was having national permit. The vehicle was also authorized by competent authority for transportation of explosive. The company is a license manufacturer of all the explosives and in this view of the matter, so far as, these two applicants are concerned, there appears to be no violation of any statutory provision by them.

7. So far as, allegation that the explosive substance was being transported without any guard in the vehicle is concerned, the same is not concerned with the present applicants and this was the responsibility of the driver and the transporter while the present applicants are officers of the company which produced the explosives.

8. Under these circumstances, the application deserves to be allowed and is allowed. The applicants No.2 and 3 are discharged from charge under sections 9(B)(1-B) and in alternative 9(B)(1-B) r/w section 12 of Explosive Act 1884 and section 5 and in alternative section 5 r/w section 6 of Explosive Substances Act. Their bail bonds are discharged.

9. With that observation and direction, the application stands disposed of.

Application disposed of.

I.L.R. [2016] M.P., 575

CRIMINAL REVISION

Before Mr. Justice C.V. Sirpurkar

Cr.Rev. No. 1758/2015 (Jabalpur) decided on 10 August, 2015

YOGENDRA NATH DWIVEDI

...Applicant

Vs.

SMT. VINITA DWIVEDI & ors.

...Non-applicants

A. *Protection of Women from Domestic Violence Act, (43 of 2005), Section 12 - Nature of proceedings - Domestic violence per se not offence - Proceedings are quasi civil.* (Paras 7 & 9)

क. घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम, (2005 का 43), धारा 12 - कार्यवाहियों का स्वरूप - घरेलू हिंसा अपने आप में अपराध नहीं - कार्यवाहियां अर्ध-सिविल हैं।

B. Protection of Women from Domestic Violence Act, (43 of 2005), Section 29 and Criminal Procedure Code, 1973 (2 of 1974), Chapter 29 - Appeal u/s 29 of Protection of Women from Domestic Violence Act - Stricto sensu is not an appeal under Chapter 29 of Cr.P.C. - Protection of Women from Domestic Violence Act is beneficial legislation. (Paras 9 & 10)

ख. घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम, (2005 का 43), धारा 29 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), अध्याय 29 - घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम की धारा 29 के अंतर्गत अपील - द.प्र.सं. के अध्याय 29 के अंतर्गत कड़े अर्थ में अपील नहीं है - घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम हिताधिकारी विधान है।

C. Protection of Women from Domestic Violence Act, (43 of 2005), Section 29 - No revision provided in Protection of Women from Domestic Violence Act - Appeal provided u/s 29 of the Act - Protection of Women from Domestic Violence Act beneficial legislation - Converting Court has jurisdiction to hear appeal - Conversion of revision into appeal - Permissible. (Paras 9, 10 & 11)

ग. घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम, (2005 का 43), धारा 29 - घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम में पुनरीक्षण उपबंधित नहीं - अधिनियम की धारा 29 के अंतर्गत अपील उपबंधित है - घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम लाभकारी विधान है - संपरिवर्तन करने वाले न्यायालय को अपील सुनने की अधिकारिता है - पुनरीक्षण का अपील में संपरिवर्तन - अनुज्ञेय है।

Cases referred :

1978 CRI.L.J. 390, 2009 CRI.L.J. 889 (Bombay), I (2010) DMC 530, 2012 AIR SCW 1515, 2010 CRI.L.J. 3596, 2008 Cr.L.J. 264.

Rajesh Kumar Nishad, for the applicant.

ORDER

C.V. SIRPURKAR, J. :- This criminal revision is directed against the order dated 22.07.2015 passed by the Court of 3rd Additional Sessions Judge, Jabalpur, in Criminal Revision No.15/2015 (Smt. Vinita Dwivedi Vs. Yogendra Nath Dwivedi) whereby, learned Additional Sessions Judge had

permitted the respondent Vinita Dwivedi to convert a "criminal revision" into an appeal under section 29 of the Protection of Women from Domestic Violence Act, 2006 (sic:2005) (hereinafter referred in this order as "the Act").

2. The facts giving rise to this criminal revision lie in a narrow compass. The respondent wife Vinita Dwivedi instituted proceedings under section 12 of the Act against applicant Yogendra Nath Dwivedi in the Court of JMFC, Jabalpur. In that proceedings, application under Section 23 (2) was filed by respondent wife for interim maintenance, which was dismissed by learned JMFC by order dated 02.12.2014. Respondent wife filed a "criminal revision" challenging aforesaid order in the Court of 3rd Additional Sessions Judge, Jabalpur. Subsequently, a prayer was made before the learned ASJ for converting aforesaid "Criminal Revision" No.15/2015 into an appeal under Section 29 of the Act. The application was opposed by the applicant husband. However, learned ASJ relying upon the Principles laid down by the Allahabad High Court in the case of *Mahesh Kumar Vs. State* 1978 CRL.L.J 390, allowed the "criminal revision" to be converted into an appeal under Section 29 of the Act.

3. The order dated 22.07.2015 allowing conversion as aforesaid, is subject matter of challenge in this criminal revision before the High Court mainly on the ground that there is no express power granted to subordinate criminal Courts under the Code of Criminal Procedure for permitting conversion of a criminal revision into a criminal appeal. The subordinate criminal Courts do not have inherent powers, reserved for the High Court under Section 482 of the Cr.P.C.; therefore, it has been submitted that learned ASJ has exceeded his jurisdiction by allowing a 'criminal revision' to be converted into a "criminal appeal".

4. On due consideration of the contentions raised by learned counsel for the applicant, the Court is of the view that this revision has to be dismissed in limine for the reasons hereinafter stated:

It may be noted at the outset that there is no provision for filing a revision under the Act.

Section 29 of the Act reads as follows:

29. Appeal.—*There shall lie an appeal to the Court of*

Session within thirty days from the date on which the order made by the Magistrate is served on the aggrieved person or the respondent, as the case may be, whichever is later.

5. It has been held by Bombay High Court in the case of *Abhijit Bikha Seth Auti Vs. State of Maharashtra and Another* 2009 CRI.L.J. 889 (Bombay), that an appeal under Section 29 is not maintainable against purely procedural orders, which do not decide or determine the rights and liabilities of the parties. As such, all orders made in proceedings under the Act determining the rights and liabilities of the parties, are appealable under Section 29 thereof.

6. Thus, it is clear that the order dated 02.12.2014 passed by the Court of JMFC, Jabalpur, declining to grant interim maintenance to the respondent wife under section 23 (2), was appealable under Section 29 of the Act; however, due to inadvertence, a "criminal revision" was filed thereagainst. Subsequently, a prayer was made for conversion of this "criminal revision" into an appeal under Section 29 of the Act, which was allowed by learned ASJ.

7. It may be noted however that in general terms, an offence means an act or illegal omission made punishable under any law for time being in force. The Delhi High Court in the case of *Savita Vs V.D. Bhanot*, I (2010) DMC 530 has held that Petition under provisions of act is maintainable even if acts of domestic violence have been committed prior to coming into force of Act or despite her having in past lived together with respondent in a shared household even if the woman is no more living with him at the time of coming into force of the Act because domestic violence *per se*, is not an offence. Though, breach of protection order or interim protection order is because it is made punishable with imprisonment which may extend to one year and fine which may extend to Rs. 20,000/- or with both and is expressly declared to be an offence under section 31 of the Act. This view was endorsed by the Supreme Court in the case of *V.D. Bhanot Vs. Savita Bhanot*, 2012 AIRSCW 1515 observing that "*We agree with the view expressed by the High Court that in looking into a complaint under Section 12 of the PWD Act, 2005, the conduct of the parties even prior to the coming into force of the PWD Act, could be taken into consideration while passing an order under Sections 18, 19 and 20 thereof. In our view, the Delhi High Court*

has also rightly held that even if a wife, who had shared a household in the past, but was no longer doing so when the Act came into force, would still be entitled to the protection of the PWD Act, 2005"

Likewise it has been held by Bombay High Court in the case *Raosaheb Pandharinath Kamble v. Shaila Raosaheb Kamble*, 2010 CRI. L. J. 3596 that proceedings under section 12 of the Act are quasi civil in nature; therefore, amendments to application under section 12 are permissible.

8. This Court has also held in the case of *Ajay Kant and others vs. Smt. Alka Sharma*, 2008 Cr.L.J. 264 that an application under section 12 is not a complaint as defined under section 2 (d) of the Code of Criminal Procedure.

9. In view of aforesaid pronouncement, it is obvious that domestic violence *per se* is not an offence. The proceedings under section 12 of the Act, are quasi-civil in nature. There is no provision for filing a revision under the Act. All orders passed in the proceedings under the Act determining the rights and liabilities of the parties are appealable under section 29. An appeal under section 29 of the Act cannot be equated with a criminal appeal under Chapter 29 of the Code of Criminal Procedure. Protection of Women from Domestic Violence Act, 2005 is a beneficial legislation enacted for providing innovative remedies for the victims of domestic violence.

10. In aforesaid view of the matter, conversion of inadvertently filed "criminal revision" into an appeal under section 29 of the Act cannot be challenged only on the ground that subordinate criminal Courts have not been endowed with inherent powers under the Code of Criminal Procedure because an appeal under section 29 of the Act, *stricto sensu*, is not an appeal under Chapter 29 of the Code of Criminal Procedure. It may also be noted that in the case at hand the "criminal revision" was converted into appeal by the Court which also had jurisdiction to hear the appeal filed under section 29. Thus, learned ASJ committed no illegality, irregularity or impropriety in permitting conversion of revision into appeal.

11. However, it is true that the limitation prescribed for filing a criminal revision is 90 days; whereas, the limitation prescribed for filing appeal under Section 29 of the Act is 30 days from the date on which the order made by

the Magistrate is served on the aggrieved person or the respondent, as the case may be, whichever is later. As such, in a given case, question of limitation might arise, which may be decided by the concerned Court in accordance with law.

12. A perusal of impugned order dated 22.07.2015 reveals that no objection with regard to the limitation was taken before learned ASJ in the instant case but if such a question is indeed involved, the applicant herein shall be free to raise that question and all other questions with regard to maintainability of the appeal that may arise and those questions shall be decided by the learned ASJ.

13. In aforesaid view of the matter, there is no substance in this criminal revision. Hence, it deserves to be dismissed.

14. Consequently, this criminal revision is dismissed in *limine*; however, all questions including that of limitation are left open to be decided by the Court below.

Revision dismissed.

**I.L.R. [2016] M.P., 580
CRIMINAL REVISION**

Before Mr. Justice Subhash Kakade

Cr. Rev. No. 1628/2015 (Jabalpur) decided on 4 September, 2015

AWADH NARAYAN & ors.

...Applicants

Vs.

STATE OF M.P. & anr.

...Non-applicants

Criminal Procedure Code, 1973 (2 of 1974), Section 233 - Application for summoning Head Muharir of AJAK Thana and to summon Rojnamcha Sanha with original complaint filed by applicants - Rejection of - Held - Aforesaid documents can be produced only if there is an order by Court - On perusal of photocopy of complaint it is clear that the same was received at AJAK Thana, so it is not baseless or vexatious and the applicants cannot be deprived to prove their defence - Revision petition allowed. (Paras 7 to 9)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 233 – अजाक थाने के प्रधान मुहरिर को समन किये जाने हेतु और आवेदकगण द्वारा प्रस्तुत मूल परिवाद के साथ रोजनामचा सान्हा समन करने के लिये आवेदन – की अस्वीकृति – अभिनिर्धारित – उपरोक्त दस्तावेजों को केवल तब प्रस्तुत किया जा सकता है यदि न्यायालय द्वारा कोई आदेश दिया गया हो – परिवाद की फोटोप्रति के परिशीलन से यह स्पष्ट है कि उसे अजाक थाना में प्राप्त किया गया था, अतः वह आधारहीन या तंग करने वाला नहीं है और आवेदकगण को अपना बचाव सिद्ध करने से वंचित नहीं किया जा सकता – पुनरीक्षण याचिका मंजूर।

Jayalakshmi Iyer, for the applicants.

R.S. Shukla, P.L. for the non-applicant/State.

ORDER

SUBHASH KAKADE, J. :- This revision petition has been preferred by the applicants under Section 397 read with Section 401 of Criminal Procedure Code, 1973, here-in-after referred to “the Code”, against the impugned order dated 02.07.2015 passed by learned Additional Sessions Judge, Bhopal in Sessions Trial No. 617/2010, by which the application filed under Section 233 of the Code for summoning defence witness and production of documents has been rejected and also closed the defence of the applicants.

2. Facts of the prosecution story need not to be discussed elaborately as trial is resting at the deface stage. Defence stand of the applicants is that the complainant a property broker is associated with Bhu-Mafiya and on the date of incident, while the applicants were reaping crops on their field, the complainant, his wife along with antisocial elements entered into field and tried to take possession forcibly. On obstruction by the applicants, the complainant and his companions assaulted and abused the applicants by caste and threatened them to surrender their field. The applicants went to concerning Police Station for lodging the report but, it was futile. On 10.10.2010, the applicants No.1 and 2 went to AJAK Thana for lodging a written report against the complainant and his wife and same was received at AJAK Thana.

3. After completion of prosecution evidence, the applicants preferred an application under Section 233 of the Code for summoning defence witness for production of written report, which was duly received at AJAK Thana in support of above defence, but, same was rejected by impugned order, hence

this revision.

4. Ms. Jayalakshmi Iyer, Advocate for the applicants has submitted that learned trial Court has passed the impugned order without considering the material facts and documents available on record, therefore, the impugned order be set aside and direct learned trial Court to summon the witness Head Muharir of AJAK Thana, Bhopal and to summon Rojnamcha Sanha and original complaint filed by the applicants from AJAK Thana Bhopal.

5. Shri R.S. Shukla, Panel Lawyer for the respondent/State has submitted that learned trial Court rightly passed the impugned order and thus, the revision petition is liable to be dismissed.

6. Considered the rival submissions made by learned counsel for the parties and perused the available record.

7. Section 233 of the Code gives power to the Court to issue summons for attendance of any witness or production of any document, which reads as under:-

"If the accused applies for the issue of any process for compelling the attendance of any witness or the production of any document or thing, the Judge shall issue such process unless he considers, for reasons to be recorded, that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice."

8. This fact need not to be repeated that applicants requested to summon Rojnamcha Sanha with original complaint filed by them in the AJAK Thana, Bhopal. Certainly, that can only be produced if there would be order from the Court because it is not possible for the applicants to produce the above evidence before the Court on their own. Apart from this, on perusal of photocopy of application it was clear that same was received at AJAK Thana, Bhopal by Police Officer. It is also clear that application filed by the applicants was not baseless or vexatious because the applicants want to summon above evidence to prove their defence and under the law they cannot be deprived with.

9. In above facts and circumstances, this revision petition is hereby allowed. The impugned order dated 02.07.2015 is hereby set aside. Learned trial Court is directed to summon Rojnamcha of AJAK Thana, Bhopal and also issue summon to Head Muharir of AJAK Thana, Bhopal for the evidence.

10. Interim order dated 29.07.2015 passed by this Court stands vacated.

Revision allowed.

I.L.R. [2016] M.P., 583

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice U.C. Maheshwari

M.Cr.C. No. 11774/2013 (Jabalpur) decided on 13 January, 2014

BALENDRA SHEKHAR MISHRA

...Applicant

Vs.

STATE OF M.P.

...Non-applicant

A. *Criminal Procedure Code, 1973 (2 of 1974), Sections 482 & 320 and Penal Code (45 of 1860), Sections 498-A & 324 - Inherent powers of High Court - Exercise of - Offences u/s 498-A and 324 IPC made non compoundable - High Court u/s 482 has jurisdiction to quash the FIR and criminal case. (Paras 7 to 9)*

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएं 482 व 320 एवं दण्ड संहिता (1860 का 45), धाराएं 498-ए व 324 - उच्च न्यायालय की अंतर्निहित शक्तियां - का प्रयोग - भा.द.सं. की धारा 498-ए व 324 के अंतर्गत अपराध अशमनीय बनाये गये - उच्च न्यायालय को धारा 482 के अंतर्गत प्रथम सूचना रिपोर्ट एवं दाण्डिक प्रकरण अभिखंडित करने की अधिकारिता है।

B. *Criminal Procedure Code, 1973 (2 of 1974), Section 320 and Penal Code (45 of 1860), Sections 498-A & 324 - Compounding of offence - Compromise deed filed jointly - Trial Court has no jurisdiction to compound - Offences are non compoundable. (Para 8)*

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 320 एवं दण्ड संहिता (1860 का 45), धाराएं 498-ए व 324 - अपराध का शमन करना - संयुक्त रूप से समझौता विलेख प्रस्तुत किया गया - विचारण न्यायालय को शमन करने की कोई अधिकारिता नहीं - अपराध अशमनीय है।

Cases referred :

(2003) 4 SCC 675, (2012) 10 SCC 303, (2005) 3 SCC 299.

Pushpendra Dubey, for the applicants.

Umesh Pandey, G.A. for the non-applicant No.1/State.

Siddarth Tyagi and *Nitin Gupta*, for the non-applicant No. 2/
Complainant.

ORDER

U.C. MAHESHWARI, J. :- At the request of counsel of the parties, the case is taken-up out of its turn from the list of motion hearing cases.

It being admitted petition vide order dated 9.12.13, in compliance of such order, is listed today for further consideration.

On behalf of the applicants/ accused, this petition is preferred under section 482 of the Cr.P.C being aggrieved by the order dated 7.8.13 passed by the JMFC, Bhopal passed in Regular Criminal Case No.16601/08, whereby the application filed with the joint signature of the applicants and respondent No.2 under section 320(2) of the Cr.P.C for compromise, has been rejected on the ground that the offence of section 498-A and 324 of the IPC in which, at the instance of respondent No.2/complainant, the applicants are facing the prosecution, are not made compoundable.

2. Along with the impugned order, the certified copy of the aforesaid application filed under section 320(2) of the Cr.P.C accompanied with some compromise-deed and the agreement dated 7.8.13 are also annexed. According to such application, compromise-deed and agreement, the settlement had taken-place between the respondent No.2 and the applicant No.1 and pursuant to such settlement, they have filed the petition under section 13-B of the Hindu Marriage Act for divorce with consent before the Family Court, Bhopal and as per terms and conditions of such settlement, respondent No.2 has also resolved the dispute of the impugned criminal case against all the applicants.

3. It is apparent from the averments of the aforesaid application and the documents that with respect of the matrimonial dispute raised in the impugned FIR by the respondent No.2 pursuant (sic:pursuant) to which the impugned crime was registered against all the applicants for the offence of section 498-A

of the IPC while in addition to it, the offence of section 324 IPC was also registered on the same FIR against applicant No.1. As per the settlement, the respondent No.2 in view of proceeding for decree of divorce from the applicant No.1 does not want to keep to continue this case and, in such premises, she wants quashment of the entire impugned criminal case and the FIR along with the impugned judgment of conviction.

4. Before proceeding further, I would like to verify the facts stated in the application of the compromise as well as in the annexed compromise deed and the agreement. On asking the respondents No.2 in this regard, she categorically stated that she had voluntarily, without undue influence or coercion from any source has entered in the alleged compromise and settled all the matrimonial dispute and filed the divorce petition under section 13-B of the Hindu Marriage Act and according to such settlement some benefit have been received by her and some benefits will be received by her subject to final order of the aforesaid consenting petition of divorce in the month of February, 2014. In continuation she said that in the light of such settlement she wants disposal of this matter by quashment of the impugned conviction and sentence of the applicants as well as the FIR of the case otherwise this case may disturb her future life.

5. On such verification, the version stated by the respondent No.2 appears to be bonafide, genuine and requires consideration for quashment of the impugned criminal case and the FIR of the same.

6. At this stage on asking the applicants present whether any of them has any objection in considering the aforesaid prayer made by respondent No.2, on which they stated that they themselves voluntarily entered in the alleged compromise and they also want the final settlement and do not want to keep the criminal case and other cases pending with respect of impugned matrimonial dispute.

7. In view of the aforesaid verification so also in view of the principle laid down by the Apex Court in the matter of *B.S.Joshi Vs. State of Haryana*-(2003) 4 SCC 675 holding that to resolve all the matrimonial dispute between the husband and wife, the court has authority to quash the criminal case pending at the instance of the wife against the husband for the offence of section 498-A of the IPC, which principle was further considered by the Apex Court in

the matter of *Gian Singh Vs. State of Punjab*-(2012) 10 SCC 303 so also taking into consideration the case law of the Apex Court in the matter of *Ruchi Agarwal Vs. Amit Kumar Agrawal and others*-(2005) 3 SCC 299 in which considering the matter of section 125 of the Cr.P.C while dismissing such appeal it was held that "in view of the above said subsequent events and the conduct of the appellant, it would be an abuse of the process of the court if the criminal proceedings from which this appeal arises is allowed to continue. Therefore, we are of the considered opinion to do complete justice, we should while dismissing this appeal also quash proceedings arising from the criminal case No.224/03 registered in Police Station Bilaspur (Dist. Rampur) filed under section 498-A,323 and 506 IPC and under section 3 and 4 of the Dowry Prohibition Act against the respondents herein. It is ordered accordingly. The appeal is disposed of", I deem fit to allow the aforesaid compromise.

8. Before proceeding further, I would like to mention that the trial court has not committed any error in passing the impugned order because such court did not have any authority to consider the compromise of the parties with respect of the offence of section 498-A and 324 of the IPC and quash the trial because the same are not made compoundable under section 320 of the Cr.P.C. Apart this, on the basis of the aforesaid decision of the Apex Court, this court has the jurisdiction to pass the appropriate order of quashment of the IPC and the criminal case under section 482 of the Cr.P.C and such power is not available with the trial court. So, in such premises, I have not found any fault of the trial court in passing the impugned order.

9. In the aforesaid circumstance, keeping in view the principles laid down by the Apex Court in aforesaid cited cases, this petition is allowed and by invoking the inherent powers of this court enumerated under section 482 of the Cr.P.C, the impugned compromise application filed before the trial court with the joint signatures of the parties, is allowed. Pursuant to it, the FIR of impugned case along with its entire investigation and the impugned case initiated at the instance of the State and FIR of respondent No.2 against the applicants for the offence of Section 498-A of the IPC and, in addition to it section 324 of the IPC against applicant No.1, are hereby quashed and they are set free from this case. There bail bonds are hereby discharged.

C.C as per rules.

Application allowed.

I.L.R. [2016] M.P., 587

MISCELLANEOUS CRIMINAL CASE*Before Mr. Justice B.D. Rath*

M.Cr.C. No. 6617/2008 (Gwalior) decided on 7 August, 2014

KULDEEP SHRIVASTAVA

...Applicant

Vs.

RAMESH CHANDRA

...Non-applicant

(Alongwith M.Cr.C. 6686/2008)

A. *Negotiable Instruments Act (26 of 1881), Section 138 - Drawer of cheque - Account holder did not issue cheque - His brother issued cheque on an account maintained by his brother - Account holder is not responsible for return of cheque - Person who had issued cheque is also not responsible as he had not issued cheque on an account maintained by him - Complaint dismissed. (Para 18)*

क. परक्राम्य लिखत अधिनियम (1881 का 26), धारा 138 - चैक का लेखीवाल - खाताधारक ने चैक जारी नहीं किया - उसके भाई ने अपने भाई द्वारा चलाये जा रहे खाते पर चैक जारी किया - चैक की वापसी हेतु खाता धारक उत्तरदायी नहीं - वह व्यक्ति भी उत्तरदायी नहीं जिसने चैक जारी किया क्योंकि उसने चैक उसके द्वारा चलाये जा रहे खाते पर जारी नहीं किया था - परिवाद खारिज।

B. *Criminal Procedure Code, 1973 (2 of 1974), Section 482 - Inherent powers - Availability of alternative remedy - Held - Only on the ground of non-availing of remedy provided for filing criminal revision would not create obstruction in the way of filing petition under section 482. (Para 21)*

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 - अंतर्निहित शक्तियाँ - वैकल्पिक उपचार की उपलब्धता - अभिनिर्धारित - केवल इस आधार पर कि दांडिक पुनरीक्षण प्रस्तुत करने हेतु उपबंधित उपचार का अवलंब नहीं लिया गया, धारा 482 के अंतर्गत याचिका प्रस्तुत करने के मार्ग में अवरोध उत्पन्न नहीं होगा।

Cases referred :

(2009) 2 SCC 370, (2006) 1 SCC (Cri) 345, AIR 2000 SC 828.

Prashant Sharma and Devendra Sharma, for the applicant.
D.D. Bansal, for the non-applicant.

ORDER

B.D. RATHI, J. :- As the grievance raised in the aforesaid two petitions is identical and same, heard together and disposed of by this common order.

2. Both the aforesaid petitions have been preferred by the petitioners/accused under Section 482 of Cr.P.C. having been aggrieved by an order dated 26/3/2008 passed in Criminal Case No.4233/06 by the Chief Judicial Magistrate, Morena as well as the order dated 3/7/2001 passed by the Sessions Judge, Morena in Criminal Revision No.98/01 while rejecting the order passed by C.J.M., Morena and remanding the matter back to the Magisterial court with a direction to register a case on private complaint of the respondent/complainant for offence under section 138 of the Negotiable Instruments Act (for short "NI Act")

3. For facility of reference, facts are being taken from Criminal Case No.4233/2006 (*Ramesh Chand Vs. Sandeep Shrivastava*), registered on private complaint.

4. As per the case of the complainant, on 1/6/2000 Sandeep Shrivastava (petitioner of Misc. Cri.C.No.6686/2008), who is brother of Kuldeep Shrivastava, took a four wheeler vehicle of Tata having registration No. 407 MP06/E0798 on hire from the complainant for a period of six months till 1/12/2000 on monthly rent basis payment of Rs. 9,000/-. The deed to that effect was duly executed before the witnesses. It is alleged that against payment of the hire rent, the petitioner Kuldeep Shrivastava had drawn four cheques for his brother Sandeep Shrivastava's Account in favour of the respondent/complainant, bearing No. (i) 064974, dated 3/6/2000 for a sum of Rs.9,000/-, No. (ii) 064971, dated 5/7/2000 for a sum of Rs. 9,000/-, No. (iii) 064972 dated 5/8/2000 for a sum of Rs. 9,000/- and No. (iv) 064973 dated 5/9/2000 for a sum of Rs. 9,000/-. When the complainant presented two cheques No. (i) 064974, dated 3/6/2000 for a sum of Rs. 9,000/- and No. (ii) 064971, dated 5/7/2000 on 26/7/2000 for encashment at the District Co-operative Central Bank, Morena, same came to be dishonoured on 26/7/2000 for want of sufficient funds in the account of holder of the cheques. Same has been informed by the Bank on 30/7/2000. The complainant duly informed by notice

in writing No.13986, dated 16/8/2000, about dishonour of aforesaid two cheques to both the petitioners and to deposit the payment in the account within seven days from the receipt of the notice, but no such amount was deposited by the petitioners.

5. Thereafter, on 12/9/2000, the respondent further presented remaining two cheques No. (iii) 064972 dated 5/8/2000 for a sum of Rs. 9,000/- and No. (iv) 064973 dated 5/9/2000 for a sum of Rs. 9,000/-, which too were dishonoured on account of insufficient fund. The complainant then issued registered notice to the petitioners through counsel Shri N.L. Jatav on 19/9/2000 demanding payment within fifteen days from the receipt of the notice. Since the petitioners despite of receiving such notice, failed to make the payment, the complaint was filed on 30/10/2000 against the petitioners/accused for committing offence punishable under section 138 of the Act as well as sections 420, 468 of I.P.C., which was dismissed as time barred on 30/3/2001 by the learned C.J.M.

6. Against said rejection order dated 30/3/2001, the complainant preferred Cri. Rev.No.98/2001 before the Sessions Judge, Morena (M.P.). The learned Sessions Judge as per order dated 3rd July, 2001 while setting aside the order dated 30/3/2001 and treating the complaint within time, directed the trial Magistrate to register a case against the petitioners/accused and proceed with the matter in accordance with law. In compliance of the order dated 3rd July, 2001 passed by the revisional court, the learned Magistrate vide order dated 12/7/2001, took a cognizance against the petitioners only for offence under Section 138 of the Act having found no case made out against the accused for other offences under sections 420, 467, 468, of I.P.C. On 5/11/2007, the accused were arrested and bailed out on furnishing bonds by the trial court. Thereafter, they filed an application for dismissal of the complaint as barred by time, which was rejected vide order dated 26/3/2008 and the case was fixed for evidence of the complainant.

Having being aggrieved by the orders aforesaid, the present petitions have been preferred.

7. Learned counsel for the petitioners contended that both the orders passed by the courts-below are against the facts on record and are liable to be set aside. It is submitted that the cause of action accrued to the respondent

from the date of notice given on 16/8/2000 but in this case the complaint was filed on 30/10/2000, beyond prescribed period of limitation. Hence, dismissal of the complaint at first instance by the trial Magistrate was proper but in revision filed by the respondent said fact was overlooked and the rejection order of complaint was set aside on wholly untenable grounds.

8. It is submitted that at very first time on 5/11/07 when petitioners reached to the trial court they came to know about the impugned actions. Admittedly, no criminal revision against the impugned orders were filed and the petitioners have directly rushed to this court for invoking inherent powers under Section 482 of Cr.P.C for which there is no bar of limitation created under the Limitation Act and so the petitions preferred under Section 482 of Cr.P.C. are maintainable in view of the law laid down by the Hon. Apex Court in the case of *Dhariwal Tomacco Product Limited & others Vs. State of Maharashtra & another* (2009) 2 SCC 370.

9. In the next submission, learned counsel for the petitioners pointed out that the revisional court passed an order on 3/7/2001 behind the back of the petitioner and no notice was issued to them and therefore without affording any opportunity of hearing to the petitioners, the order passed by the revisional court in this manner is bad in law and the same is also liable to be set aside. To support his argument, learned counsel for the petitioners placed reliance on the decision of the Apex Court in the case of *P. Sundarrajan & others Vs. R. Vidhya Sekar* (2006)1 SCC (Cri) 345.

10. On the other hand, it is submitted by the learned counsel appearing for the respondent that the cheques were issued by the petitioners against the payment of hire rent and the complaint under the NI Act is in respect of such liabilities towards which cheques were issued in favour of the respondent/complainant and subsequently came to be dishonoured. It is submitted that the respondent/complainant issued a registered notice, as required in proviso (b) to Section 138 of the Act to the accused, which despite of receiving by them on 23/9/2000, no payment was made and in such circumstances, the complaint was filed on 30/10/2000 against the petitioners/accused for having committed an offence under section 138 of the NI Act which is well within time. It is also submitted that against the impugned orders, revision should have been preferred but bypassing that forum, powers under section 482 of Cr.P.C. could not be invoked. As such, according to the learned counsel, the

petitions being not maintainable are liable to be dismissed.

11. Having regard to the arguments advanced by the learned counsel for the parties, entire record of the case and the relevant law have been perused.

12. Before adverting to the rival submissions, it would be useful to reproduce relevant provisions of the NI Act which are extracted herein below:-

“138. Dishonour of cheque for insufficiency, etc., of funds in the account-

“Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may extend to one year, or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless-

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier.

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer of the cheque, within fifteen days (later on w.e.f. 6/2/2003 substituted by 30 days) of the receipt of information by him from the bank regarding the return of the cheque as unpaid, and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.”

13. The manner of taking of cognizance of offence under Section 138 of the NI Act is provided for under Section 142 of the said Act. It reads as under:

"142. Cognizance of offences.--

Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), --

(a) no Court shall take cognizance of any offence punishable under Section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque;

(b) such complaint is made within one month of the date on which the cause of action arises under Clause (c) of the proviso to Section 138.

(c) no Court inferior to that of a Metropolitan Magistrate or a judicial Magistrate of the first class shall try any offence punishable under Section 138."

A close reading of the aforesaid provisions make it clear that the cause of action for presentation of a complaint for the offence under Section 138 can be said to have arisen on expiry of 15 days from the date of receipt of the notice issued by the complainant. A combined reading of Clause (b) of Section 142 and Clause (c) of Section 138 of the NI Act discloses that the time stipulated for submission of the complaint is one month and fifteen days from the date of receipt of notice by the accused/respondent.

14. Let us proceed now to examine the factual position of the case in the light of the legal provisions of law, as mentioned above.

15. Admittedly, as mentioned in para 2 of the complaint, alleged cheques were issued by the petitioner-accused Kuldeep Shrivastava and were not

issued by another petitioner-accused Sandeep Shrivastava. This fact also got strengthened and was proved from the statement of witness Rambihari Bandil (PW-2) recorded under Section 202 of Cr.P.C. on 16/11/2000. In Section 138 of the NI Act the legislation has clearly stated that for the dishonoured cheque, the drawer shall be liable for conviction. This was also held in the case of *Suman Sethi Vs. Ajay K. Churiwal* (AIR 2000 SC 828). It is nowhere in dispute, that the cheques in this case were not issued by petitioner-accused Sandeep Shrivastava obviously therefore he was not the drawer of the disputed cheques. Apart that, cheque No. (i) 064974, dated 3/6/2000 for a sum of Rs.9,000/- and cheque No. (ii) 064971, dated 5/7/2000 for a sum of Rs. 9,000/- were dishonoured by the bank and information was given to the complainant on 30/7/2000, meaning thereby in view of section 138(b) of the NI Act, notice should have been issued within fifteen days since the date of information, i.e. 30/7/2000 but in this case notice was issued on 16/8/2000 by written letter Entry No.13986, dated 16/8/2000, as mentioned in para 5 of the complaint itself and therefore notice was delayed by two days. When this notice was received by the petitioners ? neither it was mentioned in the complaint nor it was stated by the complainant Ramesh Chandra (PW-1) at the time of recording of his statement under Section 200 of Cr.P.C.

16. As per provisions contemplated in Section 142(b), the complaint should be made within one month of the date on which the cause of action arises under clause (c) of the proviso to section 138 of the NI Act, meaning to say when notice dated 16/8/2000 was issued and even then payment was not made after receiving the notice within fifteen days, then after a period of fifteen days, the complainant was supposed to file complaint within one month. The fact of receiving notice dated 16/8/2000 was not proved by the complainant by adducing any documentary or oral evidence on record. Therefore, the complaint submitted by the respondent on 30/10/2000 on the basis of further notice given on 19/9/2000, received on 23/9/2000 for aforesaid two cheques No. (i) 064974, dated 3/6/2000 for a sum of Rs.9,000/- and No. (ii) 064971, dated 5/7/2000 for a sum of Rs. 9,000/- was beyond period of limitation, and therefore, could not have been entertained by the revisional court but unfortunately, the revisional court wrongly held that the complaint filed for these two cheques also was well within time.

17. : So far as other two cheques bearing No. (iii) 064972 dated 5/8/2000

for a sum of Rs. 9,000/- and No. (iv) 064973 dated 5/9/2000 for a sum of Rs. 9,000/- are concerned, it is submitted by the petitioners' counsel that for these two cheques, the complaint has been filed well in time. Hence, no discussion would be required in this matter as far as question of these two cheques is concerned.

18. On further going to discuss the matter with regard to the cheques in question, Babulal (PW-3), who was an Accountant of the concerning bank at the relevant time, in his statement recorded under Section 202 of Cr.P.C. has stated that the disputed cheques could not be encashed because in the bank account of petitioner- Sandeep Shrivastava, no amount was found. Again here when we will look upon the language of opening words employed in Section 138 of the NI Act it is clear that the person liable to answer this penal provision is only the person, who had drawn the cheque, which could be seen from the opening words "where any cheque drawn by a person on an account maintained by him....." thereby indicating, the person liable to be dealt with under Section 138 of the NI Act or the person answerable under Section 138 of the NI Act must be the person, who had drawn the cheque on an account maintained by him. In this case, as seen from the materials available on record, the cheques were drawn by petitioner-Kuldeep Shrivastava for the account of another petitioner Sandeep Shrivastava. There is no evidence placed by the complainant in the shape of oral or documentary that the petitioner-Kuldeep Shrivastava was authorized to sign on behalf of Sandeep Shrivastava, who was real account holder. Therefore, petitioner-Kuldeep Shrivastava certainly will not come within the meaning of a person "cheque drawn by a person on an account maintained by him". This being the position, the complaint filed against petitioner-Kuldeep Shrivastava, who had drawn the cheques for the other account holder, is not tenable and deserves to be dismissed for the offence punishable under Section 138 of the NI Act. Similarly, petitioner- Sandeep Shrivastava can also not be held liable for these cheques because these cheques were not drawn by him. Virtually, Kuldeep Shrivastava had issued the cheques for the account which was maintained by Sandeep Shrivastava and therefore for these four cheques complaint against petitioner-Sandeep Shrivastava was not also maintainable. Similar question was decided by this court in Criminal Appeal No.319/2006 (*Alok Vs. Praveen Kumar*), on 28/3/2014.

19. Now the question left before this court for consideration is whether

this petition filed under Section 482 of Cr.P.C. is maintainable or not especially when other forum of filing criminal revision was available to the petitioners.

20. The Legislature in its wisdom, while emphasising the need of providing inherent powers to the High Court, introduced Section 482 of the Criminal Procedure Code which reads as under:

“482. Saving of inherent powers of High court. Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.”

21. A bare reading of the above provision indicates that the Legislature intentionally worded this provision widely and, thus, necessarily in order to prevent abuse of the process of any court or otherwise to secure ends of justice, appropriate order can be issued by this court under inherent powers vested under section 482 of Cr.P.C., therefore petitions are maintainable for seeking such kind of reliefs. Only on the ground of non-availing of remedy provided for filing criminal revision would not create obstruction in the way of filing such petitions under Section 482 of Cr.P.C. A reference may be made on this point to a decision of Hon. Apex court in the case of *Dhariwal Tomacco Product Limited & others* (supra). Therefore, the contention of the learned counsel for the respondent about maintainability of the petitions is not acceptable.

22. Admittedly, opportunity of hearing was not afforded by the revisional court to the petitioners when rejection order of private complaint was challenged in revision. This revision was allowed without giving any opportunity of hearing by directing the complaint to be registered for the alleged offence against the petitioners. Such kind of orders cannot be allowed to stand which has been passed in violation of the principal of natural justice as laid down in the case of *P. Sundarrajan & others* (supra).

23. To sum up, the facts which are emerging from the record of the complaint case are as following:-

- (i) complaint for two cheques was time barred;

- (ii) When rejection order was challenged before the revisional court, opportunity of hearing was not afforded to the petitioners/accused;
- (iii) Cheques were not issued by the petitioner- Sandee Shrivastava, therefore, he is not liable for the offence under Section 138 of the NI Act;
- (iv) Cheques were issued by another petitioner-accused Kuldeep Shrivastava but he had not drawn the cheques on an account maintained by him, as indicated in the opening words of Section 138 of the NI Act.
24. On these premises, the arguments advanced by the learned counsel for the respondent are neither tenable nor acceptable.
25. For the aforesaid reasons, the petitions are allowed. The entire proceedings against both the petitioners are hereby quashed. Petitioner are discharged of the offence under Section 138 of the NI Act.
26. Copy of this order be dispatched alongwith the record to the trial court for necessary compliance.

No order as to costs.

Application allowed.

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MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice Alok Verma

M.Cr.C. No. 1238/2014 (Indore) decided on 3 February, 2015

P.V. MURALIDHARAN

...Applicant

Vs.

STATE OF M.P.

...Non-applicant

Excise Act, M.P. (2 of 1915), Sections 34(1)(a) & 34(2) - Commissioner (Excise) issued instructions to affix hologram on all duty paid bottles - Required hologram were not affixed on the cartons containing bottles of liquor - No provision of law or rules where liability is placed on licensee - Instruction issued by Commissioner (Excise) is merely executive

instruction - Criminal proceedings can be initiated only if it is found that liquor is not duty paid - Mere omission to affix hologram is not punishable - Proceeding against applicant quashed. (Paras 6 & 7)

आबकारी अधिनियम, म.प्र. (1915 का 2), धाराएं 34(1)(ए) व 34(2) - आयुक्त (आबकारी) ने शुल्क का भुगतान की गई सभी बोतलों पर होलोग्राम लगाने के लिये अनुदेश जारी किये - मदिरायुक्त बोतलों के कार्टन पर अपेक्षित होलोग्राम नहीं लगाये गये थे - विधि का कोई उपबंध या कोई नियम नहीं जिसमें अनुज्ञप्तिधारी पर दायित्व डाला गया हो - आयुक्त (आबकारी) द्वारा जारी अनुदेश मात्र कार्यपालिक अनुदेश है - दण्डिक कार्यवाहियां केवल तब आरंभ की जा सकती हैं यदि यह पाया जाता है कि मदिरा की शुल्क अदायगी नहीं की गई है - मात्र होलोग्राम लगाने से चूक दण्डनीय नहीं - आवेदक के विरुद्ध कार्यवाही अभिखंडित की गई।

Sameer Kumar Shrivastava, for the applicant.

R.S. Parmar, P.L. for the non-applicant/State.

ORDER

ALOK VERMA, J. :- This application under section 482 of Cr.P.C. is directed against the order passed by the learned 9th Additional Sessions Judge, Ujjain in Criminal Revision No.357/2012 in which the present applicant was the revisionist and whereby the learned Additional Sessions Judge confirmed the order passed by the learned Judicial Magistrate First Class, Ujjain framing charges against the present applicant under section 34 - 1(A) r/w section 34(2)(A) M.P. Excise Act.

2. The brief facts giving rise to this application are that on 29.05.2011, when Sub-Inspector (Excise) along with his force was petrolling the area, he intercepted goods vehicle bearing registration No.MP06-HC-0861 and MP06-HC-1157 on suspicion. The vehicles were loaded with liquor. They produced permit for the liquor. The vehicles were carrying 500 and 1000 cartons of liquor respectively. The sub-inspector checked 10 cartons from each vehicle and found that in many of such boxes, the required holograms were not affixed and, therefore, he proceeded to take action against the present applicant and other co-accused.

3. While dealing with the matter, the question raised before the learned Additional Sessions Judge was whether the present applicant was liable for

affixing holograms on the cartons. The learned Additional Sessions Judge as well as the Magistrate were of the view that at the stage of framing of charge, it could not be decided whether the accused were under liability of affixing the hologram on the cartons containing the liquor.

4. Before the proceeding to decide the controversy involved in the matter, it may be observed that Commissioner Excise issued an instruction which is filed as (Annexure P/4) at page 16 with the application directing therein that earlier instructions were issued for affixing of hologram on all the bottles and cartons of liquor which is duty paid. In the circular (Annexure P/4), it was observed that it was assumed by the officer issuing the instruction that under the previous instruction, all the bottles and cartons must be carrying such holograms affixed on it and, therefore, when any carton or bottles are found in the shops selling such liquor it may be presumed that the liquor was not duty paid and instant action should be taken against them.

5. Under these instructions, the learned counsel for the applicant submits, inter-alia, that in the present case firstly, the present applicant was not under the liability of affixing holograms on the bottles and cartons of the liquor and secondly, he submits that even if it is assumed that the present applicant was under the obligation to affix the hologram, the affixing of hologram is nowhere provided in the Act or Rules and, therefore, charges as aforesaid cannot be framed against him for violation of any provision of Act and Rules.

6. During the argument, learned counsel for the State could not provide any provision of law or the Rules where affixing of hologram is made mandatory and the liability is placed on the licensee or the permit holder. So far as, the instruction issued by the Excise Commissioner is concerned that is only an executive instruction to ensure that only duty paid liquor should be sold in the market. The language used in the circular indicates that when boxes containing bottles of liquor are found without hologram then it may be presumed that such liquor is not duty paid and instant action should be taken, that is to say that it is to be enquired into whether the liquor is duty paid or not. Only when it is found that the liquor is not duty paid, the criminal proceeding should be initiated. As offence is, selling or transporting liquor, which is not duty paid and merely, because the cartons and the bottles are not affixed with holograms, such an omission is not punishable.

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7. In this view of the matter in the present case, the bottles and the carton containing bottles of the liquor that was subject matter of this criminal case were not found to be not duty paid and it is only the case of the prosecuting agency that the boxes and the bottles were found without holograms.

8. That be so, I find that the application deserves to be allowed and accordingly, the application is allowed. The proceeding against the present applicant pending before the Judicial Magistrate First Class, Ujjain in Crime No.4080/2011 so far as, it relates to the present applicant are quashed.

9. With the aforesaid observation and direction, this application stands disposed of.

Application disposed of.

I.L.R. [2016] M.P., 599

MISCELLANEOUS CRIMINAL CASE

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

M.Cr.C. No. 1405/2014 (Indore) decided on 15 May, 2015

KALPANA PARULEKAR (DR.)(KU.)

...Applicant

Vs.

INSPECTOR GENERAL OF POLICE

SPECIAL POLICE ESTABLISHMENT

LOKAYUKT & anr.

...Non-applicants

(Alongwith Cr.Rev. No. 337/2014, Cr. Rev. No. 429/2014, Cr.Rev. No. 457/2014, M.Cr.C. No. 3243/2014, Cr.Rev. No. 499/2014, Cr.Rev. No. 507/2014, Cr.Rev. No. 532/2014, Cr.Rev. No. 670/2014, M.Cr.C. No. 7737/2014 & M.Cr.C. No. 8756/2014)

A. Penal Code (45 of 1860), Sections 120 & 120-B - Criminal conspiracy - The prosecution must prove an agreement between two or more persons to do or cause to be done some illegal act or some act, which is not illegal by illegal means - No case of criminal conspiracy and cheating made out - Charges framed against all accused persons set aside. (Para 57)

क. दण्ड संहिता (1860 का 45), धाराएं 120 व 120-बी - आपराधिक षडयंत्र - अभियोजन को किसी अवैध कृत्य या किसी ऐसे कृत्य को, जो अवैध नहीं

अवैध साधन द्वारा कारित करने या करवाने के लिये दो या अधिक व्यक्तियों के बीच सहमति साबित करनी चाहिए - आपराधिक षड्यंत्र एवं छल का कोई प्रकरण नहीं बनता - सभी अभियुक्तगण के विरुद्ध विरचित आरोप अपास्त।

B. Penal Code (45 of 1860), Sections 417 & 420 - Cheating and dishonestly inducing delivery of property - Guilty intention is an essential ingredient of offence of cheating - Mens rea on the part of the accused must be established - In order to establish the offence u/s 420 intention to deceive should be in existence at the time when inducement was done - If there is no inducement, then this does not constitute the offence of cheating and framing of charge u/s 417 and 420 was not proper.

(Paras 52 & 56)

ख. दण्ड संहिता (1860 का 45), धाराएं 417 व 420 - छल एवं बेईमानी से संपत्ति के परिदान हेतु उत्प्रेरित करना - दूषित आशय, छल के अपराध का आवश्यक घटक है - अभियुक्त की ओर से आपराधिक मनःस्थिति स्थापित की जानी चाहिए - धारा 420 के अंतर्गत अपराध स्थापित करने के लिये प्रवंचित करने का आशय उस समय विद्यमान होना चाहिए जब उत्प्रेरित किया गया था - यदि कोई उत्प्रेरण नहीं है तब यह छल का अपराध गठित नहीं करता और धारा 417 व 420 के अंतर्गत आरोप विरचित किया जाना उचित नहीं था।

C. Prevention of Corruption Act (49 of 1988), Sections 13(1)(d) & 13(2), Penal Code (45 of 1860), Sections 109, 417, 420 r/w 120-B and Criminal Procedure Code, 1973 (2 of 1974), Sections 197, 397 r/w 401 & 482 - Mahatma Gandhi Employment Guarantee Scheme - Vidhan Sabha Nirvachan Kshetra Vikas Yojana (M.P.) - Clause 2.1, 2.2, 3.5 & 4.1 - Vidhayak Nidhi - Applicant alleged to have misused funds of Vidhayak Nidhi by spending the amount of funds for her personal gain - Guilty intention is an essential ingredient of the offence of cheating - Mens rea on the part of the accused must be established - In order to establish allegation u/s 420 intention to deceive should be in existence at the time when inducement was done - There is nothing on the part of the petitioner of having prepared a false report on the basis of which certain works were completed under government scheme - No prima facie case u/s 13(1)(d) and 13(2) and also section 417, 420 r/w section 120-B is made out - Charges framed against all accused persons set aside.

(Paras 15, 52, 56 & 57)

ग. स्रष्टाचार निवारण अधिनियम (1988 का 49), धाराएं 13(1)(डी) व 13(2), दण्ड संहिता (1860 का 45), धाराएं 109, 417, 420 सहपठित 120-बी एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएं 197, 397 सहपठित 401 व 482 – महात्मा गांधी रोजगार गारंटी योजना – विधान सभा निर्वाचन क्षेत्र विकास योजना (म.प्र.) – खंड 2.1, 2.2, 3.5 व 4.1 – विधायक निधि – आवेदकगण ने अभिकथित रूप से अपने व्यक्तिगत लाभ हेतु निधि की रकम खर्च करके विधायक निधि का दुरुपयोग किया है – दूषित आशय छल के अपराध का आवश्यक घटक है – अभियुक्त की आपराधिक मनःस्थिति स्थापित की जानी चाहिए – धारा 420 के अंतर्गत अपराध स्थापित करने के लिये प्रवंचित करने का आशय उस समय विद्यमान होना चाहिए जब उत्प्रेरित किया गया था – याची की ओर से सरकारी योजना के अधीन पूर्ण किये गये कतिपय कार्यों के आधार पर मिथ्या प्रतिवेदन तैयार किये जाने के संबंध में कुछ नहीं है – धारा 13(1)(डी) व 13(2) और साथ ही धाराएं 417, 420 सहपठित धारा 120-बी के अंतर्गत प्रथम दृष्ट्या प्रकरण नहीं बनता – सभी अभियुक्तगण के विरुद्ध विरचित आरोप अपास्त किये गये।

Cases referred :

2008 (5) SCC 248, 2013 AIR SCW 5570, AIR 2013 SC 48.

Vijay Assudani, for the applicant in M.Cr.C. No. 1405/2014 & M.Cr.C. No. 3243/2014.

A.S. Kutumbale with Shakil Ahmed Khan, for the applicant in Cr.Rev. No. 337/2014, Cr.Rev. No. 429/2014 and with *Mohammed Ishaq*, for the applicant in M.Cr.C. No. 7737/2014.

Arvind Gokhale, for the applicant-Lokayukt in Cr.Rev. No. 457/2014 & Cr.Rev. No. 670/2014.

Mohammed Ishaq, for the applicant in Cr.Rev. No. 499/2014 & M.Cr.C. No. 8756/2014.

A.S. Garg with Mohammed Ishaq, for the applicant in Cr.Rev. No. 507/2014.

Brij Kishore Jain, for the applicant in Cr.Rev. No. 532/2014.

Arvind Gokhale, for the non applicant-Lokayukt in M.Cr.C. No. 1405/2014, Cr.Rev. No. 337/2014, Cr.Rev. No. 429/2014, and M.Cr.C. No. 8756/2014.

Vijay Assudani, for the non-applicant in Cr.Rev. No. 457/2014 & Cr.Rev. No. 670/2014.

Subhash Sen, for the non-applicant/State in Cr.Rev. No. 499/2014, Cr.Rev. No. 507/2014.

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S.Sen, for the non-applicant/State in Cr.Rev. No. 532/2014.

A. Gokhale, for the non-applicant -Lokayukt in M.Cr.C. No. 3243/2014 & M.Cr.C. No. 7737/2014.

ORDER

The Order of the Court was delivered by :
P.K. JAISWAL, J. :- M.Cr.(sic:M.Cr.C.) No.1405/2014 has been filed by Dr. Ku. Kalpana Parulkar (sic:Parulekar), who was former member of Legislative Assembly – Mahidpur (Vidhan Sabha area No.213) District Ujjain for the year 2009- 2013. The petitioner in this petition is challenging the order dated 9.1.2014 passed by the learned Special Judge, (Prevention of Corruption Act), Ujjain in Special Case No.5/2013, whereby charge has been framed under Section 417, 420 read with Section 120B of IPC.

2. Cri. Rev.No.337/2014 has been filed by petitioner- Mukesh Jain, the then Chief Executive Officer, in the year 2009-2012 of Jila Panchyat Mahidpur, District Ujjain. The petitioner in this revision has challenged the order dated 9.1.2014 passed by the learned Special Judge, (Prevention of Corruption Act), Ujjain in Special Case No.5/2013 whereby charge has been framed under Section 417 read with Section 120B of IPC and under Section 420 read with Section 120B, IPC.

3. Cri. Rev.No.429/2014 has been filed by petitioner- Suresh Chand Gupta, the then Joint Director of Planning and Statistics Department of Distt. Ujjain in the year 2009 2012. The petitioner in this petition is challenging the order dated 9.1.2014 passed by the learned Special Judge, (Prevention of Corruption Act), Ujjain in Special Case No.5/2013, whereby charge has been framed under Section 417 read with Section 120B, 420 and Section 120B, IPC.

4. Cri. Rev.No.457/2014 has been filed by the petitioner – SPE, Lokayukt, being aggrieved by order dated 9.1.2014, whereby the learned Special Judge discharged the respondents No.1 to 9 from the charges under Section 13(1) (d) and 13 (2) of the Prevention of Corruption Act, 1988.

5. M.Cr.C.No.3243/2014 has been filed by Dr. (Ku. Kalpana Parulekar who worked as MLA. The petitioner in this petition is challenging the order dated 18.3.2014 passed by the learned Special Judge (Prevention of

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Corruption Act), Ujjain in Special Case No.8/2013, whereby charge has been framed under Section 417, 420 read with Section 120B, IPC.

6. Cri. Rev.No.499/2014 has been filed by petitioner – Akhilesh Tomar, the then Sub – Engineer, Janpad Panchayat Mahidpur for the year 2009-2012. The petitioner in this revision is challenging the order dated 9.1.2014 passed by the Special Judge, Ujjain in Special Case No.5/2013 whereby charge under Sections 417, 120B, IPC and 420 read with Section 120B, IPC has been framed against him.

7. Cri. Rev.No.507/2014 has been filed by petitioners Basant Kumar Bagul, the then Assistant Engineer Janpad Panchayat Mahidpur Distt. Ujjain and by Goverdhanlal Malviya, Chief Executive Officer posted at Janpad Panchayat Mahidpur, Distt Ujjain, for the year 2009-2012, whereby they have been charged under Section 417 read with Section 120B, IPC and under Section 420 and 120B of IPC.

8. Cri. Rev.No.532/2014 has been filed by Hirendra Malviya, Assistant Engineer, Janpad Panchayat, Mahidpur Dist. Ujjain, for the year 2009-2012. The petitioner has challenged in this petition the order dated 9.1.2014 passed by the Special Judge (Prevention of Corruption Act), Ujjain in Special Case No.5/2013 whereby charge has been framed under Section 417 read with Section 120B, IPC and under Section 420 and 120B of IPC.

9. Cri. Rev.No.670/2014 has been filed by Special Police Establishment (Lokayukt), being aggrieved by order dated 18.3.2014, whereby the learned Special Judge, Ujjain in Special Case No.8/2013 discharged the nonapplicants (Dr.Kalpana Parulekar, S.C. Gupta and Alok Vyas) from the offence punishable under Section 13(1)(d) and under Section 13 (2) of the Prevention of Corruption Act, 1988.

10. M.Cr.C.No.7737/2014, has been filed Sureshchandra Gupta, the then Joint Director of Planning and Statistics Department of Distt. Ujjain in the year 2002-2012. By filing this petition the petitioner is challenging the order dated 18.3.2014 whereby the learned Special Judge (Prevention of Corruption Act), Ujjain in Special Case No.8/2013, framing charge under Section 417 read with Section 120B, IPC and under Section 420 and 120B of IPC.

11. M.Cr.C.No.8756/2014, has been filed by petitioner – Alok Vyas, the

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then Executive Engineer (M.P. Energy Development Co.) Ujjain for the year 2009-2010. He is challenging the order dated 18.3.2014 passed by Special Judge (Prevention of Corruption Act) in Special Case No.8/2013, whereby charge for commission of offence punishable under Section 417 read with Section 120B, IPC and under Section 420 and 120B of IPC.

12. Since, the similar and identical issue is involved in all these petitions and Criminal Revisions, therefore, they were heard together and decided by this common order. For the sake of convenience the facts are borrowed from M.Cr.C.No.1405/2014.

13. By these applications under Section 482 and Cri.Revision under Section 397 read with Section 401 of Cr.P.C, 1973, the petitioners are challenging the order dated 9.1.2014 and the charges framed in special case no.5/2013 and in special case No.8/2013 on 9.1.2014 by the Special Judge (Prevention of Corruption Act), Ujjain. Cri. Rev.No.457/2014 and Cri.Rev.No.670/2014 have been filed by Special Police Establishment, Lokayukt.

14. Brief facts of the case are that one Rajmal Kumawat son of Mohanlal Kumawat, r/o., Jharda, Tehsil Mahidpur, District Ujjain made a complaint to Lokayukt organization stating therein that the petitioner Dr. (Ku.) Kalpana Parulekar, acting as a member of Legislative Assembly, Mahidpur had sanctioned Rs.1,00,000/out of (Vidhyak Nidhi) MLA fund and Rs.3,00,000/- from Mahatma Gandhi Employment Guarantee Scheme (for short 'MANREGA') sanctioned by the competent public functionary to the village panchayat Dhulet, Tehsil Mahidpur for construction of cement concrete road commencing from house of Ramchandra to water tank which was already constructed as Bitumen road out of funds given by the Member, Parliament, out of his M.P Fund (Sansad Nidhi), the petitioner has also sanctioned Rs.3.85 lacs from Vidhyak Nidhi plus Rs.7.84 lacs sanctioned by the concerned civil servant as subsidy for installment of 40 solar energy street lamps. The petitioner sanctioned amount from (Vidhayak Nidhi) MLA fund in favour of village Panchayat Dhulet for works to be commenced, carried on and completed after grant of sanctions from the competent statutory authorities like Joint Director, Divisional Planning and Statistics, Ujjain, Executive Engineer and Collector, Ujjain. The projects were approved by the District Planning

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Committee, Ujjain.

15. The allegation against the petitioner that she has misused the funds of Vidhyak Nidhi and had constructed the cement concrete road on the Government land on survey no.23 Rakba 0.429 hectares and on survey no.80 Rakba 0.162 hectares which is a land belonging to Sudhakar Rao son of Dinkar Rao. It is also alleged that she has installed solar lamps on the agriculture land of her family members and also spent the amount of said funds for her personal gain. The allegation levelled by the complainant disclosed that part of the road (21.5 mtrs x 10.3 mtrs) has been constructed on the land owned by Sudhakar Rao, brother of the petitioner and some solar street lamps have been also installed up to Maa Chandra Ashram, a public trust, some of its members were the family members of the petitioner.

16. The respondents conducted a preliminary investigation, which discloses that the works were sanctioned by District Planning Commission, statutory body, and the competent public functionary and the works were executed by the civil servant of the State of M.P without any let, hindrance or influence of the petitioner. FIR dated 11.3.2012 No.0/11/2012 and FIR No.45/2012 dated 12.3.2012 have been lodged against the petitioner.

17. The preliminary investigation report fail to disclose any charge of corruption whatsoever during the course of commencement, carrying on and completion of the works. The preliminary investigation also disclose that although part of the road has been constructed on the land comprised in survey number owned by the brother of the petitioner. The record of rights maintained by the Revenue Department also show that the road is as a public road on Khasra of brother of the petitioner and the road is being used by general public from last 50 years without any let and hindrance. The investigation report also shows that the solar energy road lamps have also been installed on the road as well as near 'Maa Chandra Ashram', a public trust. The preliminary investigation report also fail to disclose that the petitioner has in any manner either influenced or in-conivance with the public servants for affecting any change of layout of the road or installation of the solar street lamps as sanctioned and approved by the District Planning Committee, Joint Director, Divisional Planning and Statistics, Ujjain, Collector, Ujjain and Government Engineers, for any benefit of her or her brother or her relatives.

18. As per field book prepared by the team of Patwari the area of survey no.23 is 0.429 hectares, this land is Government land and cement concrete road were constructed vide area 141.4 mtrs length x 8.225 mtrs width. The area of survey no.80 is 0.162 hectares and the total cement road constructed over the aforesaid survey number is 21.5 mtrs x 10.3 mts. Survey No.80 is owned by Sudhakar Rao son of Dinkar Rao and as per Khasra Panchshala of 1963-64 to 1966-67, which is at page no.79, Road is shown over the aforesaid survey number ('Sadak') and the same is in existence last from 50 years.

19. As per charge sheet and reply filed by SPE Lokayukt, the complainant Rajmal Kumawat prior to lodging the written complaint before the head office of lokayukt organization filed a public interest litigation vide Writ Petition No.5494/2011 on 13.7.2011 and impleaded Dr.(Ku) Parulekar, the petitioner as respondent No.5. On 12.8.2011, when the matter came up for hearing, the only prayer made on behalf of Rajmal Kumawat, complainant was that the writ petition be disposed of by directing the competent authority of the State Government / Lokayukt police to look into the grievances and take appropriate action in the matter. No notice was issued to the petitioner who was respondent No.5 in the said writ petition. Learned counsel for the petitioner submits that complainant adopted a novel method of somehow implicate the petitioner and thus, before lodging the complaint before the lokayukt organization filed a public interest litigation and on the basis of order passed in the PIL, he lodged a complaint against the petitioner. The Division Bench at the request of learned counsel for the complainant Rajmal Kumawat, disposed of the writ petition at motion hearing stage even without issuing notice to the respondent No.5 by order dated 12.8.2011. Order dated 12.8.2011 reads as under :“

By this petition filed in the nature of Public Interest Litigation, the petitioner has alleged that the 5th respondent who is Member of Legislative Assembly from Mahidpur, District – Ujjain has misused the fund of MLA Grant.

According to the petitioner for utilization of the funds of MLA Grand, guidelines have been issued by the State Government. As per the said guidelines the MLA fund has to be spent strictly in accordance to the norms fixed in it. It has been alleged that on the basis of the direction

issued by the 5th respondent, the authorities of the State Government have utilized / misused the said fund in violation of the said guidelines.

It is the case of the petitioner that though a complaint to this effect has been submitted to the Collector Ujjain and to the Lokayukt Police, Government of M.P. Bhopal, as would be clear from Annexure P-8 but, till date no steps / action has been taken on the same.

Today when the matter came up for hearing the only prayer made by the learned Senior counsel for the petitioner is to dispose of this petition directing the competent authority of the State Government / Lokayukt Police to look into the petitioner's grievance and take appropriate action on the petitioner's grievance.

Having considered the aforesaid limited prayer, without expressing any opinion about the merits of the allegation and its correctness, we are disposing of this writ petition requesting the Lokayukt Organization, Government of M.P., Bhopal / competent authority of the State Government to look into the petitioner's grievance and take appropriate steps on the same in accordance with law.

The petitioner to submit detailed representation with supporting documents before the Lokayukt organization / competent authority.

With the aforesaid, the writ petition stands disposed of."

20. Similarly, in survey no.80 ten numbers of solar lamps are installed. In survey no.277, seven numbers of solar lamps and in survey no.81, eight numbers of solar lamps have been installed. These survey numbers are adjoining to government survey numbers. The matter had been investigated by the DSP Lokayukt and two separate offence as crime no.45 and 46 of 2012 were registered.

21. After investigation charge sheet in crime no.45 and 46 of 2012 have been filed for commission of offence punishable under Sections 13(1) (d), 13 (2) of Prevention of Corruption Act, 1988 and under Section 109, 120B and 420, IPC, on the ground that administrative sanction for construction of cement road was granted for the Government land of Khasra No.33/23, but despite this in-contravention of Government rules and by hatching a conspiracy all the accused persons with a view to cheat the state government allowed the construction to be made on a private land of Khasra no.80 which belongs to the real brother of Dr. Kalpana Parulekar. Mr. Mukesh Jain who was the CEO of Janpad Panchayat Mahidpur also allowed this construction to take place on the private land and this derelicted his duty in contravention of the rules and guidelines issued by the State Government.

22. The allegation against the petitioner Dr. (Ku.) Kalpana Parulekar that she by misusing her position as MLA recommended vide her letter dated 15.6.2009 to construct cement concrete road by including the land of Maa Chandra Ashram trust in which she herself along with her nearest family members are the Trustees and the land over which the road (21.5 mtrs x 10.3 mtrs) has been constructed is a private land of Khasra No.80 belonging to her brother. In this process the funds of "Vidhayak Nidhi" and "NAREGA" were misused.

23. Mukesh Jain, who was Chief Executive Officer Janpad Panchayat Mahidpur was duty bound to adhere to the administrative sanction in which it has been directed to construct the cement concrete road on Khasra No.33/23, but he derelicted his duty and by misusing his post and in contravention of the rules and guidelines issued by the Planning and Development Department allowed the construction of cement concrete road to take place on the private agricultural land of survey no.80 apart from the Government land. It was also the duty of the CEO Janpad Panchayat, Shri Mukesh Jain to see whether the advance funds provided to the agency for completion of the work are being utilized for construction strictly on the Government land or not but Shri Mukesh Jain deliberately shut his eyes and approved the report of the Sub-Engineer in respect of the expenditure which was actually made on the private land.

24. The accused Sub-Engineer Akhilesh Tomar prepared a layout plan on the basis of which technical sanction has been issued by the Executive Engineer. He was the technical person who was entrusted to supervise the construction

of the cement concrete road which was started on 3.12.2009 under the supervision of Gram Panchayat, Dhulet. It was his duty to enter the measurement in the measurement book along with another sub-engineer accused Hirendra Malviya who were responsible to see that the construction is being carried out strictly on the Government land and nowhere else. It was also their duty to intimate to the higher officials if the construction was made on the private land out of the funds of the Government but the same was never done by them and on the contrary in the technical report submitted by them they deliberately mentioned as "cement concrete works Maa Chandra Ashram" whereas, admittedly, Maa Chandra Ashram is a private trust and the intervening land belonged to the brother of petitioner (sic:petitioner) – Dr. Kalpana Parulekar and was not a Government land. All these conspiracy was hatched to facilitate the petitioner and her family members so that they can use this road for approaching to their private trust.

25. The allegation against Hirendra Malviya and Akhilesh Tomar, who were the Sub-Engineers at that relevant time that they for justifying the illegal construction false entries were made in the measurement books with dishonest intention to cheat the Government and misused the funds of the State Government. The seized measurement books have been signed by Hirendra Malviya and Akhilesh Tomar and one B.K. Bagul the then Assistant Engineer and therefore, he was also implicated in the alleged offence.

26. Gangaram Kalesiya, who was Panchayat Secretary of Gram Panchayat, Dhulet certified the completion certificate. The allegation against him that he falsely certified that the sanctioned amount has been used for the purpose shown in the sanctioned order. The said certificate is also signed by Sub-engineer Hirendra Malviya, Assistant Engineer B.K. Bagul and Smt. Tej Kunwar, Sarpanch of Gram Panchayat Dhulet.

27. Smt. Tej Kunwar, who was at that relevant point of time Sarpanch of the village Panchayat Dhulet was made accused because she also signed the completion certificate.

28. The allegation against S.C. Gupta, who was the Joint Director of Planning and Statistics Department of Distt. Ujjain was required to inspect and then verify that the work as per the sanction order has been done on the Government land or not issued the work completion certificate. As per

regulations he was required to investigate and then verify that the work has been done as per sanction order on the Government land only and no private portion has been involved in it, whereas the investigation revealed that the work was also done on survey no.80 which is a private land and thus, the funds were misused for constructing a cement concrete road.

29. After investigation charge sheet has been filed against the the following persons :

- (i) Dr. (Ku.) Kalpana Parulekar, former MLA
- (ii) Mukesh Jain, the then Chief Executive Officer, Janpad Panchayat Mahidpur.
- (iii) B.K. Bagul, Assistant Engineer, Janpad Panchayat Mahidpur
- (iv) Akhilesh Tomar, Sub – Engineer, Janpad Panchayat Mahidpur.
- (v) Hirendra Malviya, Sub-Engineer, Janpad Panchayat Mahidpur.
- (vi) Smt. Tej Kunwar, Sarpanch of Gram Panchayat, Dhulet.
- (viii) Gangaram kalesiya, Panchayat Secretary of Gram Panchayat Dhulet.

30. The allegation against them that they hatched a criminal conspiracy and with a dishonest intention cheated the State Government for constructing 21.5 mtrs x 10.3 mts. Cement concrete road over Khasra No.80 along with the Government land by misusing the funds.

31.. Learned counsel for the petitioner and other co-accused pointed out to the Special Judge that there is no iota of documentary or oral evidence was found against them regarding committing of any offence under the provisions of Prevention of Corruption Act, 1988. The respondent No.2 even without grant of sanction / permission of the State Government / Competent Authority as mandatorily required under Section 19 of the Prevention of Corruption Act, 1988 and Section 197 of Cr.P.C filed challans under Section 13 (1)(d) and Section 13 (2) of Prevention of Corruption Act, 1988 as well as under Section 109, 120 and 420, IPC against the petitioner and eight other co-accused. The respondent at page 10 of the challan have mentioned that sanction for prosecution of Smt. Tejkanwar, Hirendra Malviya, Gangaram Kalesiya

has been granted by the State and permission of prosecution of S.C. Gupta, Mukesh Jain, Goverdhan Malviya, B.K. Bagul, Akhilesh Tomar and Smt. Tej Kunwar has not been received by the State and, therefore, they be prosecuted under Section 109, 120 and 420 of IPC since challan under Section 13 (1) (d) and under Section 13 (2) of Prevention of Corruption (sic:Corruption) Act, 1988 may be submitted subsequently. The learned Special Judge registered a special case nos.5/13 and 8/13. It has also been pointed out that petitioner is a public servant and in discharging of her duty as a public servant, she has sanctioned amount from Vidhyak Nidhi, therefore, the Special Judge is not competent to take cognizance and tried the petitioner under Section 13 (1) (d) and under Section 13 (2) of Prevention of Corruption (sic:Corruption) Act, 1988 and under Section 109, 120 and 420 of IPC, without prior sanction of the State Government / competent authority.

32. The special Judge by order dated 9.1.2014 held that prima facie the petitioner and other Government Officers have not committed any offence under Section 13 (1) (d) and under Section 13 (2) of Prevention of Corruption (sic:Corruption) Act, 1988 therefore, their trial under Section 13 (1) (d) and under Section 13 (2) of Prevention of Corruption (sic:Corruption) Act, 1988 is not permissible. However, on the basis of material placed on record, she can be tried under Section 417 and 420 read with Section 120 of IPC. Relevant part of the order by which no charge has been framed against the petitioner and other 8 accused persons under Section 13 (1) (d) and under Section 13 (2) of Prevention of Corruption (sic:Corruption) Act, 1988 and Section 109 of IPC, reads as under :

“सुना गया। प्रकरण का अवलोकन किया गया। चूंकि अभियोजन ने जो मामला पेश किया है, वह धारा 420, 109, 120 बी 21 भा0दं0वि0 और धारा 13(1)डी, 13 (2) भ्रष्टाचार निवारण अधिनियम के आरोप में पेश किया गया है। तो चूंकि धारा 13 (1) की परिधि का किसी भी आरोपी ने कोई धन संबंधी लाभ, परितोषण, मूल्यवान संपत्ति प्राप्त की हो, शासकीय संपत्ति जो उसके नियंत्रण में थी, उसका दुर्विनियोग किया हो, मूल्यवान धन संबंधी लाभ प्राप्त किया हो जो अपराधिक अवचार की श्रेणी का हो। यानि धारा 13 (1) की क लगायत घ की किसी श्रेणी का अपराध किया हो। ऐसा अभिलेख की सामग्री से दर्शित नहीं। इसलिये प्रथम दृष्टया धारा 13 (1) डी, 13 (2) भ्रष्टाचार निवारण अधिनियम का आरोप किसी के खिलाफ भी नहीं बनता क्योंकि चार्ज यह है कि, विधायक निधि से जो लोक मार्ग पर निर्माण होना था, उसका निजी संपत्ति

में निर्माण किया। उसके लिये किसी लोक सेवक ने धन संबंधी लाभ प्राप्त किया हो, प्रतिशोध प्राप्त किया, संपत्ति का स्वयं में दुर्विनियोग किया हो, ऐसी साक्ष्य नहीं है। इसलिये उक्त धाराओं का चार्ज किसी के खिलाफ नहीं बनता।”

33. It is submitted that no sooner the court of Special Judge has held that no offence even prima facie is made out under Section 13 (1) (d) and under Section 13 (2) of Prevention of Corruption Act, 1988, the Court of Special Judge has no competence and power to frame any charges under Section 417, 420 read with Section 120B, IPC.

34. He further submits that the petitioner is a public servant and is protected under the mandatory provisions of Section 19 of Prevention of Corruption Act, 1988 and under Section 197 of Cr.P.C., 1973. The learned Special Judge failed to appreciate that the challan against her has been filed by the respondents without granting any sanction / permission by the State Government / competent authority is mandatorily (sic:mandatorily) required and no cognizance can be taken against her without sanction to prosecute. He placed reliance on the decision of the Apex Court in the case of *Anjani Kumar v. State of Bihar & Anr.* reported as 2008 (5) SCC 248 Para 8 of the aforesaid judgment is relevant which reads as under :

“ 8. As noted above, a petition under Section 482 was filed, which was rejected by the High Court primarily on the ground that no sanction was required. No other question was decided. It is pointed out by learned counsel for the appellant that on the basis of the FIR given by the appellant, Respondent 2 has been convicted under Sections 18-A and 28 of the Drugs Act and Sections 420 and 468 IPC.”

12. As the factual scenario goes to show the complaint filed on 4.2.1993 appears to be a counter blast by respondent No.2 for the action taken by the appellant against him.

10. The pivotal issue i.e. applicability of Section 197 of the Code needs careful consideration. In Bakhshish Singh Brar v. Smt. Gurmej Kaur and Anr. (AIR 1988 SC 257), this Court while emphasizing on the balance between protection to the officers and the protection to the citizens

observed as follows:"

It is necessary to protect the public servants in the discharge of their duties. In the facts and circumstances of each case protection of public officers and public servants functioning in discharge of official duties and protection of private citizens have to be balanced by finding out as to what extent and how far is a public servant working in discharge of his duties or purported discharge of his duties, and whether the public servant has exceeded his limit. It is true that Section 196 states that no cognizance can be taken and even after cognizance having been taken if facts come to light that the acts complained of were done in the discharge of the official duties then the trial may have to be stayed unless sanction is obtained. But at the same time it has to be emphasised that criminal trials should not be stayed in all cases at the preliminary stage because that will cause great damage to the evidence."

11. The protection given under Section 197 is to protect responsible public servants against the institution of possibly vexatious criminal proceedings for offences alleged to have been committed by them while they are acting or purporting to act as public servants. The policy of the legislature is to afford adequate protection to public servants to ensure that they are not prosecuted for anything done by them in the discharge of their official duties without reasonable cause, and if sanction is granted, to confer on the Government, if they choose to exercise it, complete control of the prosecution. This protection has certain limits and is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and is not merely a cloak for doing the objectionable act. If in doing his official duty, he acted in excess of his duty, but there is a reasonable connection between the act and the performance of the official duty, the excess will not be a sufficient ground to

deprive the public servant from the protection. The question is not as to the nature of the offence such as whether the alleged offence contained an element necessarily dependent upon the offender being a public servant, but whether it was committed by a public servant acting or purporting to act as such in the discharge of his official capacity. Before Section 197 can be invoked, it must be shown that the official concerned was accused of an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duties. It is not the duty which requires examination so much as the act, because the official act can be performed both in the discharge of the official duty as well as in dereliction of it. The act must fall within the scope and range of the official duties of the public servant concerned. It is the quality of the act which is important and the protection of this section is available if the act falls within the scope and range of his official duty. There cannot be any universal rule to determine whether there is a reasonable connection between the act done and the official duty, nor is it possible to lay down any such rule. One safe and sure test in this regard would be to consider if the omission or neglect on the part of the public servant to commit the act complained of could have made him answerable for a charge of dereliction of his official duty, if the answer to his question is in the affirmative, it may be said that such act was committed by the public servant while acting in the discharge of his official duty and there was every connection with the act complained of and the official duty of the public servant. This aspect makes it clear that the concept of Section 197 does not get immediately attracted on institution of the complaint case.

12. At this juncture, we may refer to P. Arulswami v. State of Madras (AIR 1967 SC 776), wherein this Court held as under: "... It is not therefore every offence committed by a

public servant that requires sanction for prosecution under Section 197(1) of the Criminal Procedure Code; nor even every act done by him while he is actually engaged in the performance of his official duties; but if the act complained of is directly concerned with his official duties so that, if questioned, it could be claimed to have been done by virtue of the office, then sanction would be necessary. It is quality of the act that is important and if it falls within the scope and range of his official duties the protection contemplated by Section 197 of the Criminal Procedure Code will be attracted. An offence may be entirely unconnected with the official duty as such or it may be committed within the scope of the official duty. Where it is unconnected with the official duty there can be no protection. It is only when it is either within the scope of the official duty or in excess of it that the protection is claimable."

13. Prior to examining if the Courts below committed any error of law in discharging the accused it may not be out of place to examine the nature of power exercised by the Court under Section 197 of the Code and the extent of protection it affords to public servant, who apart, from various hazards in discharge of their duties, in absence of a provision like the one may be exposed to vexatious prosecutions. Section 197(1) and (2) of the Code reads as under:

"197. (1) When any person who is or was a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction -

(a) in the case of person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the

Union, of the Central Government;

(b) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a State, of the State Government.

* * *

(2) No Court shall take cognizance of any offence alleged to have been committed by any member of the Armed Forces of the Union while acting or purporting to act in the discharge of his official duty, except with the previous sanction of the Central Government."

The section falls in the chapter dealing with conditions requisite for initiation of proceedings. That is if the conditions mentioned are not made out or are absent then no prosecution can be set in motion. For instance no prosecution can be initiated in a Court of Sessions under Section 193, as it cannot take cognizance, as a court of original jurisdiction, of any offence unless the case has been committed to it by a Magistrate or the Code expressly provides for it. And the jurisdiction of a Magistrate to take cognizance of any offence is provided by Section 190 of the Code, either on receipt of a complaint, or upon a police report or upon information received from any person other than police officer, or upon his knowledge that such offence has been committed. So far public servants are concerned the cognizance of any offence, by any court, is barred by Section 197 of the Code unless sanction is obtained from the appropriate authority, if the offence, alleged to have been committed, was in discharge of the official duty. The section not only specifies the persons to whom the protection is afforded but it also specifies the conditions and circumstances in which it shall be available and the effect in law if the conditions are satisfied. The mandatory character of the protection afforded to a public servant is

brought out by the expression, 'no court shall take cognizance of such offence except with the previous sanction'. Use of the words, 'no' and 'shall' make it abundantly clear that the bar on the exercise of power by the court to take cognizance of any offence is absolute and complete. Very cognizance is barred. That is the complaint, cannot be taken notice of. According to Black's Law Dictionary the word 'cognizance' means 'jurisdiction' or 'the exercise of jurisdiction' or 'power to try and determine causes'. In common parlance it means taking notice of. A court, therefore, is precluded from entertaining a complaint or taking notice of it or exercising jurisdiction if it is in respect of a public servant who is accused of an offence alleged to have committed during discharge of his official duty.

14. Such being the nature of the provision the question is how should the expression, 'any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty', be understood? What does it mean? 'Official' according to dictionary, means pertaining to an office, and official act or official duty means an act or duty done by an officer in his official capacity. In B. Saha and Ors. v. M. S. Kochar (1979 (4) SCC 177), it was held : (SCC pp. 18485, para 17) "The words 'any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty' employed in Section 197(1) of the Code, are capable of a narrow as well as a wide interpretation. If these words are construed too narrowly, the section will be rendered altogether sterile, for, 'it is no part of an official duty to commit an offence, and never can be'. In the wider sense, these words will take under their umbrella every act constituting an offence, committed in the course of the same transaction in which the official duty is performed or purports to be performed. The right approach to the

import of these words lies between two extremes.

While on the one hand, it is not every offence committed by a public servant while engaged in the performance of his official duty, which is entitled to the protection of Section 197 (1), an Act constituting an offence, directly and reasonably connected with his official duty will require sanction for prosecution and the said provision."

Use of the expression, 'official duty' implies that the act or omission must have been done by the public officer in the course of his service and that it should have been in discharge of his duty. The Section does not extend its protective cover to every act or omission done by a public servant in service but restricts its scope of operation to only those acts or omissions which are done by a public servant in discharge of official duty.

15. It has been widened further by extending protection to even those acts or omissions which are done in purported exercise of official duty. That is under the colour of office. Official duty therefore implies that the act or omission must have been done by the public servant in course of his service and such act or omission must have been performed as part of duty which further must have been official in nature. The Section has, thus, to be construed strictly, while determining its applicability to any act or omission in course of service. Its operation has to be limited to those duties which are discharged in course of duty. But once any act or omission has been found to have been committed by a public servant in discharge of his duty then it must be given liberal and wide construction so far its official nature is concerned. For instance a public servant is not entitled to indulge in criminal activities. To that extent the Section has to be construed narrowly and in a restricted manner. But once it is established that act or omission was done by the public servant while discharging his duty then the scope

of its being official should be construed so as to advance the objective of the Section in favour of the public servant. Otherwise the entire purpose of affording protection to a public servant without sanction shall stand frustrated. For instance a police officer in discharge of duty may have to use force which may be an offence for the prosecution of which the sanction may be necessary. But if the same officer commits an act in course of service but not in discharge of his duty and without any justification therefor then the bar under Section 197 of the Code is not attracted. To what extent an act or omission performed by a public servant in discharge of his duty can be deemed to be official was explained by this Court in Matajog Dobey v. H. C. Bhari (AIR 1956 SC 44) thus :

"The offence alleged to have been committed (by the accused) must have something to do, or must be related in some manner with the discharge of official duty ... there must be a reasonable connection between the act and the discharge of official duty; the act must bear such relation to the duty that the accused could lay a reasonable (claim) but not a pretended or fanciful claim, that he did it in the course of the performance of his duty."

16. If on facts, therefore, it is prima facie found that the act or omission for which the accused was charged had reasonable connection with discharge of his duty then it must be held to be official to which applicability of Section 197 of the Code cannot be disputed.

17. Section 197(1) provides that when any person who is or was a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except

with the previous sanction (a) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the Union, of the Central Government and (b) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a State, of the State Government.

18. *We may mention that the Law Commission in its 41st Report in paragraph 15.123 while dealing with Section 197, as it then stood, observed "it appears to us that protection under the section is needed as much after retirement of the public servant as before retirement. The protection afforded by the section would be rendered illusory if it were open to a private person harbouring a grievance to wait until the public servant ceased to hold his official position, and then to lodge a complaint. The ultimate justification for the protection conferred by Section 197 is the public interest in seeing that official acts do not lead to needless or vexatious prosecution. It should be left to the Government to determine from that point of view the question of the expediency of prosecuting any public servant". It was in pursuance of this observation that the expression 'was' come to be employed after the expression 'is' to make the sanction applicable even in cases where a retired public servant is sought to be prosecuted.*

19. *The above position was highlighted in R. Balakrishna Pillai v. State of Kerala and Anr. (1996 (1) SCC 478), State of H.P. v. M.P. Gupta (2004 (2) SCC 349), State of Orissa through Kumar Raghvendra Singh and Ors. v. Ganesh Chandra Jew (2004 (8) SCC 40) and Rakesh Kumar Mishra v. State of Bihar and Ors. (2006 (1) SCC 557).*

35. In the case of *Anil Kumar & Ors. V/s. M.K. Aiyappa & Anr.*, reported as 2013 AIR SCW 5570 wherein the Apex Court held that the word

“cognizance in Section 197 of the Code and Section 19 of the Prevention of Corruption Act, (P.C. Act) is mandatory and no cognizance can be taken against public servant without prior sanction to prosecute him, which is mandatory requirement. Para 10, 11 and 12 are relevant which reads as under :

10. The meaning of the said expression was also considered by this Court in Subramaniam Swamy case (supra). The judgments referred to herein above clearly indicate that the word “cognizance” has a wider connotation and not merely confined to the stage of taking cognizance of the offence. When a Special Judge refers a complaint for investigation under Section 156(3) Cr.P.C., obviously, he has not taken cognizance of the offence and, therefore, it is a pre-cognizance stage and cannot be equated with post-cognizance stage. When a Special Judge takes cognizance of the offence on a complaint presented under Section 200 Cr.P.C. and the next step to be taken is to follow up under Section 202 Cr.P.C. Consequently, a Special Judge referring the case for investigation under Section 156(3) is at pre-cognizance stage.

11. A Special Judge is deemed to be a Magistrate under Section 5(4) of the PC Act and, therefore, clothed with all the magisterial powers provided under the Code of Criminal Procedure. When a private complaint is filed before the Magistrate, he has two options. He may take cognizance of the offence under Section 190 Cr.P.C. or proceed further in enquiry or trial. A Magistrate, who is otherwise competent to take cognizance, without taking cognizance under Section 190, may direct an investigation under Section 156(3) Cr.P.C. The Magistrate, who is empowered under Section 190 to take cognizance, alone has the power to refer a private complaint for police investigation under Section 156(3) Cr.P.C.

12. We may now examine whether, in the above mentioned legal situation, the requirement of sanction is a pre-condition for ordering investigation under Section 156(3)

Cr.P.C., even at a pre-cognizance stage. Section 2(c) of the PC Act deals with the definition of the expression "public servant" and provides under Clauses (viii) and (xii) as under:

"(viii) any person who holds an office by virtue of which he is authorised or required to perform any public duty.

(xii) any person who is an office-bearer or an employee of an educational, scientific, social, cultural or other institution, in whatever manner established, receiving or having received any financial assistance from the Central Government or any State Government, or local or other public authority." The relevant provision for sanction is given in Section 19(1) of the PC Act, which reads as under:

"19. Previous sanction necessary for prosecution.—

(1) No court shall take cognizance of an offence punishable under Sections 7, 10, 11, 13 and 15 alleged to have been committed by a public servant, except with the previous sanction—

a) in the case of a person who is employed in connection with the affairs of the Union and is not removable from his office save by or with the sanction of the Central Government, of that Government;

b) in the case of a person who is employed in connection with the affairs of a State and is not removeable from his office save by or with the sanction of the State Government, of that Government;

c) in the case of any other person, of the authority competent to remove him from his office." Section 19(3) of the PC Act also has some relevance; the operative portion of the same is extracted hereunder:

"Section 19(3) – Notwithstanding anything contained in

the Code of Criminal Procedure, 1973 (2 of 1974)-

a) no finding, sentence or order passed by a special judge shall be reversed or altered by a court in appeal, confirmation or revision on the ground of absence of, or any error, omission or irregularity in the sanction required under sub-section (1), unless in the opinion of that Court, a failure of justice has in fact been occasioned thereby;

b) xxx xxx xxx

c) xxx xxx xxx "

36. The Apex Court in the case *C.K. Jaffer Sharief v. State* reported as AIR 2013 SC 48 has observed the following in para 17 which reads as under :

"17. It has already been noticed that the appellant besides working as the Minister of Railways was the Head of the two Public Sector Undertakings in question at the relevant time. It also appears from the materials on record that the four persons while in London had assisted the appellant in performing certain tasks connected with the discharge of duties as a Minister. It is difficult to visualise as to how in the light of the above facts, demonstrated by the materials revealed in the course of investigation, the appellant can be construed to have adopted corrupt or illegal means or to have abused his position as a public servant to obtain any valuable thing or pecuniary advantage either for himself or for any of the aforesaid four persons. If the statements of the witnesses examined under Section 161 show that the aforesaid four persons had performed certain tasks to assist the Minister in the discharge of his public duties, however insignificant such tasks may have been, no question of obtaining any pecuniary advantage by any corrupt or illegal means or by abuse of the position of the appellant as a public servant can arise. As a Minister it was for the appellant to decide on the number and identity of the officials and supporting staff who should accompany him to London if it was

anticipated that he would be required to perform his official duties while in London. If in the process, the Rules or Norms applicable were violated or the decision taken shows an extravagant display of redundancy it is the conduct and action of the appellant which may have been improper or contrary to departmental norms. But to say that the same was actuated by a dishonest intention to obtain an undue pecuniary advantage will not be correct. That dishonest intention is the gist of the offence under section 13(1)(d) is implicit in the words used i.e. corrupt or illegal means and abuse of position as a public servant. A similar view has also been expressed by this Court in M. Narayanan Nambiar vs. State of Kerala[1] while considering the provisions of section 5 of Act of 1947. If the totality of the materials on record indicate the above position, we do not find any reason to allow the prosecution to continue against the appellant. Such continuance, in our view, would be an abuse of the process of court and therefore it will be the plain duty of the court to interdict the same."

37. The stand of the Lokayukt that in a preliminary enquiry, it was found that the petitioner in conspiracy with the Joint Director S. C. Gupta, planning Statistics Department, Ujjain, Alok Vyas, the then Addl. Assistant Engineer, issued administrative sanction against the rules and misused the funds of Vidhayak Nidhi and "Vidhansabha Nirvachan Kshetra Vikas Yojna" not only for constructing the road belonged to Maa Chandra Ashram, a public trust, but also got installed the solar street lamps on the said private land. In this process other officers of the State Government allowed those illegal constructions to be made and committed misconduct, which has been punishable under the provisions of Prevention of Corruption Act. The officer in connivance with the MLA abetted and conspired the commission of offence. The Executive Engineer, Gramin Yantrik Seva, on the basis of lay out plan granted technical sanction for construction of cement concrete road on Government land vide its order dated 25.9.2009. The said work was to be performed by spending Rs.4,00,000/for which administration sanction was granted. In the said sanction order the work order was given for constructing cement concrete road in

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Patwari Halka no. and Khasra No.33/23 and in column No.7 of the work order the word "Government Land" has been specifically mentioned. On 18.11.2009 the said sanction was amended and thereafter the work was completed on 25.10.2010. As per measurement book the road of 21.5 mtr. x 10.3 mtr has been constructed over private land. The portion of the cement concrete road which was constructed out of the funds of the Government was on the private land belonging to the brother of the petitioner. The allegation against the petitioner that she by misusing her position as MLA with the officers of the State Government cheated the Government by misusing the fund of Vidhayak Nidhi.

38. Learned counsel for the respondent submits that no sanction is required under Section 19 of the Prevention of Corruption Act, 1988 and under Section 197 of Cr.P.C and prays for dismissal of petitions and revision filed by the accused.

39. We have heard the arguments at length and perused the record of the case.

40. The State Government has initiated a scheme known as '*Vidhan Sabha Nirvachan Kshetra Vikas Yojna*' in the State of M.P. Under the said scheme the MLA of the particular constituency was granted powers to perform the development works in his constituency and was provided with funds for completion of small works in public interest. The MLA was required to recommend the works under his constituency and such recommendation was to be forwarded to the Collector in writing. The Collector was required to send the recommended work by the MLA for its approval and execution of the concerned Agencies/ Departments/ Organizations. The said guidelines of the State Government in respect of Vidhan Sabha Kshetra Nirvachan Vikas Yojna is filed along with charge sheet. Clause 2.1, 2.2, 3.5 and 4.1 are relevant which reads as under :

“2.1 इस योजना के अंतर्गत जिन कार्यों की अनुशंसा की गई हों वे जिले के भीतर चल रही जिला योजनाओं और केन्द्रीय प्रायोजित तथा केन्द्रीय क्षेत्र कार्यक्रमों के अंतर्गत परियोजनाओं एवं कार्यक्रमों के सामान्य पैटर्न के अनुरूप होंगे। उनका कार्यान्वयन अन्य सभी कार्यों के साथ-साथ ही किया जा सकता है किन्तु एक तरह से वे विधान सभा सदस्य द्वारा अनुशंसित कार्य के रूप में अभिव्यक्त होंगे। इस

प्रकार इन कार्यों की स्वीकृति एवं कार्यान्वयन के लिये निर्धारित प्रक्रिया समान कार्यों की सामान्य स्वीकृति एवं कार्यान्वयन को संचालित करने वाली प्रक्रियाओं, जिनका कार्यान्वयन लोगों की प्रतिनिधि संस्थाओं द्वारा किया जाता है, से भिन्न नहीं है। विधायकों के सुझावों को जिला कलेक्टर द्वारा संकलित किया जायेगा एवं इस मार्गदर्शिका के अंतर्गत उन पर विचार किया जायेगा तथा सामान्य प्रक्रिया का अनुसरण करते हुए यथासंभव उनको जिले में चल रहे जिला योजना कार्यक्रमों एवं अन्य केन्द्रीय प्रायोजित तथा केन्द्रीय क्षेत्र कार्यक्रमों में शामिल किया जायेगा।

2.2 इस मार्गदर्शिका की सीमा के अंतर्गत आने वाले कार्यों, जिनके लिये विधायकों ने अपनी अनुशंसा की है, की तकनीकी एवं प्रशासनिक स्वीकृति संबंधित जिलों में सामान्य विभागीय प्रक्रियाओं के अनुरूप दी जायेगी। कार्यों को जिला कलेक्टर द्वारा जिले की सरकारी एजेंसियों के माध्यम से कार्यान्वित कराया जायगा।

योजनांतर्गत 25 लाख रुपये की लागत के कार्यों की स्वीकृति हेतु जिला कलेक्टर अधिकृत है। कार्य की लागत यदि 25 लाख रुपये से अधिक हो तो ऐसे कार्यों पर विधान सभा का मत (बजट के माध्यम से) प्राप्त कर विभागाध्यक्ष (राज्य योजना आयोग) द्वारा स्वीकृति दी जावेगी।

3.5 चूंकि इस योजना के अंतर्गत राज्य सरकार की एजेंसियों जैसे कि लोक निर्माण विभाग, ग्रामीण विकास विभाग, कृषि विभाग, स्वास्थ्य एवं परिवार कल्याण विभाग, शिक्षा विभाग, लोक स्वास्थ्य यांत्रिकी विभाग तथा आवास एवं पर्यावरण विभाग आदि के द्वारा कार्यों की विचारार्थ शामिल, स्वीकृत और कार्यान्वित किया जायेगा, अतः संबंधित जिले का कलेक्टर जिला स्तर पर इस योजना के अंतर्गत कार्यों में तालमेल बैठाने और सम्पूर्ण पर्यवेक्षण के लिये उत्तरदायी होगा।

4.1 इस योजना के अंतर्गत शुरू किये गये कार्यों के प्रभावी कार्यान्वयन के लिये स्थल निरीक्षण द्वारा भौतिक निगरानी (Physical Monitoring) रखना महत्वपूर्ण है। जिले के कलेक्टर को प्रत्येक वर्ष इन कार्यों में से कम से कम 10 प्रतिशत कार्यों का स्वयं निरीक्षण करना चाहिए। इसी तरह कार्यान्वयन एजेंसियों के वरिष्ठ अधिकारियों की यह जिम्मेदारी होगी कि वे इन कार्यों की नियमित रूप से जांच करते रहें और क्षेत्रीय दौरों द्वारा यह पता लगायें कि उनके द्वारा कार्यान्वित किये जा रहे कार्यों की प्रगति संतोषजनक ढंग से चल रही है और उनका क्रियान्वयन निर्धारित प्रक्रियाओं और विशिष्टताओं के अनुरूप हो रहा है। इसी प्रकार जिला, तहसील और विकासखण्ड स्तर के अधिकारियों को कार्यस्थल का दौरा करके इन कार्यों के कार्यान्वयन पर कड़ी निगरानी रखनी चाहिए। योजना विभाग के द्वारा क्रियान्वयन एजेंसियों के लिये निरीक्षण का कार्यक्रम तैयार किया जायेगा जिसमें प्रत्येक पर्यवेक्षण स्तर (Supervision level) के कर्मचारी के लिये निरीक्षण

की संख्या निर्धारित की जानी चाहिये।”

41. It is submitted that as per scheme, Collector is a whole sole authority. He has to apply his mind before grant of sanction and it is he who sanctioned the project in question. The technical sanction was granted by the Executive Engineer. The Government Officers namely S.C. Gupta, the Joint Director of Planning and Statistics Department of Distt. Ujjain, Goverdhanlal Malviya, Chief Executive Officer, Janpad Panchayat Mahidpur, Sub-engineer Hiredra Malviya, Assistant Engineer B.K. Bagul, Gangaram Kalesiya, who was Panchayat Secretary of Gram Panchayat Dhulet and Smt. Tej Kunwar, Sarpanch of Gram Panchayat Dhulet, had executed the work sanctioned by the Collector and Executive Engineer. As per sanction order work has to be executed within a time stipulated in work order and, therefore, they have to execute the work. There was no dishonest intention to cheat the Government and misused these funds of the State Government. Nor they derelicted their duty by misusing their post in in-contravention of the rules and guidelines constructed the cement concrete road. There is no material that they hatched any conspiracy to facilitate Dr. Kalpana Parulekar and her family members, so that they can use the cement concrete road for approaching to their private trust. They submit that as per Government record the road over survey no.80 is in existence for a period of more than 50 years.

42. As per challan and other documents, which are on record, it is not disputed by the learned counsel for the parties that in the year 2004 and in 2009 the road over the private survey no.80 was constructed from the Member of Parliament Funds. In 1996 for the first time the road was constructed from Sansadh Nidhi, Ujjain and in 2002-03 the road was constructed over the said land by Madhya Pradesh PWD Department. In 2004-2009 the road was constructed from Vidhyak Nidhi. These facts are not disputed by the learned counsel for the Lokayukt nor it is in dispute that for the first time road over survey no.80 was constructed from Sansad Nidhi fund in 1996 and thereafter till 2009 the road was constructed from Vidhayak Nidhi funds.

43. In respect of solar street lamps, it is submitted that Government land and private land are adjoining to each other and therefore, the pole of the land affixed at private land whereas solar lamp has been installed for lighting purpose for public purpose to the persons who are residing near Dhulet village.

It is submitted that no case for an offence under Section 417, 420 and 120B of IPC is made out against them. The special judge wrongly framed the charges on the ground of misusing the Government funds for construction of the road on private land amounts to cheating. The petitioners have not committed the offence of cheating and abetted the offence by hatching conspiracy. There is no material iota of evidence nor prima facie ingredients of charge under Section 420, 417 and 120B, IPC is made out. As per Annexure P/1 dated 25.9.2009, the administrative sanction was granted by one Mukesh Shukl, Additional District Program Coordinator, M.P. State, Rojgar Guarantee Parishad, Distt. Ujjain. Relevant para of the same reads as under :

मध्यप्रदेश बुक ऑफ फायनेन्सियल पॉवर्स भाग-2 में वित्त विभाग के आदेश क्रमांक एफ 3/1/2003/नियम/4, दिनांक 31 जनवरी 2006 द्वारा पंचायत एवं ग्रामीण विकास विभाग के अधीन जोड़े गये अधिकारों का उपयोग करते हुए माननीय विधायक सुश्री कल्पना परुलेकर विधानसभा क्षेत्र महिदपुर की अनुशंसा अनुसार कार्यपालन यंत्री ग्रामीण यांत्रिकी सेवा, जिला उज्जैन द्वारा प्रदत्त तकनीकी स्वीकृति क्रमांक 12 दिनांक 10.07.09 के आधार पर सी.सी. कार्य ग्राम धुलेट में चन्द्रा आश्रम हेतु पंचायत धुलेट क्रियान्वयन एजेंसी नियुक्त करते हुए उक्त कार्य की राशि रुपये 4,00,000/- (राशि रुपये चार लाख मात्र) की प्रशासकीय स्वीकृति प्रदान की जाती है। इस कार्य पर होने वाला व्यय निम्नानुसार राष्ट्रीय ग्रामीण रोजगार गारंटी स्कीम मद (भाग-1) तथा विधायक विकास निधि मद (भाग-2) एवं जनसहयोग (भाग-3) में दर्शाये अनुसार विकलनीय होगा।

Clause 21 of the Administrative sanction reads as under :

21. निर्माण कार्य संपादन स्वीकृत प्राक्कलन, रूपांकन एवं मानचित्र के अनुसार कराया जावेगा। निर्माण कार्य के दौरान किसी भी प्रकार का परिवर्तन किया जाना अपरिहार्य हो तो उस स्थिति में सक्षम प्राधिकारी की पूर्व स्वीकृति प्राप्त किया जाना अनिवार्य होगा अन्यथा की स्थिति में संपादित कार्य अमान्य किया जाकर व्यय की गई राशि निष्फल मानकर क्रियान्वयन एजेंसी से राशि वसूल की जावेगी।

44. The said administrative sanction order was amended by the Collector on 18.11.2009 Annexure P/2. Relevant para of the same reads as under :

“ मध्यप्रदेश बुक ऑफ फायनेन्सियल पॉवर्स भाग-2 में वित्त विभाग के आदेश क्रमांक एफ 3/1/2003/नियम/4, दिनांक 31 जनवरी 2006 द्वारा पंचायत एवं ग्रामीण विकास विभाग के अधीन जोड़े गये अधिकारों का उपयोग करते हुए माननीय विधायक सुश्री कल्पना परुलेकर, विधानसभा क्षेत्र महिदपुर की अनुशंसा अनुसार

कार्यपालन यंत्री ग्रामीण यांत्रिकी सेवा, जिला उज्जैन द्वारा प्रदत्त तकनीकी स्वीकृति क्रमांक 12 दिनांक 10.07.09 के आधार पर सीसी. कार्य ग्राम धुलेट में चन्द्रा आश्रम हेतु ग्राम पंचायत धुलेट को क्रियान्वयन एजेन्सी नियुक्त करते हुए उक्त कार्य की राशि रुपये 4,00,000/- (राशि रुपये चार लाख मात्र) की प्रशासकीय स्वीकृति आदेश क्रमांक/8693/NREGS-MP/Conver/AS/2009. 10 दिनांक 25.09.09 से प्रदान की गयी है। उक्त प्रशासकीय स्वीकृति के कालम क्रमांक 13 में सशोधन करते हुए जनसहयोग निधि की राशि रुपये 130400/- (एक लाख तीस हजार चार सौ मात्र) के स्थान पर ग्राम पंचायत निधि से कार्य कराये जाने की स्वीकृति प्रदान की जाती है। शेष शर्तें यथावत रहेगी।”

45. The agreement was executed on 29.3.2009 and work was completed on 13.12.2010. Area where the concrete cement road has been constructed, there is no Government road and part of the area of private land has been used by the villagers as road and, the same is recorded as 'road'. As per revenue record in Khasra No.80 road is in existence from last more than 50 years. These facts are not disputed by the learned counsel for the Lokayukt.

46. The first charge sheet has been filed in crime no.45/2012 and second charge sheet was filed at crime No.46/2012 (Cri Rev.No.670/2014).

47. As per scheme the technical sanction has been granted by the Executive Engineer and administration sanction has been granted by the Collector, Ujjain. The planning department is nodal agency. In road, out of total amount of Rs.4,00,000/, they spent amount of Rs.2.69 lacs in constructing the road and Rs.1.39 lacs has been deposited.

48. M.Cr.C.No.8756/2014 has been filed by Mr. Alok Vyas, the then Executive Engineer, M.P. Urja Vikas Nigam, Ujjain. It is submitted that vide Annexure P/1 dated 15.6.2010 the MLA of Mahidpur Vidhan Sabha requested the Collector for installment of 40 solar street lamps. Relevant para of the letter reads as under :“

उपरोक्त विषयान्तर्गत में वर्तमान उर्जा संकट को देखते हुए अपारम्परिक उर्जा उत्पाद 40 नग सौर पथ प्रकाश संयंत्र में म.प्र. उर्जा विकास निगम मर्यादित उज्जैन से अनुदानित दर पर लगवाने हेतु अपनी विधायक निधि मद से चूंकि मेरे क्षेत्र में जनहितार्थ स्थापना होनी है, रुपये 3.85/-लाख स्वीकृत करती हूँ। तत्काल कार्यवाही की प्रतीक्षा में।

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49. As per Annexure P/2, the same has been sanctioned by the Collector on 14.9.2000. The Sub-Div. Officer (Rev.) Mahidpur vide letter dated 27.4.2011 Annexure P/6, very categorically stated to the Collector, Ujjain that in column no.10 Survey no.80 is recorded as road and the same is also used as road. Annexure P/6 reads as under :

“उपरोक्त विषयांतर्गत संदर्भित पत्र में दिये गये निर्देशानुसार विधानसभा निर्वाचन क्षेत्र विकास योजना अंतर्गत स्वीकृत पत्र में उल्लेखित कार्यों के संबंध में पटवारी मौजा से रिपोर्ट ली गई है। ग्राम बारापत्थर के शासकीय सर्वे क्रमांक 23 रकबा 0.429 रास्ता म.प्र. शासन मद में दर्ज है तथा सर्वे नंबर 80 रकबा 0.162 हे. सुधाकरराव पिता दिनकरराव के नाम से राजस्व अभिलेख में दर्ज है। खसरे के कालम् नंबर 10 में रास्ता दर्ज होकर रास्ते के रूप में उपयोग किया जा रहा है। उक्त दोनों सर्वे नंबरों पर सीमेंट कांक्रीट रोड बना है एवं सर्वे क्रमांकों में ही सौर पथ प्रकाश संयंत्र लगाया गया है। जिसे नक्शा ट्रेस में लालस्याही से दर्शाया गया है। पटवारी रिपोर्ट, खसरा एवं नक्शा प्रति संलग्न है। जानकारी श्रीमान् की ओर सादर प्रेषित।”

50. Similar is the report of Patwari Annexure P/7, which reads as under :

“उपरोक्त विषयांतर्गत संदर्भित निवेदन है कि संदर्भित पत्र के पालन में स्थल निरीक्षण किया गया। मौके पर शासकीय सर्वे क्रमांक 23 रकबा 0.429 हेक्टेयर रास्ता मद में दर्ज है तथा सर्वे क्रमांक 80 रकबा 0.16 हेक्टेयर सुधाकरराव पिता दिनकरराव के नाम राजस्व रिकार्ड में भूमि स्वामी स्वत्व पर दर्ज होकर खसरा खाना नं 10 में रास्ता रकबा 0.162 हेक्ट. का दर्ज है। उक्त सर्वे क्रमांकों पर सीमेंट कांक्रीट रोड बना है एवं उक्त सर्वे क्रमांकों में ही सौर पथ प्रकाश संयंत्र लगाया गया है।

अतः श्रीमान् की सेवा में प्रतिवेदन मय खसरा नकल एवं नक्शा ट्रेस के, सादर प्रेषित है।”

51. As per report of Patwari dated 22.2.2014 Annexure P/10 road over survey no.80 is in existence from more than 5 decades. Annexure P/10 is relevant which read as under:

“सेवा में,

श्रीमान् अनुविभागीय अधिकारी महोदय,
तहसील—महिपुर, जिला—उज्जैन (म.प्र.)

विषय:-सूचना के अधिकार के अंतर्गत जानकारी

महोदय

उपरोक्त विषय में लेख है कि, आवेदक श्री मुकेश जैन द्वारा गई जानकारी निम्नानुसार है:-

1. ग्राम धुलैट से कढ़ाई आने के लिये ग्राम बारापत्थर के निम्न सर्वे कमांक से होकर जाना होता है- शासकीय सर्वे कमांक 23 (रा) सर्वे कमांक-80, 275/1, 275/2, 274, 276/1, 276/2, 276/3 तथा सर्वे क. 2 (रास्ता)
2. इन सर्वे नम्बरों के अतिरिक्त ग्राम धुलैट से सीधे कढ़ाई जाने का अन्य कोई रास्ता उपलब्ध नहीं है। (संलग्न ग्राम पंचायत कढ़ाई का प्रमाण पत्र एवं पंचनामा।)
3. धुलैट से कढ़ाई जाने वाले रास्ते पर ग्रामवासी अंग्रेजों के जमाने से आवागमन कर रहे हैं सर्वे नं. 80 से सर्वे.क. 23 तक वर्ष 2003 में PWD द्वारा डामरीकरण किया गया। (ग्राम पंचायत कढ़ाई का प्रमाण पत्र एवं पंचनामा।)
4. ग्राम कढ़ाई के लोग अन्तिम संस्कार हेतु शमशान घाट जाने के लिये ग्राम बारापत्थर के सर्वे क. 273, 275/1, 275/2, 274, 276/1, 276/2, 276/3 तथा 23 व 80 का उपयोग करते हैं, इसके अतिरिक्त अन्य कोई रास्ता नहीं है।
5. हरिजन बस्ती ग्राम धुलैट के निवासियों के बच्चे स्कूल जाने हेतु जिस रास्ते का उपयोग करते हैं वह सर्वे क. 23 व 8 से होकर जाता है।
6. गारत की मस्जिद, चिंतामण गणेश मंदिर, धूलेश्वर महादेव मंदिर, बंगाली शाह की दरगाह, पंचकोशी यात्रा आदि धार्मिक स्थानों पर जाने के लिये सर्वे क. 23, 80, 275/1, 275/2, 274, 276/1, 276/2, 276/3 से होकर जाने वाले रास्ते का उपयोग किया जाता है।

अग्रिम कार्यवाही हेतु श्रीमान की सेवा में प्रेषित।

संलग्न:-

1. ग्राम पंचायत कढ़ाई का प्रमाण पत्र	हस्ताक्षर अपठित
2. पंचनामा	22.2.2014 सील मिजा नाहिव पटवारी हल्का नं..... तहसील महिदपुर ”

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52. Guilty intention is an essential ingredient of the offence of cheating. Mensrea on the part of the accused must be established. He can be charged for an offence of cheating. In order to establish the offence under Section 420, intention to deceive should be in existence at the time when inducement was done.

53. As per record the technical sanction was granted by the Executive Engineer. Thereafter, Collector Ujjain by order dated 25.9.2009 granted sanction of the work of both the works. The said sanction was amended by the Collector, Ujjain on 18.11.2009. As per Vidhan Sabha Nirvachan Kshetra Vikas Scheme, the Collector of the District, is the sole authority to grant sanction, the officers who are implicated in the present case are subordinate to Collector and, therefore, they are bound to carry out the work as per sanction granted by the Collector, but no action has been taken against the then Collector and the Executive Engineer.

54. Learned Senior counsel for the petitioners have submitted that as per Clause 2.1, 2.2, 3.5 and 4.1, the Collector is the whole sole authority and equally responsible because he has to physically monitor and supervise the work. Similarly, Executive Engineer RES who has granted technical sanction was also responsible for it. From the scheme, the contention of the learned counsel for the petitioners appears to be correct.

55. From the aforesaid, we are of the view that there is no material to bring home the charge under sections 417, 420 and 120B, IPC.

56. From the aforesaid, there is nothing on record that the petitioners have prepared a false report on the basis of which certain works were completed under the Government scheme. The work in question was for the first time executed under Sansad scheme in the year 1996. On the basis of administrative and technical sanction granted by the then Collector and Executive Engineer and, therefore, the same was executed from time to time, but no material was found that the officers who were posted from time to time prepared any false report or deceived the Government. In order to constitute the offence of cheating under Sections 417 and 420, IPC, there must be some inducement by the accused and if there is no inducement then this does not constitute the offence of cheating and framing of charge under Sections 417 and 420, IPC was not proper. To bring home charge of conspiracy home to the accused persons to prove that there was an agreement between the petitioners to commit offence. There is no material that

petitioners entered into criminal conspiracy with co-accused persons or conspiracy was hatched by the petitioners along with co-accused persons.

57. To establish a charge of criminal conspiracy, the prosecution must prove an agreement between two or more persons to do or cause to be done some illegal act or some act, which is not illegal by illegal means. In the case in hand, the Collector and Executive Engineer (RES) had knowledge that part of the private road is being used as public road as there is no other road to connect the area and villagers are using the road in question for a period of more than 50 years number of times from the funds of the Sansad/Vidhayak Nidhi, the road has been renovated / constructed. Thus, we are of the view that no case for offence of criminal conspiracy and cheating as framed by the learned Special Judge, Ujjain, is made out, therefore, we quash the charge framed against all the accused person by setting aside the order dated 9.1.2014 and 18.3.2014, passed by Special Judge (Prevention of Corruption) Act, 1988, for commission of offence punishable under Section 417 read with Section 120-B, IPC and under Section 420 read with Section 120B, IPC in M.Cr.C.No.1405/2014, Cri.Rev.No.337/2014, Cri.Rev.No.429/2014, M.Cr.C.No.3243/2014, Cri.Rev.No.499/2014, Cri.Rev.No.507/2014, Cri.Rev.No.532/2014, M.Cr.C.No.7737/2014 and M.Cr.C.No.8756/2014. We are also of the view that the learned Special Judge, (Prevention of Corruption) Act, 1988, Ujjain rightly held that no prima facie case is made out under Section 13 1(d) and under Section 13 (2) of Prevention of Corruption Act, 1988.

58. On due consideration of the aforesaid facts and circumstances of the case, M.Cr.C.No.1405/2014, Cri.Rev.No.337/2014, Cri.Rev.No.429/2014, M.Cr.C.No.3243/2014, Cri.Rev.No.499/2014, Cri.Rev.No.507/2014, Cri.Rev.No.532/2014, M.Cr.C.No.7737/2014 and M.Cr.C.No.8756/2014, are allowed as indicated hereinabove.

59. Criminal Revision No.457/2014 and Criminal Revision No.670/2014, filed by the petitioner Special Police Establishment (Lokayukt) are hereby dismissed.

60. Original order be retained in the record of M.Cr.C.No.1405/2014 and a copy thereof be placed in the record of other connected matters.

Order accordingly.

I.L.R. [2016] M.P., 634

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice N.K. Gupta

M.Cr.C. No. 394/2014 (Jabalpur) decided on 7 October, 2015

STATE OF M.P.

...Applicant

Vs.

SAURABH NAMDEO

...Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Section 482 and Forest Act, Indian (M.P. Amendment) 2009 (7 of 2010), Section 52-A - Power to hear appeal by appellate authority against the order of release of the vehicle passed by authorised officer, in respect of offence committed on 20.10.2009 - Section 52-A of Indian Forest Act (M.P. Amendment) was published in Gazette on 27.03.2010 - Held - Appellate authority was not competent to exercise his appellate powers according to the provisions of Section 52-A of the Indian Forest Act (M.P. Amendment) of that time when the crime was committed - As the same provides an appeal against the order of confiscation and not against the order of release of vehicle - Amendment made in Section 52-A on 27.03.2010 shall not have retrospective effect - Application is dismissed. (Para 8)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 एवं वन अधिनियम, भारतीय (म.प्र.संशोधन) 2009 (2010 का 7), धारा 52-ए - 20.10.2009 को कारित किये गये अपराध के संबंध में वाहन मुक्त किये जाने के प्राधिकृत अधिकारी द्वारा पारित किये गये आदेश के विरुद्ध अपीली प्राधिकारी द्वारा अपील सुनने की शक्ति - भारतीय वन (म.प्र.संशोधन) अधिनियम की धारा 52-ए 27.03.2010 को राजपत्र में प्रकाशित किया गया था - अभिनिर्धारित - जब अपराध कारित किया गया था, अपीली प्राधिकारी उस समय के भारतीय वन (म.प्र.संशोधन) अधिनियम की धारा 52-ए के उपबंधों के अनुसार अपनी अपीली शक्तियों का प्रयोग करने के लिये सक्षम नहीं था - चूंकि वह अधिहरण के आदेश के विरुद्ध अपील उपबंधित करता है और न कि वाहन को मुक्त करने के आदेश के विरुद्ध - 27.03.2010 को धारा 52-ए में किये गये संशोधन का मूललक्षी प्रभाव नहीं होगा - आवेदन खारिज।

Case referred :

(2004) 8 SCC 1.

Bramhadatt Singh, P.P. for the applicant/State.

Himanshu Chourasiya, for the non-applicant.

ORDER

N.K. GUPTA, J. :- The State has preferred the present petition under Section 482 of the Cr.P.C. being aggrieved with the order dated 14.9.2012 passed by the Additional Sessions Judge and Special Judge, Chhatarpur in criminal revision No.141/2012, whereby the revisionary Court has set aside the order dated 26.6.2012 passed by the appellate authority and Ex-Officio Conservator of Forest, Chhatarpur, in which order dated 20.4.2012 passed by the Authorized Officer in case No.232/23 dated 20.10.2009 was set aside and the matter was remanded back to the authorized officer for its reconsideration.

2. The facts of the case, in short, are that, on 20.10.2009, the authorized officer including Shri Nabi Ahmed, Deputy Range Officer (Forest) visited the beat No.615 in forest area and found that one Ramesh Raikwar with help of tractor M.P.16-M-4721 alongwith its cultivator was ploughing the forest land. He was stopped and the forest officers demanded the documents related to that field. Thereafter, it was found that he ploughed 5 acres of forest land and therefore, 150 small plants and various bushes were removed in that ploughing. Two trees of Sarkata were also found damaged and therefore, it was seized and forest crime No.232/23 dated 20.10.2009 was registered. On enquiry it was found that owner of the tractor was Shri Namdeo, R/o Vishwanath Colony, Chhatarpur. An intimation was given to the concerned Judicial Magistrate, Chhatarpur vide letter dated 22.10.2009 that confiscation proceeding was initiated. Authorized officer after recording evidence of the parties vide order dated 26.6.2012 found that the seizure of tractor was doubtful as to whether it was ploughing the forest land and whether being ploughed upon the direction of the owner and therefore, the authorized officer vide order dated 20.4.2012 released the tractor and cultivator. The appellate authority took a suo moto (sic: motu) revision and remanded the matter vide order dated 26.6.2012.

3. The revisionary Court in its order dated 30.9.2013 has reversed the order passed by the appellate authority on the basis that at the time of incident, provision of Section 52-A of Indian Forest Act (M.P. Amendment) has provided an appeal against the order of confiscation but, no such provision was made if the vehicle is released by the authorised officer and therefore, the

order passed by the appellate authority was reversed.

4. On 17.7.2014, after considering the submissions made by the parties, this Court has dismissed the present petition on the count that appellate authority has no right to take suo moto (sic: motu) cognizance in a case, if Authorized Officer has released the property. However, Hon'ble the Apex Court vide order dated 11.5.2015 in criminal appeal No.772/2015, remanded the case and directed that applicability of amended Section 52-A of Indian Forest Act (M.P. Amendment) shall also be considered by the High Court. Relevant portion of that order is as under:-

"Since this is a pure question of law as to the applicability of the amended Section 52A in relation to the order passed by the Conservator dated 26th June, 2012, it is imperative that the High Court consider the said question in the petition filed by the appellant under Section 482 of the Cr.P.C. filed by the appellant."

5. I have heard the learned counsel for the parties.

6. Learned counsel for the respondent has submitted that the vehicle was seized on 20.10.2009 and cause of action arose on that particular day, whereas Indian Forest (M.P. Amendment) Act, 2009 was published in M.P. Gazette on 27.3.2010 and assent of His Excellency the President has been received on 16.3.2010 and therefore, amended provision of Section 52-A of Indian Forest Act cannot be applied retrospectively. On the other hand learned Public Prosecutor for the State has submitted that prior to the amendment, provision of appeal was provided under Section 52-A of Indian Forest Act (M.P. Amendment), though the appellate authority shall consider an appeal against the order of confiscation, whereas after the amendment word "Order of Confiscation" was substituted as "Order of authorised officer" and therefore, by amendment it was enforced by its publication on 27.3.2010, whereas assent of His Excellency the President was received on 16.3.2010 and the suo moto (sic: motu) cognizance was taken by the appellate authority in the year 2012 i.e. much after the amendment made in the act.

7. Vide Indian Forest (Amendment) Act, 2009, the provision of Section 52-A of Indian Forest Act was amended for Madhya Pradesh, in which word

“Order of Confiscation” was substituted as “Order of Authorized Officer”. By substitution of that word, the appellate authority became competent to hear an appeal against the order of release of vehicle passed by the authorized officer. Hence, by such amendment, the provision of appeal against the order of confiscation which was already available but, a new power of appeal was added, so that concerned forest officer may also pray for suo moto (sic: motu) appeal before the appellate authority in case of release of the vehicle and therefore, by the amendment in Section 52-A of Indian Forest Act (Madhya Pradesh Amendment), a liability was imposed upon the person whose vehicle was under consideration of confiscation. It is the general rule of interpretation of statute that no fresh law enacted by the Parliament shall have any retrospective effect unless it is so directed. In this context, para 13 of the judgment passed by Hon'ble the Apex Court in case of “Zile Singh Vs. State of Haryana”, [(2004) 8 SCC 1] may be viewed, which is as under:-

“It is a cardinal principle of construction that every statute is prima facie prospective unless it is expressly or by necessary implication made to have a retrospective operation. But the rule in general is applicable where the object of the statute is to affect vested rights or to impose new burdens or to impair existing obligations. Unless there are words in the statute sufficient to show the intention of the Legislature to affect existing rights, it is deemed to be prospective only 'nova constitutio futuris formam imponere debet non praeteritis' ___ a new law ought to regulate what is to follow, not the past. (See : Principles of Statutory Interpretation by Justice G.P. Singh, Ninth Edition, 2004 at p. 438). It is not necessary that an express provision be made to make a statute retrospective and the presumption against retrospectivity may be rebutted by necessary implication especially in a case where the new law is made to cure an acknowledged evil for the benefit of the community as a whole. (ibid, p. 440).”

In the light of aforesaid judgment, when it is clear that the amended provision was not in the benefit of public in general but, it was in benefit of concerned forest officer who seized the vehicle then, according to Article 20

of Indian Constitution, such amendment could not be considered as retrospective.

8. So far as the submission of the Public Prosecutor is concerned that the appellate authority has exercised his powers in the year 2012, after amendment of Section 52-A of Indian Forest Act (M.P. Amendment) and therefore, it cannot be said that he exercised the powers with retrospective effect. Such submission cannot be accepted. The appeal was to be filed in the matter when date of offence was 20.10.2009 and therefore, if the authorized officer would have decided the matter within the reasonable time then, certainly the appellate authority should not have power under Section 52-A of Indian Forest Act (M.P. Amendment) to entertain the appeal against the order of release of the vehicle. The authorized officer took 3 years in deciding the matter and for such a delay, the respondent No.1 could not be penalized. Hence, cause of action arose to the authorized officer on 20.10.2009. Hence, the provision of Section 52-A of Indian Forest Act (M.P. Amendment) as available on 20.10.2009 shall prevail because the Madhya Pradesh Amendment in that Act was done in the year 2010 shall not have its retrospective effect. When there was no such provision under Section 52-A of Indian Forest Act (M.P. Amendment) at the time when tractor was seized, so that the appellate authority could exercise its appellate powers against the order of release of vehicle then, it is to be said that the appellate authority was not competent to exercise such powers in absence of any retrospective effect of Madhya Pradesh amendment in Indian Forest Act done in the year 2010. Hence, the Revisionary Court has rightly found that the appellate authority has not right to entertain the appeal against the order of release of the vehicle.

9. However, it would be appropriate to decide all the points raised in the petition and therefore, needs to be considered on merits and therefore, merits of the case may also be examined at this stage. According to the prosecution, the driver Ramesh Raikwar was found cultivating the field bearing area of 5 acres with help of the aforesaid tractor and cultivator and therefore, the forest officers have registered a forest crime No.232/23 dated 20.10.2009. The authorized officer after considering the evidence of the parties found that beat No.615 consists of several pieces of land, bearing various survey numbers. Out of such survey numbers, Survey No.4, 5, 8 and 11 were of Shri Saurabh Namdeo, owner of the tractor and land bearing survey No.1, 3, and 6 was

forest land. The respondent has shown the documents to the authorized officer and he and his predecessors were in possession of that land since the year 1943-44. A civil suit No.39-A/2010 was also prosecuted and won by the respondent. Therefore, it was for the forest officers to establish that the driver Ramesh Raikwar was cultivating the land belonging to the forest department. If a memo of Spot Inspection as well as POR (FIR in Forest crime) are considered then, it would be apparent that it was mentioned in omnibus manner that the driver Ramesh Raikwar had cultivated 5 acres of land.

10. The forester Umashankar Pateriya has accepted in his evidence that he was posted in that particular area for last 3-4 years and till his posting, he was looking that the respondent No.1 was cultivating the fields registered in his name with help of his servants. Hence, when it was established that land bearing survey No.4, 5, 8 and 11 was of the respondent No.1 and he was competent to cultivate the same then, it was for the prosecution to prove that the driver of the respondent had cultivated some additional land belonging to the forest department. The authorized officer has clearly mentioned in its report that trace map was traced without help of topography sheet. It was for the concerned forest officer to mention the area of the respondent's land and to specifically mention in the trace map that the cultivation was done in which portion of the land belonging to forest department and what was the area of such cultivation. The map prepared by the forest officer who seized the tractor was not according to the topography sheet. After seizure of the tractor, no forest officer would have examined that whether the trees and other plantation was remained in the area, which was in the control of the forest department and such bushes etc. were removed from the land which was not in possession of the respondent. Hence, *prima facie* the authorized officer could not prove that the driver Ramesh Raikwar cultivated the land which was in possession and control of the forest department. The authorized officer has already found that the investigation which was required to be done by the authorized officer was not complete but, it was only superficial. When the concerned forest officer could not prove *prima facie* that the driver Ramesh Raikwar cultivated any portion of the land belonging to the forest department then, *prima facie* no offence as alleged against the driver Ramesh Raikwar was made out and therefore, tractor alongwith cultivator could not be confiscated in absence of any forest crime.

9. (sic:11) Also, it is important to examine as to whether there was connivance of owner of the vehicle in committing the forest crime. It is established that few pieces of land adjacent to the forest area were of the respondent and he was getting them cultivated by his servants and therefore, it shall be presumed that if he had sent his driver Ramesh Raikwar to cultivate the field then, he would have sent him to cultivate his fields and not the land of the forest department and therefore, if it is found that the driver had cultivated some land of the forest department then, by the activities of the driver, it cannot be said that the respondent was involved in the conspiracy to encroach the land of the forest department. Hence, it was found that the driver Ramesh Raikwar had cultivated the land of forest department then, still the tractor and cultivator of the respondent could not be confiscated.

10. (sic:12) The authorized officer took an appropriate view. Hence, the appellate authority being Conservator of Forest could not remand the matter for re-examination. Also, he was not competent to exercise his appellate powers according to the provision of Section 52-A of Indian Forest Act (Madhya Pradesh Amendment) of that time when crime was committed. Hence, the Revisionary Court has rightly set aside the order passed by the appellate Authority. There is no reason to invoke the inherent powers of this Court in favour of the petitioner/State. Before concluding the present order I have to make it clear that scheme of Section 52-A of Indian Forest Act (M.P. Amendment) is to provide an impartial Forest Officer as an Authorized Officer and thereafter, the appellate authority and the officers who have to exercise the powers of authorized officer and appellate authority are expected to function as authorized officer and appellate authority impartially. At that time such thinking should not be in the mind that being an appellate authority, the officer is also the highest authority of the District relating to Forest. Function of authorized officer and appellate authority should be done without any prejudice, having impartial and judicious attitude.

11. (sic:13) On the basis of the aforesaid discussion, the present petition under Section 482 of the Cr.P.C. filed by the State is hereby dismissed.

12. (sic:14) Copy of the order be sent to the Revisionary Court, Appellate Authority and Authorized Officer alongwith their respective records for information.

Application dismissed.