



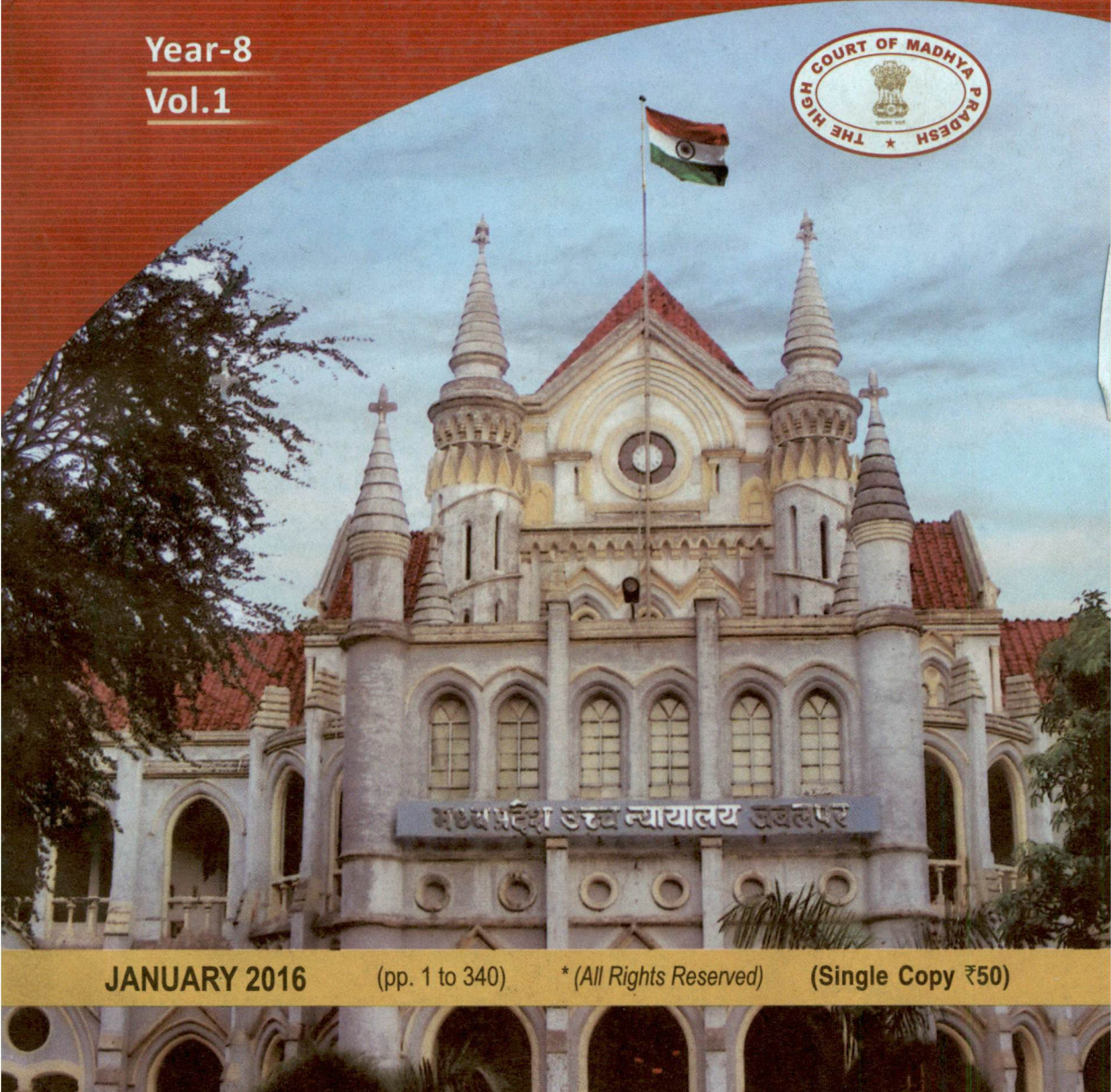
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Civil Services (Classification, Control and Appeal) Rules, M.P. 1966, Rule 14 – Departmental Enquiry – Misconduct – Petitioner, Class IV employee – Posted as Process Server – Called upon to do work of Water server – Refusal to do so – Departmental enquiry – Removal

from service – Held – It is not a case of petitioner that Process Server cannot be called upon to do work of Water Server, removal justified as it is a case of insubordination and disregarding the instructions given by the superiors – Petition dismissed. [Raj Kumar Vishwakarma Vs. State of M.P.] (DB)...115

सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 14 – विभागीय जांच – अवचार – याची, चतुर्थ श्रेणी कर्मचारी – आदेशिका वाहक के रूप में पदस्थ – पानी पिलाने का कार्य करने के लिये कहा गया – ऐसा करने से इंकार किया – विभागीय जांच – सेवा से हटाया गया – अभिनिर्धारित – यह याची का प्रकरण नहीं है कि आदेशिका वाहक को पानी पिलाने का कार्य करने के लिये बुलाया नहीं जा सकता, पद से हटाया जाना न्यायोचित क्योंकि यह अवज्ञा एवं अपने वरिष्ठ अधिकारियों द्वारा दिये गये अनुदेशों की अवहेलना का प्रकरण है – याचिका खारिज। (राज कुमार विश्वकर्मा वि. म.प्र. राज्य) (DB)...115

Civil Services (Classification, Control and Appeal) Rules, M.P. 1966, Rule 14 – Punishment from removal of services – Whether excessive or not – Held – It is a case of insubordination and disregarding the instructions of seniors, so it is a major misconduct – In one sense it is a lighter punishment – Petition dismissed. [Raj Kumar Vishwakarma Vs. State of M.P.] (DB)...115

सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 14 – सेवा से पदच्युति का दंड – क्या अत्याधिक है या नहीं – अभिनिर्धारित – यह अवज्ञा एवं अपने वरिष्ठ अधिकारी द्वारा दिये गये अनुदेशों की अवहेलना का प्रकरण है, अतः यह मुख्य कदाचरण है – एक मायने में यह हल्का दंड है – याचिका खारिज। (राज कुमार विश्वकर्मा वि. म.प्र. राज्य) (DB)...115

Civil Services (Classification, Control and Appeal) Rules, M.P. 1966, Rule 14(11) – Adjournment – Appointing Defence Assistant – Non-compliance of Rule 14(11) – Held – Adjournment sought for was not for taking inspection or for submitting list of witnesses, so not in conformity with time period specified in Rule 14(11) – Contention not tenable. [Raj Kumar Vishwakarma Vs. State of M.P.] (DB)...115

सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 14(11) – स्थगन – बचाव सहायक की नियुक्ति – नियम 14(11) का अनुपालन – अभिनिर्धारित – चाहा गया स्थगन निरीक्षण करने अथवा साक्षियों की सूची प्रस्तुत करने के लिये नहीं था, अतः नियम 14(11) में निर्धारित की गयी समयसीमा के अनुरूप नहीं था – तर्क रक्षणीय नहीं। (राज कुमार विश्वकर्मा वि. म.प्र. राज्य) (DB)...115

Coal Mines (Special Provisions) Act (11 of 2015), Sections 3(a)(n) & 4(4) – “Promoters” or “any of its company” of such prior allottee – Petitioner established a Power Plant for generating electricity – Petitioner was sourcing coal extracted from Coal Mine operated by sister concern of Petitioner – Allocation of Coal Mines to sister concern of Petitioner was annulled pursuant to the decision of Supreme Court in W.P. (Cri) 120/2012 – Bids were invited for subject coal mines as per the provisions of Act, 2015 – Whether Petitioner is eligible to participate in bid or it fits into the expression “its promoter” or “any of its company” – Held – Associate Company must be held to be covered by the expansive expression used in Section 4(4) – Petitioner itself has described itself to be a sister concern of defaulter prior allottee company but it also has significant influence and control of common promoter and his financial stakes and including the fact that petitioner was dependent on the supply of coal from prior allottee only – Petitioner has also admitted that prior allottee has not paid/deposited the additional levy as directed by Supreme Court – Share holding pattern of both companies is an alter-ego of defaulter prior allottee. [B LA Power Pvt. Ltd. Vs. Union of India] (DB)...129

कोयला खान (विशेष उपबंध) अधिनियम (2015 का 11), धाराएं 3(ए)/(एन) व 4(4) – ऐसे पूर्व आबंटिती के “प्रवर्तक” अथवा “उसकी कोई कंपनी” – याची ने विद्युत उत्पादन हेतु पावर-प्लांट (विद्युत संयंत्र) स्थापित किया – याची अपनी सहयोगी संस्था द्वारा संचालित कोयला खान से उत्खनित कोयला प्राप्त कर रहा था – रिट याचिका (दाण्डिक) 120/2012 में उच्चतम न्यायालय के निर्णय के अनुसार याची की सहयोगी संस्था को कोयला खान का आबंटन रद्द किया गया – अधिनियम, 2015 के उपबंधों के अनुसार विषयाधीन कोयला खानों हेतु बोलियां आमंत्रित की गयी – क्या याची बोली में भाग लेने के लिये पात्र है अथवा “उसके प्रवर्तक” अथवा “उसकी कोई कंपनी” की अभिव्यक्ति के अंतर्गत आता है – अभिनिर्धारित – सहयोगी कंपनी को धारा 4(4) में प्रयोग की गयी विस्तृत अभिव्यक्ति के अंतर्गत माना जाना चाहिए – याची ने स्वयं ही स्वयं को व्यक्तिग्री पूर्व आबंटिती कंपनी की सहयोगी संस्था के रूप में वर्णित किया है परंतु उसका सामान्य प्रवर्तक एवं उसके वित्तीय हिस्सेदारी पर भी उल्लेखनीय प्रभाव एवं नियंत्रण है तथा यह तथ्य भी शामिल है कि याची केवल पूर्व आबंटिती से ही कोयले की आपूर्ति के लिए निर्भर था – याची ने यह भी स्वीकार किया है कि पूर्व आबंटिती ने उच्चतम न्यायालय द्वारा यथानिर्देशित अतिरिक्त उद्ग्रहण का भुगतान/निक्षेप नहीं किया है – शेर धारण करने का दोनों कंपनियों का स्वरूप व्यक्तिग्री पूर्व आबंटिती का सूक्ष्म शरीर है। (बी एल ए पावर प्रा. लि. वि. यूनियन ऑफ इंडिया) (DB)...129

Coal Mines (Special Provisions) Act (11 of 2015), Sections 3(a)(n) & 4(4) – “Promoters” or “any of its company” of such “prior allottee” – Reasonable or direct nexus – The provision certainly has reasonable or direct nexus with the object sought to be achieved, to keep away the defaulter prior allottees from participating in the auction process directly or indirectly, through the cobweb of Companies created or in existence to defeat the direction of Supreme Court regarding payment or recovery of additional levy from them. [B LA Power Pvt. Ltd. Vs. Union of India] (DB)...129

कोयला खान (विशेष उपबंध) अधिनियम (2015 का 11), धाराएं 3(ए)(एन) व 4(4) – ऐसे “पूर्व आबंटिती” के “प्रवर्तक” अथवा “उसकी कोई कंपनी” – युक्तियुक्त अथवा सीधा संबंध – भुगतान या अतिरिक्त उद्ग्रहण की वसूली के संबंध में उच्चतम न्यायालय के निदेश को विफल बनाने के लिये सृजित या विद्यमान कम्पनियों के मायाजाल के जरिये व्यतिक्रमी पूर्व आबंटितियों को प्रत्यक्ष या अप्रत्यक्ष रूप से नीलामी की प्रक्रिया में हिस्सा लेने से दूर रखने में सफल बनाने के चाहे गये उद्देश्य के साथ निश्चित रूप से उपबंध का युक्तियुक्त एवं सीधा संबंध है। (बी एल ए पॉवर प्रा. लि. वि. यूनियन ऑफ इंडिया) (DB)...129

Constitution – Article 19 – Right to carry on business – Company not being a citizen, has no fundamental right under Article 19 of Constitution of India. [B LA Power Pvt. Ltd. Vs. Union of India] (DB)...129

संविधान – अनुच्छेद 19 – व्यापार करने का अधिकार – भारत के संविधान के अनुच्छेद 19 के अंतर्गत कंपनी जो कि नागरिक नहीं है को कोई मूलभूत अधिकार नहीं है। (बी एल ए पॉवर प्रा. लि. वि. यूनियन ऑफ इंडिया) (DB)...129

Constitution – Article 20(2) – See – Penal Code, 1860, Sections 337, 279 & 304-A, [Nadimuddin Vs. State of M.P.] ...316

संविधान – अनुच्छेद 20(2) – देखें – दण्ड संहिता, 1860, धाराएं 337, 279 व 304-ए, (नदीमुद्दीन वि. म.प्र. राज्य) ...316

Constitution – Article 226 – Departmental enquiry – Scope of interference – Held – In exercise of writ jurisdiction the scope of judicial review is limited to decision making process and is circumscribed, as the High Court does not sit over the decision as a Court of appeal. [Raj Kumar Vishwakarma Vs. State of M.P.] (DB)...115

संविधान – अनुच्छेद 226 – विभागीय जांच – हस्तक्षेप का विस्तार –

अभिनिर्धारित – रिट अधिकारिता के प्रयोग में न्यायिक पुनर्विलोकन का विस्तार निर्णय लेने की प्रक्रिया तक सीमित है एवं परिगत है क्योंकि उच्च न्यायालय, निर्णय पर अपीली न्यायालय के रूप में कार्य नहीं करता। (राज कुमार विश्वकर्मा वि. म.प्र. राज्य) (DB)...115

Constitution – Article 226 – Departmental Enquiry – Validity of charge sheet – Gravity of charges of misconduct are required to be tested only in departmental enquiry by Enquiry Officers while recording evidence – Whether there were any lapses on the part of petitioner in discharging the duty as Registrar of University or not has to be tested by the Enquiry Officer while conducting the enquiry – High Court is not required to look into those aspects nor is supposed to conduct the enquiry on its own to test the validity of charge sheet – Petition dismissed. [Brajesh Singh (Dr.) Vs. State of M.P.] ...110

संविधान – अनुच्छेद 226 – विभागीय जांच – आरोप पत्र की वैधता – अवचार के आरोपों की गंभीरता की जांच केवल विभागीय जांच में साक्ष्य अभिलिखित किये जाते समय जांच अधिकारी द्वारा की जाना अपेक्षित है – क्या विश्वविद्यालय के रजिस्ट्रार के रूप में कर्तव्य का निर्वहन करते समय याची की ओर से कुछ गलती हुई थी अथवा नहीं इसकी जांच, जांच अधिकारी द्वारा जांच संचालित करते समय की जानी चाहिये – उच्च न्यायालय को न तो उन पहलुओं पर ध्यान देना अपेक्षित है न ही आरोप पत्र की वैधता की जांच करने के लिये स्वयं जांच संचालित करना अपेक्षित है – याचिका खारिज। (ब्रजेश सिंह (डॉ.) वि. म.प्र. राज्य) ...110

Constitution – Article 226 – Investigation by CBI – Charge-sheet already filed – Merely charge-sheet has been filed it will not take away the power of the Court to direct for fresh investigation by CBI. [Kalyani Pandey (Ku.) (Dr.) Vs. Union of India] (DB)...17

संविधान – अनुच्छेद 226 – सी.बी.आई. द्वारा अन्वेषण – आरोप पत्र पहले ही प्रस्तुत किया जा चुका है – केवल आरोप पत्र प्रस्तुत किये जाने से न्यायालय की सी. बी.आई. को नये सिरे से अन्वेषण किये जाने के निदेश देने की शक्ति को वापस नहीं लिया जा सकता। (कल्याणी पांडे (कुमारी) (डॉ.) वि. यूनियन ऑफ इंडिया) (DB)...17

Constitution – Article 226 – Investigation by CBI – Police did not register FIR inspite of information regarding commission of cognizable offence – Inspite of handing over of investigation to a senior officer on the instruction of the General Administration Department, accused persons were not arrested – Interrogation of eye witnesses and other witnesses and their statements u/s 161 of Cr.P.C. also not

recorded – FIR was also registered belatedly and that too on the intervention of the Court – In view of material discrepancy in investigation and bias attitude of State Investigating agency in holding investigation is apparent – Impugned investigation and filing of charge-sheet cannot be said to be impartial – Direction issued for fresh and impartial investigation by CBI and till filing of fresh charge-sheet, proceedings in trial pending in Sessions Court shall remain stayed. [Kalyani Pandey (Ku.) (Dr.) Vs. Union of India] (DB)...17

संविधान – अनुच्छेद 226 – सी.बी.आई. द्वारा अन्वेषण – संज्ञेय अपराध घटित होने की सूचना के बावजूद पुलिस ने प्रथम सूचना प्रतिवेदन दर्ज नहीं किया – सामान्य प्रशासन विभाग के निदेश पर वरिष्ठ अधिकारी को अन्वेषण सौंपे जाने के बावजूद, अभियुक्तों को गिरफ्तार नहीं किया गया – प्रत्यक्षदर्शी साक्षियों एवं अन्य साक्षियों से पूछताछ तथा दंड प्रक्रिया संहिता की धारा 161 के अंतर्गत उनके कथन भी अभिलिखित नहीं किये गये – प्रथम सूचना प्रतिवेदन भी विलंब से दर्ज किया गया एवं वह भी न्यायालय के मध्यक्षेप से – अन्वेषण के दौरान राज्य अन्वेषण एजेंसी द्वारा अन्वेषण में तात्त्विक त्रुटियां एवं पक्षपातपूर्ण बर्ताव प्रकट होता है – आक्षेपित अन्वेषण एवं प्रस्तुत आरोपपत्र निष्पक्ष नहीं कहा जा सकता – सी.बी.आई. को नये सिरे से निष्पक्ष अन्वेषण हेतु निदेश जारी किया गया एवं नया आरोप पत्र प्रस्तुत करने तक सत्र न्यायालय में लंबित विचारण की कार्यवाहियां स्थगित रहेंगी। (कल्याणी पांडे (कुमारी) (डॉ.) वि. यूनियन ऑफ इंडिया) (DB)...17

Constitution – Article 226 – Petitioner – Appointed & posted as Process Server – Plea that he is not expected to discharge work of Water Server – Tenability – Held – Such a plea is not tenable for want of specific pleading in writ petition or during enquiry or before Appellate Authority. [Raj Kumar Vishwakarma Vs. State of M.P.] (DB)...115

संविधान – अनुच्छेद 226 – याची – आदेशिका वाहक के रूप में नियुक्त व पदस्थ – यह अभिवाक् कि उससे पानी पिलाने का कार्य करने की अपेक्षा नहीं की जा सकती – रक्षणीयता – अभिनिर्धारित – रिट याचिका में अथवा जांच के दौरान अथवा अपीलीय प्राधिकारी के समक्ष विनिर्दिष्ट अभिवचन के अभाव में ऐसा अभिवाक् रक्षणीय नहीं। (राज कुमार विश्वकर्मा वि. म.प्र. राज्य) (DB)...115

Constitution – Article 311 & 309 – Compulsory retirement – Not a punishment – It implies no stigma nor suggestion of misbehaviour. [Shiv Kumari Gulhani (Smt.) Vs. District and Sessions Judge, Mandla] (DB)...73

संविधान - अनुच्छेद 311 व 309 - अनिवार्य सेवानिवृत्ति - दंड नहीं है - इससे न तो कोई कलंक न ही दुर्व्यवहार का सुझाव विवक्षित है। (शिव कुमारी गुल्हानी (श्रीमती) वि. डिस्ट्रिक्ट एण्ड सेशंस जज, मण्डला) (DB)...73

Constitution - Article 311 & 309 - Compulsory retirement - Subjective satisfaction - Petitioner was advised to improve his work - He was also graded "E" (poor) - He was negligent in working, he was not punctual and there was no improvement inspite of repeated warnings - Ample material on record for the District and Sessions Judge to form a subjective satisfaction that it is in public interest to compulsorily retire the petitioner at the premature age of 57. [Shiv Kumari Gulhani (Smt.) Vs. District and Sessions Judge, Mandla] (DB)...73

संविधान - अनुच्छेद 311 व 309 - अनिवार्य सेवानिवृत्ति - व्यक्तिपरक संतुष्टि - याची को अपना कार्य सुधारने की सलाह दी गई थी - उसे "E" (poor) श्रेणी में भी रखा गया - वह कार्य में अपेक्षावान था, वह समयनिष्ठ नहीं था एवं बारंबार चेतावनी के बावजूद उसमें कोई सुधार नहीं हुआ - जिला एवं सत्र न्यायाधीश के पास व्यक्तिपरक संतुष्टि निर्मित करने के लिये अभिलेख पर पर्याप्त सामग्री थी कि याची को समयपूर्व 57 वर्ष की आयु में अनिवार्य रूप से सेवानिवृत्त किया जाना जनहित में है। (शिव कुमारी गुल्हानी (श्रीमती) वि. डिस्ट्रिक्ट एण्ड सेशंस जज, मण्डला) (DB)...73

Contract - Tender - Eligibility to participate in tender process - Petitioner Company is engaged in generation of power which is supplied to consumers/grid - Petitioner company is operating in a regulated sector, regulated under the provisions of Electricity Act - Tender Process for allotment of Coal Mines is in respect of coal mines earmarked for non-regulated sector - Held - Central Govt. has power to classify the coal mines for specified end uses - Petitioner who intends to use the coal for generation of power per se is not qualified to participate in auction process of the subject coal mines which is earmarked for end use of non regulated sector, for optimum utilization of national resources. [B L A Power Pvt. Ltd. Vs. Union of India] (DB)...129

संविदा - निविदा - निविदा प्रक्रिया में भाग लेने के लिए योग्यता - याची कंपनी विद्युत उत्पादन में संलग्न है जो कि उपभोक्ताओं/ग्रिड को आपूर्ति की जाती है - याची कंपनी विनियमित क्षेत्र में संचालित है जो कि विद्युत अधिनियम के प्रावधानों के अंतर्गत विनियमित है - कोयला खानों के आबंटन के लिए निविदा प्रक्रिया गैर-विनियमित क्षेत्रों के लिए चिन्हित कोयला खानों के संबंध में है -

अभिनिर्धारित – विशिष्ट अंतिम उपयोग के लिए कोयला खानों को वर्गीकृत करने की शक्ति केंद्र शासन के पास है – याची जो वास्तव में विद्युत उत्पादन के लिए कोयले के उपयोग का आशय रखता है उस विषयाधीन कोयला खान की नीलामी प्रक्रिया में भाग लेने के लिए अर्ह नहीं है जो कि राष्ट्रीय संसाधनों के अधिकतम उपयोग के लिए, गैर विनियमित क्षेत्र के उपयोग हेतु चिन्हित है। (बी एल ए पॉवर प्रा. लि. वि. यूनियन ऑफ इंडिया) (DB)...129

Criminal Procedure Code, 1973 (2 of 1974), Section 125 – Maintenance – Second wife – If the respondent/husband has done a cheating with the applicant/wife by not informing about the first marriage then still he is liable to pay maintenance to the applicant/wife – Application allowed. [Sukhvati Bai (Smt.) Vs. Manphool Narvariya] ...287

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 125 – भरण-पोषण – दूसरी पत्नी – प्रत्यर्थी/पति ने यदि प्रथम विवाह के बारे में जानकारी न देकर आवेदिका/पत्नी के साथ छल किया है, तब भी वह आवेदिका/पत्नी को भरण-पोषण का भुगतान करने के लिये उत्तरदायी है – आवेदन मंजूर। (सुखवती बाई (श्रीमती) वि. मनफूल नरवरिया) ...287

Criminal Procedure Code, 1973 (2 of 1974), Section 125 – Maintenance – Whether future salary could be ordered to be attached to meet out the maintenance amount – Held – Future salary is not tangible corporeal property available for seizure – Hence cannot be attached for realization of arrear as well as current maintenance. [Anil Jain Vs. Shilpa Jain] ...243

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 125 – भरण-पोषण – क्या भरण-पोषण की राशि की पूर्ति करने के लिए भविष्य के वेतन को कुर्क करने का आदेश दिया जा सकता है – अभिनिर्धारित – भविष्य में मिलने वाला वेतन जब्ती के लिए उपलब्ध वास्तविक मूल्य संपत्ति नहीं है – अतः बकाया की वसूली के साथ-साथ वर्तमान भरण-पोषण के लिए कुर्क नहीं किया जा सकता। (अनिल जैन वि. शिल्पा जैन) ...243

Criminal Procedure Code, 1973 (2 of 1974), Section 200 and Protection of Women from Domestic Violence Act (43 of 2005), Section 28(2) – Preliminary examination – Domestic violence case – There is no requirement to record preliminary examination of the aggrieved person on filing the complaint and prior to taking the cognizance. [Ravi Kumar Bajpai Vs. Smt. Renu Awasthi Bajpai] ...302

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 200 एवं घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम (2005 का 43), धारा 28(2) – प्रारंभिक परीक्षण – घरेलू हिंसा प्रकरण – परिवाद प्रस्तुत करने पर तथा संज्ञान लेने से पूर्व व्यथित व्यक्ति के प्रारंभिक परीक्षण को अभिलिखित किया जाना अपेक्षित नहीं। (रवि कुमार बाजपेयी वि. श्रीमती रेणु अवस्थी बाजपेयी) ...302

Criminal Procedure Code, 1973 (2 of 1974), Section 228 – See – Penal Code, 1860, Section 376 [Pukhraj Singh Vs. State of M.P.] ...248

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 228 – देखें – दण्ड संहिता, 1860, धारा 376 (पुखराज सिंह वि. म.प्र. राज्य) ...248

Criminal Procedure Code, 1973 (2 of 1974), Sections 228. & 397 – Framing of charges – Held, the material and quality of evidence cannot be gone into – Revisional Court has limitations which don't empower to intervene at an interlocutory stage – All that has to be looked into at the time of framing of charge, is existence of prima facie case. [Devendra Singh Vs. State of M.P.] ...259

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएं 228 व 397 – आरोप विरचित किये जाना – अभिनिर्धारित, साक्ष्य की सामग्री एवं गुणवत्ता पर विचार नहीं किया जा सकता – पुनरीक्षण न्यायालय की सीमाएं हैं जो कि अंतर्वर्ती प्रक्रम में हस्तक्षेप करने के लिए सशक्त नहीं करती – आरोप विरचित करते समय जो कुछ भी देखा जाना चाहिए वह यह है कि प्रथम दृष्ट्या प्रकरण विद्यमान है। (देवेन्द्र सिंह वि. म.प्र. राज्य) ...259

Criminal Procedure Code, 1973 (2 of 1974), Section 256 – Complaint dismissed in default of appearance – Magistrate should mention the reason that why he has no option but to dismiss the complaint. [Rajendra Kumar Jain Vs. Shriram Agrawal] ...296

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 256 – उपस्थिति के व्यतिक्रम में परिवाद खारिज – मजिस्ट्रेट को कारण उल्लिखित करना चाहिए कि क्यों उसके पास परिवाद खारिज करने के सिवाय कोई विकल्प नहीं। (राजेन्द्र कुमार जैन वि. श्रीराम अग्रवाल) ...296

Criminal Procedure Code, 1973 (2 of 1974), Section 256 – Non-appearance of complainant – Circumstances for exercise of power – Appearance of complainant or his counsel on previous dates of hearing – Interested in early disposal of the case – Case should not be dismissed for singular default of appearance.

[Rajendra Kumar Jain Vs. Shriram Agrawal] ...296

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 256 — परिवादी का उपस्थित न होना — शक्ति के प्रयोग हेतु परिस्थितियाँ — सुनवाई की पूर्वतर तिथियों पर परिवादी या उसके अधिवक्ता की उपस्थिति — प्रकरण के शीघ्र निपटारे के इच्छुक — उपस्थिति के एकमात्र व्यतिक्रम पर प्रकरण को खारिज नहीं किया जाना चाहिए। (राजेन्द्र कुमार जैन वि. श्रीराम अग्रवाल) ...296

Criminal Procedure Code, 1973 (2 of 1974), Section 256 — Non-appearance of complainant — Powers are discretionary to be exercised judiciously, fairly and for advancement of criminal justice and not for its impairment. [Rajendra Kumar Jain Vs. Shriram Agrawal] ...296

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 256 — परिवादी का उपस्थित न होना — शक्तियाँ वैवैकिक हैं जिसका प्रयोग न्यायोचित रूप से, निष्पक्ष रूप से तथा आपराधिक न्याय की उन्नति के लिये किया जाना चाहिये और न कि उसकी हानि के लिए। (राजेन्द्र कुमार जैन वि. श्रीराम अग्रवाल) ...296

Criminal Procedure Code, 1973 (2 of 1974), Section 300 — Double jeopardy — Respondent had lodged FIR against applicant and his parents u/s 498-A of IPC and they were acquitted — Second FIR lodged again on similar allegations — No man shall be put in jeopardy twice for one and same offence — Applicant cannot be prosecuted for same offence — Charge sheet quashed. [Ashish Vs. State of M.P.] ...273

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 300 — दोहरा संकेत — प्रत्यर्थी ने भारतीय दंड संहिता की धारा 498-ए के अंतर्गत आवेदक एवं उसके माता-पिता के विरुद्ध प्रथम सूचना प्रतिवेदन दर्ज किया था और उन्हें दोषमुक्त किया गया था — समान अभिकथनों पर पुनः दूसरा प्रथम सूचना प्रतिवेदन दर्ज किया — किसी व्यक्ति को एक एवं समान अपराध के लिये दो बार दंडित नहीं किया जा सकता — समान अपराध के लिये आवेदक को अभियोजित नहीं किया जा सकता — आरोप पत्र अभिखंडित। (आशीष वि. म.प्र. राज्य) ...273

Criminal Procedure Code, 1973 (2 of 1974), Sections 300 & 482 — See — Penal Code, 1860, Sections 337, 279 & 304-A, [Nadimuddin Vs. State of M.P.] ...316

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 300 व 482 — देखें — दण्ड संहिता, 1860, धाराएँ 337, 279 व 304-ए. (नदीमुद्दीन वि. म.प्र. राज्य) ...316

Criminal Procedure Code, 1973 (2 of 1974), Section 319 — Power

to proceed against other persons – During investigation it was found that applicant was not present on spot – Material contradictions in the evidence of witnesses – Addition of additional accused warranted only when there is reasonable prospect of case against such accused ending in their conviction – Order under this Section cannot be passed only because first informant or one of witnesses seeks to implicate other persons. [Omprakash Vs. State of M.P.] ...254

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 319 – अन्य व्यक्तियों के विरुद्ध कार्यवाही करने की शक्ति – अन्वेषण के दौरान यह पाया गया कि आवेदक घटनास्थल पर उपस्थित नहीं था – साक्षियों के साक्ष्य में तात्त्विक विरोधामास है – अतिरिक्त अभियुक्त को जोड़ना केवल तभी आवश्यक है जब ऐसे अभियुक्त के विरुद्ध प्रकरण की युक्तियुक्त संभावना है जो उनकी दोषसिद्धि में समाप्त हो – इस धारा के अंतर्गत आदेश केवल इसलिए पारित नहीं किया जा सकता कि प्रथम सूचनाकर्ता अथवा साक्षियों में से कोई एक अन्य व्यक्तियों को आलिप्त करना चाहता है। (ओमप्रकाश वि. म.प्र. राज्य) ...254.

Criminal Procedure Code, 1973 (2 of 1974), Section 397 & 401 and Penal Code (45 of 1860), Section 498A r/w 34 – Marriage solemnized on 17/05/2002 – No cruelty in relation to demand of dowry committed in short duration of two months – Held – No cruelty of serious nature alleged and there is no manifest error of law – Revision against acquittal dismissed. [Abhilasha Vs. Ashok Dongre] ...266

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 397 व 401 एवं दण्ड संहिता (1860 का 45), धारा 498ए सहपठित 34 – विवाह 17/05/2002 को संपन्न हुआ – दो महीने की संक्षिप्त अवधि में दहेज की मांग के संबंध में कोई क्रूरता कारित नहीं की गई – अभिनिर्धारित – गंभीर प्रकृति की कोई क्रूरता अभिकथित नहीं तथा विधि की कोई प्रकट त्रुटि नहीं – दोषमुक्ति के विरुद्ध पुनरीक्षण खारिज। (अभिलाषा वि. अशोक डोंगरे) ...266

Criminal Procedure Code, 1973 (2 of 1974), Section 397 & 401 – Revision – When High Court may exercise and may not exercise power of revision – Circumstances explained. [Abhilasha Vs. Ashok Dongre] ...266

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 397 व 401 – पुनरीक्षण – उच्च न्यायालय कब पुनरीक्षण की शक्ति का प्रयोग कर सकता है और कब नहीं कर सकता – परिस्थितियां स्पष्ट की गईं। (अभिलाषा वि. अशोक डोंगरे) ...266

Criminal Procedure Code, 1973 (2 of 1974), Section 408 and Penal Code (45 of 1860), Section 406 – Trial Court held that Court at Ujjain has no jurisdiction to entertain complaint for offence u/s 406 of IPC and directed to transfer the case to the Court of JMFC, Khachrod – Order attained finality – Application under Section 408 of Cr.P.C. dismissed by Sessions Judge on the ground that parallel Court has already passed the transfer order, and it has no power to take different view – No irregularity by revisional Court – Revision dismissed. [Sadhna Kothari (Smt.) Vs. Shri Abhay Kumar Dalal] ...262

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 408 एवं दण्ड संहिता (1860 का 45), धारा 406 – विचारण न्यायालय ने अभिनिर्धारित किया कि उज्जैन के न्यायालय को भा.दं.सं. की धारा 406 के अंतर्गत अपराध की शिकायत ग्रहण करने की कोई अधिकारिता नहीं और न्यायिक दंडाधिकारी प्रथम श्रेणी, खाचरौद के न्यायालय को प्रकरण अंतरित करने के लिये निदेशित किया – आदेश ने अंतिमता प्राप्त की – दं.प्र.सं. की धारा 408 के अंतर्गत आवेदन को सत्र न्यायाधीश द्वारा इस आधार पर खारिज किया गया कि समानांतर न्यायालय ने पहले ही अंतरण आदेश पारित किया है और भिन्न दृष्टिकोण लेने की शक्ति नहीं – पुनरीक्षण न्यायालय द्वारा कोई अनियमितता नहीं – पुनरीक्षण खारिज। (साधना कोठारी (श्रीमती) वि. श्री अभय कुमार दलाल) ...262

Criminal Procedure Code, 1973 (2 of 1974), Section 482, Essential Commodities Act (10 of 1955), Section 3/7 and Kerosene (Restriction on use and Fixation of Ceiling Price) Order, 1993, Sub-clause 3(2) – Quashing of FIR – No evidence available on record which may show that the petitioner was in any way connected with the tanker found stationed in his premises though truck was stationed without his sanction and authority and at the instance of owner of the tanker containing kerosene for whose benefit, the kerosene was transported – It cannot be said that the petitioner is guilty of any crime – FIR liable to be quashed and the petitioner is discharged – Application allowed. [Rasmeet Singh Malhotra Vs. State of M.P.] ...329

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482, आवश्यक वस्तु अधिनियम (1955 का 10), धारा 3/7 एवं केरोसिन (उपयोग पर निर्बंधन और अधिकतम कीमत का निर्धारण) आदेश, 1993, उपखंड 3(2) – प्रथम सूचना प्रतिवेदन अभिखंडित किया जाना – अभिलेख पर कोई साक्ष्य उपलब्ध नहीं जो यह दर्शा सके कि याची उसके परिसर में खड़े पाये गये टैंकर से किसी प्रकार संबद्ध है यद्यपि ट्रक उसकी मंजूरी या प्राधिकार के बिना और केरोसिन युक्त टैंकर के स्वामी जिसके

लाम हेतु केरोसिन का परिवहन किया गया, के कहने पर खड़ा किया गया था — यह नहीं कहा जा सकता कि याची किसी अपराध का दोषी है — प्रथम सूचना प्रतिवेदन अभिखंडित किये जाने योग्य और याची को आरोपमुक्त किया गया — आवेदन मंजूर। (रसमीत सिंह मल्होत्रा वि. म.प्र. राज्य) ...329

Criminal Procedure Code, 1973 (2 of 1974), Section 482 – Inherent power – Held – To prevent the abuse of process of the Court and to prevent the harassment to citizen of India by illegal prosecution under Section 376 of IPC, it would be imperative obligation to interfere in the impugned order. [Pukhraj Singh Vs. State of M.P.] ...248

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – अंतर्निहित शक्ति – अभिनिर्धारित – न्यायालय की प्रक्रिया के दुरुपयोग को रोकने एवं भा.द.सं. की धारा 376 के अंतर्गत अवैध अभियोजन के द्वारा भारत के नागरिक के उत्पीड़न को रोकने के लिये आक्षेपित आदेश में हस्तक्षेप करना अनिवार्य दायित्व होगा। (पुखराज सिंह वि. म.प्र. राज्य) ...248

Criminal Procedure Code, 1973 (2 of 1974), Section 482 – Inherent power – Quashment of complaint – Complaint filed by divorced wife against husband for misappropriation of “Stridhan” – Whether any property gifted during marriage is still in possession of husband and he is not returning the same while having no right, is a matter of evidence – Application has no force – Dismissed. [Sadhna Kothari (Smt.) Vs. Shri Abhay Kumar Dalal] ...262

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – अंतर्निहित शक्ति – शिकायत अभिखंडित की जाना – विच्छिन्न विवाह पत्नी द्वारा पति के विरुद्ध “स्त्रीधन” के दुर्विनियोजन की शिकायत प्रस्तुत की गई – क्या विवाह के दौरान दान की गई कोई संपत्ति अभी भी पति के कब्जे में है और कोई अधिकार न होते हुये उसे नहीं लौटा रहा है, साक्ष्य का मामला है – आवेदन में कोई बल नहीं – खारिज। (साधना कोठारी (श्रीमती) वि. श्री अभय कुमार दलाल) ...262

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5 - उस तिथि का निर्धारण जिससे वापसी की रकम या दर प्रभावी होगी - अधिसूचना में इसके प्रभावी होने की तिथि स्पष्ट रूप से उल्लिखित - उल्लिखित तिथि को प्रभावशील होगा - भूतलक्षी नहीं। (सूरज इमपेक्स (इंडिया) प्रा. लि. वि. सेक्रेटरी, यूनियन ऑफ इंडिया) (DB)...59

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Evidence Act (1 of 1872), Section 103 - Burden of proof - Where it is a admitted fact that the applicant resided with the respondent for 15 years as a wife, it shall be presumed that pleadings and statements of the applicant are acceptable and the marriage of the applicant took place with the respondent by following the various rituals and procedure as prescribed in the Hindu Marriage Act. [Sukhvati Bai (Smt.) Vs. Manphool Narvariya] ...287

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परक्राम्य लिखत अधिनियम (1881 का 26), धारा 138 एवं साक्ष्य अधिनियम (1872 का 1), धारा 45 – हस्तलिपि विशेषज्ञ – चैक लिखे जाने का समय और साथ ही अभियुक्त के हस्ताक्षर विवादित हैं – विवादित चैक के परीक्षण हेतु विचारण न्यायालय हस्तलिपि विशेषज्ञ को बुलायेगा – विचारण न्यायालय का आदेश अपास्त किये जाने योग्य। (सोहनलाल सिंघल वि. सुनील जैन) ...277

Negotiable Instruments Act (26 of 1881), Section 138 – Cheques were signed by 'A' for and on behalf of Aman Jeweler as proprietor of the concern – In the legal notice also, he was described as proprietor of the concern – In complaint filed u/s 200 of Cr.P.C., present applicant also added – No prima-facie evidence available to infer that Aman Jeweler is a partnership firm and present applicant is a partner – Applicant has no liability for dishonor of cheques – Therefore, applicant discharged from charge. [Manish Vs. K.G. Sharma] ...284

परक्राम्य लिखत अधिनियम (1881 का 26), धारा 138 – प्रतिष्ठान के स्वत्वधारी के रूप में 'ए' ने अमन ज्वेलर के लिये एवं उसकी ओर से चैक हस्ताक्षरित किये – कानूनी नोटिस में भी, वह प्रतिष्ठान के स्वत्वधारी के रूप में वर्णित था – दंड प्रक्रिया संहिता की धारा 200 के अंतर्गत, प्रस्तुत शिकायत में वर्तमान आवेदक को भी जोड़ा गया – यह निष्कर्ष निकालने के लिये प्रथम दृष्टया साक्ष्य उपलब्ध नहीं है कि अमन ज्वेलर एक भागीदारी फर्म है एवं वर्तमान आवेदक एक भागीदार है – चैक के अनादरण के लिये आवेदक का कोई दायित्व नहीं – अतः, आवेदक को आरोपमुक्त किया गया। (मनीष वि. के.जी. शर्मा) ...284

Penal Code (45 of 1860), Section 325 – Appellant convicted u/s 325 of IPC and was sentenced to undergo 7 years rigorous imprisonment with fine of Rs. 2,000/- – He himself has admitted that he has caused two injuries with lathi on the head of injured resulting fracture of the frontal bone – Hence notice was issued only limited to the quantum of sentence – Held – Since there is a fracture of frontal bone which brings offence within the definition of grievous hurt as defined u/s 320 of the IPC – High Court has rightly convicted the appellant u/s 325 of IPC – Considering the overall circumstances, as the incident was a result of sudden fight and in a fit of passion, 7 years sentence is excessive – Same is reduced to 3 years – Appeal is partly allowed. [Sakharam Vs. State of M.P.] (SC)...1

दण्ड संहिता (1860 का 45), धारा 325 – अपीलार्थी मा.द.सं. की धारा 325 के अंतर्गत दोषसिद्ध एवं 2,000/- अर्थदण्ड सहित 7 वर्ष के कठोर कारावास से दंडादिष्ट – उसने स्वयं स्वीकार किया है कि उसने आहत के सिर पर लाठी से दो चोटें कारित की जिसके परिणामस्वरूप ललाटास्थि मंग हुई – अतः जारी नोटिस केवल दंडादेश की मात्रा तक सीमित – अभिनिर्धारित – चूंकि ललाटास्थि मंग हुई है जो कि अपराध को मा.द.सं. की धारा 320 के अंतर्गत परिभाषित घोर उपहति की परिभाषा में लाती है – उच्च न्यायालय ने अपीलार्थी को उचित रूप से मा.द.सं. की धारा 325 के अंतर्गत दोषसिद्ध किया – समस्त परिस्थितियों पर विचार करने पर,

चूंकि दुर्घटना अचानक झगड़े और आवेश में आने का परिणाम थी, 7 वर्ष का दंडादेश अत्याधिक है — उक्त को कम कर 3 वर्ष किया गया — अपील अंशतः मंजूर।
(सखाराम वि. म.प्र. राज्य) (SC)...1

Penal Code (45 of 1860), Sections 337, 279 & 304-A, Criminal Procedure Code, 1973 (2 of 1974), Sections 300 & 482 and Constitution — Article 20(2) — Double jeopardy — Earlier petitioner was tried and convicted for the offence punishable under Section 337 and 279 of the IPC — Subsequently tried for offence under Section 304-A of the IPC — If a person has been tried and convicted for less graver offence arising out of one particular incidence, then he can very well to be tried for a graver offence which may also arise out of the same incidence — Constitutional protection under Article 20(2) is against the offence and not against the act/incidence — Section 304A IPC gets attracted when, the death takes place due to rash and negligence act, whereas when mere hurt takes place, Section 337 of IPC can be invoked — Whereas Section 279 of IPC gets attracted merely by driving a vehicle on public way in a rash and negligent manner which endangers human life, which may or may not cause an injury to anyone — The applicant can very well be prosecuted for a graver offence despite having been earlier prosecuted and punished for a lesser offence — Application dismissed. [Nadimuddin Vs. State of M.P.] 316

दण्ड संहिता (1860 का 45), धाराएँ 337, 279 व 304-ए, दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 300 व 482 एवं संविधान — अनुच्छेद 20(2) — दोहरा संकट — पूर्व में याची को मा.दं.सं. की धारा 337 व 279 के अंतर्गत दण्डनीय अपराध के लिए विचारित एवं दोषसिद्ध किया गया — तदनंतर उसे मा.दं.सं. की धारा 304-ए के अंतर्गत अपराध के लिए विचारित किया गया — यदि किसी विशेष घटना से उत्पन्न हुए कम गंभीर अपराध के लिए किसी व्यक्ति को विचारित एवं दोषसिद्ध किया गया है तो उसे किसी अधिक गंभीर अपराध के लिए भी मली मांति विचारित किया जा सकता है जो उसी घटना से उत्पन्न हुआ हो — अनुच्छेद 20(2) के अंतर्गत संवैधानिक सुरक्षा अपराध के विरुद्ध है और न कि कृत्य/घटना के विरुद्ध — मा.दं.सं. की धारा 304-ए तब आकर्षित होती है जब मृत्यु उतावलेपन एवं लापरवाही के कारण कारित होती हो, जबकि जब मात्र उपहति कारित होती है तो मा.दं.सं. की धारा 337 का अवलंब लिया जा सकता है — जबकि मा.दं.सं. की धारा 279 केवल उतावलेपन और लापरवाहीपूर्वक आम रास्ते में वाहन चलाने पर आकर्षित होती है जिससे मानव जीवन को खतरा हो, जिससे किसी को कोई उपहति कारित हो या न हो — किसी कम गंभीर अपराध के लिये पूर्व में अभियोजित एवं दंडित होने के बावजूद भी किसी अधिक गंभीर अपराध के लिए आवेदक को अभियोजित किया जा सकता — आवेदन खारिज।

(नदीमुद्दीन वि. म.प्र. राज्य)

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Penal Code (45 of 1860), Section 376 and Criminal Procedure Code, 1973 (2 of 1974), Section 228 – Framing of charge – Rape with two prosecutrix – In FIR, prosecutrix did not allege rape by applicant but it was alleged that he escorted both the prosecutrix, to bus stand and assured that he will help them to get marry with other two co-accused persons – Applicant was absconding – In trial against two co-accused, prosecutrix alleged that she was subjected to rape by applicant – Held – It appears that prosecutrix implicated the applicant subsequently with ulterior motive – Charge/ prosecution u/s 376 set aside. [Pukhraj Singh Vs. State of M.P.]

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दण्ड संहिता (1860 का 45), धारा 376 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 228 – आरोप विरचित किया जाना – दो अभियोक्त्रियों के साथ बलात्कार – प्रथम सूचना प्रतिवेदन में, अभियोक्त्री ने आवेदक द्वारा बलात्कार का अभिकथन नहीं किया परंतु यह अभिकथित किया गया कि वह दोनों अभियोक्त्रियों को बस स्टैंड तक ले गया और आश्वासित किया कि वह उन्हें अन्य दोनों सह-अभियुक्तों से शादी करने में सहायता करेगा – आवेदक फरार था – दोनों सह-अभियुक्तों के विरुद्ध विचारण में अभियोक्त्री ने अभिकथित किया है कि आवेदक ने उसके साथ बलात्कार किया – अभिनिर्धारित – ऐसा प्रतीत होता है कि अभियोक्त्री ने अंतरस्थ हेतु से बाद में आवेदक को आलिप्त किया – धारा 376 के अंतर्गत आरोप/अभियोजन अपास्त। (पुखराज सिंह वि. म.प्र. राज्य)

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Penal Code (45 of 1860), Section 406 – See – Criminal Procedure Code, 1973, Section 408 [Sadhna Kothari (Smt.) Vs. Shri Abhay Kumar Dalal]

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दण्ड संहिता (1860 का 45), धारा 406 – देखें – दण्ड प्रक्रिया संहिता, 1973, धारा 408 (साधना कोठारी (श्रीमती) वि. श्री अभय कुमार दलाल)

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Penal Code (45 of 1860), Section 498A r/w 34 – See – Criminal Procedure Code, 1973, Section 397 & 401 [Abhilasha Vs. Ashok Dongre]

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दण्ड संहिता (1860 का 45), धारा 498ए सहपठित 34 – देखें – दण्ड प्रक्रिया संहिता, 1973, धारा 397 व 401 (अमिलाषा वि. अशोक डोंगरे)

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Procedure – Revision – Listed for admission – Not necessary to consider the argument of respondent. [Rajesh Pandey Vs. Geeta Devi Poddar]

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प्रक्रिया - पुनरीक्षण - ग्राह्यता के लिये सूचीबद्ध - प्रत्यर्थी के तर्क पर विचार करना आवश्यक नहीं। (राजेश पांडे वि. गीता देवी पोद्दार) ...223

Protection of Women from Domestic Violence Act (43 of 2005), Section 12 (Proviso) - Whether it is obligatory to call for domestic violence report from Protection Officer or Service Provider at the time of issuance of notice, if it is not available or if report is available, then is it mandatory to consider it - Held - It is not obligatory for a Magistrate to call for or avail the report at the stage of taking cognizance and if report is available, then its consideration is obligatory even at the stage of issuance of notice or at the time of passing final order, as the case may be, affording opportunity to the other side - Application dismissed. [Ravi Kumar Bajpai Vs. Smt. Renu Awasthi Bajpai] ...302

घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम (2005 का 43), धारा 12 (परंतुक) - क्या नोटिस जारी करते समय सुरक्षा अधिकारी या सेवा प्रदाता से घरेलू हिंसा प्रतिवेदन, यदि वह उपलब्ध न हो तब उसकी मांग करना बाध्यकारी है, या यदि प्रतिवेदन उपलब्ध है तब क्या इस पर विचार किया जाना आज्ञापक है - अभिनिर्धारित - संज्ञान लेने के प्रक्रम पर प्रतिवेदन की मांग करना या प्रतिवेदन प्राप्त करना मजिस्ट्रेट के लिये बाध्यकारी नहीं है और यदि प्रतिवेदन उपलब्ध है तब नोटिस जारी करने के प्रक्रम पर या अंतिम आदेश पारित करते समय भी जैसी कि स्थिति हो, अन्य पक्षकार को अवसर प्रदान करते हुये उसका विचारण किया जाना बाध्यकारी है - आवेदन खारिज। (रवि कुमार बाजपेयी वि. श्रीमती रेणु अवस्थी बाजपेयी) ...302

Protection of Women from Domestic Violence Act (43 of 2005), Section 28(2) - See - Criminal Procedure Code, 1973, Section 200 [Ravi Kumar Bajpai Vs. Smt. Renu Awasthi Bajpai] ...302

घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम (2005 का 43), धारा 28(2) - देखें - दण्ड प्रक्रिया संहिता, 1973, धारा 200 (रवि कुमार बाजपेयी वि. श्रीमती रेणु अवस्थी बाजपेयी) ...302

Railways Act (24 of 1989), Sections 123(2) & 124 - Bonafide passenger - Railways - No witness examined - Burden of proof - Held - Burden of proof cannot be placed on the dependants and also the fact that deceased boarded the train, so presumption would be that he had valid authority to travel. [Hariram Vs. Union of India] ...205

रेल अधिनियम (1989 का 24), धाराएं 123(2) व 124 - वास्तविक यात्री - रेलवे - किसी साक्षी का परीक्षण नहीं किया गया - सबूत का भार - अभिनिर्धारित

—सबूत का भार आश्रितों पर नहीं डाला जा सकता और यह तथ्य भी कि मृतक रेलगाड़ी में सवार हुआ था, अतः यह उपधारणा की जायेगी कि उसके पास यात्रा करने का वैध प्राधिकार था। (हरीराम वि. यूनियन ऑफ इंडिया) ...205

Railways Act (24 of 1989), Sections 123(2) & 124 – Untoward incident – Tribunal – Finding – Case of runover – Written statement and Naksha Panchayatnama – Railways admitting that deceased fallen down from an unknown train – Held – The incident was an untoward incident – Appeal allowed. [Hariram Vs. Union of India] ...205

रेल अधिनियम (1989 का 24), धाराएं 123(2) व 124 – अप्रिय घटना – अधिकरण – निष्कर्ष – कुचल कर निकलने का प्रकरण – लिखित कथन तथा नक्शा पंचायतनामा – रेलवे ने यह स्वीकार किया है कि मृतक एक अज्ञात रेलगाड़ी से गिरा था – अभिनिर्धारित – घटना एक अप्रिय घटना थी – अपील मंजूर। (हरीराम वि. यूनियन ऑफ इंडिया) ...205

Railway Claims Tribunal Act, (54 of 1987), Section 16 – Application for compensation – Interest – Held – Appellant entitled for interest @ 7.5% p.a. from the date of filing of claim application till its final payment. [Hariram Vs. Union of India] ...205

रेल दावा अधिकरण अधिनियम (1987 का 54), धारा 16 – प्रतिकर हेतु आवेदन – ब्याज – अभिनिर्धारित – अपीलार्थी दावा आवेदन प्रस्तुत करने की तिथि से उसके अंतिम भुगतान तक 7.5% प्रतिवर्ष की दर से ब्याज के लिये हकदार। (हरीराम वि. यूनियन ऑफ इंडिया) ...205

Registration Act (16 of 1908), Sections 17 & 49 – See – Specific Relief Act, 1963, Section 34, [Akshay Doogad Vs. State of M.P.]

(DB)...217

रजिस्ट्रीकरण अधिनियम (1908 का 16), धाराएं 17 व 49 – देखें – विनिर्दिष्ट अनुतोष अधिनियम, 1963, धारा 34, (अक्षय दूगड वि. म.प्र. राज्य)

(DB)...217

Service Law – Effect of interim order – Petitioner working as Sub Engineer was promoted as Asstt. Engineer, the said promotion was cancelled by the respondent – Petitioner challenged the cancellation order – The effect and operation of cancellation order was stayed by the Court – The question involved, whether on dismissal of writ petition the petitioner is entitled to get the pension benefit by treating himself as Asstt. Engineer – Held – Stay of operation of order means that the

order impugned very much exists but its operation is kept in abeyance because of the order of the Court – If ultimately the petition is dismissed or interim order is vacated, the order which was stayed comes into operation – Further held, petitioner is not entitled to get the benefit of pension for the aforesaid post. [Natthu Singh Chauhan Vs. State of M.P.] ...54

सेवा विधि – अंतरिम आदेश का प्रभाव – उपयंत्री के रूप में कार्यरत याची को सहायक यंत्री के रूप में पदोन्नत किया गया, उक्त पदोन्नति प्रत्यर्थी द्वारा रद्द की गयी – याची ने रद्दकरण आदेश को चुनौती दी – रद्दकरण आदेश के प्रभाव एवं प्रवर्तन पर न्यायालय द्वारा रोक लगाई गई – यह प्रश्न अंतर्ग्रस्त है कि क्या रिट याचिका खारिज होने पर याची स्वयं को सहायक यंत्री मानते हुए पेंशन लाभ लेने का हकदार है – अभिनिर्धारित – आदेश के प्रवर्तन पर रोक का अर्थ है कि आक्षेपित आदेश अस्तित्व में है परंतु न्यायालय के आदेश के कारण उसके प्रवर्तन को स्थगित रखा गया है – यदि अंतिमतः याचिका खारिज होती है अथवा अंतरिम आदेश निष्प्रभावी होता है, वह आदेश जिसे स्थगित किया गया था प्रवर्तनीय हो जाता है – आगे अभिनिर्धारित, याची उपरोक्त पद के लिये पेंशन का लाभ पाने का हकदार नहीं। (नत्थू सिंह चौहान वि. म.प्र. राज्य) ...54

Specific Relief Act (47 of 1963), Section 34, Civil Procedure Code (5 of 1908), Section 96 and Registration Act (16 of 1908), Sections 17 & 49 – Specific performance of contract – Suit was dismissed only on the ground that agreement to sell was unregistered document and hence inadmissible in evidence – Held – Document required to be registered, if unregistered, can be admitted in evidence as evidence of a contract in a suit for specific performance – Suit filed by the appellant is decreed and impugned judgment and decree set aside. [Akshay Doogad Vs. State of M.P.] (DB)...217

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Telegraph Act, (13 of 1885), Section 7-B – Arbitration of

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तार अधिनियम, (1885 का 13), धारा 7-बी – विवादों का माध्यस्थता – प्रतिवादी द्वारा दूरभाष के उपयोग पर वसूली के लिए सिविल वाद – तथ्य के समवर्ती निष्कर्ष – क्या धारा 7-बी के उपबंधों के आलोक में दूरभाष के उपभोक्ता के बिल की वसूली के बाद का विचारण करने की अधिकारिता सिविल न्यायालय से छीन ली गयी है – अभिनिर्धारित – नहीं, बिलों की वसूली के संबंध में सिविल न्यायालय द्वारा न्याय निर्णयन करने की स्पष्ट रोक को स्थापित करने में अपीलार्थी असफल रहा। (विमला सोंधिया (श्रीमती) वि. दूर संचार जिला प्रबंधक) ...210

Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (30 of 2013), Sections 5A & 24 – Land was acquired under Scheme no. 97 for construction of Ring Road – Later on Scheme no. 97 was held to be illegal, inoperative and was also declared lapsed by order passed in M.P. No. 268/91 – Pursuant to same, State Government issued direction on 20.12.94 whereby 8.023 hct. land was released from Scheme no. 97 – Thereafter impugned order was issued on 12.10.2012 reviewing earlier order dated 20.12.1994 without issuing show cause notice to the petitioners – Held – Since the award was passed on 26.02.1991 before more than 5 years – Land acquisition proceedings deemed to have lapsed because neither possession of the land has been taken nor compensation has been paid – Possession still rests with the petitioner – Respondent Indore Development Authority is directed to consider application regarding issuance of No Objection certificate confirming release of land from Scheme no. 97 – Petition is allowed. [Shwetank Grih Nirman Sahakari Sanstha Maryadit Vs. State of M.P.] ...93

भूमि अर्जन, पुनर्वासन और पुनर्व्यवस्थापन में उचित प्रतिकर और पारदर्शिता का अधिकार अधिनियम, 2013 (2013 का 30), धाराएं 5-ए व 24 – रिंगरोड के निर्माण के लिए स्कीम नं. 97 के अंतर्गत भूमि का अर्जन किया गया – बाद में स्कीम नं. 97 को अवैध, निष्क्रिय घोषित किया गया तथा एम.पी. नं. 268/91 में पारित आदेश के द्वारा उसे व्यपगत भी घोषित किया गया – उसी के अनुसरण में, राज्य

शासन ने 20.12.94 को निर्देश जारी किया जिससे 8.023 हेक्टेयर भूमि को स्कीम नं. 97 से मुक्त किया गया — तत्पश्चात् याचियों को कारण बताओ नोटिस जारी किये बिना पूर्ववर्ती आदेश दिनांक 20.12.94 का पुनर्विलोकन करते हुए 12.10.2012 को आक्षेपित आदेश जारी किया गया — अभिनिर्धारित — क्योंकि अधिनिर्णय 5 वर्ष से अधिक अवधि के पूर्व 26.02.1991 को पारित किया गया था — भूमि अर्जन कार्यवाही व्यपगत मानी गई क्योंकि न तो भूमि का कब्जा लिया गया है न ही प्रतिकर का भुगतान किया गया है — कब्जा अभी भी याची के पास है — प्रत्यर्थी इंदौर विकास प्राधिकरण को स्कीम नं. 97 से भूमि मुक्त करने की पुष्टि करने वाले अनापत्ति प्रमाणपत्र जारी करने से संबंधित आवेदन पर विचार करने के लिए निदेशित किया गया — याचिका मंजूर। (श्वेतांक गृह निर्माण सहकारी संस्था मर्यादित वि. म.प्र. राज्य) 93

Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, M.P. 2005 (14 of 2006), Section 2 and Limitation Act (36 of 1963), Section 5 – Condonation of delay – Delay of three years – Impugned order passed on the basis of judgment passed in another case against which Writ Appeal was already dismissed– Govt. Advocate clearly opined to comply with the impugned order – Appeal was filed only after issuance of notice for contempt – Held – Action on the part of State shows high handedness in not complying with the order of Court – Application for condonation of delay dismissed with cost of Rs. 25,000/- [State of M.P. Vs. Moolchand Upadhyay] (DB)...5

उच्च न्यायालय (खण्ड न्यायपीठ को अपील) अधिनियम, म.प्र., 2005 (2006 का 14), धारा 2 एवं परिसीमा अधिनियम (1963 का 36), धारा 5 – विलंब के लिये माफी – तीन वर्ष का विलंब – अन्य प्रकरण में पारित निर्णय, जिसके विरुद्ध रिट अपील पहले ही खारिज हो चुकी है, के आधार पर आक्षेपित आदेश पारित किया गया – सरकारी अधिवक्ता ने आक्षेपित आदेश का अनुपालन करने का स्पष्ट अभिमत दिया है – अवमानना का नोटिस जारी होने के पश्चात् ही अपील प्रस्तुत की गयी – अभिनिर्धारित – शासन की ओर से न्यायालय के आदेश का अनुपालन न करने की कार्यवाही मनमानी दर्शाती है – विलंब के लिये माफी का आवेदन रु. 25,000/- के व्यय के साथ खारिज। (म.प्र. राज्य वि. मूलचन्द उपाध्याय) (DB)...5

Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, M.P. 2005 (14 of 2006), Section 2(1) – Interlocutory order – Any order, even though interlocutory in nature decides a question/issue finally or affects a vital and valuable rights which may cause injustice to a person, the same is not an interlocutory order – Writ Appeal maintainable. [Durjan Ahirwar Vs. State of M.P.] (DB)...8

उच्च न्यायालय (खण्ड न्यायपीठ को अपील) अधिनियम, म.प्र., 2005 (2006 का 14), धारा 2(1) – अन्तर्वर्ती आदेश – कोई भी आदेश, भले ही अन्तर्वर्ती प्रकृति का हो, किसी प्रश्न/विवाद को अंतिम रूप से निर्णीत करता हो अथवा महत्वपूर्ण एवं मूल्यवान अधिकारों को प्रभावित करता हो जिससे किसी व्यक्ति के साथ अन्याय कारित हो, वह अंतर्वर्ती आदेश नहीं है – रिट अपील पोषणीय। (दुर्जन अहिरवार वि. म.प्र. राज्य) (DB)...8

Urban Land (Ceiling and Regulation) Act (33 of 1976), Sections 10 & 20 – Notice of Collector requiring the petitioner to handover the possession of surplus land assailed on the ground that an application u/s 20 is pending consideration – Therefore, the notice is without jurisdiction – Though the name of Government entered in the revenue record, petitioner is in possession of the disputed land – Notice is vitiated and contrary to the provisions of law – Held – Kabza panchnama is merely a paper formality designed to frustrate the provisions of the Repeal Act – Even the impugned notice does not indicate that the possession was with the State Government – There is no compliance of provisions contained u/s 10 (5) of the Act – Possession still rests with the petitioner – Although the possession is alleged to have been taken in the year 1984 but Khasra entry upto 1988 indicates the possession of the petitioner – Notice requiring hand over the possession is quashed – Petition is allowed. [Sunil Vs. State of M.P.] ...86

नगर भूमि (अधिकतम सीमा और विनियमन) अधिनियम (1976 का 33), धाराएं 10 व 20 – कलेक्टर का नोटिस जिसके द्वारा यह अपेक्षित है कि याची अतिरिक्त भूमि का कब्जा सौंप दे को इस आधार पर चुनौती दी गई कि धारा 20 के अंतर्गत आवेदन विचारण हेतु लंबित है – अतः, नोटिस अधिकारिता विहीन है – यद्यपि राजस्व अभिलेख में शासन का नाम दर्ज है, विवादित भूमि पर याची का कब्जा है – नोटिस दूषित है तथा विधि के प्रावधानों के विपरीत है – अभिनिर्धारित – कब्जा पंचनामा केवल कागजी औपचारिकता है जिसकी रचना निरसन अधिनियम के प्रावधानों को विफल करने के लिये की गई है – यहाँ तक कि आक्षेपित नोटिस भी यह नहीं दर्शाता कि कब्जा राज्य शासन के पास था – अधिनियम की धारा 10(5) के अंतर्गत दिये गये प्रावधानों का अनुपालन नहीं किया गया – कब्जा अभी भी याची के पास है – यद्यपि अभिकथित रूप से कब्जा 1984 में ले लिया गया परंतु 1988 तक की खसरा प्रविष्टि याची का कब्जा दर्शाती है – कब्जा सौंपने की अपेक्षा का नोटिस अभिखंडित – याचिका मंजूर। (सुनील वि. म.प्र. राज्य) ...86

Words and phrases – Protection of Women from Domestic Violence Act (43 of 2005), Section 12(1) – Words 'Proviso', 'any order'

and 'before passing any order' explained. [Ravi Kumar Bajpai Vs. Smt. Renu Awasthi Bajpai] ...302

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THE INDIAN LAW REPORTS M.P. SERIES, 2016

(VOL-1)

JOURNAL SECTION

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

MADHYA PRADESH ACT

NO. 23 OF 2015

**THE MADHYA PRADESH LAND REVENUE CODE
(AMENDMENT) ACT, 2015.**

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MADHYA PRADESH ACT

NO. 23 OF 2015

**THE MADHYA PRADESH LAND REVENUE CODE
(AMENDMENT) ACT, 2015.**

[Received the assent of the Governor on the 30th December, 2015; assent first published in the "Madhya Pradesh Gazette (Extra-ordinary)", dated the 31th December, 2015, page no. 1060(3) to 1060(5)]

J/2-

An Act further to amend the Madhya Pradesh Land Revenue Code, 1959.

Be it enacted by the Madhya Pradesh Legislature in the Sixty-Sixth year of the Republic of India as follows:—

1. Short title.— This Act may be called the Madhya Pradesh Land Revenue Code (Amendment) Act, 2015.

2. Amendment of Section 50.— In Section 50 of the Madhya Pradesh Land Revenue Code, 1959 (No. 20 of 1959) (hereinafter referred to as the principal Act),

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

“(1) The Board may, at any time on its motion or on an application made by any party or the Commissioner or the Settlement Commissioner or the Collector or the Settlement Officer may, at any time on his own motion, call for the record of any case which has been decided or proceedings in which an order has been passed by any Revenue Officer subordinate to it or him and in which no appeal lies thereto, and if it appears that such subordinate Revenue Officer,—

- (a) has exercised a jurisdiction not vested in him by this Code; or
- (b) has failed to exercise a jurisdiction so vested; or
- (c) has acted in the exercise of his jurisdiction illegally or with material irregularity,

the Board or the Commissioner or the Settlement Commissioner or the Collector or the Settlement Officer, as the case may be, make such order in the case as it or he thinks fit :

Provided that the Board or the Commissioner or the Settlement Commissioner or the Collector or the Settlement Officer shall not, under this Section, vary or reverse any order made, or any order deciding an issue, in the course of the proceeding, except where –

- (a) the order, if it had been made in favour of the party applying for revision to the Board, would have finally disposed of the proceedings, or
- (b) the order, if allowed to stand, would occasion a failure of justice or cause reparable injury to the party against whom it was made.”;
- (ii) in sub-sections (2) and (3), for the words “or the Collector or the Settlement Officer” wherever they occur, the words “or the Commissioner or the Settlement Commissioner or the Collector or the Settlement Officer” shall be substituted; and
- (iii) for sub-section, (6), the following sub-section shall be substituted, namely:–
 - “(6) Notwithstanding anything contained in sub-section (1), –
 - (i) where proceedings in respect of any case have been commenced by the Board under sub-section (1), no action shall be taken by the Commissioner or the Settlement Commissioner or the Collector or the Settlement Officer in respect thereof;
 - (ii) where proceedings in respect of any such case have been commenced by the Commissioner or the Settlement Commissioner under sub-section (1), no action, shall be taken by the Collector or the Settlement Officer in respect thereof;

- (iii) where proceedings in respect of any such case have been commenced by the Commissioner or the Settlement Commissioner or the Collector or the Settlement Officer under sub-section (1), the Board may either refrain from taking any action under this Section in respect of such case until the final disposal of such proceedings by the Commissioner or the Settlement Commissioner or the Collector or the Settlement Officer, as the case may be, or may withdraw such proceedings and pass such order as it may deem fit;
- (iv) where proceedings in respect of any such case have been commenced by the Collector or the Settlement Officer under sub-section (1), the Board or the Commissioner or the Settlement Commissioner may either refrain from taking any action under this Section in respect of such case until the final disposal of such proceedings by the Collector or the Settlement Officer, as the case may be, or may withdraw such proceedings and pass such order as it may deem fit.”.

3. Amendment of Section 162. – In section 162 of the principal Act, for sub-section (1), the following sub-section shall be substituted, namely:–

- “(1) Notwithstanding anything contained in Section 248 and subject to rules made in this behalf, any land belonging to the State Government in such areas as notified in the official Gazette by the State Government, which is in unauthorized possession, may be disposed of for agricultural purposes in Bhumiswami rights and non-

agricultural purposes, in Government lessee rights by the Collector to such extent and on payment of such amount as may be prescribed.”.

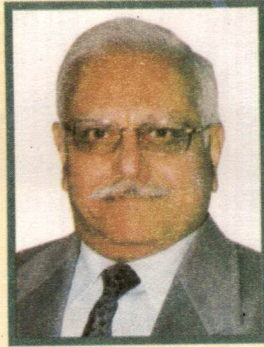
4. Amendment of Section 166. – In Section 166 of the principal Act, in sub-section (3), the word, bracket and figure “and (2)” shall be omitted.

5. Amendment of Section 247. – In Section 247 of the principal Act, in sub-section (4), for the words, figures and bracket “the Land Acquisition Act, 1894 (1 of 1894)”, the words, figures and bracket “the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (No. 30 of 2013)” shall be substituted.

6. Repeal and Saving. (1) The Madhya Pradesh Land Revenue Code (Second Amendment) Ordinance, 2015 (No. 5 of 2015) is hereby repealed.

(2) Notwithstanding the repeal of the said Ordinance, anything done or any action taken under the said Ordinance shall be deemed to have been done or taken under the corresponding provision of this Act.

FAREWELL



HON'BLE MR. JUSTICE K.K. TRIVEDI

Born on January 10, 1954. Was conferred LL.B Degree in 1978. Was enrolled as an advocate on 11.08.1979 in the rolls of the State Bar Council of Madhya Pradesh. Started practising in the High Court of Jabalpur from 1979. Was part time lecturer in University Teaching Department in the year 1986-87. Was Govt. Advocate w.e.f 27 July 1987 to 30 September, 1991. Was standing counsel for M.P. Audyogik Vikas Nigam Ltd., till 1994. Represented various Corporations, Municipal Councils etc. Was also counsel for Election Commission of India w.e.f 2003 till elevation.

Elevated as Additional Judge of the High Court of Madhya Pradesh on May 27, 2011, became permanent Judge on 23.05.2013 and demitted office on January 9, 2016.

We wish His Lordship a healthy, happy and prosperous life.

**FAREWELL OVATION TO HON'BLE MR. JUSTICE
K.K. TRIVEDI, GIVEN ON 08-01-2016 IN THE CONFERENCE
HALL OF THE HIGH COURT OF M.P. AT JABALPUR.**

**Hon'ble Mr. Justice A.M. Khanwilkar, Chief Justice, bids
farewell to the demitting Judge:-**

We have assembled here today to bid a warm adieu to Justice Keshav Kumar Trivedi, who will be demitting office on 10th January on attaining the age of superannuation.

Justice Trivedi hails from a family of Judges and Senior Civil Servants. His father was a Class-I Gazetted Officer of the State Civil Services. His grandfather was a District & Sessions Judge in British India. His maternal uncles late Shri Justice S.K. Awasthi and late Shri Justice P.K. Awasthi, were Judges of the Madhya Pradesh High Court.

Born on 10th January, 1954 at Nagpur, Justice Trivedi did his Graduation in Arts from St. Alaysius College, Jabalpur and was conferred LL.B. Degree in 1978 from University Teaching Department, Jabalpur University, rechristened as Rani Durgawati University in later years. On 11.08.1979 Justice Trivedi enrolled himself with the Bar Council of Madhya Pradesh as an Advocate. He initially practiced in the District Court at Rajnandgaon for about a year and then shifted to Jabalpur in May, 1980 under the tutelage of Justice Shri S.K. Awasthi, who was then a practicing Advocate. By sheer dint of his hard work, sincerity and legal acumen, Justice Trivedi soon carved out a niche for himself as one of the promising Advocates of the High Court.

Initially, apart from legal profession, Justice Trivedi also rendered his services as part time Lecturer in University Teaching Department in Rani Durgawati University, Jabalpur. He was appointed as a Deputy Government Advocate in 1987 and thereafter as an Additional Government Advocate for State of Madhya Pradesh from 1989 to 30th September, 1991. During his 31 years of practice, Justice Trivedi also provided his services as the Standing Counsel for Madhya Pradesh Audyogik Vikas Nigam Ltd., and various Local Bodies like Municipal Councils and Nagar Panchayats. He was also Counsel for the Election Commission of India, Madhya Pradesh State Mining Corporation, Security Paper Mills and for Mints Corporation of India. Justice Trivedi, in the process acquired expertise in diverse fields including Civil, Constitutional, Service, Company, Arbitration and

Criminal jurisdictions.

With such wide expertise and merit to his credit, his elevation as an Additional Judge of the High Court of Madhya Pradesh was a natural sequel. That happened in May, 2011. He became permanent Judge of our High Court on 23rd May, 2013. As a Judge of the High Court, Justice Trivedi handled variety of complex issues with relative ease due to his profound legal knowledge and experience. His judicial pronouncements are replete with quality, precision and in-depth knowledge of the subject.

Professor Louis E. Newman, of Carleton College, USA, while speaking on Judicial ethics, made a pertinent remark and I quote-

"The qualities of a good Judge are the qualities of a good man. There are additional demands of a Judge to be sure but at last it must be the depth and texture of his humanity that qualify and define the Judge".

Justice Trivedi epitomises all the qualities of a good judge. To speak about the private life of Justice Trivedi, I found him to be thorough gentleman, an ardent believer in God and full of virtuous life. He is soft spoken but firm in his views; has clarity in his thoughts and a focused approach.

As we all know, humility and righteousness are in abundance in the personality of Justice Trivedi which have made him an excellent Judge and a noble human being. His pleasing persona and eruditeness has had a reassuring effect on all - be it litigants, Members of the Bar or Brother and Sister Judges.

Justice Trivedi has not only contributed to the development of law on the judicial side, but has also made invaluable contribution for the betterment of administration of the High Court as well. He was Member of different Committees - such as Screening Committee, Model Courts Committee and Committee constituted for advising High Court on legal matters.

We shall be missing Justice Trivedi, who not only has raised the bar of excellence, a notch higher, while serving the cause of justice but has also left an indelible imprint because of his precious inputs given on administrative matters. The void created by his absence will be unparalleled; and to me personally, because he will not be available to preside over the Bench with me any more.

I am sure that Justice Trivedi will continue to serve the society and shower

his vast experience and wisdom.

I, on behalf of my Brother and Sister Judges and the Registry of the High Court, wish Justice K.K. Trivedi & Mrs. Sunita Trivedi and other family members a very happy, healthy, prosperous and scintillating future and success in all creative endeavours.

"JAI HIND"

Shri Ravish Chandra Agarwal, Advocate General, M.P., bids farewell :-

"Only in the agony of parting do we look into depths of love."

The depth of love and affection we have for Hon'ble Justice K.K. Trivedi and the love he has for us and this Institution.

Though farewells and good byes are always excruciating but they also compel us to ponder upon the legacy left by the person we bid adieu. I take this opportunity to articulate my appreciation for the excellent service, rendered by Justice Trivedi to this great Institution.

Just as treasures are uncovered from the earth, so does virtue appear from good deeds and wisdom appears from pure and peaceful mind. To walk safely through the maze of life, a person needs the light of wisdom and the guidance of virtue. The light of wisdom and virtues which Justice Trivedi epitomizes.

Right from day 1 of his tenure Justice Trivedi has been guided by virtues of compassion, magnanimity and diligence. I am really amazed at the ardour with which Justice Trivedi has taken up all the administrative and judicial responsibilities bestowed on him.

As a senior member of the bar it was indeed heart warming for me to see Justice Trivedi grow in stature as a professional, as well as a human being. Justice Trivedi by his sheer determination and hard work scaled new heights in the profession and selflessly accepted elevation with the sheer intention of serving the institution.

His lordship through his judicial pronouncements has left an admirable

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legacy and has carved a niche for himself in the history of this institution. He has laid the founding stones so that future generations can tread on his foot steps.

It seems just yesterday when Justice Trivedi had adorned the Bench and his absence is certainly going to leave a deep void which is impossible to fill. But as all good things someday come to an end, so has the tenure of Justice Trivedi.

As the saying goes : *" Don't cry because it's over. Smile because it happened."* So we are glad that Justice Trivedi happened to us.

I on behalf of the State Government, Law officers and my own behalf, express by deepest gratitude and extend my best wishes to Hon'ble Justice Trivedi for all his future endeavors. May the divine light be with him always.

Thank You.

Shri Adarsh Muni Trivedi, President, M.P. High Court Bar Association, bids farewell :-

Beside this great moment, the flowers red and yellow, pink and blue, orange and white; in all possible colours of time, are blooming in very first blush of the new-year; fortunately which is the ever-green sweet 16th year and why the god has put a soul into the each flower and it is why they are fluttering and dancing on weary wings of the cool breeze, privily inviting the spring-time through molesting passes.

It is not a fare-well but the trees are bowing down to resonate modulation of time, a shadowless echo of éclat hidden in the coming days of Your Lordship.

Today, with full fragrance of the flowers, we all have congregated here to Honour Your Lordship Shri Justice Keshav Kumar Trivedi, not to bid a farewell but to invite you to the other edge of time-span, which shall also be proved as another golden era for Your Lordship's great achievements.

The 'Etreya Brahman' says:-

“ चरन् वै मधु विंदति चरन् स्वादुमुदंबरम् ।

सूर्यस्य पश्च श्रेमाणं यो न तद्वयते चरश्चरैवेति ।।

..... चरैवेति चरैवेति ।।।”

[Go ahead. You shall obtain honey by trekking on. You shall obtain the taste of fruit by trekking on. See the greatness of the sun, who do not take naps while trekking on. Trek ahead, Go ahead. चरैवेति चरैवेति ।]

It is why I say :- 'कभी अलविदा न कहना ।'

It is Your Lordship's name 'Keshav' we chant each and every day with rising of the sun, mingling with sweet holy ringing of the bells of a temple; 'अच्युतं केशवं राम नारायणम् ।' Lord Krishna, become Keshav, only after killing two big demons namely Madhu and Kaitabh. Your Lordship have killed the big demon of 'Injustice'; Your Lordship have get to kill another demon of 'darkness' by spreading the light of knowledge. 'अज्ञानं तिमिरान्धस्य ज्ञानांजनं शलाकया'

Lord Krishna received farewell from 'Brij Bhoomi' at the bank of holy 'Yamuna', for trekking on a great course of His divine work; our Keshav is receiving fare-well from 'Nyay Bhoomi' at the bank of holy 'Narmada', for going ahead on the course of divinity, what the destiny has already settled.

Your Lordship were born on 10th January, 1954 at Nagpur (Maharashtra); which was then capital of Central Province and Berar State, Your Lordship's grand-father late Shri R.N. Trivedi was District and Sessions Judge in British time and retired in year 1936 from Akola in the erstwhile State of C.P. & Berar. Your Lordship's father late Shri P.N. Trivedi was class-I Gazetted Officer of M.P. State services and retired from his services on 28/2/1983 from Sihora, District- Jabalpur. Your uncle Shri S.N. Trivedi is a legal- adviser to Companies at Bhopal. Your maternal uncle late Shri Justice S. Awasthy, was an Hon'ble Judge of this High Court, and was a great lawyer of his time. Your another maternal-uncle late Shri Justice R.P. Awasthy was also a Judge of this High Court and was also the Chairman of M.P. Administrative Tribunal. So the sense of Justice was predominant in the blood of Your Lordship, and a great source of inspiration.

After availing the degrees of B.A. and LL.B., Your Lordship were enrolled as an Advocate on 11th August, 1979 with State Bar Council of M.P. and joined the Chamber of Hon'ble Justice Shri Sachchidanand Awasthy; who was then a great lawyer of his time. During 31 years of practice, you achieved success with

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flying colours and had practiced in field of Civil law, Constitutional law, Service Jurisprudence and also in arbitration matters. Your Lordship also worked as Government Advocate in the Office of Advocate General from July 1987 to September 1991. Your Lordship also worked as standing Counsel for Election Commission of India from 2003 till your elevation and as Counsel for M.P. Audyogik Vikas Nigam and several other Corporations, Municipal Councils and other Public bodies, prior to your elevation as a Judge of this High Court. Your Lordship were a senior- member of M.P. High Court Bar Association, and greatly contributed for planning to construct the 'Golden Jubilee Hall' of the Bar. Your Lordship were also part-time Lecturer in the University Teaching Department in Law-Faculty of Rani Durgawati Vishwa- Vidyalay, Jabalpur and so the sense of teaching still prevails into veins of Your Lordship.

Your Lordship have concentrated your self truly to the ideal of justice inner vocation of law as to its true spirit, after joining the rank of the bretherens in holy black-robess; and paved the way to build pavonine castle of your imaginations for bringing forth the configuration of great and remarkable judgments for those common people of the State, delivering substantial justice to them and for this even trekked beyond the technilities of Law, which were so rude in the nature to defeat very cause of Justice; and the values conquered. By your jurisprudential approach to its core, Your Lordship have infused a spirit consistent with the democratic system on the anvil of present deficiencies in the legal environment itself, so that a sufferer standing at grass-root level and belonging to down-trodden classes of common-people, may not feel harassed and frustrated with administration of justice.

At this juncture, I must say that your Lordship the Hon'ble the Chief Justice, despite of some dissenting views of the Bar on some important issues, which is an evolutionary recognized process and awakened Bar must have; have always remained even tempered with ever-lasting open heart for a dialogue on each such issue and have diluted the bitterness with pleasant melodious smile like sonority of a lyrical lute, which is absolutely praiseworthy; and also by kind words, which are always on tip of Your Lordship's tongue. There is a popular saying:-

"Hearts, like doors, will open with ease

To very very little keys;

And forget not that two of these

Are 'I thank you' and 'If you please'.

I, thank you Your Lordship, Hon'ble the Chief Justice for your great endurance and endless endeavours to solve the problems of the Bar and litigants; and I also want to use the next little key that 'If you please', kindly do some favour to the Bar when Your warm smile is the universal language of kindness.

Lord Krishna in Bhagwad Gita has defined the world as a tree of 'Ashwattha' [पीपल] whose roots are upside in the sky and branches are downwards on surface :- 'उर्ध्व मूल अधः शाखा'. The tree of 'Justice' is also like this up-side down tree of 'Ashwattha', the roots of which inhale the breaths from godly inspirations and generates and delivers great values to its branches lying in Justice- Delivery System. So the dispensation of Justice is the greatest duty assigned by the almighty to the Judges.

Francis Bacon say:-

"Judges ought to be more learned than witty, more reverend than plausible and more advised than confident. Above all things integrity is their portion and proper virtue."

Your Lordship Hon'ble Shri Justice Trivedi have decided the cases with integrity and keen knowledge to the best of your firm fidelity and floriferous ability and always heard the cases impartially with and open mind. F.M. Voltaire says :-

"The sentiment of justice is so natural and universally accepted by all mankind that it seems to be independent of all law, all party, all religion"

All the members of M.P. High Court Bar Association alongwith me, wish you a glorious future-life and the fortitude to keep your resolutions upto the mark. Nothing endures in the world but the personal qualities, one possesses. We hope that you shall maintain the same 'स्थितप्रज्ञता' as defined by Lord Krishna in Srimad Bhagwad Gita, which in the words of Saint Kabirdas is:-

“ दास कबीर जतन से ओढी ।

जस की तस घर दीन्हि चदरिया ।।”

We wish you long life with enduring physical and mental energies, and all success in your future social life.

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“ जीवेद् शरदः शतम् ।। ”

and in New Year to all this message of Rigved :-

“ समानो मंत्रः समितिः समानी

समानं मनः सह चिन्तमेषाम्

समानं मन्त्रममि मन्त्रये वः

समानेन वो हविषा जुहोमि ।। ”

[ऋग्वेद 10/191/3]

Shri R.P. Agrawal, President, M.P. High Court Advocates' Bar Association, bids farewell :-

We have assembled here to-day to bid farewell to Justice Shri K.K. Trivedi, who will be demitting his office on 09.01.2016 after having served this institution for about 4 years and 6 months.

My Lord's tenure would have been much longer but for the fact that my Lord himself declined to accept Judge-ship earlier. We have been a looser in that sense.

Though the tenure of my Lord was comparatively shorter, yet my Lord rendered very valuable and remarkable decisions touching practically all spheres of law.

My Lord was highly courteous. He has a gift of good temperament and he has been too good to juniors, very often suggesting the points available in the case.

My Lord has another gift of a sharp intellect. My Lord was very quick in getting at the route of the matter. My Lord imbibed in himself all good qualities of a Judge. He has been very, considerate and delivered justice tempered with mercy.

The all round experience gathered by my Lord by his hard work done in various spheres of law gave him an added advantage in pronouncing remarkable decisions.

He inherited legacy of late Justice S. Awasthi and R.P. Awasthi, who were pioneers in the field of law. Late Justice S. Awasthi was all rounder so was my Lord Justice Trivedi.

My Lord's relation with the Bar have always been very cordial and every member of the Bar was fully satisfied after leaving his court room. My Lord's positive approach to legal problems was excellent. I did not see any lawyer leaving his court room dissatisfied. To such a great judge we bid farewell. Parting is always very painful yet the same is unavoidable.

We the members of the Bar do sincerely wish my Lord and his family members a very happy life and we expect and hope of befitting post-retiral assignment with the blessing of my Lord the Chief Justice.

I on behalf of High Court Advocates' Bar Association and my own behalf wish a very happy life to my Lord and his family members and wish that my Lord would occasionally visit his parent institution and meet old and new members of the Association providing valuable guidance.

Shri Radhe Lal Gupta, Advocate, Spokesman State Bar Council of M.P., bids farewell :-

With mixed feelings of joy & sorrow we have gathered here to bid farewell to Hon'ble Shri Justice K K Trivedi who is demitting the High Office of Judge of this temple of justice. Though My Lord has been with us for a short time but his Lordships style of working, judgements and commitment towards his work shall be remembered by this High Court of Madhya Pradesh for a very long time.

My Lord Hon'ble Shri Justice K K Trivedi was born on 10th Jan 1954. After completing law enrolled as an advocate in the year 1979 in State Bar Council of MP and thereafter started practice under the able guidance of the then Sr. Advocate Shri S Awasthi who was later on elevated to the bench of this Hon'ble Court. In the same office I had the opportunity and being contemporary to Shri Trivedi. Thereafter he practiced mainly on Civil & Constitutional, Arbitration and Service matters in the High Court of M.P.. My Lord was Govt Adv, for a short time and he was counsel for various companies, counsel for the Election Commission, various corporations and municipal corporation. My Lord was

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appreciated for his ability and fairness as a lawyer in several reported judgements. Looking to the great wisdom, deep knowledge of law your Lordship was elevated as Hon'ble Judge of Hon'ble High Court of M.P. on 27th May 2011.

Mr Lord was appointed as permanent Judge on 23rd May 2013. My Lord has also the honour of serving as Lecturer in University Teaching Department.

Your Lordship's family background was closely associated with justice delivery system. Following the footsteps of his family My Lord also preferred the Judicial Services.

During the period as Judge of the Hon'ble High Court of M.P. your Lordship has contributed greatly by giving various important judgements on Constitutional, Civil, Criminal and other branches of law. They are always considered to be guideline in legal fraternity.

Your Lordship is with us since last more than five years the members of the legal fraternity practicing in the High Court of Madhya Pradesh has also felt that your Lordships has been kind enough to give maximum relief irrespective of the face. To the Junior Lawyers My Lord was guiding like a strict teacher Who does not believe in sparing the rod.

Besides your Lordship's above qualities, members of the Bar have also experienced your Lordship's exceptional quality of being gentle, fine and always very courteous, humble and polite. Undoubtedly after demitting your Lordship's Office, we the members of the legal fraternity will be deprived of your Lordship's able guidance. I believe the Bar is losing a guide, a friend and philosopher who was showing the right path in the crisis also. It is a difficult thing that how much we learnt from My Lord when he was in office but it is definite that we have learnt a lot when he is demitting the office by realizing our short comings and failures. The impression left on all of us cannot be erased in the days to come. Your Lordship's superannuation is certainly a great loss to this High Court.

Though retirement is closure of one chapter but every closure of chapter opens a new chapter. My Lord Shri Trivedi is such a courageous personality that he will make this new chapter of life equally lively, pleasant and happy because My Lord knows well that happiness multiplies by sharing the same.

At last but not the least, I on behalf of Advocates of State of Madhya

Pradesh and my own behalf, sincerely offer my whole hearted valediction to My Lord Shri K K Trivedi. I once again wish all the best to my Lord.

At the end I would like to express my feelings.

Some people come to our lives and quickly go

Some stay for a while .

leave foot prints on our hearts

and we are never ever the same.

Shri Jinendra Kumar Jain, Asstt. Solicitor General, bids farewell:-

आज का विदाई समारोह श्री त्रिवेदी जी के सम्मान में समर्पित है। श्री त्रिवेदी जी ने हितकारिणी विधि महाविद्यालय जबलपुर से विधि स्नातक की उपाधि प्राप्त कर 1979 से वकालत प्रारंभ की थी आप मेधावी छात्र थे, जिस समय विधि महाविद्यालय में प्रवेश लिया था उस समय छात्रों के द्वारा अपनी मांगों के लिए आंदोलन किये जा रहे थे, जगह जगह जुलूस कॉलेज बंद किये किये जाते थे जिसके कारण जबलपुर का वातावरण काफी गरम रहता था। कॉलेज की पढाई भी ठीक से नहीं हो पाती थी उसी समय तत्कालीन प्रधानमंत्री श्रीमती इंदिरा गोंधी द्वारा पूरे देश में आपातकाल की घोषणा की गई थी फलस्वरूप कक्षाएं नियमित लगने लगी थी। श्री त्रिवेदी जी पढाई के अलावा अन्य महाविद्यालयीन गतिविधियों में रुचि एवं दखल कम ही रखते थे फलस्वरूप पूरे मनोयोग से विधि स्नातक की उपाधि प्राप्त की।

श्री त्रिवेदी जी ने लगभग 31 वर्ष जबलपुर उच्च न्यायालय में बड़ी कुशलता पूर्वक दीवानी, सर्विस, संवैधानिक आदि मामलों में पैरवी कर पक्षकारों को न्याय दिलाने का कार्य दक्षतापूर्वक किया। लगभग 4 वर्ष म.प्र. शासन का प्रतिनिधित्व भी बड़ी कुशलता पूर्वक किया।

श्री त्रिवेदी जी सन् 2011 में म.प्र. उच्च न्यायालय में न्यायाधीश के रूप में पदस्थ होकर अनेक मामलों में फैसले दिये, जिनमें कई फैसले नजीर के रूप में भावी पीढी का मार्गदर्शन करेंगे।

श्री त्रिवेदी जी का छात्र जीवन से अभी तक का सफर सरल, सादगी पूर्ण मुस्कराता हुआ एवं सभी के लिये सुलभ सम्पर्क वाला रहा, वकालत के खाली समय में हाईकोर्ट के बरामदे में कुछ अधिवक्ताओं के साथ अक्सर खड़े रहकर बातचीत करते हुये देखा जाता रहा है।

श्री त्रिवेदी जी का परिवार एवं मामा पक्ष के कई सदस्यों का विधि व्यवसाय में अतुलनीय सहयोग रहा है।

समय परिवर्तनशील है, परिवर्तन ही जिंदगी है, हर पल नया संदेश देती है इस समारोह के पश्चात पुनः परिवर्तन होकर नई भूमिका प्राप्त होगी, जिम्मेदारियों समाप्त नहीं हुई हैं मैं अपनी ओर से

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भारत सरकार की ओर से एवं अपने सभी साथियों की ओर से श्री त्रिवेदी जी एवं उनके परिवार के उज्ज्वल भविष्य की कामना करता हूँ एवं उनके जीवन का अब तक के सफल एवं निर्दाग कार्यकाल की प्रशंसा करता हूँ एवं गर्व पूर्वक उन्हें बधाई देता हूँ।

धन्यवाद

Shri T.S. Ruprah, General Secretary, Senior Advocates', Council, bids farewell :-

With a heavy heart the Bar bids farewell to one of the excellent and most admirable Judges Hon'ble Shri Justice Keshav Kumar Trivedi.

As a lawyer Your Lordship had a lucrative practice. Your soothing smile, sweet, encouraging gentlemanly personality and humanitarian conduct had won over everyone who happened to meet you. Your blissful touch turned the tides. The Bar welcomed your Lordship's joining the galaxy of legal luminaries as a Judge of this Hon'ble Court.

Your Lordships tenure as a Judge has been most satisfying. Humanitarian approach always depicted in your judgments. Your Lordship always heard the lawyers patiently. Lawyers might have lost the case but came out of the court contended and smiling having got more than they had expected. There has always been a congenial and healthy odorous atmosphere in the Court. Your Lordship has won the hearts of the members of the Bar.

Your Lordship's Court room could always be seen full of junior lawyers with their small note books taking down points and important judgments. The junior lawyers were always encouraged, advised and instructed to work hard.

Your Lordship would be missed by each and every one of us, as Your Lordship has always been extremely courteous to everyone and gave equal attention to Senior and Junior Members of the Bar. My Lord will always be remembered with fond memories for the warmth and responsiveness displayed towards us as one of the distinguished Judges of this Court.

I, on behalf of the Senior Advocates council and my own behalf extend good wishes to Your Lordship and hope that your vast experience at the Bar and the Bench would be beneficially availed by the Government by assigning onerous responsibilities. We are sure that Your Lordship's legal knowledge and experience

gained during the last four decades shall be utilized for the betterment of the poor and the needy. I extend my heartfelt good wishes to My Lord as well as Smt Trivedi and the family for a healthy, peaceful and happy long life.

Farewell speech delivered by Hon'ble Mr. Justice K.K. Trivedi:-

I have no words to express my gratitude for the praise, wishes and the blessings showered on me by all of you. I have no hesitation in saying that though I am not that much deserving, yet by your grace such good wishes have been showered on me.

While demitting the office of the Judge of this Court, I have completed yet another inning of my life. As I said, at the time of my elevation, it was a cherished dream of my life to become a Judge of this Court, which has come true. I really have no knowledge whether I have accomplished the object successfully or not, which has to be judged by others. I strongly feels that if a contesting litigant before a particular Judge even after losing the battle in the Court does not criticize the Judge otherwise, it has to be treated that the Judge has acted in accordance to the norms of justice delivery system.

It is indeed important to state, though may not be the proper occasion, that the judicial system is the strongest pillar of the democratic set up. The lawyers are the foundation stone for the bridge in between the litigants and the justice delivery system. It would be a proper time for introspection by those, who are the persons suppose to take up such responsibility of making a proper bridge between the system and the litigants to strengthen the ties. It is the high time for the young lawyers to make more endeavour to acquire knowledge of this noble profession by reading and putting hard labour. As it is said labour never goes unpaid, if such endeavourment is put by the young generation inducted in this profession, they will be benefited by the same in making the future of this great institution.

I know the difficulties, which would be faced by those who would try to uplift the mechanism of working of judicial system for its development. Every development essentially creates certain inconvenience to few but the ultimate result is always fair and good. Keeping in view the requirement of the development and introduction of the modern technology, the great leadership

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which is available at present in the Court, in the shape of visionary Chief Justice, I have full confidence that in case actions are taken in coordination, this Court would rise again on high pedestal of glory.

In discharge of my duty as a Judge, I was extended full coordination by the Registrar General and the officers of the Registry. My personal staff consisting of Shri Ashwani Prajapati, Shri Sunil Chaturvedi, Shri Raghvendra Sharan Shukla, Private Secretaries, Ms. Bharti Gadge, Personal Assistant as well as Readers Shri Santosh Rajak, Shri Sandeep Khare and my Jamadars Shri Dhaniram Patel, Shri Chandrika Prasad Kushwaha, and Driver Mahesh Sharma have worked honestly and sincerely with devotion to discharge the Court function. The Protocol Officers headed by Shri Ajay Pawar, Joint Registrar including APOs Radheshyam Karluké, Shri Jitendra Vishwakarma, Shri C.L. Patle, Shri Syed Fareed Uddin, Shri Jai Prakash Kale, have taken good care of my requirements and needs. I was given full medical assistance by the physician attached with the Court and specially by Dr. A.C. Sonkar. The Personal Security Officers, Shri Harendra Kumar. Pandey and Shri Jitendra Pal have taken good care of security measures within the Court premises, at my residence and while I was on tour. I express my gratitude to all of them for extending such helpful hand to me.

My wife Smt. Sunita Trivedi and son Prakhar Trivedi and all family members have always stood behind me giving me full cooperation and support in discharge of my duties as a Judge. Equally I was given full assistance and cooperation by my colleague brother and sister Judges. I express my gratitude to all of them for giving me such supporting hand.

Specially I have to express my gratitude to Hon'ble the Chief Justice Mr. Justice Ajay Manikrao Ji Khanwilkar with whom I have shared a Bench for a long time. Equally I have spent wonderful time while sharing the Bench with My Lord Mr. Justice Rajendra Menon and Mr. Justice Shantanu Kemkar. Their Lordships have extended me all support in discharge of my duties. My personal experience of working with their Lordships is so good which I will cherish for whole of my life. I wish good health and prosperity and all the best in life to their Lordships.

Thanking you all once again for the greetings and wishes.

जय हिन्द

**I.L.R. [2016] M.P., 1
SUPREME COURT OF INDIA**

*Before Mr. Justice T.S. Thakur, Mr. Justice V. Gopala Gowda &
Mr. Justice R. Banumathi*

Criminal Appeal No. 1079/2015 decided on 19 August, 2015

SAKHARAM

...Appellant

Vs.

STATE OF M.P. & anr.

...Respondents

Penal Code (45 of 1860), Section 325 - Appellant convicted u/s 325 of IPC and was sentenced to undergo 7 years rigorous imprisonment with fine of Rs. 2,000/- -- He himself has admitted that he has caused two injuries with lathi on the head of injured resulting fracture of the frontal bone - Hence notice was issued only limited to the quantum of sentence - Held - Since there is a fracture of frontal bone which brings offence within the definition of grievous hurt as defined u/s 320 of the IPC - High Court has rightly convicted the appellant u/s 325 of IPC - Considering the overall circumstances, as the incident was a result of sudden fight and in a fit of passion, 7 years sentence is excessive - Same is reduced to 3 years - Appeal is partly allowed. (Paras 2, 9, 11 & 12)

दण्ड संहिता (1860 का 45), धारा 325 - अपीलार्थी भा.द.सं. की धारा 325 के अंतर्गत दोषसिद्ध एवं 2,000/- अर्थदण्ड सहित 7 वर्ष के कठोर कारावास से दंडादिष्ट - उसने स्वयं स्वीकार किया है कि उसने आहत के सिर पर लाठी से दो चोटें कारित की जिसके परिणामस्वरूप ललाटास्थि भंग हुई - अतः जारी नोटिस केवल दंडादेश की मात्रा तक सीमित - अभिनिर्धारित - चूंकि ललाटास्थि भंग हुई है जो कि अपराध को भा.द.सं. की धारा 320 के अंतर्गत परिभाषित घोर उपहति की परिभाषा में लाती है - उच्च न्यायालय ने अपीलार्थी को उचित रूप से भा.द.सं. की धारा 325 के अंतर्गत दोषसिद्ध किया - समस्त परिस्थितियों पर विचार करने पर, चूंकि दुर्घटना अचानक झगड़े और आवेश में आने का परिणाम थी, 7 वर्ष का दंडादेश अत्याधिक है - उक्त को कम कर 3 वर्ष किया गया - अपील अंशतः मंजूर।

J U D G M E N T

The Judgment of the Court was delivered by :
R. BANUMATHI, J. :- Leave granted

2. This appeal arises out of the judgment dated 01.08.2013 passed by the High Court of Madhya Pradesh at Jabalpur in Criminal Appeal No.935 of

2004 whereby the High Court partly allowed the appeal thereby modifying the conviction of the appellant-Sakharam under Section 307 IPC to Section 325 IPC and, sentencing him to undergo rigorous imprisonment for seven years and to pay a fine of Rs.2,000/-with default clause.

3. Briefly stated case of the prosecution is that complainant-Ramnath (PW- 1) lives in village-Devrimaal and runs a flourmill and also an agriculturist. On 09.06.2002 at about 6.00 p.m., when Ramnath-PW- 1 was working at his flourmill, Raju came to PW- 1's flourmill and asked him whether Ramnath called Jogi Lodhi for a meal in Jhalar function to which the complainant replied in the negative and on this issue there was a wordy altercation between them. At about 7:30 p.m., when Ramnath was returning back from his flourmill in front of one Prahlad Vishwakarma's house, Raju wrongfully restrained him and started quarrelling with him. At that time Vipatlal-grandfather of Raju came thereon with *lathi* and hit the complainant-Ramnath's head. On hearing the hues and cries of the fight, from the complainant's side, his nephew Santu Lodhi (PW-2) and his younger brother Badri Lodhi came to the spot and from the side of the accused Raju's father-Tularam armed with a sharp iron rod (*Ballam*) and appellant-Sakharam armed with *lathi* came to the spot. Accused Tularam pierced his *Ballam* on the left side of the chest of Badri, when complainant-Ramnath(PW 1) tried to prevent, Tularam also attacked Ramnath on his left shoulder with the *Ballam*. Appellant-Sakharam caused two *lathi* blows on the head of Santu-PW-2 due to which he became unconscious. Raju threw Ramnath (PW- 1) on the ground due to which Ramnath (PW- 1) sustained head injuries. On hearing the noise, Jogi Lodhi (PW-10), Mahasingh (PW-5), Shivsingh Gond (PW-8) came to the spot and intervened to stop the fight. Badri succumbed to injuries.

4. On the complaint lodged by complainant-Ramnath (PW-1), FIR was registered in FIR No.58 of 2002 under Sections 341, 323, 324, 302 and 34 IPC at police station Chand, District Chhindwara, Madhya Pradesh. Injured Santu (PW-2) was sent to the hospital for treatment. ASI-V.P. Mishra (PW-16) took up the investigation and after due investigation chargesheet was filed against Tularam, appellant-Sakharam, Raju and Vipatlal.

5. Upon consideration of evidence, Additional Sessions Judge, Chhindwada, held that the prosecution has established the guilt of the accused beyond reasonable doubt. Trial court vide its judgment dated 28.05.2004 convicted accused-Vipatlal and Raju under Sections 323 and 323 read with

Section 34 IPC respectively and each of them were sentenced to undergo three months rigorous imprisonment. Raju was also convicted under Section 341 IPC and a fine of Rs.500 / - imposed on him with default clause. Accused Tularam and accused appellant-Sakharam were convicted under Sections 302, 302 IPC read with Section 34 IPC respectively and each of them were sentenced to undergo imprisonment for life with a fine of Rs.2 ,000/- with default clause. They were also convicted under Sections 307 read with Section 34 IPC, 307 IPC respectively and each of them were sentenced to undergo ten years rigorous imprisonment with a fine of Rs.500/- with default clause.

6. Being aggrieved by the conviction and sentence awarded to them by the Additional Sessions Judge, the accused-Tularam and appellant- Sakharam preferred criminal appeal before the High Court of Madhya Pradesh Bench at Jabalpur. Conviction of accused-Tularam under Section 302 IPC was confirmed. High Court vide impugned judgment dated 01.08.2013 partly allowed appellant-Sakharam's appeal setting aside his conviction under Section 302 IPC and modified his conviction under Section 307 IPC as conviction under Section 325 IPC and sentenced him to undergo rigorous imprisonment for seven years with a fine of Rs.2,000/-. This appeal assails the correctness of the conviction of the appellant-Sakharam under Section 325 IPC and the sentence of imprisonment imposed upon him.

7. Learned counsel for the appellant Mr. Himanshu Dubey contended that a quarrel took place between the parties and the incident happened all of a sudden and without prior meeting of mind and accused-appellant had no common intention to assault the complainant parties. It was submitted that Dr. Moitra-PW- 15 did not opine about the nature of injuries caused to Santu-PW-2 and in the absence of evidence to prove that the injuries sustained by PW-2 were grievous injuries, the High Court erred in convicting the appellant under Section 325 IPC. It was submitted that the sentence of imprisonment of seven years imposed on the appellant is harsh and excessive and prayed for reduction of the sentence.

8. Learned counsel for the respondent Mr. Naveen submitted that the appellant caused two blows on the head of Santu (PW-2) and considering the gravity of the offence and the injuries, the High Court rightly awarded the sentence of seven years and the same warrants no interference.

9. Key witness Ramnath (PW- 1) has clearly deposed that the appellant

attacked Santu (PW-2) with *lathi* on his head and his statement was further corroborated by the testimonies of Maltibai (PW-3), Mahasingh (PW-5), Shanta Bai (PW-7), Shiv Singh (PW-8), Jogi (PW- 10) and Horilal (PW-11). Appellant himself claims that he intervened to prevent the fight, he himself has admitted that he has caused two injuries with *lathi* on the head of Santu-PW-2. In the light of the concurrent findings of the courts below and the admission of the appellant, in the SLP, notice was issued only limited to the quantum of sentence.

10. Insofar as the injuries sustained by Santu-PW-2, injury No. 1 was found to be a lacerated wound size 2 x ½ cm deep upto the skin on the right side of the head; injury No.2 was a lacerated wound size 2 x ½ cm deep upto the skin on the left side of the head. Dr. Moitra - PW-15 opined that both the injuries were inflicted by a blunt and hard object. X-ray report (Ex. P-23) revealed that there was a fracture of the frontal bone of the head of Santu and there was a callus. Dr. Moitra-PW-15 neither gave any opinion regarding nature of injuries caused to Santu (PW-2) nor the questions were put to him.

11. 'Grievous hurt' is defined in Section 320 IPC. To make out the offence of voluntarily causing grievous hurt, there must be a specific hurt voluntarily inflicted and coming within the eight kinds of hurt enumerated in Section 320 IPC. By perusal of X-ray report (Ex. P-23), it is evident that PW-2 sustained fracture or dislocation of the bone which clearly falls in the category of grievous hurt as expressly mentioned in clause (7) of Section 320 IPC. The fracture or dislocation of bone is considered grievous hurt because it causes great pain and suffering to the injured person. Even though Dr. Moitra-PW- 15 was not questioned about the nature of the injuries, fracture of the frontal bone would bring the offence within the definition of 'grievous hurt'. Having regard to the nature of injuries and the X-ray report, in our view, the High Court rightly convicted the appellant under Section 325 IPC and the same cannot be modified.

12. For conviction under Section 325 IPC, the High Court imposed seven years rigorous imprisonment. The imposition of sentence is always a matter of discretion of the Court. In imposing the sentence, Judge must consider variety of factors and circumstances and overall view of the situation and impose appropriate sentence. The measure of punishment in a given case must depend upon nature of the offence, the conduct of the accused and unprotected state of victim. The Supreme Court will not interfere with the sentence unless this

Court finds that the discretion has been exercised arbitrarily or capriciously or on unsound principles or that the lower court or the High Court has not taken into account any relevant factor in imposing the sentence. In the present case, when the complainant was returning from the flourmill, Raju restrained him and there was a wordy altercation. On hearing the hues and cries, both complainant party and accused party gathered and there was a fight and in which the appellant inflicted two *lathi* blows on Santu-PW-2. As the occurrence was a sudden fight and in a fit of passion the appellant inflicted injuries on Santu PW-2. In our view, the sentence of imprisonment of seven years imposed on the appellant is excessive and the same is to be reduced.

13. While confirming the conviction under Section 325 IPC, the sentence of imprisonment of seven years imposed on him is reduced to three years and this appeal is partly allowed.

Appeal partly allowed.

I.L.R. [2016] M.P., 5

WRIT APPEAL

Before Mr. Justice M.C. Garg & Mr. Justice Sheel Nagu

W.A. No. 89/2014 (Gwalior) decided on 21 November, 2014

STATE OF M.P. & ors.

...Appellants

Vs.

MOOLCHAND UPADHYAY & ors.

...Respondents

Uchcha Nyayalaya (Khand Nyayapeeth Ko Appeal) Adhiniyam, M.P. 2005 (14 of 2006), Section 2 and Limitation Act (36 of 1963), Section 5 - Condonation of delay - Delay of three years - Impugned order passed on the basis of judgment passed in another case against which Writ Appeal was already dismissed- Govt. Advocate clearly opined to comply with the impugned order- Appeal was filed only after issuance of notice for contempt - Held - Action on the part of State shows high handedness in not complying with the order of Court - Application for condonation of delay dismissed with cost of Rs. 25,000/-.

(Paras 5 to 7)

उच्च न्यायालय (खण्ड न्यायपीठ को अपील) अधिनियम, म.प्र., 2005 (2006 का 14), धारा 2 एवं परिसीमा अधिनियम (1963 का 36), धारा 5 - विलंब के लिये माफी - तीन वर्ष का विलंब - अन्य प्रकरण में पारित निर्णय, जिसके विरुद्ध रिट अपील पहले ही खारिज हो चुकी है, के आधार पर आक्षेपित आदेश पारित किया

गया – सरकारी अधिकृत ने आक्षेपित आदेश का अनुपालन करने का स्पष्ट अभिमत दिया है – अवमानना का नोटिस जारी होने के पश्चात् ही अपील प्रस्तुत की गयी – अतिनिर्धारित – शासन की ओर से न्यायालय के आदेश का अनुपालन न करने की कार्यवाही मनमानी दर्शाती है – विलंब के लिये माफी का आवेदन रु. 25,000/- के व्यय के साथ खारिज।

B. Raj Pandey, G.A. for the appellants.

M.S. Rana, for the respondents.

(Supplied: Paragraph numbers)

ORDER

The Order of the Court was delivered by :
M.C. GARG, J. :- This writ appeal filed under Section 2(1) of the Madhya Pradesh Uchcha Nyayalya (Khand Nyay Peeth Ko Appeal) Adhiniyam, 2005 assails the final order passed by learned Single Judge on 15.12.2010 in W.P. No. 2022/2008.

2. Heard on I.A. No. 1487/14.

3. This is an application seeking condonation of delay in filing of this writ appeal which has been filed against the order passed on 15.12.2010 after about three years.

Para 2 of this application reads as under:

“That legal opinion was sought in the matter on 16.03.2011, in which it has been advised that there is no scope in filing the appeal in the matter and it has been directed that competent authority is required to decide the matter in respect of time bound promotion to the concerning employees. It has been further advised in case employees are not entitled to receive the benefit of time bound scale, authorities are free to reject their representation keeping in view the aforesaid legal advice given, but no action has been taken immediately. Thereafter authorities have received contempt notice on 08.07.2013 in which this Hon'ble Court has directed to comply with the orders. On the basis of aforesaid legal opinion, authorities have rejected the prayer of the respondents herein holding therein

that because the respondents are work charge contingency paid employee, therefore they are entitled to any benefit of Kramonnati under the Policy Annexure P-1, because under the policy itself it has been specifically mentioned that the policy is applicable to the employees who are working under the regular establishment and admittedly the respondents herein were working under the work charge contingency. It means respondents herein were only engaged for specific work and because the work is continuously, therefore as per Rules framed by the State Government, they are receiving the payment as per work charge contingency rules.”

4. Thus, it shows that the appellants have no regard even for their own law officers. They sent the matter for legal opinion firstly on 16.03.2011, even though the order was passed on 15.12.2010.

5. It is only after a contempt petition was filed against them, they considered it appropriate to call a second opinion for filing of this writ appeal. This shows high handedness on the part of the State in not complying with the order of this Court.

6. We also find in this case that the impugned order is basically reiteration of the earlier order passed by this Court in W.P No. 1070/2003 in the case of *K.L. Asre Vs. State of Madhya Pradesh*. Appellants are unable to explain, as to why they have not challenged the order passed in *K.L. Asre's* case, which was delivered on 07.11.2005 and a writ appeal filed against that order was dismissed by the Principal Seat of this Court in W.A. No. 1248/2009 vide order dated 19.05.2010.

7. Despite this settled legal position, the appellants sought to challenge this order, that too after three years, irrespective of the fact that they could not succeed in challenging the order of *K.L. Asre*(Supra).

8. In view of the aforesaid, I.A. No. 1487/14 is dismissed with cost of Rs. 25,000/- to be payable in favour of M.P.State Legal Service Authorities and as a sequel thereto, the writ appeal also stands dismissed.

Appeal dismissed.

I.L.R. [2016] M.P., 8

WRIT APPEAL

Before Mr. Justice Rajendra Menon & Mr. Justice S.K. Seth

W.A. No. 661/2015 (Jabalpur) decided on 7 September, 2015

DURJAN AHIRWAR

...Appellant

Vs.

STATE OF M.P. & anr.

...Respondents

(Alongwith W.A. No. 662/2015)

A. Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, M.P. 2005 (14 of 2006), Section 2(1) - Interlocutory order - Any order, even though interlocutory in nature decides a question/issue finally or affects a vital and valuable rights which may cause injustice to a person, the same is not an interlocutory order - Writ Appeal maintainable. (Para 4)

क. उच्च न्यायालय (खण्ड न्यायपीठ को अपील) अधिनियम, म.प्र., 2005 (2006 का 14), धारा 2(1) - अन्तर्वर्ती आदेश - कोई भी आदेश, भले ही अन्तर्वर्ती प्रकृति का हो, किसी प्रश्न/विवाद को अंतिम रूप से निर्णीत करता हो अथवा महत्वपूर्ण एवं मूल्यवान अधिकारों को प्रभावित करता हो जिससे किसी व्यक्ति के साथ अन्याय कारित हो, वह अंतर्वर्ती आदेश नहीं है - रिट अपील पोषणीय।

B. Industrial Disputes Act (14 of 1947), Section 17-B - Appellants were reinstated during the pendency of writ petition filed against the award of labour Court but only last pay drawn as per Section 17-B is being paid and not regular salary - Held - Section 17-B will apply only when during pendency of matter the employee is not reinstated and therefore by way of subsistence allowance he is paid full wages last drawn - However in case employee is reinstated, the concept of last wages drawn will not apply - The employer has to pay wages as prescribed under the law for the work which employee is discharging. (Paras 5 to 11)

ख. औद्योगिक विवाद अधिनियम (1947 का 14), धारा 17-बी - श्रम न्यायालय के अवार्ड के विरुद्ध प्रस्तुत की गयी रिट याचिका के लंबन के दौरान अपीलार्थियों को बहाल किया गया परंतु धारा 17-बी के अनुसार केवल अंतिम आहरित वेतन का ही भुगतान किया जा रहा है और न कि नियमित वेतन - अभिनिर्धारित - धारा 17-बी केवल तभी लागू होगी जब मामले के लंबन के दौरान कर्मचारी को बहाल नहीं किया जाता और इसलिए गुजारा भत्ते के माध्यम से उसे

अंतिम आहरित पूर्ण मजदूरी का भुगतान किया जाता है – तथापि यदि कर्मचारी बहाल किया जाता है तो आहरित अंतिम मजदूरी की संकल्पना लागू नहीं होगी – नियोक्ता को कर्मचारी द्वारा निर्वहन किये जा रहे कार्य के लिये विधि के अंतर्गत विहित की गयी मजदूरी का भुगतान करना होगा।

Cases referred :

2007 (3) MPHT 376 (FB), (1992) 2 SCC 106, (1999) 9 SCC 64, (2001) 5 SCC 169, (1992) 64 FLR 741 (MP).

Vijay Tripathi, for the appellant.

Pushpendra Yadav, G.A. for the respondents.

ORDER

The Order of the Court was delivered by :
RAJENDRA MENON, J. :- As common question of law and facts are involved in both the appeals, they are being disposed of by this common order.

2. Appellants were employed in the Higher Educational Department of the State Government and their services were terminated. This resulted in a dispute being raised under the Industrial Disputes Act, 1947 and on failure of conciliation the matter was referred for adjudication to a Labour Court. The Labour Court passed an award, held the termination to be illegal and directed for reinstatement of the appellants with 25% back wages.

3. Challenging the awards, the writ petitions filed by the State Government are pending before the learned writ Court. During the pendency of the writ petitions in compliance to the provision of section 17-B of the Industrial Disputes Act, 1947 (hereinafter referred to as 'Act' for short) the departmental authority started paying to the appellants full wages last drawn by them in accordance with the stipulations contained in section 17-B of the Act. Inter alia contending that the appellants have been reinstated in service and as they are discharging their duties regularly they are entitled to current wages of the post on which they are working and payment of full wages last drawn is not proper, interlocutory applications seeking current wages were filed, the same having been rejected by the impugned order by the writ Court, these appeals under section 2(1) of the M.P. Uchha Nyayalaya (Khand Nyayapeeth Ko Appeal), Adhiniyam, 2005.

4. A preliminary objection is raised by Shri Pushpendra Yadav, learned

G.A., to say that against an interlocutory order passed in a pending petition, a writ appeal is not maintainable, however Shri Vijay-Tripathi, learned counsel for appellant invited our attention to a Full Bench judgment of this Court in the case of *Arvind Kumar Jain and others Vs. State of Madhya Pradesh and others*[2007 (3) MPHT 376 (FB)] to say that if the orders passed, even though interlocutory in nature decides a issue or question finally or affects a vital and valuable rights which may cause injustice to a person, the same is not an interlocutory order, but a final order with regard to that question and against such an order the writ appeal is maintainable. In the present case, even though the order is interlocutory in nature, but the order finally decides the issue with regard to entitlement of the petitioners to get salary for the work they are discharging on their reinstatement, pending adjudication of the writ petition. That being so, it is in the nature of a final order and in view of the law laid down in the case of *Arvind Kumar Jain* (supra), we are not inclined to uphold the preliminary objection. The preliminary objection raised by the Government Advocate is rejected.

5. The question warranting consideration is as to whether the appellants are entitled to current wages as claimed for in the interlocutory applications or they are only entitled to full wages last drawn as stipulated under section 17-B of the Act.

The learned writ Court has taken note of the judgment rendered by the Supreme Court in the case of *Dena Bank Vs. Kiritikumar T. Patel*[(1992) 2 SCC 106] followed in the case of *Rajaram Maize Products Vs. Brij Lal and another*[(1999) 9 SCC 64] and has rejected the application.

6. In the case of *Kiritikumar T. Patel* (supra) the question was with regard to interpretation of words "**full wages last drawn**" occurring in section 17-B of the Act and its meaning. Hon'ble the Supreme Court took note of the principles governing section 17-B of the Act, the aims and objects for which the provision was incorporated and held that words "**full wages last drawn**" occurring in section 17-B of the Act means the wages last drawn by the employee/workman at the time of his termination and would not include the current wages or the increase in the wages due to revision of salary, increments etc. It would only mean the wages drawn at the time of termination. However it may be taken note of that in the case of *Kiritikumar T. Patel* (supra) during the pendency of matter before the High Court the workman concerned was

not reinstated in service, but in lieu of reinstatement he was only granted the benefit of section 17-B by paying to him the full wages last drawn and when the benefit of revision of pay with increment was not granted the dispute arose. While interpreting the provision of section 17-B of the Act, the Hon'ble Supreme Court in the aforesaid case in para 21 & 23 found that section 17-B of the Act has been enacted by the Parliament with a view to give some relief to a workman, who is ordered to be reinstated under the award of Labour Court or Industrial Tribunal during the pendency of the proceedings when the award is under challenge before the High Court or the Supreme Court. It was found that the principles underlying for enactment of the provision was to relieve to certain extent the hardship caused to the workman due to the delay in implementing an award passed by the Labour Court or the Industrial Tribunal, as the case may be and it was found that payment which was to be made under section 17-B of the Act, was in the nature of subsistence allowance which could not be recovered or refundable from the workman, even if the award is set aside by the High Court or Supreme Court. As this was the nature and character of the amount paid, it was found that the Parliament thought it appropriate to extend the relief of last wages drawn when his services were terminated and therefore after taking note of the aforesaid objection the expression "**full wages last drawn**" was held to mean the wages which would have been drawn by the workman at the time of termination and not the wages which would have been drawn if he would have continued in service had the order of termination not passed.

7. After holding so and disagreeing with the observation made by certain High Courts in this regard in para 23 the Hon'ble Supreme Court further holds that inspite of the provisions as contained in section 17-B of the Act and the provisions conferring right to the workman for payment of full wages last drawn, the power of the High Court and Supreme Court under Article 226 and 136 of the Constitution of India are not curtailed or reduced. It was held that inspite of provision of section 17-B of the Act, the same does not in any way precluded the High Court or the Supreme Court to pass an order directing payment of higher amount to the workman if such higher amount is considered necessary in the interest of justice. It was held that such a direction would be de hors the provision contained in section 17-B of the Act within the powers of the High Court or Supreme Court under Article 226 and 136 of the Constitution, we may reproduce the observations made by the Supreme

Court in this regard :

"23. As regards the powers of the High Court and the Supreme Court under Articles 226 and 136 of the Constitution, it may be stated that Section 17-B, by conferring a right on the workman to be paid the amount of full wages last drawn by him during the pendency of the proceeding involving challenge to the award of the Labour Court, Industrial Tribunal or National Tribunal in the High Court or the Supreme Court which amount is not refundable or recoverable in the event of the award being set aside, does not in any way preclude the High Court or the Supreme Court to pass an order directing payment of a higher amount to the workman if such higher amount is considered necessary in the interest of justice. Such a direction would be dehors the provisions contained in Section 17-B and while giving the direction, the court may also give directions regarding refund or recovery of the excess amount in the event of the award being set aside."

(Emphasis supplied)

Thereafter while concluding in para 24 the Supreme Court made the following observations :

"The said direction of the learned Single Judge, which has been upheld by the Division Bench of the High Court in the impugned judgment, cannot be upheld since it amounts to directing payment of wages which would have been drawn by the respondent if he had been reinstated and not the full wages last drawn by him."

(Emphasis supplied)

It is therefore clear from the aforesaid observation of Supreme Court that the provision of section 17-B of the Act is intended to be used for the purpose of granting subsistence allowance to the employee who inspite of award of reinstatement passed is unable to reap the benefit of reinstatement and is kept out of service. This is more clear, if we go through the provision of section 17-B of the Act, which contemplates that the workman should file an affidavit showing that he was not in gainful employment and was not earning

the wages during the pendency of proceedings before the High Court or Supreme Court, therefore the workman is entitled to receive the benefit under section 17-B of the Act only if he is unemployed and not earning any wages or remuneration or is not gainfully employed when the challenge to the award is pending.

8. The judgment of *Kiritikumar T. Patel* (supra) was again considered by the Supreme Court in the case of *Dena Bank Vs. Ghanshyam* [(2001) 5 SCC 169] and therein also the aims and object and provision of section 17-B of the Act was considered and similar principle is laid down, however in the case of *Ghanshyam* (supra) it was found that the High Court in the order impugned before the Supreme Court had directed for reinstatement of the employee in pursuance to the award while passing an interim order of stay with regard to payment of back wages and in the event of employee not being reinstated directed for paying the full salary for the post in which he would have been reinstated, the Supreme Court took note of the powers available to the High Court under Article 226 of the Constitution, as observed in the case of *Kiritikumar T. Patel* (supra) and held that the Court may depending on the fact of the case direct payment for full wages last drawn under section 17-B of the Act or may pass such order as it may deem appropriate, interlocutory in nature exercising its jurisdiction under Article 226 of the Constitution and after taking note of the stay order granted by the High Court in para 11 observed as under :-

"A plain reading of this order shows that the High Court stayed the award of the Labour Court on condition of the appellant reinstating the respondent in the service and paying him salary regularly in accordance with law. It needs no debate to conclude that on reinstatement the respondent will be entitled to his salary on a par with other employees working in the same post and it is in that meaning that the said clause "and is paid his salary regularly in accordance with law", has to be understood."

(Emphasis supplied)

9. From the aforesaid observation, it is clear that the High Court was empowered to direct for reinstatement of workman and pay him regular salary in accordance with law and it has been observed by the Supreme Court that

it needs no debate to conclude that on reinstatement the workman may be entitled to his salary at par with other employee working on the same post and paid salary regularly in accordance with law. If we read the two judgments of the Supreme Court in the case of *Kiritikumar T. Patel and Ghanshyam* (supra), we find that when an award is passed directing reinstatement of a workman and when such an award is challenged in the High Court or Supreme Court in case the employee/workman is not reinstated and he is not gainfully employed anywhere and if he files an affidavit in this regard, he is entitled to payment of last wages drawn, in accordance with section 17-B of the Act, however inspite of aforesaid the High Court exercising jurisdiction under Article 226 and Supreme Court exercising jurisdiction under Article 136 of the Constitution can pass such orders as may be in the interest of justice depending under the facts and circumstances of the case and in case by virtue of order passed by the High Court or Supreme Court or even if the employer on his own reinstate the employee, takes work from him and the employee is discharging his duties alongwith other employees then the employer is duty bound to pay salary at par with other employees, in such a case the workman or the employee is not to be paid the last wages drawn under section 17-B of the Act, but actual wages for the work he is discharging. A complete reading of section 17-B of the Act and law laid down by the Supreme Court as discussed herein clearly indicates that the question of granting benefit under section 17-B and the last wages drawn will not arise where during the pendency of the matter before the High Court or Supreme Court the employee/workman is reinstated and discharges duties, then he is entitled to current salary at par with other employees as this is the requirement of law and also on the principle of equal work for equal wages. That apart, this is also the principle laid by the Coordinate Bench of this Court in the case of *M.P. State Co-operative Marketing Federation Ltd., Vs. Presiding Officer, Labour Court, Raipur and another* [(1992) 64 FLR 741 (MP)]. In the said case in para 3, 4 & 5 the following directions were issued :-

"3. It is however, difficult to agree with petitioner's contention that this Court has no jurisdiction to grant an ad-interim relief prayed for in the above said Interlocutory application. The provision of Section 17-B I.D. Act, cannot causes the plenary powers of this Court to grant any ad-interim relief necessitated by the circumstances of the case and

warranted in the ends of justice. This Court's direction of stay of the impugned award did not oblige the petitioner to reinstate the respondent no.2. The reinstatement has been done by the petitioner voluntarily. Had the petitioner not reinstated respondent No.2 the latter would have had the choice to take employment elsewhere and in that case the petitioner would have been absolved of its liability to pay him wages under Section 17-B I.D. Act. Therefore, when the petitioner has on his own reinstated respondent No.2 and is taking full work from him the argument that it's liability for payment of wages to respondent no.2 at the current rates minus payment already made will arise only after the final decision in this petition cannot be accepted. There appears to be no justifiable reasons why the payment of full wages to respondent No.2 should be allowed to remain in abeyance till the final decision of this petition. The petitioner's liabilities to pay respondent No.2 wages at the current rate for the period after his reinstatement remains unaltered whether the petition succeeds or is dismissed. When this is the case, there can be no reasonable cause to permit postponement of such payment till disposal of this petition.

4. Provision of Section 17-B of the Act is attracted only if the award of reinstatement pending consideration in the High Court or the Supreme Court is not eliminated by the employer and can, as is clear from its terms not applicable when the employee is reinstated by the employer pending proceeding against the award.

5. In result, I.A.No.6909/90 is allowed. The petitioner is directed to pay to respondent No.2 the current wages from the date of his reinstatement in service."

(Emphasis supplied)

10. In this case also the employee/workman was reinstated and as he was discharging the duty the directions issued was to pay him wages at current rate on his reinstatement. That being the legal position, we are unable to uphold the order passed by the learned writ Court, to say that in view of the

judgment rendered by the Supreme Court in the case of *Kiritikumar T. Patel* (supra), the appellants are only entitled to last wages drawn, we hold that in case appellants are reinstated and are discharging duties, they are entitled to be paid the current wages. Therefore the matter is remanded back to the learned writ Court to consider as to whether the employees/workmen have been reinstated, are still working and if so they be paid the current wages. We find from the record that even though appellants have come out with a case that they have been reinstated, but the respondents have not given any specific reply to the same and therefore we deem it appropriate to leave it to the learned writ Court to decide this aspect of the matter.

11. The principle governing the grant of benefit i.e. full wages last drawn under section 17-B of the Act will apply only when during the pendency of the matter before the High Court or Supreme Court the employee or the workman is not reinstated and therefore by way of subsistence allowance he is granted the full wages last drawn. However, in case where by virtue of any interim direction passed by the High Court or the Supreme Court or the employer on his own thought it appropriate to take work from the workman concerned and therefore reinstated him, the concept of last wages drawn under section 17-B of the Act will not apply. In such a case where the employee is reinstated and is discharging the duty and the employer is taking work and taking benefit of the labour put in by the employee, which is consequently used for the benefit of the employer for his business or for the advantage of the establishment, the employer has to pay wages as prescribed under the law for the work which the employee or the workman is discharging on reinstatement.. In such a case after taking work from the employee, the employer cannot say that he will pay something less to the employee than his entitlement, this cannot be permitted. It would amount to violation of provisions of law laid down under the Minimum Wages Act, rules and regulation governing contract of service, and right of a person to receive wages prescribed for the work he is discharging and therefore in cases where the employee is reinstated in service pending finalization of the dispute by the High Court or the Supreme Court, as the case may be, the workman/employee would be entitled to current wages of the post and not last wages drawn as permissible under section 17-B of the Act.

12. With the aforesaid, these appeals stand allowed and disposed of.

Appeal allowed.

I.L.R. [2016] M.P., 17

WRIT PETITION

Before Mr. Justice Krishn Kumar Lahoti, Acting Chief Justice &

Mr. Justice U.C. Maheshwari

W.P. No. 14525/2012 (PIL) (Jabalpur) decided on 29 October, 2013

KALYANI PANDEY (KU.) (DR.)

...Petitioner

Vs.

UNION OF INDIA & ors.

...Respondents

(Alongwith W.P.No. 9991/2012)

A. Constitution - Article 226 - Investigation by CBI - Police did not register FIR inspite of information regarding commission of cognizable offence - Inspite of handing over of investigation to a senior officer on the instruction of the General Administration Department, accused persons were not arrested - Interrogation of eye witnesses and other witnesses and their statements u/s 161 of Cr.P.C. also not recorded - FIR was also registered belatedly and that too on the intervention of the Court - In view of material discrepancy in investigation and bias attitude of State Investigating agency in holding investigation is apparent - Impugned investigation and filing of charge-sheet cannot be said to be impartial - Direction issued for fresh and impartial investigation by CBI and till filing of fresh charge-sheet, proceedings in trial pending in Sessions Court shall remain stayed. (Paras 21 to 31)

क. संविधान - अनुच्छेद 226 - सी.बी.आई. द्वारा अन्वेषण - संज्ञेय अपराध घटित होने की सूचना के बावजूद पुलिस ने प्रथम सूचना प्रतिवेदन दर्ज नहीं किया - सामान्य प्रशासन विभाग के निदेश पर वरिष्ठ अधिकारी को अन्वेषण सौंपे जाने के बावजूद, अभियुक्तों को गिरफ्तार नहीं किया गया - प्रत्यक्षदर्शी साक्षियों एवं अन्य साक्षियों से पूछताछ तथा दंड प्रक्रिया संहिता की धारा 161 के अंतर्गत उनके कथन भी अभिलिखित नहीं किये गये - प्रथम सूचना प्रतिवेदन भी विलंब से दर्ज किया गया एवं वह भी न्यायालय के मध्यक्षों से - अन्वेषण के दौरान राज्य अन्वेषण एजेंसी द्वारा अन्वेषण में तात्त्विक त्रुटियाँ एवं पक्षपातपूर्ण बर्ताव प्रकट होता है - आक्षेपित अन्वेषण एवं प्रस्तुत आरोपपत्र निष्पक्ष नहीं कहा जा सकता - सी.बी.आई. को नये सिरे से निष्पक्ष अन्वेषण हेतु निदेश जारी किया गया एवं नया आरोप पत्र प्रस्तुत करने तक सत्र न्यायालय में लंबित विचारण की कार्यवाहियाँ स्थगित रहेंगी।

B. Constitution - Article 226 - Investigation by CBI -

Charge-sheet already filed - Merely charge-sheet has been filed it will not take away the power of the Court to direct for fresh investigation by CBI. (Para 27).

ख. संविधान - अनुच्छेद 226 - सी.बी.आई. द्वारा अन्वेषण - आरोप पत्र पहले ही प्रस्तुत किया जा चुका है - केवल आरोप पत्र प्रस्तुत किये जाने से न्यायालय की सी.बी.आई. को नये सिरे से अन्वेषण किये जाने के निदेश देने की शक्ति को वापस नहीं लिया जा सकता।

Case referred :

(2011) 5 SCC 79.

Ahadulla Usmanmi, for the petitioner in W.P. No. 14525/2012.

Siddharth Datt, for the petitioner in W.P. No. 9991/2012.

Mohd. Amjad, for the respondent No. 1 in W.P. No. 14525/2012.

P.K. Kaurav, Addl. A.G. for the respondent/State Nos. 2 to 7 in W.P. No. 14525/2012 and for respondents/State in W.P. No. 9991/2012.

Surendra Singh with Sanjeev Kumar Patel, for the respondent Nos. 8, 9 & 10 in W.P. No. 14525/2012.

ORDER

The Order of the Court - was delivered by :
U.C.MAHESHWARI, J. :- The petitioner being Spokesman of Congress-I of State of M.P., Ex- MLA of State of M.P., Ex-Mayor of Jabalpur Municipal Corporation, and also Office bearer of various social institutions, has filed this regular Public Interest Litigation petition for the following reliefs:-

“1. That this Hon’ble Court may kindly be pleased to issue a writ in the nature of Mandamus to the Competent Authority to depute the Central Bureau of Investigation (C.B.I.) to investigate into the murder of the deceased.

2. That this Hon’ble Court may be pleased to issue a writ in nature of Mandamus for providing police protection to the family members of the deceased, including the eye witness of the incident, thereby protecting the life, limb and property at the hands of local police administration and State Administration.

3. That this Hon’ble Court may be pleased to issue a writ in nature of Certiorari thereby quashing the Crime No.169/12 and Crime No.170/12, registered at Police Station Suatala,

District Narsinghpur.

4. Any other relief which this Hon'ble Court deem fit and proper may also be awarded to the petitioner in the nature of public interest"

2. The facts giving rise to this petition in short are that, Shri Ambika Prasad Dubey @ Munna Maharaj, being resident of village Jhilpinadhana of District Narsinghpur was a volunteer of Indian National Congress-I Party, and the president of Van Samiti of his village. He was also involved in social services of the Tribals of such area, pursuant to that majority of Tribals had remained with the National Congress-I political party and on account of this reason, party had won some election. At present, the wife of younger brother of Ambika Prasad Dubey is Sarpach (sic:sarpanch) of the village. He being devoted to the social work, was popular in the vicinity for raising the voice against the police and State machinery with respect of the atrocities carried out by its officials on the Aadisavi (sic:Adivasi) and the public at large.

3. On dated 15.6.2012, in his village some food material grain under a Scheme for distribution to the Adivasi through Sahakari Samiti brought to the village by some persons in a Vehicle bearing registration no. MP20-GA-278. Ambika Prasad had suspected the commodity of such material lesser in comparison stated in its built (sic:bilty), on which he had raised an objection and parked the vehicle in the Society Bhawan and carried out the weight of substance in which same was found to be less by 5 Quintals and 64 Kg, for which he had also prepared Panchnamas (Annexure-P-1 and P-2) in presence of the villagers. On account of his aforesaid public work and action to protect the rights of tribales, the officials of the administration and along with some other persons including police authorities had a grudge with him and due to this reasons, the persons involved in the aforesaid defalcation of sending the less ration to the village had send the police party of Police Station Suatala District Narsinghpur headed by respondent no.8 Ashutosh Chand, Station House Officer along with 10-12 police personnel armed with their service weapons to the village on 16.6.2012 at 4.00 PM. Soon after reaching to the village, they had started abusing to Ambika Prasad Dubey (since deceased) with filthy languages with a threat to kill him made assault on him on which, his daughter Aarti Dubey, son Abhishek with the help of the villagers intervened to save him. At the same time, the respondent no.8 and his police party fellowman had opened the fire by their service weapon on Ambika Prasad

Dubey by which, he had sustained four arm injuries on his person. Thereafter, the respondent no.8 accompanied with police officials including the respondents no.9 and 10 Shankar Patel and Rajesh Jaat, Head Constables of aforesaid Police Station Suatala, had ran away from such place. After sustaining the injuries by Ambika Prasad, his daughter and other villagers picked up him from the place of the incident and while taking him to Medical College Jabalpur, on the way, due to aforesaid injuries of firearm, he had died. After his death, his younger brother went to the Police Station Suatala for lodging the report, but his report was not registered against the commission of the aforesaid murder by the police officials. On the contrary, the respondents no.8 to 10 and their fellowman in order to shield their own misdeed and commission of the offence had got registered false cases against the deceased Ambika Prasad Dubey, his son Abhishek with some other persons of the village as Crime No.169/12, for the offence punishable under Sections 394, 342 of I.P.C. and Crime No.170/12 for the offence under Sections 147, 148, 149, 294, 353, 307, 332, 186, 224 and 225 of I.P.C. read with Section 3 (iv) of the Lok Sampatti Hani Adhiniyam. The same were registered with the intention to create pressure on the family members of the deceased and other victims of the police assault, so that they should not raise their voice against the commission of murder of Ambika Prasad Dubey by the above mentioned police officials. The copies of First Information Report of Crime No. 169/12 and Crime No.170/12 are annexed with the petition as Annexure-P-3 and P-4.

4. Subsequent to aforesaid, the daughter of the deceased namely Aarti Dubey had served a report in writing in this regard at Police Station Garha, SDM Gorakhpur, Collector and Superintendent of Police Jabalpur on dated 17.6.2012 for registration of the offence. Such reports are annexed with the petition as Annexure-P-5 and P-6.

5. As on the way to the Hospital, Ambika Prasad Dubey had died then, his corpus was send to Medical College Jabalpur to carry out the postmortem, the same was conducted. According to postmortem report (Annexure-P-7) Ambika Prasad died due to gun shot injuries as on his person four gun shot injuries were found.

6. Inspite making efforts when the report of the incident was not registered against the aforesaid police officials then, the daughter of the deceased, Aarti Dubey had sent a written report dated 21.6.2012 (Annexure-P-8) to the Hon'ble Chief Justice of High Court of M.P., with a prayer for registration of

the offence against the above-mentioned accused persons and for investigation through Central Bureau of Investigation, with a further prayer to protect the life, limb and property of the family members of the Ambika Prasad Dubey and the alleged eye witnesses of the incident from the police atrocities. Subsequent to that, looking to the gravity of the offence by the police officials, in order to shield the commission of their aforesaid offence, the respondent no.4 Collector Narsinghpur vide its order No.6454 dated 19.6.2012, had directed to hold the Magisterial Enquiry of the incident. In consequence of which, the SDM Gadarwara vide its letter dated 9.7.2012 had published Aam Soochna (Annexure-P-9) (public notice). On publication of such notice, the family member of the deceased and the eye witnesses of the incident by submitting letter dated 12.7.2012 (Annexure-P-10) before such SDM had shown their apprehension at the hands of the police, in giving the evidence in the Magisterial Inquiry.

7. Considering the aforesaid complaint of Aarati Dubey dated 21.6.2012 (Annexure-P-8) send to the Hon'ble Chief Justice, a Letter Petition W.P. No.9991/12 was registered in the Madhya Pradesh High Court at Jabalpur. On listing such petition on 18.7.2012 for hearing, the State counsel had taken time to seek instructions from the Collector and S.P. Narsinghpur. A copy of such order is annexed as Annexure-P-11. After filing the return (Annexure-A-12) on behalf of the State authorities on dated 28.7.2012, such petition was listed on 30.7.2012, on such date, the Single Bench of this Court had ordered (Anexure-P-13) for listing the petition after a month to enable the learned Government Advocate to furnish the report regarding steps taken by the State.

8. In para 7 of the aforesaid return, *inter-alia* stated that "As Magisterial Inquiry has already been ordered by the District Magistrate, Narsinghpur, investigation done by the police is ceased". As per the petitioner the State has protected the police official, who are real culprit of the alleged offence. In such circumstance, the petitioner being the social worker and political figure of the State and on national level, always working for the upliftment of the downtrodden and specially women, had visited the place of the incident, met with the victims of the police atrocities and protested against such commission of murder "in the garb of Khaki".

9. In the aforesaid circumstances, inspite making efforts when the First Information Report of the victims regarding murder of Ambika Prasad Dubey

was neither registered nor any investigation in that regard was started by the police authorities on which, the petitioner demanded for investigation of the alleged offence by the CBI and for registration of the FIR. As per the averments, the local administration are hands in gloves with the respondents and instead of lodging the First Information Report, they are shielding the culprits of the offence and in order to show their bonafide, the District Magistrate Narsinghpur has ordered for Magisterial Inquiry, knowing fully well that the alleged offence was committed by the respondents no.8 to 10 and other their official are, the cognizable offence and registration of the FIR of the same under Section 154 of Cr.P.C. was necessary but inspite that, they have not registered the same and in the absence of such FIR against the police officials, no investigation of the offence was started. The initiation of Magisterial enquiry by the District Administration through SDM do not have any legal entity in the eye of law specially when there is *prima facie* cognizable offence of murder was committed by the police officials; as such directing the magisterial enquiry by the District Administration was nonest and with the object of tampering the evidence of the murder, in order to shield the commission of the offence committed by the respondents no.8 to 10. With these submissions this public interest litigation for conduction of investigation of the matter through Central Bureau of Investigation, with the other reliefs as mentioned above, has been filed.

10. In response filed on behalf of the respondent no.1/CBI on dated 4.2.2013 it is contended that specialized investigation agencies of the State Government like Criminal Investigation Department (CID), Special Task Force (STF) etc. functioning in the State of M.P. are having the necessary expertise for conducting the investigation into the allegations mentioned in the petition. So the investigation through Central Bureau of Investigation, (CBI), specialized investigation agency of the Government of India, dealing with the cases of corruption by public servants of Central Government Departments, Public Sector Undertakings etc. and the cases having inter-State or international ramifications, is already over burdened with the work entrusted to it and if the investigation of the present case is directed to be carried out by it then such institution would be put unavoidable strain. It is also stated that CBI has limited resources to investigate the matter and in the lack of wide infrastructure, it would be very strainful for it to carry out the investigation of the aforesaid matter, if the same is directed and handed over to it.

11. In the return filed on behalf of respondent no.2 to 7, the authorities of the State of M.P. the allegations stated in the petition against the police officials respondents no. 8, 9 and 10 the Station House Officer, Head Constables and other officials of the aforesaid Police Station regarding their alleged criminal act murdering Ambika Prasad Dubey, are denied. It is further stated that present petition is nothing but sheer abuse of process of law and the same has been filed as parallel litigation before this Court, while the writ petition No.9991/12, at the instance of Aarti Dubey, daughter of deceased Ambika Prasad Dubey is pending in which after hearing the complainant Aarti Dubey in person on 18.7.2012, the State counsel was directed to seek instructions from the concerned Collector/SP. In response of the same, a detail return dated 27.7.2012 (Annexure-R-1) was filed in such petition, all the factual aspects of the matter were stated. On hearing of such petition on dated 30.7.2012, after taking into consideration the proceedings of Magisterial enquiry carried out at the instance of the District Magistrate Narsinghpur, it was directed that the enquiry should be conducted in a fair and impartial manner, with a further direction to such District Magistrate to hold such enquiry by sitting at a place nearby residence of the deceased Ambika Prasad Dubey. On completion of the Magisterial enquiry, a report (Annexure-R-2) was prepared on dated 30.10.2012. It is further stated that soon after receiving the FSL report, the FIR has been registered against the respondents no.8 Ashutosh Chand, Station House Officer, respondent no.9 and 10 Kripa Shankar Patel and Rajesh Jat, Head Constables and so also against other persons posted at Police Station Suatala as Crime No.340/12 on dated 28.10.2012 for the offence punishable under Sections 302, 304 and 34 of I.P.C. and R.L. Armo, SDO (P) Tendukheda, District Narsinghpur has been appointed as Investigating Officer. In the light of initial return filed in the writ petition No.9991/12, the Single Bench had observed that since the FIR has been lodged against the concerning police officials and the matter is taken into investigation consequently, the writ petition deserves to be disposed of. But, however, considering the request of the counsel of the complainant/petitioner of such writ petition based on illness, the same was adjourned for next hearing. Thereafter on listing the matter on several occasion, the same was adjourned at the instance of the complainant/petitioner of such writ petition. During the pendency of such writ petition, the present petitioner has filed this Public Interest Litigation. In addition to it, it is stated that the FIR has already been lodged against the concerning police officials and the matter

is under active investigation hence, there is no occasion to grant any relief prayed by the petitioner in the instant petition whereas, the Crime No.169/12 and 170/12 registered against the deceased and other persons, deserve to be investigated properly in view of the FSL report and Magisterial enquiry report. It is also stated that accused persons therein are free to avail the recourse available under the law against registration of crime against them. In such premises, the present Public Interest Litigation is nothing but a sponsored litigation at the behest of the persons made accused in the aforesaid Crime No.169/12 and 170/12. With these averments the prayer for dismissal of the petition is made.

12. (a) In response of the petition, on behalf of the respondents no.8, 9 and 10, by denying the averments stated in the petition regarding involvement of such respondents in the murder of Ambika Prasad Dubey, it is stated that the respondent no.8 has not registered any false case at Police Station Suatala as Crime No.169/12 and 170/12 against the deceased Ambika Prasad Dubey and his family members and other eye witnesses of the incident. That these respondents, have been arrayed as accused persons in Crime No. 340/12 of Police Station Suatala for the offence under Sections 302, 304 read with Section 34 of I.P.C. on false allegations and present public interest litigation has also been filed on false pretext. As such on the date of alleged incident i.e. 16.6.2012, a report was lodged at Police Station Suatala by one Govind Parashar, the Manager of the Lead Society, that a truck bearing registration no. MP-20- GA-2781, having PDS wheat for the fair price shop, run by Co-operative Society Suatala, has been apprehended by Ambika Prasad Dubey @ Munna Maharaj along with certain people of village and he has taken away the aforesaid truck to his residence. It was also alleged that besides the truck, three hammals and one Driver, have also been abducted by the said persons. On receiving such complaint at Police Station Suatala, an offence under Sections 394 and 342 of I.P.C. was registered against Ambika Prasad, his son Abhishek Dubey and other unidentified persons at about 3.45 PM. Firstly, the information of such incident was brought to the notice of Superintendent of Police and Collector Narsinghpur by the Manager of Lead Society and on the direction of the S.P. Narsinghpur, TI Suatala, respondent no.8 had registered the above-mentioned First Information Report and looking to the fact that the public property and four individuals are in illegal custody of said Ambika Prasad, he along with police party had rushed to village Jhilpinidhana. A copy of First Information Report dated 16.6.2012 is annexed as Annexure-R-8/1.

(According to such FIR the alleged incident was happened on 15.6.2012 while the original FIR was registered on 16.6.2012.) The alleged Dehati Nalishi is not placed on record along with the return.

(b) Apart from the aforesaid, it is further stated that in response of the aforesaid FIR, on reaching the spot the police party had found that the deceased Ambika Prasad Dubey, surrounded the truck with the mob of 20- 25 persons, armed with country made pistol, lathies, swords and stones. The respondent no.8 had conversation with Ambika Prasad and tried to convince him that he was in illegal custody of truck and had abducted four individuals and advised him to release the truck and four persons, but such advise was not adhere to by the deceased-Ambika Prasad, therefore, police party had no other option except to arrest the said Ambika Prasad. At the time of his arrest, the mob at the instigation of Ambika Prasad, had attacked on the police party and son of deceased Abhishek Dubey, had fired with country made pistol on Head Constable Rajesh Jaat, by which he had sustained the gun shot injuries on his right hand. The papers relating to his treatment in some hospital is annexed as Annexure-R.8/2. The said mob led by Ambika Prasad and Abhishek Dubey, had not only assaulted police party but had also damaged the police vehicle. During the aforesaid assault by the mob, certain persons had tried to snatch the rifle of Head Constable Rajesh Jaat and in this process, the fire had taken place from such rifle which after hitting the hard surface, had broken down into pieces and one piece of such bullet has hit the deceased Ambika Prasad Dubey.

(c) It is also mentioned that there was no intention of the respondents no.8 to 10, to commit any offence, but the alleged incident had taken place due to attack by the mob and on trying to snatch the service rifle.

(d) That in view of the aforesaid criminal act of Ambika Prasad, Abhishek Dubey, Shravan Thakur, Bhikam Mallah, Nabbu Thakur, Bhupat Thakur and Dashrath Thakur, a Crime No.170/12 for the offence punishable under Sections 147, 148, 149, 294, 353, 332, 186, 224 and 225 of I.P.C. was registered against them. The papers of registered criminal case are annexed as Annexure-R.8/4. In further averments it is stated that the respondent no.9 Kripashankar Patel (wrongly mentioned as Shankar Patel) was not present on the date of incident as he was on leave for 10 days from 12.6.2012 because of marriage of his daughter Nandni scheduled on 18.6.2012, and he had resumed the duties on 24.6.2012. In support of this contention the copy of Roznamacha

entries along with the marriage invitation card are annexed as Annexure-R.8/5. In such premises, the allegations regarding presence of said Head Constable, respondent no.9 is apparently false and he has been wrongly implicated in the aforesaid Crime No.340/12.

(e) A copy of Roznamacha Sanha dated 16.6.2012 is also annexed as Annexure-R.8/6. According to which, the respondents no.8 and 9 had not gone from the Police Station to the place of alleged incident. It is also stated that deceased Ambika Prasad Dubey, was hard core criminal and against him the offence punishable under I.P.C. as well as under Forest Act, were registered. In this regard the entries (Annexure-R-8/7) are also made in the village crime Book of Police Station Suatala. With these submissions the prayer for dismissal of the present petition is made.

13. Apart the aforesaid, on behalf of the State on dated 24.1.2013, by filing the I.A. No. 1232/13, the prayer for grant of two months time to investigate the matter and submit the report was made. In such I.A., *inter alia* it is stated that MLA Sunil Jaiswal, Ajay Singh and Choudhary Rakesh Singh have raised the question no.299,296 and 297 in the Legislative Assembly under Rule 138(1) i.e. the question of immediate attention of the Minister of Administrative Department where the allegations were made that on account of action of the police, there were fear amongst the people on which, the Minister assured that the investigation of the aforesaid Crime No.170/12 and Crime No.340/12 will be conducted through the Officer not below the rank of Superintendent of Police. Pursuant to that, on such assurance of Minister of Administrative Department vide order dated 20.12.2012, the Director General of Police constituted the four members team as a special team under the headship of Surendra Jain, Superintendent of Police, AJK Jabalpur to investigate the matter. Pursuant to that, the further investigation of the abovementioned crime was handed over to the aforesaid S.P. AJK, Jabalpur on dated 7.1.2013. In such premises, the case diary had not remained in possession of police officials of District Narsinghpur, the same was handed over to the Special Team constituted under the headship of aforesaid police official Surendra Jain, who visited the place of incident at the village Jhilpanidhana on 15.1.2013 where, they had tried to record the statements of eye witnesses and also to collect necessary evidence to proceed for arrest of the accused persons, but only the statements of Vishnu Prasad Dubey, the elder brother of the deceased and Narbar Singh, the resident of same village, could have been recorded, while the other family members of the deceased and other persons of the village have not recorded

their statement to the police. No eye witnesses had come forward to give statement. Despite all possible efforts made by SIT, no sufficient evidence could be collected on such date. Copies of statement of the aforesaid both the witnesses are annexed with I.A., as Annexure-A.4. It is also stated that the investigation has been carried out by SIT sincerely and further efforts are being made to reveal as to who are the main culprits and as to whose weapon the fire was occurred and whether there was any intention to kill somebody. It is also stated that the investigation is going on and as on today it cannot be said that as to whether the offence of Sections 302 and 304 of I.P.C. and other offence has actually been committed or not. On the basis of report in writing, the crime has been registered and after investigation if it is found that the accused are guilty of committing the offence and if there is sufficient evidence against them, then they will be arrested and the challan will be submitted before the Court.

14. In response of the return of the respondent no.1 as well as the return of the respondents no.8 to 10, so also the aforesaid application submitted by the respondents no.2 to 7, State authorities, the rejoinder was filed on behalf of the petitioner on 13.3.2013, stating that the respondent no.1 should have seen that the alleged incident was committed by the local police official under the political patronage and thereby, they have murdered Ambika Prasad Dubey by making gun shot on him and thereafter, in order to shield their criminal act, has registered the offence against the deceased and his family members and the other victims of the police assault and in spite of commission of the cognizable offence by the police officials i.e. respondents no.8 to 10 and others by misusing and abusing the authority inflicted excess of police atrocities and only by the intervention of this Court in order to show their bonafide, the local police has registered the offence very belatedly on 28.10.2012, as Crime No. 340/12 against the abovementioned police officials under Section 304 of I.P.C. with Sections 302, 34 of I.P.C. with intention to bring the case in a narrow campus for an offence of culpable homicide, not amounting to murder. In such premises, the public at large including the victim of the police assault and the family members of the deceased has no credibility and confidence on any of the investigation Agency of the State Government.

15. It is further stated that after registration of the aforesaid offence, at very belated stage the investigating Officer R.L. Armo was appointed to investigate the matter, who at the initial stage had defended the police official from the alleged crime in the writ petition No.9991/12, filed by the daughter

of the deceased and later on, on filing the rejoinder by the petitioner in such writ petition in response of the return of the respondents no.2 to 7, State Investigation Agency has constituted Special Investigation Team headed by SP AJK, Jabalpur, by the order of Director General of Police. The matter was also raised before the Assembly of the State from where assurance was given to the members of the Legislative Assembly to appoint the Officer not below the rank of Superintendent of Police, then the investigation was handed over to such S.P. AJK. Jabalpur. In such situation, the victim of the police assault and also the public at large have lost the confidence in the investigation carried out by the State Investigating Agency. It is further stated (sic:stated) that mere perusal of para 9 of the application dated 22.1.2013 of the respondent no.2 to 7, it is apparent that inspite registration of the cognizable offence against the respondents no.8 to 10 so also against the other police officials, none of them was arrested. On the contrary, it was stated before this Court that after investigation if it is found that the accused are guilty of committing the offence and if there is sufficient evidence against them, they will be arrested and challan will be submitted before the Court. Such conduct of the high rank police official i.e. Superintendent of Police AJK Jabalpur, who has been handed over the investigation of Crime No.340/12, he also tried to save the police officials from their alleged offence of Section 302 of I.P.C. so also save them from their arrest. In such premises the present case is a case of rarest of rare case. The law protectors have taken law into their own hands and after breaking the law, misusing and abusing their position, committed the offence of murder and thereafter, shielded the commission of offence, tampered the evidence of offence committed by them and whole investigating agency from bottom to top are bent upon to shield the commission of the offence committed by the police personnel. So in such premises, the accused persons may not be prosecuted, punished for their criminal act and in such premises, the present case is a fit case for which investigation by the CBI/respondent no.1 is essential and necessary for doing the complete justice and enforcing the fundamental rights as held by the apex Court.

16. In compliance of the order dated 9.1.2013 the respondents no.2 to 7 have filed the report on dated 5.4.2013 in which it is contended that on dated 23.3.2013, the SIT has arrested the then T.I. Ashutosh Chand, respondent no.8, Rajat Jatt Head Constable respondent no.9 Shikhar @ Shiv Kumar Udenia, Head Constable respondent no.10 and other accused of Crime No.340/12. It is also stated that although the name of four persons were

mentioned, but during investigation it has been found that the Head Constable Kripa Shanker Patel, was on leave on the date of the alleged incident and he had not participate in the entire incident.

17. Apart the aforesaid, on behalf of the petitioner, after filing the charge-sheet of the aforesaid Crime No.340/12, copy of the same is placed on the record along with I.A. No. 10343/12, contented that such chargesheet has been filed by the Police Station Suatala District Narsinghpur, in a biased and un-transparent manner just to save the accused persons from the alleged offence committed by them. During the course of arguments such copy of the charge-sheet was referred by the counsel of the parties.

18. Counsel of the parties of this petition as well as of writ petition No.9991/12 were heard at length, keeping in view their arguments advanced, we have carefully gone through the averments of the petition, as well as the aforesaid returns of all the respondents, applications so also the rejoinder filed on behalf of the petitioner.

19. Before filing the present public interest litigation petition, on receiving the complaint letter from Aarti Dubey, daughter of deceased Ambika Prasad Dubey, a letter writ petition No.9991/12 was registered. The same is also pending for adjudication before the learned Single Bench. The record of such writ petition is placed along with the present petition, so while hearing this petition, we have also heard the respective counsel of such other writ petition because the identical question, to direct the investigation of Crime No.340/12 of Police Station Suatala District Narsinghpur, to Central Bureau of Investigation, is involved in both the petitions. Pursuant to it, such petition is being also decided by this order.

20. As per case of the petitioner, the deceased Ambika Prasad Dubey @ Munna Maharaj being political and social worker of village Jhilpinadhana District Narsinghpur, was working in the welfare of the villagers and on dated 15.6.2012, some ration came to the village for its distribution to the Adivasi by Sahakari Samiti and when it was verified by the deceased that commodities are less to the extent of 5 quintal and 64 Kg to the quantity mentioned in the bilty on which, he had made an objection and had got the said vehicle kept in the Society Bhawan of the village and also prepared Panchnama in presence of the villagers i.e. Annexure-A-1 and A-2. On account of which, the persons who were involved in this defalcation of sending the less ration for distribution, had send the police party of Police Station Suatala, District Narsinghpur,

headed by respondent no.8 Station House Officer along with 10-12 police personnel armed with their service weapon, who after reaching to the village on 16.6.2012 at about 4.00 PM, had started abusing the deceased with filthy languages and threatened him to kill and had started assaulted on him, at that time, her daughter Aarti Dubey and son Abhishek Dubey had intervened to save him with the help of the villagers on which, the respondent no.8, police party, fellowman had fired by their weapons on the person of Ambika Prasad Dubey (since deceased) by which, he had sustained four fire arm injuries on his person, as revealed from the post-mortem report of his corpus. After causing such incident, the respondent no.8, accompanied with his police officials had ran away from the place of the incident and the relative of the deceased, villagers and the eye witnesses of the incident were terrified and shocked came under apprehension because of the murder at the hands of the police as they were eye witnesses of the commission of the murder of the Ambika Prasad Dubey. It appears from the record that while taking the Ambika Prasad Dubey to Medical College Jabalpur on the way, he had died and on reaching to the Hospital he was declared dead on which, the brother of the deceased went to the Police Station Suatala to lodge the report, but his report was not registered as it was against the police officials. On the contrary, in order to shield and save the police officials, Crime No.169/12 for the offence punishable under Sections 394, 342 of I.P.C. and Crime No.170/12, for the offence punishable under Sections 147, 148, 149, 294, 353, 307, 332, 186, 224, 225 of I.P.C. read with Section 3 & 5 of Lok Sampatti Hani Adhinyam were registered against the deceased, his son Abhishek so also other persons which is evident from the copies of FIR Annexure-P-3 and P/4. But it is apparent that no offence regarding murder of Ambika Prasad Dubey due to injury of the gun shot was registered at such Police Station while, such fact was very well in the knowledge of the respondent no.8 Station House Officer, as well as of the Head Constables respondents no.9 and 10. It is also stated that when the report of the brother of the deceased was not registered at Police Suatala, then the daughter of the deceased had given the report to Police Station Garha and S.D.M. Gorakhpur, Jabalpur regarding murder of her father on 17.6.2012 by the police officials. A copy of such written report is available on record as Annexure-P-5 and P-6. According to postmortem report (Annexure-P-7) four gun shot anti-mortem injuries were found on the person of the deceased. In spite such report, when the offence was not registered then initially said Aarti Dubey wrote a letter to the Hon'ble Chief Justice on which the letter writ petition was registered and in such petition the learned Single Bench of

this Court, monitored the matter by issuing directions from time to time to the State authorities. On behalf of the State authorities, with respect of the alleged offence stated by the Aarti Dubey-complainant, the Magisterial enquiry was set-up by the District Magistrate Narsinghpur, by appointing SDM Gadarwara as Enquiry Officer and in the garb of such enquiry, the investigation which could have been carried out by the police was ceased.

21. It is undisputed fact on record, that inspite (sic:inspite) making report for the cognizable offence by the complainant Aarti Dubey, the crime was not registered against the accused persons till 28.10.2012, although in the return, on behalf of the State it is stated that after receiving the FSL report regarding service rifle of Police Station Suatala and Magisterial Enquiry Report, the crime was registered against the aforesaid police officials for the offence punishable under Sections 302, 304/34 of IPC., but inspite registration of such offence, although at belated stage against the respondents no.8 to 10 and others, none of them was arrested for a long period. Then the investigation Officer A.R. Armo, SDO (P) Narsighpur was appointed but for one reason or another, the respondents authorities were giving assurance on every date of hearing of writ petition (Letter Petition) that investigation of the case is going on and as soon as the evidence comes that the police officials have committed such offence, then they will be arrested, but till 21.2.2013, inspite handing over the investigation of the case to aforesaid Senior police official of the State Superintendent of Police, AJK Jabalpur, on the instruction of the Ministry of General Administration, the accused were not arrested and it appears that such Senior Police Officer Surendra Jain had also extended the shelter to culprits of the case.

22. It is apparent from the case diary and the police report filed under Section 173 (2) of Cr.P.C. that in Crime No.340/12, the interrogation of the various eye witnesses including the complainant Aarti Dubey, Abhishek Dubey son of the deceased so also other villagers, was not carried out and there statements were not recorded by the police under Section 161 of Cr.P.C. In this regard, no reasons are stated by the concerning police officials in their respective return. In the oral submissions, it was said that inspite making efforts to trace out the witnesses of the alleged incident, they were not available so their interrogatory statements could not be recorded and it appears from the case diary that only on one or two occasions from the date of the registration of the offence till filing the charge-sheet, against the respondents no.8 and 10 so also against some other accused, continuous or sincere efforts to trace out

the witnesses as per existing legal position, were not taken/carried out by the Investigating Agency. It shows that from the very beginning of the case i.e. from the date of alleged incident i.e. 16.6.2013, the impugned offence being committed by the Station House Officer, Head Constables and other police officials of the Police Station Suatala, the Investigation Officer of the case so also the other senior police officials have tried to save the aforesaid persons from the offence of the murder of Ambika Prasad Dubey, and with this intention instead to register the offence against the culprit police officials for committing the murder of Ambika Prasad Dubey by gun shot on dated 16.6.2012, to create the pressure on the family of the deceased and the victims so also other alleged eye witnesses of the incident, on false pretext the Crime No.170/12 was registered at Police Station Suatala, not only against the deceased but also against his son Abhishek Dubey and other eye witnesses of the incident and thereafter, the investigation of such crime was immediately started against the family members of the deceased, victims and others.

23. Simultaneously, it appears from the First Information Report of Crime No. 169/12 registered at Police Station Suatala that the same was not registered on the date of incident i.e. on 15.6.2012 when the alleged ration came to the village from the alleged vehicle and the same was less in quantity. By preparing the Panchnama the same was kept as it is, in the Vehicle by the deceased in the Society Bhawan of village Jhilpinadhana. It appears that the report of Crime No. 169/12, was registered on the basis of some Dehati Nalishi of Crime No.02/12, (although the copy of the same is not placed on record) on 16.6.2012, at 6.05 PM against the deceased and his son Abhishek Dubey and others for the offence punishable under Section 394 and 342 of I.P.C. alleging that by using the criminal force against the driver and other persons of the vehicle, the deceased had taken the custody of such vehicle and the ration by committing the offence of robbery also abducted the persons deployed on the vehicle.

24. In the aforesaid premises, prima facie it appears that till reaching the police party to the aforesaid village of the deceased, no offence was registered against the deceased Ambika Prasad Dubey. So, it appears that such Dehati Nalishi, on which the FIR of Crime No.169/2012 is based, was registered ante-time after happening the aforesaid incident of murder of the Ambika Prasad Dubey with the hands of the respondents no.8 to 10 and fellowmen. It is apparent that the investigation of such case was started from the same date on which the offence was registered but for one reason or another, the FIR was

not registered against the police officials for the alleged offence of murder.

25. It is settled proposition that as soon as the information of the cognizable offence is received at the Police Station, then there is no option with the Station House Officer except to register the offence, but in the present case, the incident was happened on 16.6.2012, inspite that the First Information Report was not registered for a long period and only on intervention of the Court at the instance of Aarti Dubey, daughter of the deceased in Letter writ petition No.9991/12, the FIR was registered at very belated stage on 28.10.2012 by stating the reasons that on receiving the report of FSL, in respect of service weapon and the Magisterial Enquiry, the offence has been established. In the available scenario such reason does not appear to be believable and digestible. In such FIR, the story stated in the aforesaid First Information Reports of Crime Nos. 169/12 and 170/12 registered at the same Police Station, to save the respondents no. 8, 10 and others, was stated and it appears that the earlier investigating Officer A.R. Armo, Dy, S.P. and subsequent to that Surendra Jain, SP AJK Jabalpur, have also tried to save the respondents No. 8 to 10 from their alleged offence.

26. Apart the aforesaid, it is apparent from the copy of charge-sheet of Crime No. 340/12 that till filing the same, the interrogatory statements of Aarti Dubey, the daughter of the deceased, who gave the report in writing to Police Station Garha, Abhishek, the son of the deceased and various other material eye witnesses of the occurrence have not been recorded and reasons whatsoever have been assigned about non-recording the interrogatory statement of such witness. The reasons shown in the case diary prima facie do not appear to be convincing. The case diary of the case has also not been kept in accordance with the procedure prescribed under Section 163 of Cr.P.C. by proper paging and day-to-day basis. So, in such premises, the entire investigation carried by the State Agencies does not appear to be impartial or fair. In such premises, it is apparent that investigation Agency has not carried out the investigation independently, fairly and impartially.

27. In the light of aforesaid material discrepancy in investigation the bias attitude of the State Investigating Agency in holding the investigation is apparent. Therefore, the entire investigation has been carried out in a very casual manner with intention to save the police officials by the State investigation Agency and the police report filed along with the charge sheet, are not acceptable, pursuant to it even after filing the charge sheets, there is no option with the

Court except to direct the fresh independent investigation of the aforesaid case of murder of Ambika Prasad Dubey through respondent no.1, Central Bureau of Investigation, an independent and impartial investigation Agency so the reality of the impugned offence could be investigated and the real facts, complete evidence and culprits could be brought before the Court for their prosecution.

28. Our aforesaid approach is fully fortified by the decision of the apex Court announced in the matter of *Narmada Bai vs State of Gujarat and others* reported in [2011] 5 SCC 79 in which it was held as under:-

“27. The first issue i.e. (A) as in the case on hand also arose in the case of *Rubabbuddin Sheikh*. The factual details therein will be discussed in the later paragraphs. With regard to the similar objection as to further investigation by the CBI, this Court considered the following cases:-

- (i) *Vineet Narain vs. Union of India*,
- (ii) *Union of India vs. Sushil Kumar Modi*,
- (iii) *Rajiv Ranjan Singh 'Lalan' (8) vs. Union of India*,
- (iv) *Hari Singh vs. State of U.P.*,
- (v) *Aleque Padamsee vs. Union of India*,
- (vi) *M.C. Mehta vs. Union of India*,
- (vii) *R.S. Sodhi vs. State of U.P.*,
- (viii) *Ramesh Kumari vs. State (NCT of Delhi)*,
- (ix) *Kashmeri Devi vs. Delhi Administration*,
- (x) *Gudalure M.J. Cherian vs. Union of India*, and
- (xi) *Punjab & Haryana High Court Bar Assn. Vs. State of Punjab*,

And concluded in paras 60-61 as under:- (*Rubabbuddin Sheikh* case, SCC pp.216-17)

“60. Therefore, in view of our discussions made hereinabove, it is difficult to accept the contentions of Mr Rohatgi, learned Senior Counsel appearing for the State of Gujarat that after the charge-sheet is submitted in the court in the criminal

proceeding it was not open for this Court or even for the High Court to direct investigation of the case to be handed over to CBI or to any independent agency. Therefore, it can safely be concluded that in an appropriate case when the court feels that the investigation by the police authorities is not in the proper direction and in order to do complete justice in the case and as the high police officials are involved in the said crime, it was always open to the court to hand over the investigation to the independent agency like CBI. It cannot be said that after the charge-sheet is submitted, the court is not empowered, in an appropriate case, to hand over the investigation to an independent agency like CBI.

61. Keeping this discussion in mind, that is to say, in an appropriate case, the court is empowered to hand over the investigation to an independent agency like CBI even when the charge-sheet has been submitted, we now deal with the facts of this case whether such investigation should be transferred to the CBI Authorities or any other independent agency in spite of the fact that the charge-sheet has been submitted in court. On this ground, we have carefully examined the eight action taken reports submitted by the State police authorities before us and also the various materials produced and the submissions of the learned counsel for both the parties.”
(Emphasis supplied)

59. It is not in dispute that it is the age-old maxim that justice must not only be done but must be seen to be done. The fact that in the case of murder of an associate of Tulsiram Prajapati, Senior police officials and a senior politician were accused which may shake the confidence of public in investigation conducted by the State Police. If the majesty of rule of law is to be upheld and if it is to be ensured that the guilty are punished in accordance with law notwithstanding their status and authority which they might have enjoyed, it is desirable to entrust the investigation to the CBI:

61. In *Mohd. Anis vs. Union of India and Ors.*, it has been observed by this Court that:

“5.....Fair and impartial investigation by an independent agency, not involved in the controversy is the demand of public interest. If the investigation is by an agency, which is allegedly privy to the dispute, the credibility of the investigation will be doubted and that will be contrary to the public interest as well as the interest of justice” (SCC p.148, para 5)

“2.....Doubts were expressed regarding fairness of investigation as it was feared that as the local police was alleged to be involved in the encounter, the investigation by an officer of the UP Cadre may not be impartial.” (SCC p.147, para 2)

62. In another decision of this Court in *R.S. Sodhi vs. State of U.P.*, the following conclusion is relevant (SCC pp.144-45, para 2)

“2.....We have perused the events that have taken place since the incidents but we are refraining from entering upon the details thereof lest it may prejudice any party but we think that since the accusations are directed against the local police personnel it would be desirable to entrust the investigation to an independent agency like the Central Bureau of Investigation so that all concerned including the relatives of the deceased may feel assured that an independent agency is looking into the matter and that would lend the final outcome of the investigation credibility. However faithfully the local police may carry out the investigation, the same will lack credibility since the allegations are against them. It is only with that in mind that we having thought it both advisable and desirable as well as in the interest of justice to entrust the investigation to the Central Bureau of Investigation forthwith and we do hope that it would complete the investigation at an early date so that those involved in the occurrences, one way or the other, may be brought to book. We direct accordingly.”

63. In both these decisions, this Court refrained from

expressing any opinion on the allegations made by either side but thought it wise to have the incident investigated by an independent agency like the CBI so that it may bear credibility. This Court felt that no matter how faithfully and honestly the local police may carry out the investigation, the same will lack credibility as allegations were directed against them. This Court, therefore, thought it both desirable and advisable and in the interest of justice to entrust the investigation to the CBI so that it may complete the investigation at an early date. It was clearly stated that in so ordering no reflection either on the local police of the State Government was intended. This Court merely acted in public interest.

64. The above decisions and the principles stated therein have been referred to and followed by this Court in *Rubbabuddin Sheikh* where also it was held that considering the fact that the allegations have been leveled against higher level police officers, despite the investigation made by the police authorities of the State of Gujarat, ordered investigation by the CBI. Without entering into the allegations leveled by either of the parties, we are of the view that it would be prudent and advisable to transfer the investigation to an independent agency. It is trite law that accused persons do not have a say in the matter of appointment of an investigation agency. The accused persons cannot choose as to which investigation agency must investigate the alleged offence committed by them.

65. In view of our discussions and submission of learned counsel on either side and keeping in mind the earlier directions given by this Court, although, charge-sheet has been filed by the State of Gujarat after a gap of 3 ½ years after the incident, that too after pronouncement of judgment in *Rubbabuddin's* case and considering the nature of crime that has been allegedly committed not by any third party but by the police personnel of the State of Gujarat, we are satisfied that the investigation conducted and concluded in the present case by the State police cannot be accepted. In view of various circumstances highlighted and in the light of the involvement of police officials of the State of Gujarat and police officers of two other States,

i.e. Andhra Pradesh and Rajasthan, it would not be desirable to allow the Gujarat State Police to continue with the investigation, accordingly, to meet the ends of justice and in the public interest, we feel that the CBI should be directed to take the investigation.”

29. In the aforesaid premises, the impugned investigation and the charge-sheet being based on such investigation which can not be said to be fair, impartial, is not acceptable so we direct a fresh and impartial investigation of the case relating to murder of Ambika Prasad Dubey @ Munna Maharaj through respondent no.1-Central Bureau of Investigation, and till such investigation and filing the charge-sheet, the trial of the sessions case of Crime No. 340/12, registered at Police Station Suatala, District Narsinghpur, pending in the Court of some Sessions Judge Narsinghpur, is hereby stayed.

30. So far as the submission on behalf of the respondent no.1-CBI, as stated in it's return that it is already overburdened with the work and did not possess sufficient infrastructure to carry out the investigation of each and every case in which competent Agency of State is not in a position to do the fair and impartial investigation is concerned, it is suffice to say that in view of the aforesaid discussions, it has been revealed that the investigation of the case has not been carried out by the State agency impartially against the Station House Officer and the other officials of Police Station Suatala and in such premises, such investigation and filed charge-sheets is not acceptable, so the matter requires fresh investigation through some impartial Agency. But there is no any other independent agency in the State of M.P. to investigate such matter fair and impartially. So in view of the aforesaid cited decision of the apex Court, there is no option except to direct to carry out the investigation of the impugned case through the respondent no.1 CBI. True it is that the CBI is overburdened with the work and may be having less infrastructure but in the available circumstances to do justice with the deceased and victimized family, except this there is no any way to carry out the fresh investigation of the matter. Hence, the respondent no.1 Central Bureau of Investigation, is directed to investigate the impugned case along with the crime No. 169/12 and Crime No.170/12 registered at the same Police Station where the Crime No.340/12 is registered and submit it's report before the appropriate Court. Pursuant to this, the Director General of Police of State of Madhya Pradesh and also the other concerning officials of its Department are directed to handover the case diary and all other necessary papers relating to the aforesaid murder of Ambika

Prasad Dubey, so also of the case diaries of Crime No. 169/12 and Crime No. 170/12 to the authorities of the respondent no.1 Central Bureau of Investigation within 30 days, to investigate the case in compliance of the aforesaid direction.

31. Besides the aforesaid, in the available circumstances as discussed above, the State authorities the District Magistrate and the Superintendent of Police of Narsinghpur, are directed to provide the appropriate securities to the complainant Aarti Dubey and other family members of the deceased Ambika Prasad Dubey @ Munna Maharaj, so also to the all material and eye witnesses of the case till the fresh investigation is completed, charge sheet is filed and their evidence is recorded by the Court to them, and their properties.

32. In view of the aforesaid directions, no separate order is required in writ petition No.9991/12, hence such writ petition being identical, is also allowed with the same terms as mentioned above. Copy of this order be also kept with the record of such W.P. No.9991/12. The Central Bureau of Investigation after investigation and filing challan in the matter shall submit a report to the Registry of this Court within 90 days from the date of communication of this order.

33. Both the petitions are allowed as indicated above.

Petition allowed.

I.L.R. [2016] M.P., 39

WRIT PETITION

Before Mr. Justice U.C. Maheshwari

W.P. No. 19928/2013 (Jabalpur) decided on 22 November, 2013

HARIDAS KACCHI

...Petitioner

Vs.

JAY KRISHAN PURANIK

...Respondent

Civil Procedure Code (5 of 1908), Order 9 Rule 7 - Setting aside of exparte proceedings - Trial Court not only refused to set aside exparte proceedings but did not allow the defendant to participate in subsequent proceedings - Held - Unless sufficient cause is shown, the trial Court is not bound to set aside exparte proceedings and not bound to start the proceedings afresh - However, defendants cannot be deprived to participate in further proceedings - Petition allowed. (Para 4)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 9 नियम 7 – एकपक्षीय कार्यवाहियों को अपास्त किया जाना – विचारण न्यायालय ने न केवल एकपक्षीय कार्यवाहियों को अपास्त करने से मना किया है बल्कि प्रतिवादी को पश्चात्वर्ती कार्यवाहियों में भाग लेने नहीं दिया – अभिनिर्धारित – जब तक पर्याप्त कारण न दर्शाया जाये, विचारण न्यायालय एकपक्षीय कार्यवाहियाँ अपास्त करने हेतु बाध्य नहीं है एवं नये सिरे से कार्यवाहियाँ प्रारंभ करने हेतु बाध्य नहीं है – यद्यपि, प्रतिवादीगण को आगे की कार्यवाहियों में भाग लेने से वंचित नहीं किया जा सकता – याचिका मंजूर।

Case referred :

AIR 1964 SC 993.

Sunil Mishra, for the petitioners.

(Supplied: Paragraph numbers)

O R D E R

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

2. The petitioners/defendants no.4 to 9 have filed this petition being aggrieved by the order dated 24.10.2013 passed by Civil Judge Class-II, Chhatarpur in Civil Original Suit No.21-A/2011, whereby their application filed under Order 9 Rule 7 of CPC., for setting aside the exparte order permitting them to participate in the pending suit, has been dismissed, at the stage of recording the evidence of defendants.

3. Having heard, keeping in view the arguments advanced, I have carefully gone through the papers placed on the record along with the impugned order.

4. It is apparent from the impugned order that the trial Court while dismissing the application, have not permitted the petitioners to participate in the matter even from the date of filing the aforesaid application or in any case, from the date of passing the impugned order. Such approach of the trial Court in view of the decision of the apex Court in the matter of *Arjun Singh vs. Mohindra Kumar others* reported in AIR 1964 SC 993 is not sustainable. It is settled principle of law that if any application is filed on behalf of the defendants under order 9 Rule 7 of the CPC., in pending matter for setting aside the exparte order, then the Court is always not bound to set aside the earlier exparte order and also not bound to start the proceedings again from the date on which the exparte order was passed against such defendants unless sufficient cause for setting aside such order is made out by the defendants, but

in any case, the defendants cannot be deprived to participate in the further proceedings of the case from the date of filing the application under Order 9 Rule 7 of CPC., or in any case, from the date of passing the order on such application. So in such premises, the impugned order is hereby set aside and by allowing the impugned application in part, the present petitioners/defendants are permitted to participate in the further proceedings of the impugned civil original suit i.e. from the date of passing the impugned order. Accordingly, this petition is allowed in the absence of other side.

5. It is also observed that if the respondents/plaintiffs or any of them is aggrieved by this order or any part of it, then he/they shall be at liberty to file the appropriate proceedings/application for redressal of his/their dispute.

Certified copy as per rules.

Petition allowed.

I.L.R. [2016] M.P., 41

WRIT PETITION

Before Mr. Justice U.C. Maheshwari

W.P. No. 19916/2013 (Jabalpur) decided on 10 December, 2013

SWATI NAGPURE

...Petitioner

Vs.

SMT. KAMLA NAGPURE

...Respondent

A. Civil Procedure Code (5 of 1908), Order 1 Rule 10 - For impleading attesting witness as a party against whom no relief is claimed - Proposed defendant is only the attesting witness of the document - Unless some allegation is made against such witness to assess the executant of document with some fraud or dishonesty such attesting witness is neither necessary party nor proper party in the suit. (Para 6)

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 1 नियम 10 - ऐसा अनुप्रमाणक साक्षी जिसके विरुद्ध कोई अनुतोष नहीं चाहा गया है, को पक्षकार के रूप में अभियोजित करने हेतु - प्रस्तावित प्रतिवादी केवल दस्तावेज का अनुप्रमाणक साक्षी है - जब तक कि दस्तावेज के निष्पादक का निर्धारण करने के लिए उक्त साक्षी के विरुद्ध किसी कपट या बेईमानी का कोई आरोप नहीं लगाया जाता, उक्त अनुप्रमाणक साक्षी न तो आवश्यक पक्षकार है न ही वाद में उचित पक्षकार है।

B. Civil Procedure Code (5 of 1908), Order 6 Rule 17 - Amendment - Delay - If the application has been filed after the beginning

of the trial and the desired amendment was very well in the knowledge of the petitioner on the date of filing the written statement, the same could not be allowed by the trial Court - Petition dismissed. (Para 9)

ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 6 नियम 17 - संशोधन - विलंब - यदि आवेदन विचारण आरंभ होने के पश्चात् प्रस्तुत किया गया है तथा चाहा गया संशोधन लिखित कथन प्रस्तुत करने की तिथि को भली भांति याची की जानकारी में था, तब उसे विचारण न्यायालय द्वारा मंजूर नहीं किया जा सकता - याचिका खारिज।

Cases referred :

(2012) 8 SCC 384, (2012) 2 SCC 300, (2006) 12 SCC 1, 2012 (3) MPLJ 37(SC), AIR 1973 SC 76, AIR 2011 SC 1353.

Gaurav Tiwari, for the petitioner.

N.K. Salunke, for the respondents.

(Supplied: Paragraph numbers)

ORDER

U.C.MAHESHWARI, J. :- Heard.

2. Petitioner defendant No.3 has filed this petition under Article 227 of the Constitution of India being aggrieved by the order dated 04.10.2013, passed by the 11th Additional District Judge, Bhopal in Regular Civil Suit No.633-A/2011 whereby her application filed under Order 1, Rule 10 of CPC to implead her husband who is a son of respondent No.1 namely Arun Nagpure as defendant in the matter and application under Order 6 Rule 17 of CPC with respect of raising the question regarding maintainability of the suit filed at the stage of recording the evidence of respondent No.1 plaintiff have been dismissed.

3. Petitioner's counsel after taking me through the averments of the petition as well as papers placed on record along with impugned order argued that the aforesaid earlier application under Order 1 Rule 10 of CPC was filed to implead husband of petitioner while the son of respondent No.1 namely Arun Nagpure as defendant in the matter contending that in the alleged sale deed he has signed the same as attesting witness before the Sub Registrar, accordingly he is a necessary party in the matter and in his absence no effective decree could be passed. By way of another application filed under Order 6 Rule 17 of CPC the petitioner wants to insert the pleadings to insert the grounds for

dismissal of the suit according to which the same is not entertainable under the law, but while dismissing such application the trial Court has not considered the relevant facts and circumstances of the matter and has also not considered the law laid down by the Apex court in the matter of *Vidur Impex and Traders Private Limited and others vs. Tosh Apartments Private Limited and others* reported in (2012) 8 SCC 384. He has referred to para 41 of the said judgment. In connection of amendment application he placed his reliance on a decision of the Apex Court in the matter of *J. Samuel and others vs. Gattu Mahesh and others* reported in (2012) 2 SCC 300. He has referred to paras 16 and 18 of the said judgment and prayed to allow the applications by setting aside the impugned order by admitting and allowing this petition.

4. On the other hand such argument is opposed by the counsel of the respondents saying that the impugned order being passed on proper appreciation of the available factual matrix and the existing legal position do not require any interference at this stage. In continuation he said that Arun Nagpure is neither necessary nor proper party in the matter. He also said that respondent No.1 plaintiff is a sole *dominus litus (sic:litis)* of her litigation and she cannot be insisted to implead any person as defendant or plaintiff in the suit contrary to her wish unless the compelling circumstances are available in the matter which is not the situation in the case at hand. He also said that on account of non-joining the necessary party in the matter the respondent No.1 has to face the consequences. So in such premises also the impugned application of Order 1 Rule 10 of CPC was rightly dismissed. He further said that application under Order 6 Rule 17 of CPC was filed at belated stage at the stage of recording the evidence. So in view of the mandatory provision of the proviso of Order 6 Rule 17 of CPC the same has been rightly dismissed by the trial Court. Even otherwise the question of maintainability of the suit being legal question could be considered by the trial Court at any stage even without pleadings of the parties. In such premises, he prayed for dismissal of the petition.

5. Having heard the counsel at length, keeping in view the arguments advanced, I have carefully gone through the papers placed on record along with impugned order so also the aforesaid case law cited by the petitioner's counsel.

6. It is undisputed fact on record that in the alleged sale deed said Arun Nagpure is not a party in any manner. He has signed such document only as an attesting witness and in view of the settled proposition of law that unless

some allegation is made against such witness, to assess the executant of the document with some fraud or dishonest intention, such attesting witness is neither necessary party nor the proper party in the suit. In such premises, Arun Nagpure being attesting witness of the document could neither be treated to be necessary party nor the proper party in the matter. Apart this, the respondent No. 1 is a sole *dominus litus* (*sic: litis*) of her litigation and she cannot be insisted by the Court or by the petitioner to implead any other person as a defendant or plaintiff in her suit. In such premises, it is apparent that she is ready to face the consequences of the non-joining of any person as necessary or proper party in her suit. So in such premises also, the trial Court has not committed any error in dismissing the application of the petitioner filed under Order 1 Rule 10 of CPC.

7. So far as the case law of *Vidur Impex and Traders Private Limited* (supra) cited by the petitioner's counsel is concerned, in such case it is held that Court can at any stage of the proceedings, either on an application made by the parties or otherwise, direct to implead any person as party, whose presence is necessary either as a plaintiff or defendant for passing effective or complete adjudication of the issues involved in the suit or on whose absence an effective order could not be passed in the matter.

8. In view of such principles on examining the case at hand, it is apparent that the presence of Arun Nagpure to adjudicate any question involved in the impugned suit is not required and it is also apparent that respondent No. 1 has not claimed any relief against Arun Nagpure. Thus in such circumstances and looking to the nature of the suit the effective decree could be passed only in presence of existing party and for that purpose also the presence of Arun Nagpure is not required. So the principles laid down in the said case is not helping to the petitioner.

9. Coming to consider the sustainability of the finding of the impugned order whereby amendment application of the petitioner has been dismissed, it is undisputed fact that this application has been filed after beginning the trial i.e. at the stage of recording of evidence of respondent No. 1 and whatsoever amendment has been proposed in the impugned application the same was very well in the knowledge of the petitioner on the date of filing the written statement. So in view of the mandatory provision of the proviso of Order 6 Rule 17 of CPC the same could not have been allowed by the trial Court. In such premises, the trial Court has not committed any error in dismissing the aforesaid application.

10. So far as the case law cited in the matter of *J. Samuel* (supra) is concerned, such case was decided by taking into consideration the factual matrix that one party has stated something and other has denied and there was some subsequent development and on that account the application was considered and allowed which is not the situation in the case at hand.

11. My aforesaid approach affirming the part of impugned order relating to application of Order 6 Rule 17 of CPC is based on the decisions of the Apex Court in the matter of *Ajendraprasadji N. Pandey and Anr. vs. Swami Keshavprakeshdasji N. & ors.* reported in (2006)12 SCC 1 so also in the matter of *J. Samuel and others vs. Gattu Mahesh and others* reported in 2012(3) MPLJ 37(SC).

12. Apart the aforesaid, it is apparent that the impugned order has been passed by the trial Court under the vested discretionary jurisdiction, the same could not be interfered at this stage in writ petition under Article 227 of the Constitution of India or in the revisional jurisdiction as laid down by the Apex Court in the matter of *Managing Director (MIG) Hindustan Aeronautics Ltd. Balanagar vs. Ajit Prasad Tarway* reported in AIR 1973 SC 76 and in the matter of *Kokkanda B. Poondacha & ors. vs. K.D. Ganapathi & anr.* reported in AIR 2011 SC 1353.

13. In view of the aforesaid, I have not found any perversity, illegality, irregularity and impropriety in the impugned order. Consequently, by affirming the same, this petition being devoid of merit is hereby dismissed.

Petition dismissed.

I.L.R. [2016] M.P., 45

WRIT PETITION

Before Mr. Justice S.K. Gangele & Mr. Justice B.D. Rath

W.P. No. 1756/2014 (Gwalior) decided on 1 May, 2014

VIJAY BAJAJ

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

Motor Vehicles Rules, M.P. 1994, Rule 72 - Carriage permit - One application is confined only to one permit for a single route as single permit for two different routes is not permissible. (Para 4)

मोटर यान नियम, म.प्र. 1994, नियम 72 - वाहन अनुज्ञापत्र - एक आवेदन

केवल एकल मार्ग हेतु एक अनुज्ञापत्र के लिये सीमित है क्योंकि दो भिन्न मार्गों के लिए एक अनुज्ञापत्र अनुज्ञेय नहीं।

Case referred :

AIR 1999 MP 1.

R.D. Sharma, for the petitioner.

H.D. Gupta with Suresh Agrawal, for the respondent No. 1.

S.S. Jadon, for the respondent No. 2.

O R D E R

The Order of the Court was delivered by :
B.D.RATHI, J. :- Present petition under Article 226/227 of the Constitution of India has been preferred by the petitioner on being aggrieved by the order dated 6/2/14 as well as 27/4/13 as per Annexures P/1 and P/4 passed by the State Transport Appellate Tribunal, Gwalior, in Revision No.218/13 and by the Regional Transport Authority, Sagar, i.e. respondent No.2, herein, praying for following reliefs:

“(i) Issuing a writ of certiorari or any suitable writ, order or direction by quashing the impugned orders dated 27/4/13 and 6/2/14 (Annexure-P/4 & P/1) passed by the Respondent No.2, RTA and STAT, respectively.

(ii) Passing of any other order/direction, which may deem fit in the facts and circumstances of the case, may also be passed.”

2. On going through the pleadings and averments, it emerges that the petitioner is a holder of regular stage carriage permit bearing No.14/Damoh/2005-06 on Hatta to Jabalpur via Bangaon Damoh Abhana, Taijghar Tandukheda Pandajhir Patan Nunsar Route for one trip which is valid up to 30th June, 2016. It is the case of the petitioner that respondent No.3, namely, Karan Singh Parihar moved before the RTA for seeking two permits to ply bus from Damoh to Hatta via Palar, Bangaon, Luhari and Damoh to Jabalpur via Abhana, Naohata, Gabera, Simgrampur, Gubra, Katangi by submitting one application vide Annexure-P/2 dated 11/1/12 and proposing his vehicle bearing registration No.MP34 P-0138 for both permits.

3. It is submitted by the learned counsel for the petitioner that at the time of

consideration of the application in question no heed was paid to the provisions contemplated in Rule 72(3) of the M.P. Motor Vehicles Rules, 1994 and further to the Notification dated 24/11/10 which prescribed the method for seeking requisite permit and production of necessary documents at the time of submission of the application. It is submitted that the learned RTO in the absence of having such materials and failure on the part of the respondent No.3 to comply with the conditions under the relevant provisions, the permit was granted in his favour vide Annexure-P/3 which is valid up to 31/7/2018. It is submitted that by granting the permit to the respondent No.3, the authority itself has closed the eyes and violated the provisions of law and on revision against the order passed by the RTO, the appellate authority also failed to appreciate the objection raised by the petitioner and consider the law, hence by preferring the present petition, it is prayed that both the orders be quashed. In support of his submissions, learned counsel for the petitioner has placed heavily reliance on the provisions of Rule 70 as well as Rule 72(1)(a) of the M.P. Motor Vehicles Rules, 1994. Further reliance is placed by the learned counsel for the petitioner in the case of *Vivek Dwivedi Vs. Prem Narain* (AIR 1999 MP 1) to contend that the orders are not sustainable in law.

4. Taking into consideration the arguments advanced by the learned counsel for the parties and after going through the provisions contemplated under the Act as well as Rules, this court is of the considered view that the orders impugned are not sustainable in the eyes of law. In the case of *Vivek Dwivedi* (supra), it was clearly laid down that one application is confined only to one permit for a single route as single permit for two different routes is not permissible.

5. Similarly in Writ Petition No.9382/12 (*Sita Devi Mange Vs. State Transport Appellate Tribunal & others*) it was held by this court vide order dated 11/3/14 as under:-

“Rule 72(3) (b) of the Madhya Pradesh Motor Vehicles Rules, 1994 (hereinafter referred Rules of 1994) prescribes that an application of stage carriage permit shall be accompanied by certain documents and one of the condition is of certificate of registering authority in regard to ownership of vehicle of the applicant.

Relevant rule is as under:-

(b) “certificate from Registering Authority containing make, model and seating capacity of the vehicles owned by the

applicant at the time of making the application.”

From the aforesaid provision, it is clear that an person must be the owner of the vehicle. It means that if a person files two separate applications for two permits, then he must be the owner of two vehicles because one vehicle could not be covered under both the permits.”

6. Therefore, in our considered view the impugned permit (Annexure-P/3) granted in favour of respondent No.3 Karan Singh for plying single Bus bearing registration No.MP34 P-0138 on two separate routes is bad in law.

7. Accordingly, by quashing both the orders assailed herein, the matter is remitted back to the respondent No.2/RTA to pass a fresh order in regard to grant of permit to the respondent No.3 which would be confined to a single route by re-fixing the time schedule in accordance with law, after affording opportunity of hearing to all affected parties.

No order as to costs.

Order accordingly.

I.L.R. [2016] M.P., 48

WRIT PETITION

Before Mr. Justice Sanjay Yadav

W.P. No. 11989/2014 (Jabalpur) decided on 7 August, 2014

KAMAL KANT BHARADWAJ

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

Municipalities Act, M.P. (37 of 1961), Section 47 - Recall of President - Satisfaction - 12 out of 15 elected councillors presented themselves before Collector with a signed proposal to recall - Collector after verifying that half of the period of tenure has expired forwarded the proposal to State Govt. - Non-mention of word "satisfying" will not belie the existence of facts leading to forwarding of proposal to State Govt. - Petition dismissed.
(Paras 12 & 13)

नगरपालिका अधिनियम, म.प्र. (1961 का 37), धारा 47 - अध्यक्ष को वापस बुलाया जाना - संतुष्टि - 15 चयनित पार्षदों में से 12 पार्षद, वापस बुलाने हेतु हस्ताक्षरित प्रस्ताव के साथ कलेक्टर के समक्ष उपस्थित हुए - कलेक्टर ने यह सत्यापित

करने के पश्चात् कि कार्यकाल की आधी अवधि का अवसान हो चुका है, प्रस्ताव राज्य शासन को अग्रेषित कर दिया – "संतोषजनक" शब्द का उल्लेख न करना, राज्य शासन को प्रस्ताव अग्रेषित करने की ओर ले जाने वाले तथ्यों की उपस्थिति को नहीं झुठलायेगा – याचिका खारिज।

Cases referred :

2005 (3) MPLJ 578, 2008 (4) MPLJ 316.

T.S. Ruprah with U.S. Tiwari, for the petitioner.

Sheetal Dubey, G.A. for the respondent/State and its functionaries.

(Supplied: Paragraph numbers)

ORDER

SANJAY YADAV, J. :- Proceedings having been initiated for recalling of President under Section 47 of the Madhya Pradesh Municipalities Act, 1961 (for short '1961 Act') has led the petitioner, a President, Municipal Council Chanera (New Harsud) District Khandwa, to file this petition seeking quashment of proposal sent by the Collector Khandwa in purported exercise of the powers under sub-section (2) of Section 47 of 1961 Act.

2. The proposal emanates when 12 out of 15 elected councillors presented themselves before the Collector on 23.7.2014 with a signed proposal to recall the President.

3. The presentation led the Collector to seek information as to whether two years has expired from the date on which the President is elected and entered his office and that the half of the period of tenure has expired.

4. On receiving such report from the Chief Executive Officer, Nagar Panchayat Chanera (New Harsud), the Collector has communicated the proposal on 24.7.2014 to the State Government.

5. The only ground on which the impugned proposal is questioned is that the Collector who is under statutory obligation to record the satisfaction as required under Section 47(2) of 1961 Act, having failed to record, vitiates the proceedings, therefore, the proposal deserves to be quashed.

6. Section 47 of 1961 Act which deals with the provisions regarding recalling of President is in the following terms -

"47. Recalling of President.-- (1) Every President of a Council

shall forthwith be deemed to have vacated his office if he is recalled through a secret ballot by a majority of more than half of the total number of voters of the municipal area casting the vote in accordance with the procedure as may be prescribed :

Provided that no such process of recall shall be initiated unless a proposal is signed by not less than three-fourth of the total number of the elected Councillors and presented to the Collector :

Provided further that no such process shall be initiated :--

(i) within a period of two years from the date on which such President is elected and enters his office;

(ii) If half of the period of tenure of the President elected in a by-election has not expired :

Provided also that process for recall of the President shall be initiated once in his whole term.

(2) The Collector, after satisfying himself and verifying that the three-fourth of the Councillors specified in sub-section (1) have signed the proposal of recall, shall send the proposal to the State Government and the State Government shall make a reference to the State Election Commission.

(3) On receipt of the reference, the State Election Commission shall arrange for voting on the proposal of recall in such manner as may be prescribed."

7. Sub-section (2) of Section 47 of 1961 Act which deals with the satisfaction which has to be arrived at by the Collector before sending the proposal of recall, has been interpreted in *State of M.P. and ors vs Mahendra Kumar Saraf and ors* 2005(3) MPLJ 578 by Full Bench in the following terms -

"17. Again we have to refer to the language used in Section 47 of the Act. Sub-section (2) of this Section requires that the Collector after satisfying himself and verifying that the 3/4th of the Councillors specified in Sub-section (1) have signed the proposal of recall, shall send the proposal to the State Government. The provision nowhere mandates that the verification shall be made in the presence of signatories. Need not to say that verification of

signatures of signatories after procuring their presence may be one of the modes for such verification but it is not the only or exclusively mode, because nothing can be read in the proviso itself to this effect. Therefore, to put fetters on the discretion of the Collector in selecting the mode of verification by making the personal presence of signatories mandatory while the law is framed to give him more elbow room in the matter would be clearly against the Legislative intent.

...

21. Therefore, we hold that proviso to Section 47 of the Act does not contemplate that the proposal should be presented by the 3/4th of the Councillors in person or that for the purpose of verification of signatures of the signatories their personal presence is necessary."

8. A Division Bench of this Court in *Madan Lal Narvariya vs. Smt. Satya Prakash Parsedia* 2008(4) MPLJ 316 also had an occasion to examine the scope of sub-section (2) of Section 47; it was held that -

"20. the word 'satisfaction' means the act of satisfying or the state of feeling being satisfied and the action of satisfaction contemplates adequate deliberation for acceptability of the conclusions. In other words, it means that before recording satisfaction, the concerned Authority must be convinced or persuaded to come to the conclusion."

9. In other words, satisfaction could be a state of a thing which when probed into reflects the rationality of its being and is capable of being rationally examined.

10. In the case at hand, the proceedings are duly recorded by Collector on 23.7.2014 and 24.7.2014.

11. On 23.7.2014 (erroneously mentioned as 23.7.2012), the proceedings were recorded in the following terms -

"नगर परिषद छनेरा (नया हरसूद) के 12 सदस्यों कमश:

1. श्रीमती नोसरबाई पति श्री शिवप्रसाद, 2. श्रीमती रेखाबाई पति श्री राजेन्द्र, 3. श्रीमती शंकुतलाबाई पति श्री विरेन्द्रसिंह, 4. श्री महेन्द्र प्रतापसिंह पिता श्री प्रमोद

सिंह, 5. श्री मो. परवेज पिता श्री मो. सूफी, 6. श्री मो. जावेद गौरी पिता श्री हॉजी मोसादिक गौरी, 7. श्रीमती शारदाबाई पति श्री दिनेश कुमार, 8. श्रीमती अन्नपूर्णा पति श्री माखनलाल, 9. श्रीमती शायराबी पति श्री मजीद खां, 10. श्री गजानन्द पिता श्री बालाराम, 11. श्रीमती मंजू पति श्री हरनारायण एवं 12. श्री मुकेश कुमार वर्मा पिता श्री सुन्दरलाल वर्मा, ने समक्ष में उपस्थित होकर, हस्ताक्षरयुक्त आवेदन पत्र मय शपथपत्र के म.प्र. नगर पालिका अधिनियम, 1961 की धारा 47 के अंतर्गत नगर परिषद, छनेरा (नया हरसूद) के अध्यक्ष को वापस बुलाये जाने की सूचना प्रस्तुत की है। उक्त सदस्यगण द्वारा समक्ष में भी उपस्थिति के हस्ताक्षर किए।

2. आवेदकगण/नगर परिषद सदस्यों से प्राप्त सूचना को ग्राह्य किए जाने के पूर्व सूचना वैध होने की पुष्टि हेतु मुख्य नगर पालिका अधिकारी, नगर पंचायत, छनेरा (नया हरसूद) से निम्न बिन्दुओं पर जानकारी प्राप्त की जावे :-

1. नगर परिषद, छनेरा (नया हरसूद) में निर्वाचित सदस्यों की संख्या एवं नामों की सूची,

2. नगर परिषद अध्यक्ष के निर्वाचन की दिनांक तथा अध्यक्ष द्वारा पदभार ग्रहण किए जाने की तारीख,

3. अध्यक्ष पद का कार्यकाल कितनी अवधि का पूर्ण हो चुका है तथा कितनी अवधि का शेष है।

3- प्रकरण मुख्य नगर पालिका अधिकारी, नगर पंचायत, छनेरा (नया हरसूद) की रिपोर्ट एवं ग्राह्यता के बिन्दु पर विचार हेतु।

कलेक्टर
जिला खण्डवा

The proceedings drawn on 24.7.2014 are as under -

मुख्य नगर पालिका अधिकारी, नगर पंचायत, छनेरा (नया हरसूद) से जानकारी प्राप्त, जिसके अवलोकन से ज्ञात होता है कि नगर परिषद, छनेरा (नया हरसूद) के अध्यक्ष का निर्वाचन दिनांक 17.03.2012 को हुआ तथा अध्यक्ष ने दिनांक 30.03.2012 को पदभार ग्रहण किया था। अध्यक्ष का कार्यकाल 2 वर्ष 04 माह 06 दिवस पूर्ण हो चुका है तथा 02 वर्ष 07 माह 24 दिवस का कार्यकाल शेष है। अध्यक्ष पद के विरुद्ध पूर्व में वापस बुलाये जाने की सूचना प्राप्त नहीं हुई है। नगर परिषद, छनेरा (नया हरसूद) के सदस्यों की संख्या 15 है।

2- प्रकरण दर्ज करें।

3- अतः मैं इस निष्कर्ष पर पहुंची हूँ कि:-

1. अध्यक्ष, नगर परिषद, छनेरा (नया हरसूद) को दो वर्ष से अधिक का समय हो गया है।

2. नगर परिषद, छनेरा (नया हरसूद) के अध्यक्ष के विरुद्ध वापस बुलाये जाने की सूचना पर तीन चौथाई निर्वाचित सदस्यों द्वारा हस्ताक्षर किए हैं, तथा

3. नगर परिषद, छनेरा (नया हरसूद) के अध्यक्ष का कार्यकाल 02 वर्ष से अधिक अवधि का शेष है ।

4- अतएव, म.प्र. नगर पालिका अधिनियम, 1961 की धारा 47 की उपधारा (2) के तहत नगर परिषद, छनेरा (नया हरसूद) के अध्यक्ष को वापस बुलाये जाने की सूचना पर प्रस्ताव प्रमुख सचिव, मध्यप्रदेश शासन, नगरीय प्रशासन एवं विकास विभाग, भोपाल को अग्रिम कार्यवाही हेतु भेजे जावे ।

शासन को प्रेषित किए जाने वाले प्रस्ताव पर हस्ताक्षर किये गये ।

कलेक्टर
जिला खण्डवा

12. Apparent it is from the proceedings that 12 elected councillors had personally appeared before the Collector (though as per Full Bench, it is not necessary for the councillors to personally appear) and besides giving the proposals had also signed the order-sheet to mark their presence. The Collector thereafter to ascertain that the condition stipulated in second proviso to sub-section (1) of Section 47 of 1961 Act had directed to give necessary information and on satisfying with the information and the presentation of proposal by 12 elected councillors, forwarded the proposal to State Government.

13. Contention that unless individual councillors are identified and such identification is recorded in the proceedings and unless expressly written that there is personal satisfaction, is asking for something which is not contemplated in the statute. In that case, since the proceedings are not drawn in camera, it is always open for the councillors whose name find mention in the proceedings to deny their presence. The proposition as propitiated is not borne out from the scheme of Section 47 of 1961 Act and if accepted would create fetters with the powers conferred on Collector by the legislature. Non-mentioning of the word 'satisfying' will not belie the existence of facts leading to forwarding of proposal to the State Government.

14. There being no jurisdictional error emanating from the satisfaction that the proposal for recalling is by 3/4th of the elected councillors and two years have expired and half of the term remains, no interference is caused.

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

Petition dismissed.

I.L.R. [2016] M.P., 54

WRIT PETITION

Before Mr. Justice Sujoy Paul

W.P. No. 8049/2012 (Gwalior) decided on 11 August, 2014

NATTHU SINGH CHAUHAN

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

Service Law - Effect of interim order - Petitioner working as Sub Engineer was promoted as Asstt. Engineer, the said promotion was cancelled by the respondent - Petitioner challenged the cancellation order - The effect and operation of cancellation order was stayed by the Court - The question involved, whether on dismissal of writ petition the petitioner is entitled to get the pension benefit by treating himself as Asstt. Engineer - Held - Stay of operation of order means that the order impugned very much exists but its operation is kept in abeyance because of the order of the Court - If ultimately the petition is dismissed or interim order is vacated, the order which was stayed comes into operation - Further held, petitioner is not entitled to get the benefit of pension for the aforesaid post. (Paras 6 to 8 & 13).

सेवा विधि - अंतरिम आदेश का प्रभाव - उपयंत्री के रूप में कार्यरत याची को सहायक यंत्री के रूप में पदोन्नत किया गया, उक्त पदोन्नति प्रत्यर्थी द्वारा रद्द की गयी - याची ने रद्दकरण आदेश को चुनौती दी - रद्दकरण आदेश के प्रभाव एवं प्रवर्तन पर न्यायालय द्वारा रोक लगाई गई - यह प्रश्न अंतर्गुस्त है कि क्या रिट याचिका खारिज होने पर याची स्वयं को सहायक यंत्री मानते हुए पेंशन लाभ लेने का हकदार है - अभिनिर्धारित - आदेश के प्रवर्तन पर रोक का अर्थ है कि आक्षेपित आदेश अस्तित्व में है परंतु न्यायालय के आदेश के कारण उसके प्रवर्तन को स्थगित रखा गया है - यदि अंतिमतः याचिका खारिज होती है अथवा अंतरिम आदेश निष्प्रभावी होता है, वह आदेश जिसे स्थगित किया गया था प्रवर्तनीय हो जाता है - आगे अभिनिर्धारित, याची उपरोक्त पद के लिये पेंशन का लाभ पाने का हकदार नहीं।

Cases referred :

(1992) 3 SCC 1, 2008 (1) MPLJ 577, (2007) 14 SCC 73, (2011) 1 SCC 216.

D.P. Singh, for the petitioner.

Nidhi Patankar, G.A. for the respondent/State.

ORDER

SUJOY PAUL, J. :- The petitioner has filed this petition under Article 226 of the Constitution, seeking a direction to the respondents to modify the Pension Payment Order (PPO) dated 17.1.2012 by treating him as Asstt. Engineer with further direction to pay him the attendant benefits.

2. Brief facts necessary for adjudication of this matter are that the petitioner while working as Sub Engineer was promoted by order dated 10.7.2003 (Annexure P/2) as Asstt. Engineer. The post of Asstt. Engineer carries the pay scale of Rs. 8000-275-13500. The promotion order dated 10.7.2003 was cancelled by the respondents on 13.7.2007, Annexure P-3. The petitioner feeling aggrieved by the aforesaid cancellation order preferred a Writ Petition No. 4533/2007 (S) before this Bench. The notices were issued in the said writ petition on 25.9.2007. As an interim measure, the effect and operation of the order of cancellation of promotion dated 13.7.2007 was stayed by this Court.

3. Shri D.P.Singh, learned counsel for the petitioner, submits that pursuant to the aforesaid interim order, the petitioner continued as Asstt. Engineer and retired on attaining the age of superannuation on 31.12.2008. Writ Petition No.4533/2007 was subsequently dismissed as infructuous. The respondents have issued the PPO by treating the petitioner as Sub Engineer. The bone of contention of Shri Singh is that the fact remains that the petitioner retired while holding the post of Asstt. Engineer. His salary till retirement was paid on the post of Asstt. Engineer. As per M.P.Civil Services (Pension) Rules, 1976 (for brevity, the "Pension Rules"), the pension is to be calculated on the basis of last pay drawn or on the emoluments which the employee has drawn at the time of his retirement. On the basis of these rules, it is argued that the respondents have erred in issuing the PPO by treating the petitioner as Sub Engineer. Hence, it is prayed that PPO be directed to be modified by treating the petitioner as Asstt. Engineer. A further prayer is made to provide him gratuity, provident fund and other retiral dues on the basis of last pay drawn by the petitioner on the post of Asstt. Engineer. The petitioner has also claimed interest.

4. Mrs. Nidhi Patankar, learned Govt. Advocate on the other side opposed the said relief. She submits that WP No. 4533/2007 was dismissed as infructuous. On dismissal of this petition, the interim order stood vacated automatically. Accordingly, the reversion order came into force. The petitioner

is not entitled for the benefits which accrued on the basis of interim relief granted in the said petition.

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

6. No doubt, the petitioner has attained the age of superannuation while working on the post of Asstt. Engineer. WP No. 4533/2007 was dismissed as infructuous. It cannot be disputed that the petitioner continued as Asstt. Engineer only because of the interim order passed initially in WP No. 4533/2007. The question is whether on dismissal of that writ petition, the petitioner is entitled to get pension by treating himself as Asstt. Engineer ?

7. The Apex Court has made it clear that there is world of difference between an interim order and a final order, whereby an order, notification, rule etc. is quashed. In *Shree Chamundi Mopeds Ltd. v. Church of South India Trust Assn.*, reported in (1992) 3 SCC 1, the Apex Court opined as under:-

"While considering the effect of an interim order staying the operation of the order under challenge, a distinction has to be made between quashing of an order and stay of operation of an order. Quashing of an order results in the restoration of the position as it stood on the date of the passing of the order which has been quashed. The stay of operation of an order does not, however, lead to such a result. It only means that the order which has been stayed would not be operative from the date of the passing of the stay order and it does not mean that the said order has been wiped out from existence."

This judgment of Supreme Court is followed by a Division Bench of this Court in 2008 (1) MPLJ 577 (*Kunal Kanti Majee vs. Chancellor, Rani Durgawati Vishwavidyalaya, Jabalpur and others*). A plain reading of the said portion makes it clear that stay of operation of an order means that the order impugned very much exists but its operation is kept in abeyance because of the order of the court. If ultimately the petition is dismissed or interim order is vacated, the order which was stayed comes into operation. Thus, on dismissal of WP No. 4533/2007, the interim order stood vacated and the reversion order became automatically operative.

8. The argument of Shri D.P.Singh is solely based on the provisions of

Pension Rules, which prescribes that the pension is to be calculated on the basis of the emoluments last drawn by the employee. In normal circumstances, there is no difficulty in accepting and implementing the said rule. However, in the present case, it is to be seen whether the petitioner is entitled to get benefits of pension on the post of Asstt. Engineer. In the opinion of this Court, the petitioner is not entitled to get the benefit of pension on the basis of the pay scale drawn on the post of Asstt. Engineer. At the cost of repetition, it is made clear that on dismissal of WP No. 4533/2007, the reversion order came into force. Thus, the petitioner became Sub Engineer from the date of cancellation of promotion order. Merely because the petitioner has drawn salary on the post of Asstt. Engineer pursuant to an interim order will not bestow any right to him to enjoy the pension on the said post. I find support in my view from the judgment of Supreme Court in *Kanoria Chemicals and Industries Ltd. v. U.P. SEB*, reported in *State of Gujarat v. Dilipbhai Shaligram Patil*, (2006) 8, the Apex Court opined as under:-

"5. It is well settled that an order of stay granted pending disposal of a writ petition/suit or other proceedings, comes to an end with the disposal of the substantive proceedings and that it is the duty of the court in such a case to put the parties in the same position, they would have been but for the interim orders of the court. Any other view would result in the act or order of the court prejudicing the party for no fault of his and would also mean rewarding the writ petitioner in spite of his failure. Any such unjust consequence cannot be countenanced by the courts. (See Kanoria Chemicals and Industries Ltd. v. U.P. SEB)."

9. In *Oriental Select Granite (P) Ltd. v. State of Karnataka*, (2007) 14 SCC 73, the Apex Court opined as under:-

"15. It is thus to be seen that the petitioners' contention that they carried on quarrying operations on the basis of the interim order of the High Court dated 24-10-1990 coupled with the final order of status quo dated 24-6-1994 is untenable for more reasons than one. Firstly, the writ petition was rendered infructuous on 18-6-1991 when the petitioners' leases were renewed by the State Government. The interim order dated 24-10-1990 became ineffective with the renewal of the

leases and it lost all force when the grant/renewal of leases by the State Government was struck down by the High Court. No reliance can also be placed on the final order in the writ petition as it was passed in a petition that was infructuous. Secondly, it was passed without any adjudication on the issues involved in the case and without determining the rights and liabilities of the parties."

(Emphasis Supplied)

10. On the basis of aforesaid dictum of Supreme Court, it is clear that it is the duty of the Court to put the parties to the same position as if there was no interim order by the Court. Any other view, as opined by the Supreme Court, will cause prejudice to the other side for no fault of his. If this duty is discharged by this Court, there is no manner of doubt that the clock is to be put back on the date the petitioner was reverted by order dated 13.7.2007.

11. The ancillary question is whether the petitioner is entitled for any relief?

12. In *Nava Bharat Ferro Alloys Ltd. v. Transmission Corpn. of A.P. Ltd.*, (2011) 1 SCC 216, the Apex Court opined as under:-

"23. This Court then applied the principle of restitution as enunciated by the Privy Council in Rodger v. Comptoir D'Escompte de Paris and held that it will be the endeavour of the Court to ensure that a party who had suffered on account of a decision that is finally reversed should be put back in the same position as far as the same is practicable, in which he would have been if the decision of the Court adversely affecting him had not been passed. This Court observed: (Kerala SEB case SCC p. 608, para 24)

"24. ... In giving full and complete relief in an action for restitution, the court has not only power but also a duty to order for mesne profits, damages, costs, interest, etc. as may deem expedient and fair conforming to justice to be done in the facts of the case. But in giving such relief, the court should not be oblivious of any unmerited hardship to be suffered by the party against whom action by way of restitution is

taken. In deciding appropriate action by way of restitution, the court should take a ragmatic view and frame relief in such a manneras may be reasonable, fair and practicable and does not bring about unmerited hardship to either of the parties."

(Emphasis Supplied)

A plain reading of this judgment shows that in the facts and circumstances of a case the Court may put back the parties in the same position "as far as same is practicable".

13. In view of this judgment, I am only inclined to hold that the petitioner is not entitled to get the pension as Asstt. Engineer for the reasons stated above. However, since the petitioner has worked as Asstt. Engineer till his retirement, no recovery etc. should be made from payments already made. In other words, the practicable view is that the petitioner's salary as Asstt. Engineer shall not be recovered by the respondents. The claim of petitioner for pension and retiral dues as Asstt. Engineer is rejected.

15. Petition is disposed of with aforesaid direction.

Petition disposed of.

I.L.R. [2016] M.P., 59

WRIT PETITION

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

W.P. No. 2576/2012 (Indore) decided on 17 November, 2014

SURAJ IMPEX (INDIA) PVT. LTD.

...Petitioner

Vs.

SECRETARY, UNION OF INDIA

...Respondent

Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 Rule 5 - Determination of date from which the amount or rate of drawback is to come into force - Notification categorically mentions the effective date thereof - Shall come in force on mentioned date - Not retrospective. (Para 9)

सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवा कर वापसी नियम, 1995, नियम 5 - उस तिथि का निर्धारण जिससे वापसी की रकम या दर प्रभावी होगी - अधिसूचना में इसके प्रभावी होने की तिथि स्पष्ट रूप से उल्लिखित - उल्लिखित

60 Suraj Impex Pvt. Ltd. Vs. Secre. Union of India (DB) I.L.R.[2016]M.P.
तिथि को प्रभावशील होगा — भूतलक्षी नहीं।

Cases referred :

2003 (1) MPLJ 10/ (LPA No. 641/2000), 2009 (236) E.L.T. 625 (SC), 2011 (1) SCC 236.

A.M. Mathur with Ashutosh Upadhayay, for the petitioner.
Prasana Prasad, for the respondent.

ORDER

The Order of the Court was delivered by :
P.K.JAISWAL, J. :- They are heard.

2. By this writ petition under Article 226 / 227 of the Constitution of India, the petitioner is praying for the following relief :-

(i) *Allow this petition with costs; &*

(ii) *By a suitable writ, direction or order it may be declared that circular no.35/2010 Cus dated 17.9.2010 has retrospective effect.*

(iii) *Grant such other relief which this Hon'ble Court deems fit in the facts and circumstances of the case in favour of the petitioners.*

3. Brief facts of the case are that the petitioner is engaged in merchant export of Soyabean Meal falling under Chapter 23 (hereinafter referred to as 'SBM') on which they are entitled to claim duty drawback at the All Industry Rate (for short 'AIR') introduced by Customs notification No.81/2006-Cus dated 13.7.2006 and continued vide yearly customs Notification no.68/2007 dated 16.7.2007; no.103/2008 dated 29.8.2008 and no.84/2010 dated 17.9.2010. According to Clause 5 of the Notification Nos.81/2006 and 68/2007 as well as Clause 6 of Notification No.103/2008, the petitioner has been entitled to 1% AIR duty drawback towards customs component since the drawback rate is 1% whether CENVAT has been availed or not. During 2008-09 the respondent No.4 formed a view that according to Clause 7(e) and (f) of Notification No.81/2006 and 68/2007 and Clause 8 (e) and (f) of Notification no.103/2008, the petitioner was not entitled to the said AIR drawback towards customs portion if the manufacturers had availed rebate of central excise duty under Rule 18 or procured excise duty free inputs under

Rule 19(2) of the Central Excise Rules, 2002. The respondent No.3 at the instance of respondent No.4 withheld release of AIR drawback to SBM exporters. The petitioners and other exporters as well as industry associations represented the matter to the Directorate of Drawback as well as Central Board of Excise and Customs, New Delhi stating that Drawback on SBM export was towards customs portion and benefit under Rule 18 or 19(2) of Central Excise Rules, 2002 was towards central excise portion therefore, there cannot be any reason to withhold customs drawback if the manufacturers had claimed rebate of central excise duty or procured central excise duty free inputs.

4. The respondent No.2 vide custom circular No.35/2010 dated 17.9.2010, while issuing yearly customs notification No.84/2010 of even date, clarified that both the benefits ie., AIR drawback @ 1% and the benefit of Rule 18 or 19(2) of the Central Excise Rules, 2002 are simultaneously available. The respondent No.3 commenced releasing AIR drawback on SBM exports for the period after 17.9.2010 but continued to withhold AIR drawback for the earlier period.

5. The question involved in this writ petition is whether the circular No.35/2010 dated 17.9.2010 is prospective or retrospective in nature (a) when the language used in earlier Notification No.81/2006; 68/2007 and 103/2008 and the language used in subsequent notification no.84/2010 is same and (b) when the circular being a benovolent circular has prospective effect or retrospective effect.

6. The petitioners made several representations to the respondent No.3. The respondent No.3 vide impugned letter / dated 23.1.2012 stated that the circular No.35/2010 – Cus dated 17.9.2010 has not been given retrospective effect and that the said circular is effective from the date of issuance. Clause 23 of Notification No.84/2010 dated 17.9.2010 reads as under :-

“(23) The drawback rates specified in the said Schedule against tariff items 711301 and 711302 shall not be applicable to goods manufactured or exported in discharge of export obligation against any scheme of the relevant Export and Import Policy or the Foreign Trade Policy of the Government of India which provides for duty free import/replenishment/procurement from local sources of gold or silver.

2. *All claims for duty drawback shall be filed with reference to the tariff items and descriptions of goods shown in columns 1 and 2 of the said Schedule respectively.*

3. *This notification shall come into force on the 20th day of September, 2010."*

7. The respondent No.1 by communication dated 4.1.2012 (Annexure P/20) intimated that since the words of the Notification No.84/2010, dated 17.9.2010 are clear and have prospective effect and turn down the request for apply the same retrospectively. Clause 2 to 5 of communication dated 4.1.2012 reads as under :-

"2. *Para 2 of your letter quotes a line from the Circular no.35/2010-Cus. dated 17.9.2010 and refers that as a clarification of the Board. A plain reading of the Circular shows that what has been quoted is the reference from the exporters, not the Board's clarification.*

3. *Vide Condition No. 8 (3) & (f) of notification No.103/2008-Customs (N.T), dated 29.8.2008 which notified the earlier Drawback Schedule of 2008-09, the rates of drawback specified in the Schedule were not applicable to export of a commodity or product which is manufactured or exported by availing the rebate of duty paid on materials used in the manufacture or processing of such commodity or product in terms of rule 18 of the Central Excise Rules, 2002 or manufactured or exported in terms of sub-rule (2) of rule 19 of the Central Excise Rules, 2002.*

4. *The said notification was superseded by notification No.84/2010-Custom (N.T.), dated 17.09.2010, effective from 20.09.2010, with a revised Drawback Schedule. The condition No.9 of notification No.84/2010-Custom(NT) provided that the rates and caps of drawback specified in columns (4) and (5) of the schedule would not apply to export of a commodity or product which is manufactured or exported by availing the rebate of duty paid on materials used in the manufacture or processing*

of such commodity or product in terms of rule 18 of the Central Excise Rules, 2002 or manufactured or exported in terms of sub-rule (2) of rule 19 of the Central Excise Rules, 2002. Therefore, effective 20.9.2010, the rates and caps under column (6) and (7) of the Schedule became available for such exports. Through para 4 (VI) (d) of Board's Circular No.35/2010-Cus, dated 17.9.2010 this aspect was informed.

5. *Since the words of the notification No.84/2010-Customs (N.T.), dated 17.09.2010 are clear and have prospective effect, the request for applying the same retrospectively does not arise."*

8. The present petition raises the dispute regarding release of AIR drawback of export of SBM for the period prior to 17.9.2010. The contention of the learned Senior counsel for the petitioner is that Circular Nos.81/2006 dated 3.7.2006, 68/2007 dated 16.7.2007; no.103/2008 dated 29.8.2008 and no.84/201 dated 17.9.2010, do not make any material change in the legal provisions as far as it relates to availment of drawback of customs component even where the manufacturer / exporter had availed the benefits of rule 18 or 19 (2) of the Central Excise Rules, 2002, as existed prior to issuance of the same. The notification No.84/2010 merely clarify the position and make the issue explicit which was implicit in the earlier notification. He submitted that it is a settled position of law that such clarificatory circulars and notifications would apply equally to any law / notifications issued earlier if the provisions are identical. According to the learned Senior counsel, notification No.84/2010 merely clarify the position and make the issue explicit which was implicit in the earlier notifications. The respondent No.1 vide communication dated 4.1.2012 wrongly stated that the same would be applicable prospectively and submits that writ of mandamus be issued directing the authorities that Circular No.35/2010 Cus dated 17.9.2010 has retrospective effect.

9. Per contra, Shri Prasana Prasad, learned counsel for the respondents has submitted that legal position is well settled that the question of giving retrospective effect to any statute does not arise when its effective date is categorically mentioned therein. He submitted that the Notification dated 17.9.2010 very categorically mentioned that the rates of drawback have been

made effective from 20.9.2010. He submitted that at Serial No.3 which has quoted herein above in the preceding paragraph, it is very clearly mentioned that Notification dated 17.9.2010 shall come into the force on 20th Day of September, 2010. He also drew our attention to sub rule 2 of Rule 5 of the Customs, Central Excise Duties & Service Tax Drawback Rules, 1995:

Rule 5. Determination of date from which the amount or rate of drawback is to come into force and the effective date for application of amount or rate of drawback. -

(1) The Central Government may specify the period upto which any amount or rate of drawback determined under rule 3 or revised under rule 4, as the case may be, shall be in force.

(2) where the amount or rate of drawback is allowed with respective (sic:retrospective) effect, such amount or rate shall be allowed from (sic:from) such date as may be specified by the Central Government by notification in the official Gazette which shall not be earlier than the date of changes in the rates of duty on inputs 8[or tax on input services] used in the export goods.

10. To buttress his arguments, he drew our attention to the full bench decision of the M.P. High Court in the case of *Laxminarayan v/s. Shiv Gujar & Ors.*, 2003 (1) MPLJ 10 / (LPA No.641/2000) wherein the full bench has held the following :-

"We have quoted both the provisions in juxtaposition to comprehend the scenario and further to sensitize ourselves to the controversy in issue. It is well settled proposition of law that enactments dealing with substantive right are primarily prospective unless it is expressly or by necessary implication given retrospectively. The aforesaid principle has full play when vested rights are affected or influenced. In the absence of any unequivocal expose, the piece of Legislation must exposit adequate intendment of Legislature to make the provision retrospective. It is significant to allude to the facet that routinely or conventionally retrospective operation of law is not to be

easily deduced Hypothesization in that regard is ordinarily unwarranted."

with the aforesaid, he prays for dismissal of the writ petition..

11. The respondents denied that the petitioner was entitled for duty drawback on SBM in terms of Clause 5 of Notification No.81/2006 and 68/2007 as well as Clause 6 of Notification No.103/08.

12. As per condition No.7 (f) of Notification No.81/06 the rates of drawback specified in the said Schedule shall not be applicable to export of the commodity or product if such commodity or product is manufactured or exported in terms of sub – rule (2) of Rule 19 of the Central Excise Rules, 2002. Condition No.7 (f) of Notification No.81/2006 reads as under :-

(7) The rates of drawback specified in the said Schedule shall not be applicable to export of a commodity or product if such commodity or product is -

(f) manufactured or exported in terms of sub-rule (2) of rule 19 of the Central Excise Rules, 2002;

13. From the aforesaid, it is clear that the notification denies the drawback of the entire schedule (whether Excise or Customs components), if the facility of rule 19(2) of the Central Excise Rules, 2002 is availed. The said conditions are the prime requirement to get the commodity eligible for the drawback. In the case in hand, the condition No.7 (f) debar the goods from the purview of the drawback if the said goods manufactured or exported availing facility of Rule 19(2) of Central Excise Rules, the drawback was not admissible to the said goods (SBM/DOC) manufactured availing facility of Rule 19(2) of Hexane and/or other materials procured duty free by them and used the same in the manufacture of DOC/SBM.

14. As per reply the stand of the respondent that clause 5 of Notification nos.81/2006 and 68/2007 and clause 6 of Notification No.103/2008 and 84/2010 are not applicable in the case of petitioner as the petitioner was not working under Cenvat scheme as their final product was exempted from payment of duty. On the contrary the Clause 7 (f) of Notification Nos.81/2006 and 68/2007 and Clause 8 of Notification No.103/2008 were applicable in their case as the benefit of Rule 19(2) of the Central Excise Rules, 2002 was availed for the manufacture of goods exported by the petitioner. Since

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the petitioner was well aware about non availability of drawback to him it had fully given the false declaration at the port that the export goods have been manufactured without availing benefit of the said Rule 19(2) and thereby fraudulently availed the drawback of more than Rs.11 crores. It is also stated that the contention of the petitioner that there drawback was withheld, is incorrect as the said drawback was not legally admissible. The simultaneous availment of drawback as well as Rule 19(2) was introduced by the respondent No.2 by omission of Clause 8(f) of erstwhile Notification No.103/2008 and the introduction of new Clause 9(b) in Notification No.84/2010 which was made effective from 20.9.2010 and explained the same in Circular No.35/2010. Since the Notification No.84/2010 was effective from 20.9.2010 and the same cannot be given retrospective effect in light of the aforementioned facts.

15. The Apex Court in the case of *Commissioner of Central Excise, Chandigarh – I v/s. Mahaan Dairies*, reported as 2004 (166) E.L.T. 23 (SC) have held as under :

“It is settled law that in order to claim benefit of a Notification a party must strictly comply with the terms of the Notification. If on wordings of the Notification the benefit is not available then by stretching the words of the Notification or by adding words to the Notification benefit cannot be conferred.”

16. The Apex Court in the case of *Commissioner of Central Excise & Customs, Indore v/s. Parenteral Drugs (I) Ltd*, 2009 (236) E.L.T. 625 (SC) has observed in para 8 the following which reads as under :-

“8. We may add that exemption notifications have to be read strictly. We may also add that the burden is on the assessee to prove that the item falls within the four corners of the exemption notification”

17. The Apex court in the case of *Commissioner of Central Excise, New Delhi v/s. Hari Chand Shri Gopal & Ors.*, 2011 (1) SCC 236 has held as under :-

“29. The law is well settled that a person who claims exemption or concession has to establish that he is entitled

to that exemption or concession. A provision providing for an exemption, concession or exception, as the case may be, has to be construed strictly with certain exceptions depending upon the settings on which the provision has been placed in the statute and the object and purpose to be achieved. If exemption is available on complying with certain conditions, the conditions have to be complied with. The mandatory requirements of those conditions must be obeyed or fulfilled exactly, though at times, some latitude can be shown, if there is a failure to comply with some requirements which are directory in nature, the noncompliance of which would not affect the essence or substance of the notification granting exemption."

18. In the light of the above discussions, we are of the view that notification dated 17.9.2010 is not merely clarify the position and make the issue explicit, which was implicit in the earlier notification nor the same would be applicable retrospectively. The question of giving retrospective effect to Notification dated 17.9.2010, does not arise when it is very clearly mentioned therein that the same shall come into force on the 20th day of September, 2010.

19. The writ petition has no merit and is accordingly, dismissed, but without any orders as to costs.

Petition dismissed.

I.L.R. [2016] M.P., 67

WRIT PETITION

Before Mr. Justice Sujoy Paul

W.P. No. 6667/2014 (Gwalior) decided on 19 November, 2014

BALMUKUND SHARMA

...Petitioner

Vs.

BALKRISHNA SHARMA UPADHYAY & anr.

...Respondents

Civil Procedure Code (5 of 1908), Order 39 Rule 1 & 2 - Injunction
- Whether the trial Court has power to call the deponent for cross-examination under Order 39 - Held - It cannot be accepted as a thumb rule that in no circumstances the trial Court can permit the cross-examination of the deponent in proceedings under Order 39 Rule 1 & 2 - This cannot be forgotten that the statute is to be interpreted to advance

the cause of justice - Too technical a construction of provision that leaves no room for reasonable elasticity of interpretation should be avoided - Court has power to permit cross-examination. (Paras 11 & 13)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 39 नियम 1 व 2 - व्यादेश - क्या आदेश 39 के अंतर्गत विचारण न्यायालय को प्रतिपरीक्षण के लिये अभिसाक्षी को बुलाने की शक्ति है - अभिनिर्धारित - यह सामान्य नियम के रूप में स्वीकार नहीं किया जा सकता कि किसी भी परिस्थिति में विचारण न्यायालय द्वारा आदेश 39 नियम 1 व 2 के अंतर्गत कार्यवाहियों में अभिसाक्षी का प्रतिपरीक्षण करने की अनुमति नहीं दी जा सकती - यह मूला नहीं जा सकता कि कानून का निर्वचन, न्याय के ध्येय को अग्रसर करने के लिये किया जाना चाहिये - उपबंध के ऐसे अति तकनीकी अर्थान्वयन से बचना चाहिये जो निर्वचन के युक्तियुक्त लचीलेपन के लिये कोई जगह न छोड़े - न्यायालय को प्रतिपरीक्षण की अनुमति देने की शक्ति है।

Cases referred :

AIR 1975 Allahabad 398, AIR 1978 Andhra Pradesh 103, AIR 1994 Gauhati 52, 1995 AIHC 360, AIR 2002 Allahabad 198, AIR 1984 Calcutta 184, 1991 MPLJ 32, AIR 1991 Rajasthan 119, AIR 1968 Guj 198, 1976 MPWN 103, AIR 1991 Raj 56, AIR 1983 AP 114, (1975) 1 SCC 774, AIR 1955 SC 425, (1976) 1 SCC 719, (1984) 3 SCC 46, (2005) 4 SCC 480.

D.D. Bansal, for the petitioner.

N.K. Gupta with S.D. Singh for the respondent No. 1.

R.P. Rath, G.A. for the respondent No. 2/State.

ORDER

SUJOY PAUL, J. :- This petition filed under Article 227 of the Constitution challenges the order dated 27.11.2013 whereby the court below has allowed the application preferred under Order 19 Rule 1 & 2 C.P.C. filed by the plaintiff and permitted him to cross-examine the persons who have filed their affidavits along with reply of application filed under Order 39 Rule 1 & 2 C.P.C.

2. The plaintiff / respondent No.1 filed a suit for declaration of title and permanent injunction against the petitioner / defendant No.1. The plaintiff stated that he is the owner of the house having half share and similarly his mother was having half share in the house. In her life time, mother Smt. Ganga Devi had executed a registered will dated 28.07.2007 in favour of the plaintiff, therefore, after the death of his mother, he became exclusive owner of the suit property.

Accordingly, relief was claimed that plaintiff be declared as an exclusive owner and in possession of the suit property. In addition, a permanent injunction was sought to the effect that the defendant No.1 be restrained from making any interference in the suit property. He be restrained from alienating the same. On the aforesaid factual backdrop, plaintiff filed an application under Order 39 Rule 1 & 2 R/w Section 151 C.P.C and prayed for temporary injunction to the effect that defendants be restrained from making any interference in possession of plaintiff and they be directed to maintain status quo with respect to suit property. In support of said application, plaintiff also filed an affidavit as well as documentary evidence. Copy of will is filed as Annexure P/4.

In turn, the petitioner / defendant No.1 filed his written statement and reply to the application for temporary injunction. Averments of plaint and injunction application were denied. It is stated that will has been prepared by the plaintiff. In fact, no such will was ever executed by mother in favour of the plaintiff. The said reply is Annexure P/5. In support of said reply to the application under Order 39 Rule 1 & 2 C.P.C, petitioner filed affidavits of attesting witnesses of the will namely Rafiq Khan and Vishal Gupta. In the affidavits, it is stated by said persons that the will has not been executed in their presence. Thus, they deposed against the will. At this stage, the plaintiff filed an application under Order 19 Rule 1 C.P.C. seeking permission to cross-examine the aforesaid attesting witnesses, who have filed affidavits contrary to reality. The present petitioner opposed the said application by filing reply. The Court below after hearing the parties on the said application, allowed the same by order dated 27.11.2013. The petitioner feeling aggrieved with said order preferred a review application under Order 47 Rule 1 C.P.C. (Annexure P/9). This application is also rejected by order dated 13.10.2014. Thus, order dated 27.11.2013 and 13.10.2014 (Annexure P/1 and P/2) are called in question in this petition.

3. Shri D.D. Bansal, learned counsel for the petitioner, drew attention of this Court on the language of Order 39 C.P.C. He also relied on Order 19 Rule 1 & 2 C.P.C. By reading aforesaid provisions in juxta position, it is argued that order 39 does not contemplate any opportunity of cross-examination. Order 39 C.P.C makes it clear that word affidavit alone has been mentioned so that without going through the evidence, the court may decide the matter of injunction pending disposal of the suit. In support of his contention he relied on AIR 1975 Allahabad 398 (*Abdul Hameed Khan Vs. Mujeed-Ul-Hasan and Ors.*) AIR 1978 Andra Pradesh 103 (*Sakalabhaktula*

Vykunta Rao and Ors. Vs. Made Appalaswamy), AIR 1994 Gauhati 52 (*Rajib Barooah and Anr. Vs. Hernendra Prasad Barooah and Ors.*), 1995 AIHC 360 (*Bhairon Lal and another Vs. Chandmal and another*) and AIR 2002 Allahabad 198 (*Satya Prakash and Anr. Vs. Ist Additional District Judge, Etah and Ors.*).

4. In nutshell, the submission of Shri Bansal is that order 39 C.P.C deals with aspect of injunction. Order 19 Rule 1 & 2 C.P.C. is an independent provision and cannot be applied in an injunction proceeding. He submits that court below has erred in allowing the said application of plaintiff. He further submits that basic purpose of order 39 Rule 1 & 2 is to decide the injunction application expeditiously. If oral evidence is permitted to be led or cross-examination is permitted to be conducted at this stage, it will frustrate the very purpose of Order 39 Rule 1 & 2.

5. Shri N.K. Gupta, learned Sr. counsel for the respondent, on the other hand opposed the same. He submits that in the interest of justice, the court may allow the party to cross-examine the person who has filed the affidavit. He supported the order passed by the Court below. He relied on AIR 1984 Calcutta 184 (*Pijush Kanti Guha Vs. Smt. Kinnori Mullick*), 1991 MPLJ 32 (*Harsh Wood Products Pvt. Ltd. Vs. Sant Prakash Gupta*) and AIR 1991 Rajasthan 119 (*Chotu Khan Vs. Abdul Karim*).

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

7. Shri Bansal placed reliance on judgment of *Abdul Hameed Khan* (Supra). In the said judgment, the Allahabad High Court relied on judgment of Gujrat High court reported in AIR 1968 Guj 198 (*Mavji Khimji Vs. Manjibhai Abjibhai*). In *Abdul Hameed Khan* the High Court opined that it has not been ruled in *Mavji Khimji* that even in an interlocutory matter like the one under O. 39 Rule 1 C.P.C, the Court has no power to summon and cross-examine the deponent if it thinks it necessary to do so in the interests of justice. All that has been laid down in *Mavji Khimji* is that the power to decide the interlocutory matter under Order 39 Rule 1 is specifically conferred on the Court independently of Order 19 Rule 1 C.P.C. It is further recorded in *Abdul Hameed Khan* that in Order 39 Rule 1 & 2 C.P.C. there is no bar to the court to summon the witness for cross-examination if it thinks it necessary to do so in the interest of justice. This judgment does not help the petitioner in any manner.

8. In *Satya Prakash* (Supra) Allahabad High Court opined that while deciding the application preferred under Order 39 Rule 1 & 2 C.P.C., the court is not subjected to the provision of Order 19 Rule 1 & 2 C.P.C. The Gauhati High Court in *Rajib Barooah* (Supra) opined that purpose of Order 39 is to ensure that the injunction matter be disposed of as quickly as possible. Sole object is that said injunction matter be disposed of without going through full length of procedure of examination and cross-examination of witness because if such lengthy procedure is adopted, the very purpose and object of granting injunction will be frustrated. It is further opined that word affidavit mentioned in Order 39 makes it clear that court has to proceed without going through the evidence. In *Sakalabhaktula* (Supra) Andhra Pradesh High Court opined that while dealing with an application under Order 39 Rule 1 & 2 C.P.C., the court is not subject to limitations and conditions prescribed by the provisions of Rules 1 & 2 of O. 19. The same view is taken by the Rajasthan High Court in *Bhairon Lal* (Supra).

9. It is seen that M.P. High Court had an occasion to deal with this aspect. In *Rajendra Prasad Vs. Bhagwandas and Ors* reported in 1976 MPWN 103 this Court opined that though recording of evidence is not prohibited, yet it should be rarely resorted to in exceptional circumstances. This finding is given by the Court while interpreting O. 39 R. 1 & 2 C.P.C. In the opinion of this Court, the pivotal question is whether while dealing with an application preferred under O. 39 R. 1 & 2 the trial court can permit the parties to cross-examine the person whose affidavit has been filed by the other side.

10. Order 39 C.P.C. reads as under:-

"1. Cases in which temporary injunction may be granted-
Wherein any suit it is proved by affidavit or otherwise."

No doubt the provision is silent regarding the power of the Court to permit the parties to cross-examine the deponent in proceeding under O. 39 R. 1 & 2 C.P.C. As discussed above, certain High Courts have opined that cross-examination of deponent is not permissible at this stage, yet I am bound by the finding given by the M.P. High Court in *Rajendra Prasad* (Supra). Same view is also taken by a Division Bench of Rajasthan High Court in AIR 1991 Raj 56 (*Ram Swaroop and Ors. Vs. Bholu Ram*). After following AIR 1983 AP 114 (*Ali Bin Aifan*), the Division Bench opined that as per principle of natural justice, under O. 39 R. 1 & 2 the court has power to call the deponent for cross-examination. The Rajasthan High Court considered various

judgments of different High Courts. I am in respectful agreement with the said view of the Rajasthan High Court.

11. Apart from this, the matter may be examined from yet another angle. There may be cases where the affidavit filed raises doubt in the mind of Court. In exceptional cases, where in the interest of justice it is necessary to examine the truth of the matter, the trial court cannot be held to be power less in this regard. In the facts and circumstances of the present case, the question of delay which may frustrate the injunction would not arise because in the present case, it is the plaintiff who is seeking permission to cross-examine the deponent. Thus, it cannot be accepted as a thumb rule that in no circumstances the trial court can permit the cross-examination of deponent in proceedings under O. 39 R. 1 & 2. This cannot be forgotten that statute is to be interpreted to advance the cause of justice. Too technical a construction of provision that leaves no room for reasonable elasticity of interpretation should be avoided. [See: (1975) 1 SCC 774 (*Sushil Kumar Sen Vs. State of Bihar*) and AIR 1955 SC 425 (*Sangram Singh Vs. Election Tribunal Kotah*)].

12. The Apex Court opined that the procedure is designed to facilitate justice and further its ends: not a penal enactment for punishment and penalties, not a thing designed to trip people up. It is further opined that morality of justice at the hand of law troubles a Judge's conscience and points an angry interrogation at the law reformer. The humanist rule that procedure should be handmaid, not the mistress of legal justice compels consideration of vesting a residuary power in judges to act *ex debito justitiae* where the tragic sequel otherwise would be wholly inequitable. Justice is the goal of jurisprudence – processual, as much as substantive. In (1976) 1 SCC 719 (*State of Punjab Vs Shamlal Murari*), the Apex Court held that processual law is not to be a tryant but a servant, not an obstruction but an aid to justice. Procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice. In (1984) 3 SCC 46, *Ghyanshyam Dass Vs. Dominion of India* the Apex Court reiterated the need of interpreting a part of the adjective law dealing with procedure alone in such a manner as to subserve and advance the cause of justice rather than to defeat it as all the laws for procedure are based on this principle. In (2005) 4 SCC 480 (*Kailash Vs. Nankhu and Ors*) the Apex Court held that the provisions of Civil Procedure Code or any other procedural enactment ought not to be construed in a manner such which would leave the Court helpless to meet extraordinary situations in the ends of justice.

13. In view of aforesaid analysis, this Court is of the view that in exceptional circumstances the trial court has power to permit the cross-examination of deponents. In view of this finding, It is not necessary to decide whether O. 19 R. 1 & 2 can be applied in O. 39 R. 1 & 2 proceeding. Since I am of the view that trial court has inherent power even under O.39 R. 1 & 2 to permit cross-examination of deponent, the order passed by the trial court, by taking assistance of O. 19 R. 1 & 2, at best may be treated as an order passed by wrong quoting of provision. This is trite in law that if power can be traced elsewhere, order cannot be interfered with on the ground that it is passed by relying on a different and wrong provision.

14. Considering the aforesaid, in my view, the court below has taken a view to advance the cause of justice and did not permit itself to be strangled by hyper-technicalities. I find no reason to interfere with this plausible view in the present proceeding under Article 227 of the Constitution.

15. Petition is bereft of merits and is hereby dismissed. No Costs.

Petition dismissed.

I.L.R. [2016] M.P., 73

WRIT PETITION

Before Mr. Justice Rajendra Menon & Mr. Justice C.V. Sirpurkar

W.P. No. 3398/2000 (Jabalpur) decided on 2 February, 2015

SHIV KUMARI GULHANI (SMT.) & ors. ...Petitioners

Vs.

DISTRICT AND SESSIONS JUDGE, MANDLA ...Respondent

A. Constitution - Article 311 & 309 - Compulsory retirement - Not a punishment - It implies no stigma nor suggestion of misbehaviour. (Para 6)

क. संविधान - अनुच्छेद 311 व 309 - अनिवार्य सेवानिवृत्ति - दंड नहीं है - इससे न तो कोई कलंक न ही दुर्व्यवहार का सुझाव विवक्षित है।

B. Constitution - Article 311 & 309 - Compulsory retirement - Subjective satisfaction - Petitioner was advised to improve his work - He was also graded "E" (poor) - He was negligent in working, he was not punctual and there was no improvement inspite of repeated warnings - Ample material on record for the District and Sessions Judge to form a subjective satisfaction that it is in public interest to

compulsorily retire the petitioner at the premature age of 57.(Paras 9 & 12)

ख. संविधान - अनुच्छेद 311 व 309 - अनिवार्य सेवानिवृत्ति - व्यक्तिपरक संतुष्टि - याची को अपना कार्य सुधारने की सलाह दी गई थी - उसे "E" (poor) श्रेणी में भी रखा गया - वह कार्य में उपेक्षित था, वह समयनिष्ठ नहीं था एवं बारंबार चेतावनी के बावजूद उसमें कोई सुधार नहीं हुआ - जिला एवं सत्र न्यायाधीश के पास व्यक्तिपरक संतुष्टि निर्मित करने के लिये अभिलेख पर पर्याप्त सामग्री थी कि याची को समयपूर्व 57 वर्ष की आयु में अनिवार्य रूप से सेवानिवृत्त किया जाना जनहित में है।

Case referred :

AIR 1992 SC 1020.

Malti Dadariya, for the petitioners.

Rakesh Jain, for the respondent.

ORDER

The Order of the Court was delivered by :
C.V.SIRPURKAR, J. :- This writ petition under Article 226/227 of the Constitution of India is directed against the order No.124/III-10- 7/1999, dated 10.5.2000 passed by the District and Sessions Judge, Mandla, on administrative side, whereby the petitioner was directed to be compulsorily retired w.e.f. 12.5.2000.

2. The facts giving rise to this writ petition, may briefly be summarized as hereunder:

The petitioner was appointed as Lower Division Clerkcum- deposition writer on the establishment of District Judge, Seoni, in the month of June, 1964. He was transferred therefrom to the establishment of District Judge, Mandla in the month of September, 1972. He was promoted as Upper Division Clerk on 20.9.1980 and as Assistant Accountant on 15.9.1992. He completed 57 years of age on 23.12.1999. Thereafter, he was compulsorily retired by the impugned order dated 10.5.2000 (Annexure-P/1) passed by District and Sessions Judge, Mandla under section 56(3) of the Fundamental Rules read with memo of Government of Madhya Pradesh General Administration Department No.C-3-24/84/3/1, dated 20.7.1984 read with memo of the High Court of Madhya Pradesh, Jabalpur No.B/5666/III/18-117/84 dated 27.6.1985. He was directed to be paid salary and allowances for the period

of notice of three months, in lieu of the notice.

3. Aforesaid order had been challenged mainly on the grounds that the petitioner was a sincere and hard working employee. There was not even a single complaint against his work or conduct during his entire tenure. His career record was excellent and unblemished. No adverse entry or remark entered in his service record was ever communicated to him; therefore, it shall be deemed that there were no adverse entries or remarks in his annual character role. No departmental inquiry was ever instituted against him and no penalty, minor or major, was ever imposed upon him. The impugned order dated 10.5.2000 was laconic and indicated no reason as to why continuation of the petitioner in the service, was against public interest. It has been pleaded in the rejoinder that the petitioner had already been reverted from the post of Accountant to that of Assistant Accountant on the basis of entries in ACR. Thus on the same record, he could not have been compulsorily retired as this tantamount to double jeopardy. It has further been argued that three months salary and allowances in lieu of notice period have not been tendered to him. On aforesaid grounds, it has been submitted that the impugned order was arbitrary, illegal and void and it has been prayed that the order be quashed.

4. Opposing the writ petition, it has been contented on behalf of the respondent that after being promoted as Assistant Accountant in the year 1992 the petitioner was also promoted as Accountant. However, since his work as Accountant was not satisfactory, he was reverted back to the post of Assistant Accountant by order No.8/II-12-1/1996 dated 10.1.1996 passed by District and Sessions Judge, Mandla on administrative side. The work and conduct of the petitioner, was not satisfactory as he was careless and negligent in discharge of his duties. The entries in annual character role of the petitioner from the year 1995 to the year 2000, were extremely adverse and reflected poor performance of the petitioner. On various occasions, his explanations were called and warnings were issued; however, his performance did not improve.

5. It has further been submitted that in aforesaid circumstances, the departmental screening committee examined the case of the petitioner under section 56 of the Fundamental Rules and recommended compulsory retirement in public interest as he had already attained the age of 55 years. It has further been submitted on behalf of the respondent that for the purpose of compulsorily retiring a Government servant, his entire service record is required to be assessed; as such, there is no question of double-jeopardy; therefore, it has

been prayed that the writ petition be dismissed.

6. Having carefully considered the rival contentions, this Court is of the view that the challenge to the impugned order must fail for the reasons hereinafter stated:

In the case of *Baikuntha Nath Das and another vs. Chief District Medical Officer, Baripada and another*, AIR 1992 SC 1020, the Supreme Court, after considering the entire gamut of case law available on the point, formulated following principles in respect of compulsory retirement of Government employee:-

32. The following principles emerge from the above discussion:

(i) *An order of compulsory retirement is not a punishment. It implies no stigma nor any suggestion of misbehaviour.*

(ii) *The order has to be passed by the Government on forming the opinion that it is in the public interest to retire a government servant compulsorily. The order is passed on the subjective satisfaction of the Government.*

(iii) *Principles of natural justice have no place in the context of an order of compulsory retirement. This does not mean that judicial scrutiny is excluded altogether. While the High Court or this Court would not examine the matter as an appellate Court, they may interfere if they are satisfied that the order is Passed (a) mala fide, or (b) that it is based on no evidence, or (c) that it is arbitrary in the sense that no reasonable person would form the requisite opinion on the given material in short; if it is found to be a perverse order.*

(iv) *The Government (or the Review Committee, as the case may be) shall have to consider the entire record of service before taking a decision in the matter - of course attaching more importance to record of and performance during the later years. The record to be so considered would naturally include the entries in the confidential records/ character rolls, both favourable and adverse. If a government servant is promoted to a higher post*

notwithstanding the adverse remarks, such remarks lose their sting, more so, if the promotion is based upon merit (selection) and not upon seniority.

(v) An order of compulsory retirement is not liable to be quashed by a Court merely on the showing that while passing it uncommunicated adverse remarks were also taken into consideration. That circumstance by itself cannot be a basis for interference.

Interference is permissible only on the grounds mentioned in (iii) above.

7. It is clear from the aforesaid principles that all that is required for compulsorily retiring a Government servant, is the subjective satisfaction of the Government that such compulsory retirement is in public interest. Principle No.3 reproduced hereinabove, delineates limits of the scope of judicial review of such an order. In the case of challenge to the order of compulsory retirement, the Court is not competent to examine the matter as an appellate Court; however, the Court may interfere if it satisfied that the order is malafide or there is no evidence to support the order or it is perverse because no prudent person would form requisite opinion on the basis of material available against the employee.

8. In the backdrop of aforesaid legal position, when we examine the case of the petitioner, we find that the order was passed on the recommendation of Departmental Scrutiny Committee, which was duly constituted by the office order No. Q/III-10-4/99 dated 25.11.1999, comprising one Additional Sessions Judge and one Judicial Magistrate of First Class (R/15). The recommendation of the Committee was made pursuant to the report dated 5.1.2000 of the Clerk of Court. The scrutiny committee took into account the fact that the petitioner persistently failed to properly maintain the registers, required to be maintained by him and failed to prepare various statements within the prescribed time limits. He was also grossly negligent in submitting telephone and other bills in time, necessitating payment of surcharge. The fact that the surcharge was ultimately recovered from the petitioner, is besides the point. The Committee also considered the ACR entries for the years from 1995 to 1999 and concluded that the Committee was of the opinion that the petitioner was extremely careless and negligent in discharge of his duties and

his conduct amounted to dereliction of duty. The quality of the work of the petitioner was poor and there was no improvement in his performance, even after repeated directions and warnings. In the circumstances, the opined that petitioner was a financial liability on the establishment and it was in the public interest to retire him compulsorily, as he had already attained the age of 57 years. The recommendation of the Committee was accepted by the District and Sessions Judge, who was a competent authority to order compulsory retirement of a non-gazetted employee. Consequently, the impugned order for compulsory retirement of the petitioner was passed.

9. It may be observed that the recommendations of the Committee were passed on the reports submitted by the Clerk of Court dated 15.12.1999 (Annexure-R/15). The conclusions of the Committee are supported by the entries made in the annual confidential report of the petitioner for the years from 1995 to 1999 (Annexure-R/2 to R/7). In the year 1994-1995 (R/2) it has been recorded that after getting promotion, he had not performed well. In March, 1996 (Annexure-R/3), it has been recorded that he is a poor worker and he had been reverted from the post of Accountant. He was advised to improve his work. He was also graded as "E" [poor]. Though, in the year 1996-1997 it was observed that his work is satisfactory; however, in the following year, i.e. 1997-1998, it was recorded (Annexure-R/5) that he is negligent in working, he is not punctual and there is a great scope of improvement. It was also observed that he should improve his behaviour with his colleagues.

10. Learned counsel for the petitioner was at pains to point out during the arguments that in Annexure-R/5, it has been recorded that the petitioner can be considered for clearing efficiency bar or promotion; however, this lone entry cannot be read in isolation and has to be read along with myriad damning entries. In the year 1999 he was again graded as a poor worker and it was recorded that he lacks capacity and zeal to work. He was also found to be not alive to the responsibility of position he was occupying and had to be reminded many a time before he made any compliance. It was specifically observed that he was unfit for promotion. In the annual character role recorded on 10.4.2000 (R/1) he was again graded as poor and it was observed that he does not prepare bills, periodic statements etc. within time. It was also observed that all the files related to his work are maintained in a totally haphazard manner and a explicit remark to the effect that it would be in the interest of the Government to retire him, was made.

11. In the order of reversion dated 10th of January, 1996 (Annexure-R/1) also, aforesaid deficiencies in the work and conduct of the petitioner are reflected.

12. Thus, the character role entries and observations made in the order of reversion, are based upon office record from Annexure- R/8 to Annexure-R/12. Hence, it may be seen that there was ample material on record for the District and Sessions Judge, Mandla to form a subjective satisfaction that it is in public interest to compulsorily retire the petitioner at the premature age of 57.

13. The entries made in the annual confidential role of the petitioner have been challenged mainly on the ground that they were never communicated to the petitioner. However, it has been held in the case of *Baikuntha Nath Das* (supra) that an order of compulsory retirement is not liable to be quashed by a Court merely on showing that while passing it, un-communicated adverse remarks were also taken into consideration. It was further observed that this circumstance, by itself, cannot be a basis for interference by the Court.

14. Now we shall advert to the second argument advanced on behalf of the petitioner that the order of compulsory retirement has resulted in double-jeopardy. It may noted in this regard that for the purpose of arriving at subjective satisfaction that continuation of the petitioner in service would not be in public interest, entire service record of the petitioner, particularly the entries in the recent years are required to be considered. In this view of the matter, the fact that the petitioner was earlier reverted from the post of Accountant to that of Assistant Accountant would not come in the way of passing an order for compulsory retirement. As such, this argument also, does not have any substance.

15. No other ground has been raised during the arguments.

16. On the basis of aforesaid discussions, this Court is of the view that the impugned order compulsorily retiring the petitioner, was passed by the competent authority in a bonafide manner, it was based on sufficient material available on record and by no stretch of imagination could it be deemed to be arbitrary or perverse.

17. Consequently, this writ petition is dismissed.

Petition dismissed.

I.L.R. [2016] M.P., 80

WRIT PETITION

Before Mr. Justice Jarat Kumar Jain

W.P. No. 1632/2014 (Indore) decided on 19 February, 2015

SHREE VAISHNAV SAHAYAK TRUST

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

Land Revenue Code, M.P. (20 of 1959), Section 250 - Restoration of possession - Maintainability - Application u/s 250(2) of the M.P. Land Revenue Code is not maintainable when the civil suit has already been filed - Petition allowed. (Paras 18 & 21)

भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 250 - कब्जे का प्रत्यावर्तन - पोषणीयता - म.प्र. भू राजस्व संहिता की धारा 250(2) के अंतर्गत आवेदन पोषणीय नहीं है, जब सिविल वाद पहले ही प्रस्तुत कर दिया गया हो - याचिका मंजूर।

Cases referred :

1976 J LJ 278, ILR 2010 MP 1588 (DB), ILR (2008) MP 1683, ILR (2007) MP 1282 (SC).

Vijay Assudani, for the petitioner.

A.K. Sethi with *Harish Joshi*, for the respondents.

ORDER

JARAT KUMAR JAIN, J. :- In this petition filed under Article 226 of the Constitution of India, the petitioner has challenged the order dated 30.01.2014 whereby the respondent No.3 Additional Tehsildar, Indore rejected the objections in regard to maintainability of the application under Section 250 of the M.P. Land Revenue Code (in brief "Code").

2. Brief facts for adjudication of this matter are as under :

[i] The petitioner a registered Public Trust, is owner and in possession of the land survey Nos. 293, 295 and 296 admeasuring 0.279, 0.134 and 0.522 hectares respectively situated at Village Sirpur Tehsil Rau Distt. Indore. At the request of Kailash and Badrilal, the demarcation of the said land was done on 11.06.2009 and it was found that land comprised in Survey No.295 (in brief "suit land") is within the boundary wall of petitioner Trust. After demarcation report Kailash, Badrilal and respondent No.2 were

trying to dispossess the petitioner, therefore, the petitioner Trust filed a Civil Suit No.42A/ 09 for declaration and permanent injunction in the Court of Additional District Judge, Indore. In the said suit petitioner and respondent No.2 both have filed the applications under Order 39 Rule 1 & 2. 13th Additional District Judge, Indore by a common order dated 01.03.2013 allowed the application of the petitioner directing the respondents not to dispossess the petitioner from suit land whereas the application of the respondent No.2 was dismissed. Against this order respondent No.2 filed the Misc. Appeal before this Court which is pending.

[ii] During the pendency of the suit respondent No.2 preferred an application under Section 131 of the Code. Learned Additional Tehsildar, Indore vide order dated 10.08.2009 directed the petitioner that the gate be kept open to provide means of access to respondent No.2. Being aggrieved with this order petitioner preferred WP No.6598/2009 wherein on 10.09.2009 ad interim stay was granted in favour of the petitioner. Subsequently the application under Section 131 of the Code has been dismissed in non-prosecution. In the light of that order petitioner withdrew Writ Petition No.6598/2009.

[iii] Thereafter respondent No.2 filed an application under Section 129 of the Code for demarcation of land. Ex parte order for demarcation was passed by the Tehsildar, Indore. The said order was challenged by the petitioner in WP No.7480/2013. This Court directed that the demarcation be done in the presence of both the parties. In compliance of the order demarcation was done in the presence of petitioner and respondent No.2. In demarcation report it was found that land comprised in Survey No.295 is in possession of petitioner. Thereafter WP No.7480/2013 was disposed off with the direction that the parties shall be at liberty to take appropriate action in accordance with law pursuant to the demarcation done by the Tehsildar.

[iv] On 28.12.2013 respondent No.2 filed an application under Section 250 of the Code before the respondent No.3/Additional Tehsildar, Indore for obtaining possession from the petitioner of the land which is found in possession of the petitioner as per demarcation report. The petitioner resisted the application on two grounds (i) the application is time barred; and (ii) during the pendency of the civil suit, Revenue Court has no jurisdiction to entertain application under Section 250 of the Code. Additional Tehsildar vide order dated 30.01.2014 rejected the objections holding that the application is well

within time and the Revenue Court is free to proceed even during pendency of civil suit. Being aggrieved with the order the petitioner preferred this petition.

3. Learned Counsel for the petitioner submits that there was no direction in the order dated 20.12.2013 passed in WP No.7486/2014 to initiate proceedings under Section 250 of the Code but the respondent No.2 filed the application scandalizing the order. Since the suit for declaration and injunction of the suit land is pending and the order passed by the Civil Court is binding on Revenue Court, therefore, during the pendency of Civil Suit an application under Section 250 of the Code is not maintainable.

4. Learned Counsel for the petitioner submits that the impugned order is an interlocutory order, therefore, no appeal is maintainable against the impugned order. The order is illegal and is contrary to settled law and is without jurisdiction, therefore, the High Court may exercise writ jurisdiction under Article 226 and 227 of the Constitution. In such circumstances on the ground of availability of alternative remedy present Writ Petition cannot be dismissed. Alternative remedy is a rule of discretion and not one of compulsion, thus, the Writ Petition under Article 226 and 227 is maintainable.

5. Learned Counsel for the petitioner submits that the Bhumiswami can apply for restoration of possession when he has been unauthorizedly and illegally dispossessed and such application can be filed within 2 years from the date of dispossession u/s 250 of the Code moreover when the civil suit is pending the revenue court cannot pass order for restoration of possession. The petitioner is in possession of the suit land since 1923-26. Whereas the respondent No.2 filed the application on 28.12.2013 i.e. after lapse of about 90 years. Thus the application is apparently time barred. Admittedly concerning the suit land petitioner has filed the civil suit for declaration and injunction and the Civil Court has granted temporary injunction against the respondent No.2. The decision of Civil Court is final whereas the decision of Revenue Court will not operate as res judicata in such a civil suit as held by the Full Bench of this Court in the case of *Ramgopal V/s. Chetu* 1976 J.L.J 278. In such circumstances the application under Section 250 of the Code is not maintainable at all but by the impugned order learned Additional Tehsildar, Indore rejected the objections of the petitioner.

6. Per contra learned Counsel for the respondent submits that in the order dated 20.12.2013 passed in WP No.7480/2013 the liberty was given to the respondent No.2 for taking appropriate action in accordance with law pursuant

to demarcation done by the Tehsildar. Thus, in the light of the order respondent No.2 has filed an application under Section 250 of the Code therefore it is not correct that the respondent no.2 filed the application by scandalizing the order of this Court.

7. Learned Counsel for the Respondents submits that against the impugned order the petitioner has alternative remedy of filing appeal or revision u/s 44 and 50 of the Code. Thus the Petition is not maintainable and is liable to be dismissed solely on this ground.

8. It is contended by learned counsel that merely because order dated 01.03.2013 was passed granting injunction in favour of petitioner and refusing injunction to the respondent No.2 will not affect the proceedings under Section 250 of the Code. An application under Section 250 of the Code is a judicial proceedings seeking relief for possession and which was never enjoined by the Civil Court. The impugned order is interlocutory order and is not at all going to affect the merits of the case.

9. Learned Counsel for the respondent No.2 further submits that in demarcation report dated 24.07.2013 it was found that the petitioner is in possession of the suit land then immediately the respondent No.2 has filed the application under Section 250 of the Code. Thus the application is within time. Therefore there is no substance in the petition, it deserves to be dismissed.

10. I have heard learned Counsel for the parties and perused the record.

11. Firstly I have considered the objection in regard to maintainability of the petition. This Court in the matter of *Shyama Prasad Datta V/s. Arun Kumar Vasudev* ILR 2010 MP 1588 (DB) held that against the order of rejection of application under Order VII Rule 11 CPC though revision could be maintainable but High Court has in exercise of its powers under Article 226/227 has to strike with the sword of its power against each and every illegality.

12. This Court in the case of *Bhuvneshwar Prasad @ Guddu Dixit V/s. State of M.P.* ILR (2008) MP 1683 held that petition once admitted could not be dismissed on the ground of availability of alternative remedy.

13. Hon'ble Apex Court in the case of *M.P. State Agro Industries Development Corporation Limited V/s. Jahan Khan* ILR (2007) MP 1282

(SC) held as under :

"The Rule of exclusion of writ jurisdiction due to availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, inspite of availability of an alternative remedy, a Writ Court may still exercise its discretionary jurisdiction of judicial review, in atleast three contingencies, namely (i) where the writ petition seeks enforcement of the fundamental rights, (ii) where there is failure of principal of natural justice or (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged. In these circumstances, an alternative remedy does not operate as a bar."

14. In the light of the aforesaid precedents I am of the view that the petition is maintainable even if the alternative remedy of filing revision is available to the petitioner.

15. Now I have considered whether this Court while deciding the earlier Writ Petition No.7480/2013 on 20.12.2013 directed to file an application u/s 250 of the Code. While deciding the aforesaid petition this Court gave liberty to the parties to take appropriate action in accordance with law pursuant to the demarcation done by the Tahsildar. It is nowhere directed that the respondent No.2 can file an application under Section 250 of the Code for obtaining possession, but the respondent No.2 filed the application under Section 250 of the Code mentioning that the application is filed in compliance with order passed by this Court on 20.12.2013 in WP No.7480/2013. Thus it is clear that the respondent No.2 has misconstrued the order passed by this Court.

16. Now I have considered that whether during the pendency of the Civil Suit for declaration and injunction an application under Section 250(2) of the Code is maintainable.

17. Full Bench of this Court in the case of *Ramgopal* (supra) examined the ambit and scope of Section 250 and the effect of Clause (X) of Section 257 of the Code and held :

"Even after the revenue Court makes an order under Section 250, the aggrieved party has the remedy of filing

a civil suit for establishing his title to the land and for obtaining possession of the same. The decision of the revenue Court cannot operate as res judicata in the civil suit; nor can Section 257(X) of the Code stand in the way of institution of a suit for possession of a land founded on title. What is excluded from the cognizance of a civil Court under Clause (X) of Section 257 is a suit of the type of one under Section 9 of the Specific-Relief Act for restoring possession of land to a dispossessed Bhumiswami."

18. This Court in the case of *Ramgopal* (supra) held that that without availing the remedy under Section 250 of the Code Bhumiswami can straightway filed a suit in Civil Court for declaration of his title. In the present case the petitioner has filed the suit for declaration and possession in regard to suit land and the Civil Court has granted temporary injunction in favour of the petitioner. In such a situation the revenue Court while exercising the jurisdiction under Section 250 of the Code cannot grant any relief i.e. cannot restore the possession to the respondent No.2. Thus the application u/s 250(2) of the Code is not maintainable when the civil suit has already been filed.

19. Besides the aforesaid, the material facts are missing in the application filed u/s 250 of the Code. It is not averred that the respondent No.2 is a Bhumiswami of suit land and on which date he has been unauthorizedly dispossessed by the petitioner from the suit land. And he has also not mentioned the date on which cause of action accrued to him in order to calculate limitation. Thus in absence of material averments the application u/s 250 of the Code is not tenable.

20. In the present case on 11.6.2009 the demarcation was conducted then first time it was disclosed that petitioner is in possession of suit land. Subsequently this fact was confirmed by demarcation report dated 24.7.2013. The limitation for filing application starts from the date of demarcation i.e. 11.6.2009. Thus the application for restoration of possession can be filed within two years i.e. before 10.6.2011 whereas the application u/s 250 of the Code was filed on 28.12.2013. Thus the application is apparently time barred but the learned Additional Tahsildar recorded incorrect finding that the limitation will start from 24.7.2013.

21. The finding of the learned Additional Tahsildar that the application

under Section 250 of the Code is within limitation and when there is no injunction against the revenue Court, in such a situation the revenue Court is free to proceed under Section 250 of the Code is incorrect and illegal. Thus the revenue Court has committed a patent error which is manifest and apparent from the face of record which has resulted in gross injustice. Moreover the learned Additional Tahsildar assumed jurisdiction to proceed u/s 250 of Code when there is an injunction order in favour of the Petitioner by a Civil Court and the application of the Respondent has already been dismissed by the Civil Court. Thus the order passed by the Additional Tahsildar is set aside. Consequently the petition is allowed.

Petition allowed.

I.L.R. [2016] M.P., 86

WRIT PETITION

Before Mrs. Justice S.R. Waghmare

W.P. No. 3945/2010 (Indore) decided on 18 March, 2015

SUNIL

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

Urban Land (Ceiling and Regulation) Act (33 of 1976), Sections 10 & 20 - Notice of Collector requiring the petitioner to handover the possession of surplus land assailed on the ground that an application u/s 20 is pending consideration - Therefore, the notice is without jurisdiction - Though the name of Government entered in the revenue record, petitioner is in possession of the disputed land - Notice is vitiated and contrary to the provisions of law - Held - Kabza panchnama is merely a paper formality designed to frustrate the provisions of the Repeal Act - Even the impugned notice does not indicate that the possession was with the State Government - There is no compliance of provisions contained u/s 10 (5) of the Act - Possession still rests with the petitioner - Although the possession is alleged to have been taken in the year 1984 but Khasra entry upto 1988 indicates the possession of the petitioner - Notice requiring hand over the possession is quashed - Petition is allowed. (Paras 9, 10 & 11)

नगर भूमि (अधिकतम सीमा और विनियमन) अधिनियम (1976 का 33), धाराएं 10 व 20 - कलेक्टर का नोटिस जिसके द्वारा यह अपेक्षित है कि याची अतिरिक्त भूमि

का कब्जा सौंप दे को इस आधार पर चुनौती दी गई कि धारा 20 के अंतर्गत आवेदन विचारण हेतु लंबित है — अतः, नोटिस अधिकारिता विहीन है — यद्यपि राजस्व अभिलेख में शासन का नाम दर्ज है, विवादित भूमि पर याची का कब्जा है — नोटिस दूषित है तथा विधि के प्रावधानों के विपरीत है — अभिनिर्धारित — कब्जा पंचनामा केवल कागजी औपचारिकता है जिसकी रचना निरसन अधिनियम के प्रावधानों को विफल करने के लिये की गई है — यहाँ तक कि आक्षेपित नोटिस भी यह नहीं दर्शाता कि कब्जा राज्य शासन के पास था — अधिनियम की धारा 10(5) के अंतर्गत दिये गये प्रावधानों का अनुपालन नहीं किया गया — कब्जा अभी भी याची के पास है — यद्यपि अभिकथित रूप से कब्जा 1984 में ले लिया गया परंतु 1988 तक की खसरा प्रविष्टि याची का कब्जा दर्शाती है — कब्जा सौंपने की अपेक्षा का नोटिस अभिखंडित — याचिका मंजूर।

Prakash Verma, for the petitioner.

Sudhanshu Vyasa, for the respondents/State.

ORDER

S.R. WAGHMARE, J. :- By this petition under Article 226 of the Constitution of India, the petitioner is aggrieved by order dated (sic:29-01-2010) passed by the respondent No.3 Upper Collector and Competent Authority, Nagar Bhumi Vinayaman (Annexure P/1) noticing the petitioner for handing over possession of the disputed land under the Urban Land Ceiling Act.

2. Briefly stated the petitioner is a citizen of Indore and resides at village Tejpur Gadbad and is in possession of ancestral property bearing survey No.310 and half the land of the survey ad-measuring 0.509 hectare. That the said land was agricultural land and application was filed that the land be excluded under Section 20 of the Ceiling Act. The application is Annexure P/ 2. A case for urban land ceiling bearing No.384/A-90/C-1/77-78 was pending before the respondent No.3 competent authority under the Urban Land Ceiling Act, 1976. It was also stated that all the family members were the equal share holders in the ancestral land and the respondent No.3 had erred in only excluding 0.150 hectare of the said land. However, Respondent No.3 declared 0.359 hectares as surplus and demanded filing of the draft statement under Section 8(1) of the Urban Land Ceiling Act, 1976 which is also filed as Annexure P/3. The draft statement was issued without notice. Similarly application under Section 20 of the Act was also pending consideration and hence the notice issued by the respondent No.3 impugned in this petition was without jurisdiction and contrary to the provisions of law. Thereafter, the respondents also included the land in the notification issued by the State Govt.

and under Section 10(1) of the Act and a notice dated 14.02.1984 was issued and possession was taken over by the petitioner on 27.02.1984 by preparing panchnama. And whereas the disputed land was ancestral land in the possession of the petitioner the panchnama is Annexures P/5 & P/6 annexed with the petition. Thereafter in the revenue records the name of the government is entered and the entire action of the respondent No.3 is, therefore, vitiated and contrary to the provisions of law. Counsel submitted that opportunity of hearing was not granted to the petitioner besides an important fact which cannot be marginalised is that the petitioner is in possession even today and notice was received by the petitioner issued by the respondent No.3 on 29.01.2010 that the land be excluded from the provisions of Act of Urban Land Ceiling.

3. Counsel for the petitioner has vehemently urged the fact that Urban Land Ceiling Act was repealed on 17.02.2000 and it is wrongly stated by the respondents that the land in question has been declared surplus and possession thereof was taken on 27.02.1984. The notice was also issued to the petitioner according to the respondents vide Annexure P/1, however Counsel urged that it is incorrect since Annexure P/6 was just a mere paper formality and the possession of the petitioner's was actual and legal. Moreover Section 10(5) of the present Act requires that a notice to be given to the owner before taking possession of land and such a notice has not been issued and hence in this light also Annexure P/6; the notice in question is vitiated and contrary to the provisions of law.

4. Counsel placed reliance in the matter of *Gaurav Agro Plast Ltd Vs. State and others* in WP No.603/2000 and the Court had held as under:-

“No possession in fact also seems to have been taken on the spot and the punchnama (R/6) appears to be an empty formality. Curiously enough this document is not signed by any puch (sic:punch) witness much less by any person in possession of the land, so as to entitle it to be called as punchnama.....”

And the Court further held that:-

“Sequence of things leave no manner of doubt that this punchnama was a mere paper formality designed to frustrate the effect of Repeal Act....”

The judgment in the matter of *Gaurav Agro Plast* (supra) had attained

finality since, the LPA filed by the State Govt. bearing No.179/2001 was dismissed.

5. Similarly relying on the decision of WP 887/98 *Narayan Dharam Vs. State of MP and others*, Counsel submitted that the Court held thus:

“17. So far as the punchnama is concerned, it appears that it was a paper possession because it was not in accordance with law. By one punchnama possession of two properties situated at two different places could not have been taken at a time. Apart from this no notice was given to the petitioner who was occupying the land at the relevant time.

18. No notice was given to the occupiers whose huts were found on spot. Apart from this no independent witness has signed the punchnama while the land was situated in thickly populated area as it was residential colony of the city.”

6. Counsel also placed reliance on WP No.3241/2008 (*Badrilal and others Vs. Commissioner, Indore Division, Indore and others*) to bolster his submissions. Counsel submitted that in the present case also it is denied that *kabza panchnama* dated 27.02.1984 (Annexure P/6) was in accordance with the provisions of law; even *khassra* in column No.12 is considered the petitioner was in possession of the land in the year 1999. Counsel submitted that all the activity of the respondent Authorities has been behind the back of the petitioner and hence it ought to be set aside.

7. Counsel for the respondents *per contra* has vehemently opposed the contentions put forth by the Counsel for the petitioner and submitted that the claim of the petitioner was hopelessly time barred. The possession was already taken from the petitioner on 27.02.1984 and he had also filed proceedings under Section 20 of the Urban Land Ceiling Act vide Case No.384/A-90/C-1/77-78 which were dismissed, and has now filed the petition after 26 years. Besides the petitioner had also suppressed the fact that the petitioner had filed an appeal against decision passed in the above mentioned ceiling case bearing No.225/84-85 and the same was also dismissed on 18.07.1985. A copy of the order was filed as Annexure R/1 and thereafter even today the petition has been filed after 26 years knowing well that the claim of the petitioner in appeal has been dismissed. The fact has been suppressed from this Court.

8. The respondents also placed reliance on *Radha Kishan Vs. State of MP*

in WP No.1669/05 whereby the Court had categorically held that the *kabza panchnama* was dated 05.05.1998 and the petition was filed on 01.06.2005 after seven years and the Court had dismissed the petition on the ground of delay and laches. Similarly the writ appeal filed before the Division Bench placed by the petitioner in the matter of *Radha Kishan* (supra) had been dismissed by the Division Bench. Besides the appellate Court also held that the petitioner had appeared before the competent authority on 30.12.1996 and filed objections which were dismissed in the year 1997 and the notification was issued regarding the land use on 07.11.1997 under the provisions of sub-Section 3 of the Ceiling Act and in this sense also the present petition is time barred by 26 years and ought to be dismissed on this ground alone. Moreover the recovery panchnama dated 27.02.1984 (Annexure P/6) had been properly prepared; the possession of the disputed land was taken over on the same day in accordance with the provisions of law. Moreover the declaration under Section 8(1) filling by the petitioner themselves had attained finality vide Ex.P/3 & P/4 filed by them and it is the petitioner who had filed the claim under Section 20 of the Act before the competent authority. Besides under Section 10(1) a notification had been issued on 12.01.1982 and was properly published in all open places. The ceiling case under Section 20 filed by the petitioner was dismissed on 24.09.1983 and since the matter was published under Sections 10(1) & 10(3) of the Act, it had attained finality on notification in the gazette on 24.10.1983. The land has already vested in the government as per the notice dated 14.02.1984 whereby the land was declared surplus and the same was also published by a affixture. It is only because the petitioner has refused to handover the vacant possession of the land that the *kabza panchnama* dated 27.02.1984 (Annexure P/6) was prepared by the competent authority Assistant Land Measurement Officer, Additional Tehsildar Urban Land Ceiling and other employees were present on the spot along with the petitioner. The land has been recorded in the revenue records as government land. The *khasra panchshala* and the spot *panchnama* are filed as Annexures R/9 & R/10. Moreover the respondents Counsel also vehemently urged the fact that the land had already been declared surplus when the Ceiling Act was in existence and it was repealed only in the year 1999, whereas the *kabza panchnama* (Annexure P/6) is dated 27.02.1984 thereby clearly indicating that the savings clause could not held as applicable to the petitioner, since on the date of repeal the land was already declared to be government land. The very fact that the petitioner had filed the claim under Section 20 of the Act indicated that the petitioner had knowledge that the land was government land and both the claim as well as the appeal were dismissed by the Courts below. Similarly Annexure P/1 the impugned notice dated 29.01.2010

was issued by the Additional Collector and competent authority since the petitioner, as encroacher was selling the land to different persons and he had no right to do so. Besides Counsel for the respondent/State urged that this Annexure P/1 was a notice, it was not an order but only notice to show cause why government land was being alienated. Moreover Counsel urged the fact that after the publication in the official gazette the matter had attained finality and merely permissive holders and the *kabza panchnama* (Annexure P/6) would not help the petitioner. The claim was also hopelessly time barred. The petitioner has not come with the clean hands. The petitioner suppressed the fact that his appeal was dismissed by the competent authority and in this light also the petition deserves to be dismissed.

9. On considering the above submissions and the record, I find that the sole question that arises for consideration in the present case is whether by the *kabza panchnama* the possession was taken from the petitioner on 27.02.1984 (Annexure P/6) and whether the action of the competent authority under Section 10(1) and thereafter under Section 10(3) of the Ceiling Act were in accordance with the provisions of law. Hence it is essential to consider the validity of the *kabza panchnama* first. Considering the Annexure P/6 the *kabza panchnama*, I find that by the signatures of Sitaram, R.B. Manglia and Amritlal were present on the spot. Moreover since Kasturibai the petitioner was not present the *kabza panchnama* clearly mentions that the proceedings were being taken ex-parte and there was a crop of wheat standing on the spot and hence it was directed that proper proceedings be initiated. Considering the *khasra panchnama* it is for the year 1982-1983, 1983-1984, 1987-1988, 1988-1989 and thereafter 1992-1994 and 1996-1999. The *khasra* in column No.12 up to the year 1988 indicated the possession of the petitioner and their family members and *khasra panchshalas* 1988-1992 indicated that the land was being taken over by the competent authority under the Urban Land Ceiling Act then the stand of the respondents government is demolished in this regard regarding the fact that of the disputed land the possession was taken from the petitioner in the year 1984 itself by the respondents/State. Considering the affidavit of the petitioner it supports the averments made in the petition and in the petition it has been stated that in para 5.8 that the possession was with the petitioners till date and they were tilling the land. Then in this light the notice under Sections 10(1) and 10(3) has to be considered.

10. Considering the impugned annexure P/1, I find that the notice indicates that since in the revenue records the possession was recorded in the name of the State Govt. the petitioners were required to show cause why they were alienating the said land and were also encroachers on the same. However,

even this document of notice does not indicate that the possession was with the State Govt. and Annexure P/5 the letter of Authority by the Additional Tehsildar and Assistant survey Officer of Urban Land Ceiling has also been discarded by the petitioner as being mere a paper formality and hence Counsel has rightly urged that there is no compliance of provision under Section 10 (5) of the Urban Land Ceiling Act. If the objections under Section 10 of the Act were not decided in accordance with the provisions of law, then placing reliance on *Narayan Dharam* (supra) I find that so far as the panchnama is considered it was merely a paper possession and made only to with the purpose of completing the paper formalities. Even if the claim and appeal of the petitioner were dismissed by the competent authority mere declaration would not be sufficient according to Section 3 of the Repeal Act which reads thus:-

“3. Saving.-(1) The appeal of the principal Act shall not affect-

- (a) the vesting of any vacant land under sub-section (3) of Section 10, possession of which has been taken over the State Government or any person duly authorised by the State Government in this behalf or by the competent authority;**
- (b) the validity of any order granting exemption under sub-section (1) of Section 20 or any action taken thereunder, notwithstanding any judgment of any court to the contrary;**
- (c) any payment made to the State Government as a condition for granting exemption under sub-section 91) of Section 20.**

(2) Where-

- (a) any land is deemed to have vested in the State Government under sub-section (3) of Section 10 of the Principal Act but possession of which has not been taken over by the State Government or any person duly authorised by the State Government in this behalf or by the competent authority; and**
- (b) any amount has been paid by the State Government with respect to such land then, such land shall not be**

restored unless the amount paid, if any, has been refunded to the State Government."

11. It is, therefore, held that the possession cannot be now taken from the petitioner since as already held above. Annexure P/6, the kabza panchnama dated 27.02.1984 does not appear in the order or in accordance with the provisions of law. Moreover taking over possession has remained a mere paper formality designed to frustrate the provision of the Repeal Act.

12. Thus the facts and circumstances of the case clearly reflect that the proceedings of taking over the possession of the disputed land have remained to be merely a paper transaction and the possession of the land in question has remained with the present petitioner all through out. Thus I find that the notice needs to be set aside. Consequently the notice dated 29/01/2010 (Annexure P/1) issued by the Additional Collector and Competent Authority, Urban Land Ceiling, Indore (MP) is hereby quashed.

With the aforesaid observations and directions, the petition is allowed only to the extent herein above indicated. No costs.

CC as per rules.

Petition allowed.

I.L.R. [2016] M.P., 93

WRIT PETITION

Before Mrs. Justice S.R. Waghmare

W.P. No. 10951/2012 (Indore) decided on 30 March, 2015

SHWETANK GRIH NIRMAN SAHAKARI

SANSTHA MARYADIT

Vs.

STATE OF M.P. & ors.

...Petitioner

...Respondents

(Alongwith W.P. No. 10958/2012)

Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (30 of 2013), Sections 5A & 24 - Land was acquired under Scheme no. 97 for construction of Ring Road - Later on Scheme no. 97 was held to be illegal, inoperative and was also declared lapsed by order passed in M.P. No. 268/91 - Pursuant to same, State Government issued direction on 20.12.94 whereby 8.023

hct. land was released from Scheme no. 97 - Thereafter impugned order was issued on 12.10.2012 reviewing earlier order dated 20.12.1994 without issuing show cause notice to the petitioners - Held - Since the award was passed on 26.02.1991 before more than 5 years - Land acquisition proceedings deemed to have lapsed because neither possession of the land has been taken nor compensation has been paid - Possession still rests with the petitioner - Respondent Indore Development Authority is directed to consider application regarding issuance of No Objection certificate confirming release of land from Scheme no. 97 - Petition is allowed. (Paras 12 to 14, 16 & 18)

भूमि अर्जन, पुनर्वासन और पुनर्व्यवस्थापन में उचित प्रतिकर और पारदर्शिता का अधिकार अधिनियम, 2013 (2013 का 30), धाराएं 5-ए व 24 - रिंगरोड के निर्माण के लिए स्कीम नं. 97 के अंतर्गत भूमि का अर्जन किया गया - बाद में स्कीम नं. 97 को अवैध, निष्क्रिय घोषित किया गया तथा एम.पी. नं. 268/91 में पारित आदेश के द्वारा उसे व्यपगत भी घोषित किया गया - उसी के अनुसरण में, राज्य शासन ने 20.12.94 को निर्देश जारी किया जिससे 8.023 हेक्टेयर भूमि को स्कीम नं. 97 से मुक्त किया गया - तत्पश्चात् याचियों को कारण बताओ नोटिस जारी किये बिना पूर्ववर्ती आदेश दिनांक 20.12.94 का पुनर्विलोकन करते हुए 12.10.2012 को आक्षेपित आदेश जारी किया गया - अभिनिर्धारित - क्योंकि अधिनिर्णय 5 वर्ष से अधिक अवधि के पूर्व 26.02.1991 को पारित किया गया था - भूमि अर्जन कार्यवाही व्यपगत मानी गई क्योंकि न तो भूमि का कब्जा लिया गया है न ही प्रतिकर का भुगतान किया गया है - कब्जा अभी भी याची के पास है - प्रत्यर्थी इंदौर विकास प्राधिकरण को स्कीम नं. 97 से भूमि मुक्त करने की पुष्टि करने वाले अनापत्ति प्रमाणपत्र जारी करने से संबंधित आवेदन पर विचार करने के लिए निदेशित किया गया - याचिका मंजूर।

Cases referred :

(2004) 11 SCC 317, (2014) 3 SCC 183.

P.V. Bhagwat & V.P. Bhagwat, for the petitioner.

Manoj Dwivedi, Addl. A.G. with *Sudarshan Joshi*, for the respondents.

ORDER

S.R. WAGHMARE, J. :- These two writ petitions are taken up together since they arise out of common question raised by the petitioners Societies namely Shwetank Grih Nirman Sahakari Sanstha Maryadit (WP.No.10951/12) and Suniket Co-Operative housing Society Ltd. (WP No.10958/12). This common order shall regulate both these appeals.

2. By these petitions under Article 226 of the Constitution of India, the petitioner Societies have challenged the order dated 12.10.2012 passed by respondent No.1/ Principal Secretary, the State of MP reviewing its earlier order dated 20.12.1984 and 11.08.1995 without issuing show cause notice to the petitioners and without complying with the directions issued by this Court in WP No.1132/03.

3. Briefly stated the facts of the case are that the petitioners are Housing Societies duly registered under the MP Cooperative Societies Act and the petitions are filed through the respective Presidents. The petitioner Society is the bhumi swami of the land bearing Survey Nos.58 (parts) and 59 admeasuring 5.337 hectares situated at village Hukmakhedi, Tehsil & District Indore in WP No.10951/12 and the petitioner Society is the bhumiswami of the land bearing Survey Nos.60 and 61 admeasuring 3.711 hectares situated at village Hukmakhedi, Tehsil and District Indore in WP No.10958/12. The petitioner purchased the said land vide registered sale deed dated 11.07.1997 and 11.12.2000. However the respondent No.2/IDA had framed the Scheme No.97 regarding the lands situated in village Hukmakhedi and the nearby villages in the said scheme and the acquisition proceedings under the land Acquisition Act were undertaken. The validity of the Scheme however happened to be challenged before this Court in WP No.550/1991 and during pendency of the petition, the predecessor in title of the present petitioner Society, Shri Sitaram Kaluji moved an application for release of his land from the said scheme before the State Govt. (Resp. No.1). The State Govt. in exercise of its power conferred under Section 52 of the Act directed the IDA vide order dated 20.12.1994 to acquire only 1.025 hectares of the land required for Ring Road and to release the remaining 8.023 hectare land falling in surevey Nos.58, 59, 60 & 61 of village Hukmakhedi, Tehsil and Distt. Indore from the Scheme No.1997. A copy of the order dated 20.12.1994 is Annexure P/4. It has also come about that under the new master plan, 2021, there is no proposal for acquirement of 1.025 hectares of land for the Ring Road and land use of the disputed said land was reserved for residential purpose in the master plan of 2021. However, the respondent/IDA requested the respondent No.1/State to review its order dated 20.12.1994 and the State, however, **rejected** the request and hence the earlier directions remained in force and the government also called for a compliance report. The petitioners, therefore, assumed that their application for release of their land from the Scheme before the State Govt. would be duly processed and hence

the petitioners did not press the petitions and the same were dismissed as not pressed. Thirty six other petitions regarding the same Scheme No.97 of the IDA were heard on the merits and **allowed** by this Court vide judgment dated 10.12.1998. A copy of the order passed in MP No.268/1991 is Annexure P/7 to the petition. This Court clearly held that Scheme had **lapsed** and **acquisition proceedings were bad-in-law for non-compliance of Section 5A of the Land Acquisition Act**. Counsel submitted that the petitioner was, therefore, entitled for the release of land, however, after passing of 7 years, the respondent No.2 IDA issued show cause notice to the predecessor in title of the petitioner Shri Sitaram S/o. Kaluji proposing to review the order dated 20.12.1994 (Annexure P/4). Thereafter the case of the petitioner followed chequered proceedings. Respondent No.1/State after hearing the parties reviewed its decision dated 20.12.94 and passed an order dated 16.06.2003. Annexure P/8. This order was challenged by late Shri Sitaram in WP No.1132/2003 and although this Court has set aside the order dated 16.06.2003, however, this Court left it open to the State to initiate fresh proceedings after issuing a show cause notice and giving opportunity of hearing to all the parties concerned. The order of the High Court is Annexure P/9 dated 18.12.2008. Thereafter the petitioner wrote several letters to the respondent/IDA as well as the State Govt. for grant of NOC regarding the release of the said land, despite such repeated requests; no answer has been given by the respondent/IDA to either the petitioner or to the predecessor Shri Sitaram. Counsel vehemently urged the fact **without** a formal No Objection Certificate confirming that the land stands released from Scheme No.97 it was very difficult for the petitioners, to get further approvals for development or transfer of the land in question from the respondents/Departments. Counsel very candidly submitted that the Ring Road proposed to pass through the said land **is not now so earmarked in the new master plan of 2021 of the respondent/IDA** and for all practical purposes Scheme No.97 **has ceased to exist**. Besides Counsel also submitted that there promissory estoppel against the respondent IDA since the assurance was given in the earlier writ petition. The petitioner had also filed a Contempt Petition bearing No.119/12 (Annexure P/12) which is pending consideration. However, the petitioner has now learnt that the State Govt. on 15.09.2010 wrote a letter to the IDA regarding release of the land and for grant of compensation and Counsel urged that compensation was also not paid to the petitioners.

4. Counsel for the petitioners also submitted that the petitioners are still

in possession of their land and there was no question regarding the land vesting in the respondent No.2 IDA. However, the State Govt. taking advantage of the liberty granted in WP No.2732/12 to initiate fresh proceedings reviewed its order and set aside the same by impugned order dated 12.10.2012 passed by Respondent State the Chief Secretary, State Govt. of MP and hence the present petition.

5. Counsel submitted that on the basis of the above, it was admitted that the action of the respondent No.1/State for initiating of fresh proceedings was malafide and an attempt to nothing but frustrate the present petitioner Societies. Besides notice was never given and opportunity of hearing has also been lost. The order is, therefore, in violation of principles of natural justice and deserves to be quashed. Counsel vehemently urged that the suo motu powers of revision by the respondent State Government have been used to abuse the process of law, that too without opportunity of hearing and hence the same be set aside and release the land in question; especially when it was not clothed with the power under Section 52 of the Adhiniyam. The order also suffers from discrimination and is violative of Article 14 of the Constitution of India. Counsel prayed that the impugned order dated 12.10.2012 Annexure P/16 passed by the respondent No.1 State be quashed and Annexure P/4 dated 20.12.1994 and Annexure P/5 dated 11.08.1995 passed by the respondents be implemented in their true spirit.

Counsel vehemently urged the fact that the land was not acquired in accordance with the provisions of law. The possession still rests with the petitioners. If at all the land is required by the respondents; they should be directed to acquire the same afresh, in accordance with the provisions of law. Counsel also referred to the fact that very recently on 31.12.2014, the right to fair compensation and transparency in Land Acquisition Rehabilitation and Resettlement (Amendment) Ordinance, 2014 came into force and under the new Act, the respondent State Government was precluded from acquiring the lands of the petitioners since more than 5 years have been lapsed since making of the award and compensation has not been paid to the petitioners and the petitioners are still in possession of the said lands. Thus, in **this situation** also the land acquisition proceedings in the present case have lapsed under Section 24(2) of the New Act, 2013.

6. Per contra Counsel for the State respondents No.1, 3 & 4 have adopted the answer filed by the respondent No.2 I.D.A.

7. Counsel for the respondent No.2 Indore Development Authority has vehemently urged the fact that the State Govt. on 20.12.1994 had passed an order under Section 52 of the M.P. Nagar Tatha Gram Nivesh Act (sic:Adhiniyam) to acquire the land required for Ring Road and release the balance of the land admeasuring 8.023 hectare and M.P. No.550/91 filed by the petitioner Sitaram had been dismissed by this Court on 20.12.1994 as not pressed. Thereafter in several cases this Hon'ble Court on 10.12.1998 such as in M.P. No.268/1991 petitions were allowed and against the said order Writ Appeals had been filed. Some of the writ appeals are still pending consideration and hence Counsel submitted that no advantage would accrue to the petitioner Society. A review was also *suo moto* (sic: motu) initiated by the Govt. against the order dated 20.12.1994 before the State Govt. and the State Govt. had after hearing of the parties decided to set aside the order on 16.06.2003 and it is not as if the State Govt. has been lax in the matter. It has been re-evaluating the entire facts and circumstances of the case and hence the order was passed on 16.06.2003. This order was also challenged by the present petitioner in WP No.1132/2003 and this Hon'ble Court had set aside the order, however, the question was left open to respondent No.2 Indore Development Authority to initiate fresh proceedings by first issuing show cause notice to the petitioners and thereafter opportunity has appropriately being given to the petitioner. The State Govt. has however failed to take any action in the matter whereas in the proposed master plan of 2021; the respondent State Govt. had directed that an area of 1.025 hectares of the disputed land would be required for construction of ring road and the State Govt. directed that although the entire land may not be required but the portion required for the Ring road could be acquired. That, the respondent No.2 I.D.A. submitted that an award had been passed after hearing the petitioner and thereafter the land has vested in the State Govt. Notice was issued to the original land owners Sitaram Kaluji on 18.12.2008 and after receipt of notice; the original land owner has not filed any objections and fresh proceedings were thus initiated by the State Govt. and a final order was passed on 12.10.2012 impugned as Annexure P/16. Therefore, Counsel urged that the objections raised by the petitioners are of no use. It cannot be thus said that the legal representatives of Sitaram Kaluji had no notice. Shri Badrilal s/o. Sitaram had sought time to file objections/reply on 10.07.12 and then never filed any objections, thus clearly indicating that they had given up their rights without any objections. The State Govt. passed orders in consonance with the directions given by this Court in WP No.1132/03. However, there has been some delay, but it cannot

be said that there has been a violation under Article 300A of the Constitution of India by the said notification. The award has been passed in accordance with Section 48(2) of the Land Acquisition Act and on this ground the petition is without merit. Counsel prayed that the petition be dismissed.

8. Counsel for the respondent No.2 has vehemently urged that the Chief Secretary by the impugned Annexure P/16 dated 12.10.2012 had correctly appreciated the facts as well as the provisions of law and had considered Section 52 of the Nagar Tatha Gram Nivesh Adhiniyam and held that Lokayukt had considered the position and held that even the State Government could not release land which had vested in it under a scheme; the land in question was already acquired by the State Government through the District Collector, Indore on 26.02.1991 according to the Land Acquisition proceedings and the said land could not be released to the owner unless it was released under Section 48 of the Land Acquisition Act and also under Section 52 of the Nagar Tatha Gram Nivesh Adhiniyam. And whereas in the present case no proceedings have been taken regarding the land of the petitioners either under Section 48 of the Land Acquisition Act or in terms of Section 52 of the Nagar Tatha Gram Nivesh Adhiniyam. Moreover it was for the respondent I.D.A. to take appropriate action once the land has vested in the Government and not for the home and Environment Department, besides the Chief Secretary also held that the IDA had always shown willingness to comply with the Court orders passed in Writ Petition No.550/1991 and it was not for the Department of Home and Environment Department of the State Government to release any land and under the circumstances if any order had been passed by the State Government, Department of Home and Environment contrary to Section 52 of the Nagar Tatha Gram Nivesh Adhiniyam; it was null and void and the Chief Secretary had declared that the advertisement (gyap) No.9321/32/94, dated 20.12.94 and advertisement (gyap) No.F-6-24/32/95, dated 11.08.95 were set aside and the Chief Secretary also held that the disputed land in the present cases was acquired land and compensation for the said land acquisition had already been awarded to the petitioners by passing of award by the Land Acquisition Officer and it was not possible to release the land which had already vested with the respondents. Moreover by the impugned order Annexure P/16 liberty was also granted to the respondent No.2/I.D.A. to see that proper steps were taken regarding the possession. Counsel submitted that the order was in accordance with the provisions of law and the provisions of the new Act would not be attracted.

9. Counsel also urged that the provisions of the New Land Acquisition Act, 2013 would not be attracted in the present case because land had already vested in the Government in the year 1991 itself and although the petitioner may have physical possession; the acquisition proceeding by the Land Acquisition Officer (L.A.O.) clearly indicate that the land vested in the State Government and award was passed on 26.02.1991 for a sum of Rs.18,62,819/-. In this light Counsel submitted that the petition must fail and Counsel prayed for dismissal of the petition.

10. On considering the above submissions, the record and the impugned order, I find that the following questions arise for consideration in these petitions.

1. **Whether the land of petitioners stands released from the scheme No.97 of the respondent No.2/ I.D.A. which has lapsed and was deemed to be released under Section 52 of MP Nagar Tatha Gram Nivesh Adhiniyam ?**
2. **Whether under the facts and circumstances of the case, the Land Acquisition Rehabilitation and Resettlement (Amendment) Ordinance, 2014 could be applicable in the case of the petitioner ?**
3. **Consequently the impugned order dated 12.10.12 Annexure P/16 is bad-in-law and requires to be set aside.**

11. Considering these facts I find that the entire question hinges whether the possession has been taken from the petitioners i.e. they have been divested of the possession and land vested in the State govt. pursuant to the Land Acquisition proceedings, it is essential to reconsider these facts first. I find that the petitioner Societies had purchased the land by registered sale deed dated 11.07.1997 & 11.12.2000 from deceased Sitaram Kaluji who was the original Bhumi Swami. The scheme No.97 was proposed by the respondent No.2/IDA in the year 1991 for construction of Ring road for public purposes. However, the validity of the scheme No.97 and the acquisition proceedings were challenged by several Bhumi Swamis as already stated above and I find from the judgment passed in Writ Petitio No.268/1991 (*Burhani Grah Niraman Sahakari Sanstha Maryadit Vs. State of MP and others*) that this Court was pleased to hold thus:-

67. On account of foregoing discussions, the petitions are allowed. The Scheme is held to be illegal, inoperative and invalid. Consequently, acquisition proceedings shall also fail and Notifications issued under Ss.4 & 6 and the subsequent award are hereby quashed.

68. It is clarified that this order shall be applicable only to those parties who have approached this Court and not to others. It is further clarified that this judgment shall not create a bar for the Respondents to frame a fresh Scheme in accordance with the provisions of the Adhiniyam and to acquire the lands, thereafter in accordance with the land Acquisition Act, provided, they adhere to the provisions of law.

12. Thus it was clear that Writ Petition filed by the petitioners original owner Sitaram Kaluji was, however precluded from claiming that the acquisition proceedings in his case had failed since he had withdrawn the M.P. No.550/91 on 20.12.1994. However, it is crystal clear that the Scheme No.97 framed by the Respondent No.2/I.D.A. was quashed as illegal and inoperative.

13. Then, the moot question that would arise is, whether the land is still in the possession of the present petitioners ? In this case also it must categorically observed that the present petitioners have stepped into the shoes of the original Bhumi Swamis Sitaram Kaluji and his son Bheruji since they are the owners by the registered sale deed. The land acquisition proceedings were started against the original owner Sitaram in the year October, 1987 itself and the petitioners had challenged the same in M.P. No.550/1991. Counsel for the petitioner has already drawn the attention of this Court to the fact that in this petition, the High Court had passed stay order dated 22.03.1991 restraining the respondents IDA and State Government from dispossessing the petitioners from the land in question. Thereafter at the time of withdrawal of the petition by the order dated 01.03.1996 in M.P. No.550/91 Annexure P/6 passed by this Court, the Counsel for the respondent No.1 IDA had given an undertaking that they would follow the directions issued by the State Govt. on 20.12.1994 regarding the release of the petitioners' land and also order dated 11.08.1995 Annexure P/1 & P/2 in MP No.550/91 and it was only in this background that the petition was withdrawn. Therefore, the original Bhumi Swami Sitaram Kaluji had moved an application for release of his land before the State.

Government respondent No.1 and under Section 52 of the MP Nagar Tatha Gram Nivesh Adhiniyam. The State Government vide order dated 20.12.1994 had acquired only 1.025 hectare and remaining 8.023 hectare of the land was released from the Scheme No.97 belonging to the petitioners. That, the IDA had protested against the same, however, the State Government had refused to review its order dated 20.12.1994. Unfortunately however placing reliance on the stand taken by the respondent State Government the petitioners had withdrawn WP No.550/1991. However, if the ratio laid down by this Court in WP No.268/1991 is considered as already stated above the Scheme itself was declared to be lapsed and the acquisition proceedings were declared to be bad-in-law. Similarly the important fact that cannot be marginalised is that there was no further action on the judgment passed by this Court in the matter of petitioners in M.P. No.550/91 and it has attained finality and the petitioners continued to be in possession of their land. Thereafter again in the matter of WP No.1132/2003, the impugned order dated 16.06.2003 passed by Chief Secretary of State of MP also impugned in this petition has been set aside by this High Court and the present petitioners Societies were party to the petition, although the original Bhumi Swami Sitaram had died during the pendency of WP No.1132/2003. Hence it is not for this Court now to question the legality of the order which has been set aside by this Court. The important fact to be considered, therefore, the petitioners has continued in possession of their land all through out. Therefore, the contentions put forth by the Counsel for the respondent No.2 I.D.A. are hereby demolished. However, that brings us to the next question whether the impugned order Annexure P/16 passed by the Chief Secretary State Government is in accordance with the provisions of law.

14. However, from the impugned order it is found that Badrilal was issued notices on several occasions and there was also paper publication in this regard and it cannot be held that the petitioners were not noticed. However, I find that order (Annexure P/16, dated 12.10.2012) is contrary to facts and circumstances of the case and also contrary to the provisions of law. As already held above the respondent Chief Secretary has failed to consider that the Scheme No.97 has been declared to be illegal and consequently also lapsed. Moreover there is no categorical finding regarding the petitioners having being divested of their possession regarding the disputed land; only, taking note that the land acquisition proceedings had been initiated, and award passed would not lead to the presumption that the disputed land vested with the State

Government. Moreover under Section 52 of the M.P. Nagar Tatha Gram Nivesh Act (sic:Adhiniyam) the State Govt. had already released the land of the petitioners and that govt. did not have the powers under Section 52 of the M.P. Nagar Tatha Gram Nivesh Act (sic:Adhiniyam) to do so is a preposition which is seriously disputed. Placing reliance on *State of M.P. and others Vs. Kewal Yadav* [(2004) 11 SCC 317] whereby the Apex Court directed that under Sections 24, 52, 56, 72 & 73 of M.P. Nagar Tatha Gram Nivesh Adhiniyam, 1973, State Govt. is empowered to issue directions in exercise of power of control which have to be complied with by the authorities concerned unless the same are contrary to law or otherwise in valid and directions issued by the State Govt. to all authorities constituted under the Adhiniyam to abide by all orders/directions issued by it were held to be valid. The Apex Court had considered that "the High Court was of the view that since the authorities are constituted under the Act, it is not open to the State Government to issue directions under Sections 52 and 73 of the Act; but the Apex Court further held "that the aforesaid provisions unmistakably show that there exists power of control with the State Government and the State Government is empowered to issue directions which have to be carried out by the authorities. It is no longer *res integra* that while exercising power of control the Government can issue directions which have to be complied with by the authorities. It is a different thing that if any order passed by the State Government is contrary to law or otherwise invalid, in which event the same can independently be challenged in a court of law." And hence in this light also the impugned order is contrary to the provisions of law. However, more importantly the provisions of the new Act (Land Acquisition Rehabilitation and Resettlement (Amendment) Ordinance, 2014) have been invoked by the Counsel for the petitioners.

15. I find that Clause -6 of the Land Acquisition Rehabilitation and Resettlement (Amendment) Ordinance, 2014 reads as under:-

6. In the principal Act, in Section 24, in Sub-section (2), after the proviso, the following proviso shall be inserted, namely:-

"Provided further that in computing the period referred to in this subsection, any period or periods during which the proceedings for acquisition of the land were held up on account of any stay or injunction issued

by any court or the period specified in the award of a Tribunal for taking possession or such period where possession has been taken but the compensation lying deposited in a court or in any account maintained for this purpose shall be excluded.”

And in this regard also the amendment would have retrospective effect and after passing of the award on 26/02/1991 till date there were two periods from 01/03/1996 to 16/06/2003 (7 years 3 months) and from 18/12/2008 to 12/10/2012 (3 years 9 months) when there was no stay or injunction by any court because of which the proceedings of acquisition of the land were held up.

16. Considering the case *Pune Municipal Corporation and another Vs. Harakchand Misirmal Solanki and others* reported in (2014) 3 SCC 183 to state that when the subject land acquisition proceedings had lapsed and compensation was deposited in the government treasury, it would not be equivalent to compensation paid to land owners or interested persons and the Apex Court had held that under Section 24(2), land acquisition proceedings initiated under the 1894 Act, by legal fiction, are deemed to have lapsed where award is made 5 years or more prior to commencement of 2013 Act and possession of land has not been taken or compensation not paid.

And in instant case, since compensation was not paid to petitioners and the award had been made more than 5 years previously, the land acquisition proceedings are deemed to have lapsed of General Clauses Act, 1897 and under Clause 6 of the Ordinance of 2014. Besides the Land Acquisition Act, 1894 being an expropriatory legislation should be strictly followed and Collector while making payment of compensation, can only act in manner so provided, since where power is given to do certain thing in certain way, it should be done in that way or not at all and other methods of performance are necessarily forbidden under Sections 31 to 34, 11 & 12 of Land Acquisition Act, 1894.

17. Considering the case of *Sree Balaji Nagar Residential Association Vs. State of Tamil Nadu and others* [Civil Appeal No.8700 of 2013] whereby the Court held thus:

“.....13. From the discussions made above, it is amply clear that though there is lack of clarity on the

issue whether compensation has been paid for majority of land holdings under acquisition or not, there is no dispute that physical possession of the lands belonging to the appellants under consideration in these appeals has not been taken by the State or any other authority on its behalf and more than five years have elapsed since the making of the award dated 30.11.2006 and 01.01.2014 when the 2013 Act came into force. Therefore, the conditions mentioned in Section 24(2) of the 2013 Act are satisfied for allowing the plea of the appellants that the land acquisition proceedings must be deemed to have lapsed in terms of Section 24(2) of the 2013 Act. The appeals are disposed of accordingly. It goes without saying that the Government of Tamil Nadu shall be free, if it so chooses to initiate proceedings of such land acquisition afresh in accordance with the provisions of 2013 Act. In the facts and circumstances of the case there shall be no order as to costs."

18. Considering the above submissions; I find that Section 24 of the New Act (Land Acquisition Rehabilitation and Resettlement (Amendment) Ordinance, 2014) would thus be attracted and in this light the impugned order Annexure P/16 needs to be set aside, since it has already been held above that the petitioners were never dispossessed and contend to be in possession of property even today. The petition is hereby allowed and in the light of Section 24 of the Land Acquisition Rehabilitation and Resettlement (Amendment) Ordinance, 2014 which has already been quoted above.

It is therefore, directed that land acquisition proceedings in respect of land in question situated at Village Hukmakhedi, Teh. and Distt. Indore bearing Survey Nos.58 & 59 admeasuring 5.337 Hectares have lapsed and Respondent Indore Development Authority is directed to consider the application regarding issuance No Objection Certificate confirming release of the land from Scheme No.97 of Indore Development Authority.

With the aforesaid observations and directions, the petitions are allowed to the extent herein above indicated.

Original order be retained in the record of WP No.10951/2012 and a record thereof be placed in the record of WP No.10958/12.

CC as per rules.

Petition allowed.

I.L.R. [2016] M.P., 106

WRIT PETITION

Before Mr. Justice Alok Aradhe

W.P. No. 12371/2014 (Jabalpur) decided on 30 April, 2015

MAGMA FINCORP LIMITED

...Petitioner

Vs.

RAJBHAN SINGH

...Respondent

A. Arbitration and Conciliation Act (26 of 1996), Section 36 - Execution petition - In respect of an award the execution proceeding can not be initiated where the person or property of person is situated against whom decree is sought to be executed, without insisting on to first apply for execution to one Court, merely to obtain transfer - Petition allowed. (Paras 2, 6 & 7)

क. माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 36 - निष्पादन याचिका - अवार्ड के संबंध में निष्पादन कार्यवाही, मात्र अंतरण अभिप्राप्त करने के लिए एक न्यायालय को निष्पादन हेतु पहले आवेदन करने पर जोर दिये बिना, उस स्थान पर आरंभ नहीं की जा सकती है जहां वह व्यक्ति जिसके विरुद्ध डिक्री का निष्पादन चाहा गया है या उस की संपत्ति स्थित है - याचिका मंजूर।

B. Arbitration and Conciliation Act (26 of 1996), Section 36 - Award - Execution - Held - Award passed by the arbitral tribunal under the provisions of the Act is enforceable under Section 36 in the same manner as if it were a decree of the Court, though Arbitral Tribunal is not a Court, so application for execution cannot be filed before arbitral tribunal. (Para 5)

ख. माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 36 - अवार्ड - निष्पादन - अभिनिर्धारित - माध्यस्थम् अधिकरण द्वारा अधिनियम के उपबंधों के अंतर्गत पारित किया गया अवार्ड धारा 36 के अंतर्गत उसी ढंग से प्रवर्तनीय है जैसे कि वह न्यायालय की डिक्री हो, यद्यपि माध्यस्थम् अधिकरण, न्यायालय नहीं है तथापि निष्पादन हेतु आवेदन को माध्यस्थम् अधिकरण के समक्ष प्रस्तुत नहीं किया जा सकता।

Cases referred :

AIR 2006 MP 34, F.A. No. 105/2009 decided on 13.03.2009 Delhi High Court, W.P. Civil No. 13971/2011 decided on 18.10.2011 Rajasthan High Court, Jaipur, W.P. Civil No. 13966/2011 decided on 18.10.2011 Rajasthan High Court, Jaipur, CRP (NPD) No. 574/2011 decided on 26.08.2011 Madras High Court.

S.K. Rao with Sanjeev Chaturvedi, for the petitioner.

None for the respondent.

ORDER

ALOK ARADHE, J.:- In this petition preferred under Article 227 of the Constitution of India the petitioner has assailed the validity of the order dated 18.6.2014 passed by the executing court by which the application for execution preferred by the petitioner has been dismissed. To appreciate the petitioner's challenge to the impugned order, few facts need mention which are stated infra.

2. The petitioner is a company incorporated under the Companies Act, 1956. The petitioner is engaged in the business of providing financial assistance to the persons purchasing vehicles. The loans are advanced by the company which are secured by high purchase agreements which contain the provisions for recovery of the loan amount and also has the arbitration clause for resolving any dispute arising between the parties. The petitioner entered into hire purchase agreement with the respondent on 29.9.2010 with respect to purchase of a vehicle. Clause 21 of the agreement contains arbitration clause. The dispute between the parties was referred to the sole arbitrator. The arbitrator passed an award on 26.9.2011 by which the claim of the petitioner was decreed for a sum of Rs.3,39,951/- along with interest. The petitioner after receipt of copy of the award from the arbitrator and after expiry of time prescribed under Section 34 of the Arbitration and Conciliation Act, 1996 (in short 'the Act') initiated proceeding for execution before the District Judge, Rewa as the respondent is residing at Rewa. However, the executing court vide order dated 18.6.2014 returned the application filed by the petitioner for execution of the decree for presenting the same before the competent court. It was held that in case the execution proceeding received on transfer from the competent court with certificate as to non-satisfaction of the decree then only the proceeding for execution shall be conducted in accordance with law. Accordingly, the proceeding for execution was closed. In the aforesaid factual

background, the petitioner has approached this Court.

3. Learned senior counsel for the petitioner submitted that executing court grossly erred in relying on the decision rendered by a Bench of this Court in *Computer Science Corporation India Private Ltd. v. Harishchandra Lodhwal and Others*, AIR 2006 MP 34 and in holding that the execution proceeding is not maintainable. It is further submitted that there is no provision in the Act requiring the court to pass a decree in terms of the award and in the absence of any provision in the Act making the arbitral tribunal a Court which passed the decree, it is not open for the executing court to demand transmission from any other court or order transmission to any other court. In support of the aforesaid submission, learned senior counsel has placed reliance on the decisions in *Daelim Industrial Co. Ltd. v. Numaligarh Refinery Ltd.* (FA No.105/2009 decided on 13.3.2009, Delhi High Court), *Indusind Bank Ltd. v. Sardar Singh and Anr.*, (Writ Petition Civil No.13971/2011 decided on 18.10.2011, Rajasthan High Court, Jaipur), *Kotak Mahindra Bank Ltd. v. Ram Sharan Gurjar and Another*, (Writ Petition Civil No.13966/2011 decided on 18.10.2011, Rajasthan High Court, Jaipur) and *B. Muthu Kumar v. Sivakama Sundari S. Narayana S B Murthy*, [CRP (NPD) No.574/2011 decided on 26.8.2011 Madras High Court]

4. I have considered the submissions made by learned senior counsel for the petitioner. Section 38 of the Code of Civil Procedure provides that a decree may be executed either by the Court which passed it, or by the Court to which it is sent for execution. Section 37 of the Code of Civil Procedure defines the "Court which passed a decree" to include the Court of first instance where the decree has been passed in exercise of appellate jurisdiction or the Court which would have jurisdiction to try the suit if the court of first instance has ceased to exist or to have jurisdiction to execute it. Section 39 (1) enables the Court which passed the decree to send it for execution to another court of competent jurisdiction.

5. However, it is noteworthy that the award passed by the arbitral tribunal under the provisions of the Act is enforceable under Section 36 of the Act in the same manner as if it were a decree of Court. In other words, the award passed by the arbitral tribunal is equated to a decree of a court for limited purpose of execution only by creating a legal fiction. The arbitral tribunal is not a Court. It is also pertinent to mention here that under the Act, an award can be executed directly without seal of approval by the civil Court. Section 19 (1) of the Act provides that arbitral

tribunal shall not be bound by the Code of Civil Procedure, 1908 or Indian Evidence Act, 1872. An application for execution cannot be filed before the arbitral tribunal by treating the arbitral tribunal, a Court which passed the decree. There is no deeming fiction contained in any provision of the Act in so far as it pertains to proceeding under Part I of the Act that the Court within whose jurisdiction the arbitration award is passed should be deemed to a Court which passed the decree. However, such a provision has been made by the legislature for enforcement of foreign awards contained in Section 49 which provides that award shall be deemed to be decree of that Court. Therefore, the procedure for filing a petition for execution before the court within whose jurisdiction arbitral award has been passed as if it was a Court which passed the decree cannot, but, be said to be misconceived. The Delhi High Court in the case of *Daelim Industrial Co. Ltd.* (supra) has held that Section 42 of the Act does not apply to the petition for execution as the same is not an arbitral proceeding within the meaning of Section 42 of the Act. It has further been held that expression "Court" in Section 36 is not meant to be the Court within the meaning of Section 2 (1) (e) of the Act. I concur with the view taken by the Delhi High Court on this issue for the reasons recorded in paragraph 18 of the aforesaid decision.

6. There appears to be no plausible reason to take a view that in respect of an award, the execution proceeding can not be initiated where the person or the property of the person is situate against whom the decree is sought to be executed. Such a Court, in my considered opinion, would have inherent jurisdiction to execute the decree in the absence of applicability of mandate contained in Section 38 of the Code of Civil Procedure and, therefore, the pedantic insistence on first applying for execution to one Court, merely to obtain transfer, would be also contrary to the intent of the 1996 Act. The decision in *Computer Sciences Corporation India Pvt. Ltd.* (supra) is clearly distinguishable and does not apply to the fact situation of the case as in the aforesaid case, a Bench of this Court was dealing with the issue of return of application for transfer of a decree.

7. In view of preceding analysis, the impugned order dated 18.6.2014 passed by the executing court is hereby quashed. The executing court is directed to proceed with the execution of the award expeditiously in accordance with law.

8. In the result, the writ petition is allowed.

Petition allowed.

I.L.R. [2016] M.P., 110

WRIT PETITION

Before Mr. Justice K.K. Trivedi

W.P. No. 5832/2014 (Jabalpur) decided on 9 July, 2015

BRAJESH SINGH (DR.)

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

Constitution - Article 226 - Departmental Enquiry - Validity of charge sheet - Gravity of charges of misconduct are required to be tested only in departmental enquiry by Enquiry Officers while recording evidence - Whether there were any lapses on the part of petitioner in discharging the duty as Registrar of University or not has to be tested by the Enquiry Officer while conducting the enquiry - High Court is not required to look into those aspects nor is supposed to conduct the enquiry on its own to test the validity of charge sheet - Petition dismissed.

(Para 5)

संविधान - अनुच्छेद 226 - विभागीय जांच - आरोप पत्र की वैधता -
 अवचार के आरोपों की गंभीरता की जांच केवल विभागीय जांच में साक्ष्य अभिलिखित किये जाते समय जांच अधिकारी द्वारा की जाना अपेक्षित है - क्या विश्वविद्यालय के रजिस्ट्रार के रूप में कर्तव्य का निर्वहन करते समय याची की ओर से कुछ गलती हुई थी अथवा नहीं इसकी जांच, जांच अधिकारी द्वारा जांच संचालित करते समय की जानी चाहिये - उच्च न्यायालय को न तो उन पहलुओं पर ध्यान देना अपेक्षित है न ही आरोप पत्र की वैधता की जांच करने के लिये स्वयं जांच संचालित करना अपेक्षित है - याचिका खारिज।

Cases referred :

AIR 1999 SC 22, (2006) 12 SCC 28, (2012) 11 SCC 565.

Vibhudendra Mishra, for the petitioner.*None* for the respondents.**ORDER**

K.K. TRIVEDI, J. :- The petitioner, who was at the relevant time posted as Registrar, Awadhesh Pratap Singh Vishwavidyalaya, Rewa (hereinafter referred to as the University for brevity), has initially challenged the order dated 28.03.2014, by which the respondent No.1/State Government has placed him under suspension in terms of provisions of Rule 9 of M.P. Civil

Services (Classification, Control & Appeal) Rules, 1966 (hereinafter referred to as the Rules of 1966 for brevity) on various grounds. It is contended that only to circumvent the orders passed by this Court on earlier occasion, the order of suspension has been issued against the petitioner. It is the case of the petitioner that since he was posted on deputation and that deputation was curtailed by the respondent-State, a writ petition was required to be filed by the petitioner being Writ Petition No.3618/2014. This Court has admitted the aforesaid writ petition and has granted an interim stay to the petitioner. However, since the respondent-State was not happy with such an action taken by the petitioner, the order impugned of suspension was issued.

2. During pendency of the writ petition, since a charge sheet was issued to the petitioner, assailing the said charge sheet also, an amendment has been made in the writ petition and by way of amended pleadings, the charge sheet dated 19.4.2014 and 29.5.2014 are also called in question. An application was made by the petitioner stating that since he was on deputation under the provisions of Rule 20 of the Rules of 1966, the petitioner could not have been placed under suspension by the State Government. Detailed hearing of the said application was done on 17.10.2014 and since it was found that the petitioner being a Government Officer was governed by the Rules of 1966 and could have been placed under suspension even when he was on deputation, in exercise of the power under Rule 9 of the Rules of 1966, such a prayer of the petitioner was rejected. Notably, this order has not been called in question anywhere nor has been set aside by any higher forum, therefore, the same has attained finality. The issue raised by the petitioner in these circumstances relating to the authority and jurisdiction of the respondent No.1 in placing the petitioner under suspension is not required to be tested once again.

3. Indeed, while the order of repatriation was challenged by the petitioner and an interim stay was granted by this Court, the State Government has passed an order on 27.5.2014 cancelling the said order, as a result, challenge to the said order in Writ Petition No.3618/2014 has come to an end. Even before cancellation of that order, on account of certain irregularities pointed out, if the competent authority has issued an order of suspension, the allegation of malafides cannot be sustained. Further, the authorities against whom allegations of malafides are made, are not impleaded by name as a party to show any personal bias of any higher officials of the State against the petitioner. In absence of such specific grounds, allegations of malafides are not to be looked into. The petition is, thus, not maintainable on this count.

4. It is not in dispute that the petitioner is holding a lien on the substantive post in the Government Department which post is squarely covered by the Rules of 1966. The power to place any person under suspension under Rule 9 of the Rules of 1966 is available to the appointing authority or any authority which is higher to the appointing authority or the disciplinary authority. It is not the case of the petitioner that none of those authorities have issued the order of suspension and, therefore, it cannot be said to be violative or *de hors* the Rules and is, therefore, not amenable to a challenge in the writ petition directly specifically under the circumstances when an appeal against such an order is provided under Rule 23 of the Rules of 1966, wherein it is specifically provided that an appeal can be preferred against an order of suspension made or deemed to have been made under Rule 9 of the Rules of 1966. The efficacious remedy of appeal was available to the petitioner which he has not deliberately resorted to. Ofcourse in the case of *Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and others* (AIR 1999 SC 22), the Apex Court has held that an alternative remedy is not a bar to exercise power under Article 226 of the Constitution of India by this Court, but keeping in view the detailed deliberation done in the matter of grant of interim relief vide order dated 17.10.2014, it was necessary for the petitioner to resort to the said remedy as allegations of malafides were not accepted nor it was held that the authority was not competent to place the petitioner under suspension.

5. Now advertng to the allegations of charge sheet being incompetent or otherwise not maintainable suffice it to say that the same is also not required at this stage. The Apex Court in catena of cases has held that gravity of charges of misconduct are required to be tested only in the departmental enquiry by the enquiry officers while recording the evidence. The allegations made by the petitioner that he has not committed any misconduct relating to the function which he is required to discharge as Registrar of the University, as is not within the statutory duties to be performed by the said authority in terms of provisions of M.P. Universities Act, 1973, cannot be sustained at this stage as whether the petitioner was required to discharge such duties or not and whether any lapses in performing the said duty will amount to a misconduct or not, has to be tested by the enquiry officer while conducting the enquiry. This Court is not required to look into those aspects nor is supposed to conduct the enquiry on its own to test the validity of the charge sheet.

6. In the case of *Union of India and Another vs. Kunisetty Satyanarayana*, [(2006) 12 SCC 28], while considering the scope and extent

of judicial review and interference in charge sheet permissible under Article 226 of the Constitution of India, the Apex Court has held in paragraph 13, 14, 15 & 16 as under :-

“13. It is well settled by a series of decisions of this Court that ordinarily no writ lies against a charge sheet or show-cause notice vide *Executive Engineer, Bihar State Housing Board vs. Ramesh Kumar Singh and others*, [(1996) 1 SCC 327], *Special Director and another vs. Mohd. Ghulam Ghouse and another*, [(2004) 3 SCC 440], *Ulagappa and others vs. Divisional Commissioner, Mysore and others*, [2001 (10) SCC 639], *State of U.P. vs. Brahm Datt Sharma and another*, [(1987) 2 SCC 179], etc.

14. The reason why ordinarily a writ petition should not be entertained against a mere show-cause notice or charge-sheet is that at that stage the writ petition may be held to be premature. A mere charge-sheet or show-cause notice does not give rise to any cause of action, because it does not amount to an adverse order which affects the rights of any party unless the same has been issued by a person having no jurisdiction to do so. It is quite possible that after considering the reply to the show-cause notice or after holding an enquiry the authority concerned may drop the proceedings and/or hold that the charges are not established. It is well settled that a writ lies when some right of any party is infringed. A mere show-cause notice or charge-sheet does not infringe the right of any one. It is only when a final order imposing some punishment or otherwise adversely affecting a party is passed, that the said party can be said to have any grievance.

15. Writ jurisdiction is discretionary jurisdiction and hence such discretion under Article 226 should not ordinarily be exercised by quashing a show-cause notice or charge sheet.

16. No doubt, in some very rare and exceptional cases the High Court can quash a charge-sheet or show-cause notice if it is found to be wholly without jurisdiction or for some other reason if it is wholly illegal. However, ordinarily the High Court should not interfere in such a matter.”

7. Similarly, in the case of *Secretary, Ministry of Defence and Others vs. Prabhash Chandra Mirdha*, [(2012) 11 SCC 565], the Apex Court has held that ordinarily a writ petition does not lie against the charge-sheet or a show cause notice as it does not give rise to any cause of action unless the same has been issued by an authority not competent to initiate departmental proceedings. The Supreme Court has laid down the law in this regard by relying on several previous decision, in the following terms:-

“10. Ordinarily a writ application does not lie against a charge sheet or show cause notice for the reason that it does not give rise to any cause of action. It does not amount to an adverse order which affects the right of any party unless the same has been issued by a person having no jurisdiction/competence to do so. A writ lies when some right of a party is infringed. In fact, charge sheet does not infringe the right of a party. It is only when a final order imposing the punishment or otherwise adversely affecting a party is passed, it may have a grievance and cause of action. Thus, a charge sheet or show cause notice in disciplinary proceedings should not ordinarily be quashed by the Court. (Vide : *State of U.P. v. Brahm Datt Sharma*, [(1987) 2 SCC 179]; *Executive Engineer, Bihar State Housing Board v. Ramesh Kumar Singh & Ors.*, [(1996) 1 SCC 327]; *Ulagappa & Ors. v. Div. Commr., Mysore & Ors.*, [(2001) 10 SCC 639]; *Special Director & Anr. v. Mohd. Ghulam Ghouse & Anr.*, [(2004) 3 SCC 440]; and *Union of India & Anr. v. Kunisetty Satyanarayana*, [(2006) 12 SCC 28.]).

11. In *State of Orissa & Anr. v. Sangram Keshari Misra & Anr.*, [(2010) 13 SCC 311], this Court held that normally a charge sheet is not quashed prior to the conclusion of the enquiry on the ground that the facts stated in the charge are erroneous for the reason that correctness or truth of the charge is the function of the disciplinary authority. (See also: *Union of India & Ors. v. Upendra Singh*, [(1994) 3 SCC 357]).

12. Thus, the law on the issue can be summarised to the effect that charge sheet cannot generally be a subject matter of challenge as it does not adversely affect the rights of the

delinquent unless it is established that the same has been issued by an authority not competent to initiate the disciplinary proceedings. Neither the disciplinary proceedings nor the charge sheet be quashed at an initial stage as it would be a premature stage to deal with the issues. Proceedings are not liable to be quashed on the grounds that proceedings had been initiated at a belated stage or could not be concluded in a reasonable period unless the delay creates prejudice to the delinquent employee. Gravity of alleged misconduct is a relevant factor to be taken into consideration while quashing the proceedings.”

9. In view of the aforesaid law laid down by the Apex Court, there is no requirement of exercising the extraordinary power under the writ jurisdiction by this Court to test the validity of such submission of the petitioner. Even otherwise, sufficient time has elapsed from the date of issuance of the charge sheet and it would have been much better for the petitioner to state his defence before the enquiry officer and to get a decision on merits of the departmental enquiry rather than challenging the same in such writ petition.

6. In view of the aforesaid, the writ petition fails and is hereby dismissed. However, there shall be no order as to costs.

Petition dismissed.

I.L.R. [2016] M.P., 115

WRIT PETITION

Before Mr. Justice A.M. Khanwilkar, Chief Justice &

Mr. Justice J.K. Maheshwari

W.P. No. 8266/2004 (Jabalpur) decided on 31 July, 2015

RAJ KUMAR VISHWAKARMA

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

A: Civil Services (Classification, Control and Appeal) Rules, M.P. 1966, Rule 14 - Departmental Enquiry - Misconduct - Petitioner, Class IV employee - Posted as Process Server - Called upon to do work of Water server - Refusal to do so - Departmental enquiry - Removal from service - Held - It is not a case of petitioner that Process Server cannot be called upon to do work of Water Server, removal justified as it is a case of

**insubordination and disregarding the instructions given by the superiors -
Petition dismissed. (Paras 7 & 15)**

क. *सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 14 - विभागीय जांच - अवचार - याची, चतुर्थ श्रेणी कर्मचारी - आदेशिका वाहक के रूप में पदस्थ - पानी पिलाने का कार्य करने के लिये कहा गया - ऐसा करने से इंकार किया - विभागीय जांच - सेवा से हटाया गया - अभिनिर्धारित - यह याची का प्रकरण नहीं है कि आदेशिका वाहक को पानी पिलाने का कार्य करने के लिये बुलाया नहीं जा सकता, पद से हटाया जाना न्यायोचित क्योंकि यह अवज्ञा एवं अपने वरिष्ठ अधिकारियों द्वारा दिये गये अनुदेशों की अवहेलना का प्रकरण है - याचिका खारिज।*

B. Constitution - Article 226 - Petitioner - Appointed & posted as Process Server - Plea that he is not expected to discharge work of Water Server - Tenability - Held - Such a plea is not tenable for want of specific pleading in writ petition or during enquiry or before Appellate Authority. (Paras 12 & 13)

ख. *संविधान - अनुच्छेद 226 - याची - आदेशिका वाहक के रूप में नियुक्त व पदस्थ - यह अभिवाक् कि उससे पानी पिलाने का कार्य करने की अपेक्षा नहीं की जा सकती - रक्षणीयता - अभिनिर्धारित - रिट याचिका में अथवा जांच के दौरान अथवा अपीलीय प्राधिकारी के समक्ष विनिर्दिष्ट अभिवचन के अभाव में ऐसा अभिवाक् रक्षणीय नहीं।*

C. Constitution - Article 226 - Departmental enquiry - Scope of interference - Held - In exercise of writ jurisdiction the scope of judicial review is limited to decision making process and is circumscribed, as the High Court does not sit over the decision as a Court of appeal. (Para 14)

ग. *संविधान - अनुच्छेद 226 - विभागीय जांच - हस्तक्षेप का विस्तार - अभिनिर्धारित - रिट अधिकारिता के प्रयोग में न्यायिक पुनर्विलोकन का विस्तार निर्णय लेने की प्रक्रिया तक सीमित है एवं परिमित है क्योंकि उच्च न्यायालय, निर्णय पर अपीली न्यायालय के रूप में कार्य नहीं करता।*

D. Civil Services (Classification, Control and Appeal) Rules, M.P. 1966, Rule 14 - Punishment from removal of services - Whether excessive or not - Held - It is a case of insubordination and disregarding the instructions of seniors, so it is a major misconduct - In one sense it is a lighter punishment - Petition dismissed. (Para 15)

घ. सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 14 – सेवा से पदच्युति का दंड – क्या अत्याधिक है या नहीं – अभिनिर्धारित – यह अवज्ञा एवं अपने वरिष्ठ अधिकारी द्वारा दिये गये अनुदेशों की अवहेलना का प्रकरण है, अतः यह मुख्य कदाचरण है – एक मायने में यह हल्का दंड है – याचिका खारिज।

E. Civil Services (Classification, Control and Appeal) Rules, M.P. 1966, Rule 14(11) - Adjournment - Appointing Defence Assistant - Non-compliance of Rule 14(11) - Held - Adjournment sought for was not for taking inspection or for submitting list of witnesses, so not in conformity with time period specified in Rule 14(11) - Contention not tenable. (Para 11)

ङ. सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 14(11) – स्थगन – बचाव सहायक की नियुक्ति – नियम 14(11) का अनुपालन – अभिनिर्धारित – चाहा गया स्थगन निरीक्षण करने अथवा साक्षियों की सूची प्रस्तुत करने के लिये नहीं था, अतः नियम 14(11) में निर्धारित की गयी समयसीमा के अनुरूप नहीं था – तर्क रक्षणीय नहीं।

Anil Lala, for the petitioner.

Rakesh Jain, for the respondent Nos. 2 to 4.

ORDER

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

This petition under Article 226 of the Constitution of India takes exception to the order dated 13.08.2004 passed by the respondent No.4 in appeal and order of termination dated 23.05.2004 (Annexure P-8) passed by the respondent No.3.

2. Briefly stated, the petitioner was appointed as Class- IV employee on 04.01.1995 on regular basis. At the relevant time he was assigned the work of Process Server, in terms of order dated 06.07.1999 issued under the signature of respondent No.3. The incident in question, however, occurred on 07.07.1999 when the petitioner was working in the District Court establishment at Mandla. Since, the Peon assigned with the work of Water server was absent on that day, the petitioner was asked by the respondent No.2 to discharge that work. When the petitioner was asked to provide water by the District Nazir – respondent No.2, he refused to do so. It is also noticed

from the charge-sheet served on the petitioner that the petitioner was asked to perform the duties in the Court of First Additional District Judge, Mandla as Peon but even that instruction was not complied by the petitioner. Thus, the petitioner was proceeded departmentally on the charge of insubordination and also for unauthorisedly remaining absent between 08.06.1999 till 22.06.1999. The petitioner was served with the charge-sheet dated 14.10.2000 which contains three charges. The said charge-sheet reads thus :-

“कार्यालय जिला एवं सत्र न्यायाधीश, मंडला

—:आरोप पत्र:—

क्रमांक /दो-12-8/99, मंडला,

दिनांक 14 अक्टूबर, 2000

मैं, बी.जी. यादव, जिला एवं सत्र न्यायाधीश, मंडला, आप श्री राजकुमार विश्वकर्मा, आदेशिका वाहक के ऊपर निम्नलिखित आरोप अधिरोपित करता हूँ:—

प्रथम:— यह कि दिनांक 07-06-99 को जब आप कार्यालय में उपस्थित हुए तब जिला नाजिर श्री व्ही.एस.गोलवलकर द्वारा आपको आदेशित किया गया कि वाटर-मेन आज उपस्थित नहीं है, इसकिये न्यायालय तथा अनुविभागों में पानी भरने का कार्य करें लेकिन आपने पानी भरने से साफ इन्कार किया एवं न्यायालयों तथा अनुविभागों में पानी नहीं भरा जिससे न्यायाधीशों, अन्य कर्मचारियों आदि को असुविधा हुई।

द्वितीय:— यह कि श्री व्ही.एस.गोलवलकर जिला नाजिर द्वारा आपको प्रथम जिला न्यायाधीश मंडला के न्यायालय में भृत्य की ड्यूटी करने हेतु आदेशित किया गया तब आपने ड्यूटी करने से इन्कार किया तथा आकस्मिक अवकाश का आवेदन पत्र फेंककर आप कर्तव्य से अनुपस्थित हो गये।

तृतीय:— यह कि दिनांक 8-6-99 से 22-6-99 तक बिना अवकाश स्वीकृत कराये, कर्तव्य से अनुपस्थित रहे तथा दिनांक 23-6-99 को कर्तव्य पर उपस्थित हुए।

यह कि जिला नाजिर द्वारा दिये गये आदेश का पालन नहीं करता तथा शासकीय कार्य का निष्पादन जान-बूझकर नहीं करना, आकस्मिक अवकाश का आवेदन पत्र फेंककर बिना अवकाश स्वीकृत कराये, बिना अनुमति प्राप्त किये, कर्तव्य से अनुपस्थित रहना तथा तत्पश्चात् बिना अवकाश स्वीकृत कराये कर्तव्य से अनुपस्थित रहना, म.प्र. सिविल सेवा (आचरण) नियम 1965 के नियम 3 एवं 74 का उल्लंघन है जो कि म.प्र. सिविल सेवा (वर्गीकरण, नियंत्रण तथा अपील) नियम 1966 के नियम 10 के अंतर्गत दंडनीय है।

(बी.जी. यादव)

जिला एवं सत्र न्यायाधीश
मंडला

3. The petitioner submitted response after receipt of the said charge-sheet. In the reply submitted on 07.11.2000, the petitioner asserted thus:-

महानुभाव,

प्रार्थी/आवेदक सविनय जवाब प्रस्तुत करता है :-

1. यह कि आवेदक के आरोप पत्र की कंडिका प्रथम विशिष्ट रूप से इंकारी है। जवाब में कथन है कि मेरे द्वारा उच्चाधिकारियों के आदेश का विधिवत् पालन किया गया है। मैं छोटा कर्मचारी आपके आदेश की अवहेलना करने की कभी कोई चेष्टा नहीं की है।

2. यह कि आवेदक के द्वितीय आरोप पत्र की कंडिका अनावश्यक रूप से भ्रामक है इस कारण अस्वीकार है। जवाब में कथन है कि आवेदक ने अर्जित अवकाश का आवेदन दिया है। जिसमें नायब नाजिर/नाजिर द्वारा मेरे से दुर्व्यवहार करते हुये मेरे पेट में अधिक दर्द होने से मैं आवेदन पत्र देकर चला गया था एवं आरोप पत्र में यह भी दर्शित नहीं है।

3. यह कि आरोप पत्र की कंडिका तृतीय अस्वीकार है। जवाब में कथन है कि आवेदक के पेट में लगातार दर्द नहीं होता कभी कभी गैस के कारण अधिक दर्द होने लगता है और बेचैनी बढ़ जाती है इस कारण आवेदक चिकित्सकीय इलाज करवाने के लिये जिला चिकित्सालय मण्डला गया और आवेदन के साथ संलग्न कर नायब नाजिर/नाजिर को दिया था लेकिन मेरे साथ ही उपेक्षित व्यवहार करते हुये मुझे जानबूझकर अपमानित किया चूँकि आवेदक पेट के दर्द से भी पीड़ित था और ऊपर से जबरा कार्य करने के लिये दबाव डाला जा रहा था इसलिए मैं आवेदन देकर अपने घर चला गया था।

आवेदक 8.6.99 से 22.6.99 तक चिकित्सकीय अवकाश पर था। स्वीकृत मेडिकल सर्टिफिकेट दिया जाता तब चिकित्सकीय अवकाश स्वीकृत किया जाता है पूर्व में आवेदन निरस्त किया जाना स्पष्ट कर्मचारी को मिलने वाली सुविधा से वंचित किया जाना है व कर्मचारी के प्रति द्वेष पूर्व अभियोजन का खुला प्रमाण मैं एक छोटा कर्मचारी नियमों व आदेश का विधिवत् परिपालन करता रहा हूँ और करूँगा।

(अतिरिक्त कथन)

आवेदक के साथ श्रीमान् नायब नाजिर/नाजिर द्वारा जानबूझकर आवेदक को परेशान करने की हैसियत से जबरन कोई भी कार्य सौंप दिया जाता है और

मेरे सामने उन्हीं भृत्य को भगा कर उनसे आवेदन लेकर उनका आवेदन स्वीकार करते हैं और मेरे द्वारा दिये आवेदन को अस्वीकार कर देते हैं। मैंने कार्यालय पदस्थ अधिकारियों के आदेश का विधिवत् पालन किया है और सक्षम कार्य मुझे सौंपा जाता है कर्तव्य पूर्वक निवेदन करता हूँ यही मेरा आरोप पत्र का जवाब है।

अतः श्रीमान जी से निवेदन है कि आवेदक का आरोप पत्र का जवाब स्वीकार करते हुये की जा रही जाँच कार्यवाही से दोषमुक्त किये जाने की दया करें।

स्थान: निवास

दिनांक: 7-11-2000

आवेदक

राजकुमार विश्वकर्मा

आ० वा० निवास

4. The petitioner appeared before the Inquiry Officer on 20.12.2002 for the first time. The petitioner chose to remain absent thereafter and did not participate in the inquiry for reasons best known to him. On 20.12.2002, the Inquiry Officer had adjourned the proceedings to 24.12.2002, which fact was within the knowledge of the petitioner.

5. As aforesaid, the petitioner did not appear on the returnable date which was granted pursuant to the request made by him to give him time to engage defence Assistant, or on subsequent dates fixed by the Inquiry officer, for the reasons best known to him. As a result, the Inquiry Officer proceeded with the inquiry and after examining the departmental witnesses closed the inquiry. In the inquiry report submitted on 28.08.2003, the Inquiry Officer found all the three charges framed against the petitioner, as proved. The Inquiry Officer then called upon the petitioner to submit his reply, to which the petitioner responded on 8.10.2003 (Annexure P-7). In this reply, the petitioner reiterated the stand taken by him in the previous reply filed by him on 17.10.2000. In addition, the petitioner alleged that the departmental enquiry is at the behest of respondent No.2, who was biased because of refusal to do his personal work in the past.

6. The inquiry report was submitted to the Disciplinary Authority. The Disciplinary Authority considered the inquiry report as well as the evidence collected during the inquiry and the response filed by the petitioner to the charge-sheet. The petitioner was also afforded personal hearing by the Disciplinary Authority before passing the impugned order dated 23.2.2004. The Disciplinary Authority accepted the findings recorded by the Inquiry Officer and concluded that all the three charges have been proved against the petitioner.

The defence taken by the petitioner has also been considered by the Disciplinary Authority and negated. The Disciplinary Authority then finally proceeded to impose punishment of removal from service. Against this decision, the petitioner preferred a statutory appeal before the respondent No.4, which came to be rejected on 13.08.2004. The Appellate Authority affirmed the opinion of the Disciplinary Authority and confirmed the order of punishment of removal. In this backdrop, the petitioner has approached this Court by way of present writ petition.

7. The first contention raised by the petitioner, is that, the decision of the Appellate Authority is not a speaking order. No reasons have been recorded for dismissing the appeal. The second point raised by the petitioner is that the procedure prescribed under Rule 14(11) of the M.P. Civil Services (Classification, Control and Appeal) Rules, 1966 has not been complied with in the present case. Further, the inquiry proceeded *ex parte* without affording any opportunity to the petitioner. As a result, the entire inquiry against the petitioner is vitiated on that count. The next contention urged before us, is that, the appointment of the petitioner was as a Process Server. The posting of the petitioner was to discharge the work of Process Server. He was, however, called upon to do the work of Water Server, who was absent on that day. Since the petitioner was not posted as Water Server, by no stretch of imagination, it can be said to be a case of insubordination even if the allegation made by the concerned departmental witness is accepted as it is. The last point urged before us, is that, in any case the punishment of removal is excessive. Besides these points, an attempt was made by the learned counsel for the petitioner to persuade us to reappraise the evidence produced during the inquiry to take a view different than the one taken by the Inquiry Officer and the Appellate Authority. No other contention has been raised before us.

8. Per contra, learned counsel for the respondents submits that the order dated 13.08.2004 (Annexure P-9), which is impugned in this petition, is in the nature of communication. The reasons for rejection of the appeal are found in the proposal which has been considered by the Appellate Authority along with the other material. The entire proposal note has been placed on record along with the return. In response to the second contention, it is submitted that the provisions of Rule 14(11) of the Rules of 1966 have no application to the fact situation of the present case. The petitioner having appeared before the Inquiry Officer was obliged to abide by the further dates indicated by the

Inquiry Officer. The Inquiry Officer was, therefore, not obliged to adjourn the matter as per the time specified in Rule 14(11) of the Rules of 1966. As regards the argument of the petitioner that the petitioner was appointed as Process Server and was, therefore, not obliged to discharge the duties of the Water Server and thus, it will not be a case of insubordination, it is submitted that the same is ill-advised. In that, the petitioner was appointed as Peon Class-IV employee. He was required to discharge the work in that capacity, as would be assigned from time to time. Further, this submission is *de hors* the plea taken before the Inquiry Officer or in the appeal and more so, not specifically taken in the pleadings in the writ petition. Hence, this contention cannot be taken forward by the petitioner. With reference to the next argument of the petitioner about punishment being excessive, it is submitted that the punishment of removal itself was a lighter punishment in the fact situation of the present case. In that, it is a case of proved insubordination and for which no other punishment can be prescribed especially when reading of three charges together, it is manifest that the petitioner completely disregarded the authority of his superiors and committed major misconduct. With reference to the argument that the finding of fact recorded by the Inquiry Officer is not in conformity with the evidence on record, it is submitted that this Court should be loath to re-appreciate the evidence to take a view different than the one taken by the Competent Authority, even though some other view may be possible, in exercise of writ jurisdiction. For, that is not the scope of judicial review. The judicial review can be in respect of the process followed during the inquiry and not of the opinion recorded by the Inquiry Officer itself.

9. After having considered the rival submissions, we may now turn to the first argument of the petitioner about the vagueness and infirmity of no reasons recorded in the order of the Appellate Authority. No doubt, the petitioner has been communicated about his removal by way of communication dated 13.8.2004 (Annexure P-9). However, we are in agreement with the submission of the respondents that the same, was only a communication and not the order of the Appellate Authority as such. The order can be traced to the proposal note and consideration thereof by the Appellate Authority. The Appellate Authority considered all aspects of the matter, which were placed before him along with the proposal including the evidence collected during the departmental inquiry, response of the petitioner and the opinion of the Inquiry Officer. Suffice it to observe that it is not possible to countenance the argument of the petitioner that the decision of the Appellate Authority is without recording reasons, as

contended. The reasons can be traced to the proposal which is quite elaborate and has been placed on record along with the response filed by the respondents. Hence, this argument will have to be negated.

10. Reverting to second contention about non-compliance of Rule 14(11) of the Rules of 1966 we deem it apposite to reproduce the relevant provision, which reads thus:-

“14. Procedure for imposing penalties:-

(11) The inquiring authority, shall, if the Government servant fails to appear within the specified time or refuses or omits to plead, require the Presiding Officer to produce the evidence by which he proposes to prove the articles of charge, and shall adjourn the case to a later date not exceeding thirty days, after recording an order that the Government servant may, for the purpose of preparing his defence-

(i) inspect within five days of the order or within such further time not exceeding five days as the enquiring authority may allow, the documents specified in the list referred to in sub-rule (3);

(ii) submit a list of witnesses to be examined on his behalf.

Note.- If the Government servant applies orally or in writing for the supply of copies of the statements of witnesses mentioned in the list referred to in sub-rule (3), the inquiring authority shall furnish him with such copies as early as possible and in any case not later than three days before the commencement of the examination of the witnesses on behalf of the disciplinary authority.

(iii) Give a notice within ten days of the order or within such further time not exceeding ten days as the inquiring authority may allow, for the discovery or production of any documents which are in the possession of the Government but not mentioned in the list referred to in sub-rule (3).

Note:- The Government servant shall indicate the relevance

of the documents required by him to be discovered and produced by the Government.”

11. On a bare reading of this provision, it is seen that the same comes into play where the Government servant fails to appear within the specified time or refuses or omits to plead, to produce the evidence before the Presiding Officer. The Inquiring Authority is required to adjourn the case to a later date as per the time frame prescribed, to prepare the defence. That time is to provide opportunity to the delinquent employee to participate in the inquiry. Admittedly, in the present case, the petitioner appeared before the Inquiry Officer on 20.12.2002 for the first time. The Inquiry Officer granted time to the petitioner as requested, till 24.12.2002 for appointing a Defence Assistant to espouse his cause. That request was accepted by the Inquiry Officer. It was not for taking inspection or submitting list of witnesses as such. It is also noticed from the record, which fact has remained unchallenged, that the petitioner did not participate in the inquiry after 20.12.2002 for the reasons best known to him. Notably, no grievance is made that the adjournment granted by the Inquiry Officer after 24.12.2002 was not in conformity with the time period specified in Rule 14 (11). Therefore, reliance placed on Rule 14(11) of the Rules of 1966, in the fact situation of the present case, is of no avail. Hence, even this contention must fail.

12. Reverting to the next contention that the petitioner was appointed and posted as a Process Server and therefore, was not expected to discharge the work of Water Server, even this argument must fail. Firstly, the petitioner has failed to substantiate that he was appointed as a Process Server. The record, however, indicates that the petitioner was appointed on the post of Peon Class-IV employee. Indeed, at the relevant time he was posted as Process Server, but it is established in the inquiry that on the given day the Peon posted as Water Server was absent. For that reason, the petitioner was asked to do that work. It is not the case of the petitioner that the work of Water Server cannot be assigned to a Peon Class-IV employee. Nor it is argued that the District Nazir has had no power to assign the work of Water Server to another Peon under him albeit given posting of a Process Server, if it was expedient to do so because of absence of peon posted as Water Server. Moreover, the defence taken by the petitioner in response to the notice received after the charge-sheet was served on the petitioner and again after the inquiry report was served on the petitioner, is that, the incident as alleged and noted in the charge did not

happen. The argument now canvassed was not raised in the said response and before the Appellate Authority. Even in the writ petition, no material facts have been mentioned to pursue this argument. The averments in paragraph 5.5 and 5.8 of the writ petition, on the other hand, are that the petitioner was directed by the respondent No.2 to perform duties of Peon and he refused to do the same as he was suffering from acute stomachache and he left the office after giving leave application. In view of this pleading, it is not open to the petitioner now to argue across the bar that the duties of Water Server were not assigned to him on the given date or that his refusal to do that work, does not entail in insubordination. Notably, charge No.2 which is independent of the incident referred to in charge No.1, is also of insubordination. Even that charge has been proved against the petitioner.

13. In our opinion, this argument is an argument of desperation and does not require any further consideration for want of specific pleading in the writ petition or taken by the petitioner during the inquiry or before the Appellate Authority.

14. Before we deal with the argument that the punishment as imposed is excessive, we may now advert to the last point agitated before us about the correctness of the finding of fact recorded by the Inquiry Officer. We are in agreement with the submission of the respondents that in exercise of writ jurisdiction, the scope of interference in matters of departmental proceedings is circumscribed. The High Court does not sit over the said decision as a Court of appeal. The scope of judicial review is limited to the decision making process and when the petitioner demonstrates and substantiates the position that the finding recorded by the Authority is manifestly perverse and a case of jurisdictional error, which has caused serious miscarriage of justice to the petitioner. In the present case, the petitioner having failed to participate in the inquiry proceedings and more so, when the evidence adduced by the department is of high officials, which has been accepted as trustworthy by the Competent Authority, it is not open for this Court to disregard the said concurrent finding or to doubt the said evidence. We hold that it is not possible to re-appreciate the evidence, which has been taken into consideration by the Inquiry Officer, the Disciplinary Authority and also weighed with the Appellate Authority for recording finding that all the three charges framed against the petitioner have been duly proved. As a result, even this submission must be rejected.

15. That takes us to the last aspect about the punishment as imposed being excessive. Considering the three charges framed against the petitioner, even if charge No.3 is to be kept aside for considering the punishment of removal, charge Nos.1 and 2 singularly and together leave no manner of doubt that it is a case of insubordination and disregarding the instructions given by the superiors. That is a major misconduct. Not only that, the petitioner is questioning the entire inquiry on the argument that the departmental inquiry has been initiated at the behest of respondent No.2 and alleging mala fide exercise of powers. The petitioner having deliberately failed to comply with the instructions issued by the superior officer and as he has the audacity to also allege bias against his superiors – which he has failed to substantiate, cannot be heard to complain about the punishment of removal from service being excessive. The punishment of removal, in one sense, is a lighter punishment than the other punishment, which may disentitle him to seek employment elsewhere. Thus understood, we find no merit even in the last argument made by the petitioner about punishment being excessive.

16. Hence, this petition fails being devoid of merits and is dismissed with no order as to costs.

Ordered accordingly.

Petition dismissed.

I.L.R. [2016] M.P., 126

WRIT PETITION

Before Mr. Justice A.M. Khanwilkar, Chief Justice &

Mr. Justice Sanjay Yadav

W.P. No. 15948/2015 (Jabalpur) decided on 1 October, 2015

SATTAR & ors.

...Petitioners

Vs.

STATE OF M.P. & ors.

...Respondents

National Security Act (65 of 1980), Sections 5 & 14 - Preventive Detention - Right to make representation - Detenu was not informed about his right to make representation to Central Govt. - Opportunity was denied to detenu - Continued detention is illegal and untenable - Petition allowed.

(Paras 4, 7 to 9)

राष्ट्रीय सुरक्षा अधिनियम (1980 का 65), धाराएं 5 व 14 – निवारक निरोध

— अम्यावेदन देने का अधिकार — बंदी को केन्द्र सरकार को अम्यावेदन देने के उसके अधिकार के संबंध में सूचित नहीं किया गया था — बंदी को अवसर देने से इंकार — सतत् निरोध अवैध एवं असमर्थनीय है — याचिका मंजूर।

Cases referred :

2014 (3) J.L.J. 387, (1995) 4 S.C.C. 51.

Sankalp Kochar, for the petitioners.

Amit Seth, G.A. for the respondents/State.

(Supplied: Paragraph numbers)

ORDER

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

2. As short question is involved, petition is taken up for final disposal forthwith by consent. Counsel for the State waives notice for final disposal. By consent, taken up for final hearing.

3. This writ petition under Article 226 of the Constitution of India is filed by the next friends of the five detenus (Akram S/o Abdul Samad, Shahid S/o Sattar, Aslam S/o Abdul Saleem, Lalu @ Irshad S/o Maksood, Izran S/o Mukhtar). The detention orders were passed on 25.7.2015 and on the same day the detenus were taken into custody. On the same day they were served with the grounds of detention.

4. The sole point on which this petition must succeed, is that, the detaining Authority has failed to inform the detenus that they have a right of making representation before the Central Government under Section 14 of the National Security Act, 1980. The detenus were merely informed that they can make representation to the State Government. Neither the detention order nor the grounds of detention served on the detenus disclose the fact that the detenu can also make representation to the Central Government and invoke remedy for revocation of the detention order, in terms of Section 14 of the National Security Act, 1980.

5. It is indisputable that the said fact has not been mentioned either in the detention order or the grounds of detention served on the detenus, unlike the disclosure made about the right to make representation to the State

Government. This issue is no more res integra. The Division Bench of this Court has considered the same in the case of *Maikal @ Shahid Vs. State of M.P. and others*¹. After adverting to the provisions of Section 14, in Paragraph No.6, the Court observed thus:-

“The plain reading of aforequoted provision makes it clear that the detention order can be revoked by the State Government as well as by the Central Government. Therefore, the detenu must be apprised of his right to submit representation before the State Government as well as Central Government.”

6. Again after referring to Section 8 of the Act in Paragraph No.7, the Court observed thus:-

“Thus section 8 of the Act further strengthen the position that detenu be apprised of his right to make representation before the State Government as well as before the Central Government.”

7. This exposition is founded on the dictum of the Supreme Court in the case of *Kamleshkumar Ishwardas Patel Vs. Union of India & others*² which predicates that the detenu has been guaranteed right to make representation against the order of detention not only to the Advisory Board, but also to the Detaining Authority. Applying the same principle, to the right to make representation to the Central Government under Section 14 of the Act, the petitioners are justified in contending that there is infraction of the right of the detenu to be kept informed about the availability of such a right; and resultantly denial of opportunity to the detenu to make such representation for invoking the remedy of revocation of the detention order passed against him.

8. Understood thus, the continued detention of the concerned detenu will have to be held as illegal and untenable. On this count alone this petition succeeds.

9. Accordingly, the petition is **allowed**. The impugned detention orders are quashed and set aside with direction to the Detaining Authority, to release them forthwith, if not required in any other criminal cases. No order as to costs.

Petition allowed.

I.L.R. [2016] M.P., 129

WRIT PETITION

Before Mr. Justice A.M. Khanwilkar, Chief Justice &

Mr. Justice K.K. Trivedi

W.P. No. 846/2015 (Jabalpur) decided on 6 October, 2015

B L A POWER PVT. LTD.

...Petitioner

Vs.

UNION OF INDIA & ors.

...Respondents

(Alongwith W.P. No. 850/2015)

A. Coal Mines (Special Provisions) Act (11 of 2015), Section 3(a)(n) & 4(4) - "Promoters" or "any of its company" of such prior allottee - Petitioner established a Power Plant for generating electricity - Petitioner was sourcing coal extracted from Coal Mine operated by sister concern of Petitioner - Allocation of Coal Mines to sister concern of Petitioner was annulled pursuant to the decision of Supreme Court in W.P. (Cri) 120/2012 - Bids were invited for subject coal mines as per the provisions of Act, 2015 - Whether Petitioner is eligible to participate in bid or it fits into the expression "its promoter" or "any of its company" - Held - Associate Company must be held to be covered by the expansive expression used in Section 4(4) - Petitioner itself has described itself to be a sister concern of defaulter prior allottee company but it also has significant influence and control of common promoter and his financial stakes and including the fact that petitioner was dependent on the supply of coal from prior allottee only - Petitioner has also admitted that prior allottee has not paid/deposited the additional levy as directed by Supreme Court - Share holding pattern of both companies is an alter-ego of defaulter prior allottee. (Paras 18 to 38)

क. कोयला खान (विशेष उपबंध) अधिनियम (2015 का 11), धारा 3(ए)/(एन) व 4(4) - ऐसे पूर्व आवंटित के प्रवर्तक अथवा "उसकी कोई कंपनी" - याची ने विद्युत उत्पादन हेतु पावर-प्लांट (विद्युत संयंत्र) स्थापित किया - याची अपनी सहयोगी संस्था द्वारा संचालित कोयला खान से उत्खनित कोयला प्राप्त कर रहा था - रिट याचिका (दाण्डिक) 120/2012 में उच्चतम न्यायालय के निर्णय के अनुसार याची की सहयोगी संस्था को कोयला खान का आवंटन रद्द किया गया - अधिनियम, 2015 के उपबंधों के अनुसार विषयाधीन कोयला खानों हेतु बोलियां आमंत्रित की गयी - क्या याची बोली में भाग लेने के लिये पात्र है अथवा "उसके प्रवर्तक" अथवा "उसकी कोई कंपनी" की अभिव्यक्ति के अंतर्गत आता है - अभिनियमित - सहयोगी कंपनी को धारा 4(4) में

प्रयोग की गयी विस्तृत अभिव्यक्ति के अंतर्गत माना जाना चाहिए – याची ने स्वयं ही स्वयं को व्यतिक्रमी पूर्व आबंटिती कंपनी की सहयोगी संस्था के रूप में वर्णित किया है परंतु उसका सामान्य प्रवर्तक एवं उसके वित्तीय हिस्सेदारी पर भी उल्लेखनीय प्रभाव एवं नियंत्रण है तथा यह तथ्य भी शामिल है कि याची केवल पूर्व आबंटिती से ही कोयले की आपूर्ति के लिए निर्भर था – याची ने यह भी स्वीकार किया है कि पूर्व आबंटिती ने उच्चतम न्यायालय द्वारा यथानिदेशित अतिरिक्त उद्ग्रहण का भुगतान/निक्षेप नहीं किया है – शेरर धारण करने का दोनों कंपनियों का स्वरूप व्यतिक्रमी पूर्व आबंटिती का सूक्ष्म शरीर है।

B. Constitution - Article 19 - Right to carry on business - Company not being a citizen, has no fundamental right under Article 19 of Constitution of India. (Para 43)

ख. संविधान – अनुच्छेद 19 – व्यापार करने का अधिकार – भारत के संविधान के अनुच्छेद 19 के अंतर्गत कंपनी जो कि नागरिक नहीं है को कोई मूलभूत अधिकार नहीं है।

C. Coal Mines (Special Provisions) Act (11 of 2015), Sections 3(a)(n) & 4(4) - "Promoters" or "any of its company" of such "prior allottee" - Reasonable or direct nexus - The provision certainly has reasonable or direct nexus with the object sought to be achieved, to keep away the defaulter prior allottees from participating in the auction process directly or indirectly, through the cobweb of Companies created or in existence to defeat the direction of Supreme Court regarding payment or recovery of additional levy from them. (Para 47)

ग. कोयला खान (विशेष उपबंध) अधिनियम (2015 का 11), धाराएं 3(ए)(एन) व 4(4) – ऐसे "पूर्व आबंटिती" के "प्रवर्तक" अथवा "उसकी कोई कंपनी" – युक्तियुक्त अथवा सीधा संबंध – भुगतान या अतिरिक्त उद्ग्रहण की वसूली के संबंध में उच्चतम न्यायालय के निदेश को विफल बनाने के लिये सृजित या विद्यमान कम्पनियों के मायाजाल के जरिये व्यतिक्रमी पूर्व आबंटितियों को प्रत्यक्ष या अप्रत्यक्ष रूप से नीलामी की प्रक्रिया में हिस्सा लेने से दूर रखने में सफल बनाने के चाहे गये उद्देश्य के साथ निश्चित रूप से उपबंध का युक्तियुक्त एवं सीधा संबंध है।

D. Contract - Tender - Eligibility to participate in tender process - Petitioner Company is engaged in generation of power which is supplied to consumers/grid - Petitioner company is operating in a regulated sector, regulated under the provisions of Electricity Act - Tender Process for allotment of Coal Mines is in respect of coal mines earmarked for non-regulated sector - Held - Central Govt. has power

to classify the coal mines for specified end uses - Petitioner who intends to use the coal for generation of power per se is not qualified to participate in auction process of the subject coal mines which is earmarked for end use of non regulated sector, for optimum utilization of national resources. (Paras 51 to 70)

घ. संविदा - निविदा - निविदा प्रक्रिया में भाग लेने के लिए योग्यता - याची कंपनी विद्युत उत्पादन में संलग्न है जो कि उपभोक्ताओं/ग्रिड को आपूर्ति की जाती है - याची कंपनी विनियमित क्षेत्र में संचालित है जो कि विद्युत अधिनियम के प्रावधानों के अंतर्गत विनियमित है - कोयला खानों के आबंटन के लिए निविदा प्रक्रिया गैर-विनियमित क्षेत्रों के लिए चिन्हित कोयला खानों के संबंध में है - अभिनिर्धारित - विशिष्ट अंतिम उपयोग के लिए कोयला खानों को वर्गीकृत करने की शक्ति केंद्र शासन के पास है - याची जो वास्तव में विद्युत उत्पादन के लिए कोयले के उपयोग का आशय रखता है उस विषयाधीन कोयला खान की नीलामी प्रक्रिया में भाग लेने के लिए अर्ह नहीं है जो कि राष्ट्रीय संसाधनों के अधिकतम उपयोग के लिए, गैर विनियमित क्षेत्र के उपयोग हेतु चिन्हित है।

Cases referred :

(2014) 9 SCC 614, (2005) 5 SCC 465, (2006) 2 SCC 385, (1999) 4 SCC 458, (2012) 11 SCC 257, (1999) 4 SCC 517, 1988 Supp SCC 580, (1983) 2 SCC 402, (2011) 3 SCC 193, (2013) 3 SCC 1, (2011) 9 SCC 645, W.P. (C) 309/2015 decision dated 11.02.2015, (2009) 15 SCC 570, (2009) 14 SCC 85, (2010) 15 SCC 103, (1991) 1 SCC 505, (1987) 2 SCC 165, (1984) 3 SCC 465, (1990) 3 SCC 223, 311 US 570-77, (2010) 3 SCC 732, (1994) 6 SCC 651, (2004) 4 SCC 19, AIR 1961 SC 1602, (2008) 2 SCC 672, (2012) 8 SCC 216.

Sanjay Sen, Brian D'silva with Jaideep Sirpurkar, for the petitioners.

Sanjay Jain, Asstt. Solicitor General with *Akshay Makhija & Vikram Singh*, for the respondents/Union of India.

A.A. Barnad, G.A. for the respondent No. 3/State.

T.S. Ruprah with Saurabh Sunder, for the respondent No. 8.

Naman Nagrath with Greeshm Jain, for the intervener.

J U D G M E N T

The Judgment of the Court was delivered by :
A.M. KHANWILKAR, C.J. :- This common judgment will dispose of the two writ petitions filed by the same petitioner in respect of overlapping cause of action and reliefs. Both these petitions were filed on 16.01.2015, essentially,

to question the provisions of the Coal Mines (Special Provisions) Ordinance, 2014 (5 of 2014), the Coal Mines (Special Provisions) Second Ordinance, 2014 (7 of 2014), the Coal Mines (Special Provisions) Rules, 2014 and the action taken thereunder by the appropriate Authority.

2. In the first writ petition (W.P.No.846/2015) declaration is sought that the orders dated 18.12.2014 and 24.12.2014 issued by the respondents are *ultra vires* Section 7 of the Ordinance (now the Coal Mines (Special Provisions) Act, 2015) and the Constitution of India. Alternative relief has been prayed that the respondents be directed to modify the orders dated 18.12.2014 and 24.12.2014 so as to make the power generating stations such as the petitioner, eligible to participate in the auction process. Further direction is sought against the respondents to make available the subject Coal Mines for generating stations engaged in generation of power, for the auction process in question. In addition, it is prayed that the respondents be directed to modify Clause 2.3.1 of the tender document for Gitotoria (East) and Gitotoria (West) Coal Mines (hereinafter referred to as the "subject Coal Mines") and make the said Coal Mines available for the Power Sector or at least, the petitioner during the subject auction process. Alternative relief to this relief has been claimed to strike down Section 7 of the Coal Mines (Special Provisions) second Ordinance 2014 now the Coal Mines (Special Provisions) Act, 2015 (hereinafter referred as "Act"), as unconstitutional. As the Ordinance has now become the Act during the pendency of the writ petitions; and in the light of the pleadings exchanged, the petitioner has amended the petitions and has urged additional grounds and sought further reliefs. By way of amendment, the petitioner has sought direction against the respondents to produce the relevant records pertaining to constitution and business of Technical Committee and to set aside the classification of the subject Coal Mines exclusive for non-regulated sector. Further relief has been claimed to declare that the reverse bidding protocol specified for auction of Coal Mines classified for regulated sector and to reserve only the Mines with reference to more than 100 MT for Power Sector as illegal, as it suffers from the vice of non-application of mind.

3. Although, the petitioner could have asked for the reliefs, as claimed in the second writ petition (W.P.No.850/2015), in the first writ petition itself, but was advised to file a separate writ petition on the same day praying for striking down clause 4.1.2(a)(i) of the tender document dated 27.12.2014 issued by the respondent No.2 and to further direct the respondents to permit the petitioner to participate in the auction process. In the alternative, it has

been prayed that Section 4(4) of the Ordinance (now the said Act), be declared as unconstitutional and void.

4. Briefly stated, the petitioner is incorporated as a Private Company under the provisions of the Companies Act, 1956 having its registered office in Madhya Pradesh. It has set up a Thermal Power Plant at village Nigar, Gadarwara, District Narsinghpur in the State of Madhya Pradesh. It is engaged in the business of power generation and claims to be the first independent power producer in the State of Madhya Pradesh. It is stated that the said project was set up by the petitioner under the Private Partnership module, where at least 35% of the power generated, was required to be sold in the State of Madhya Pradesh, as per the policy of the Government of Madhya Pradesh - to facilitate private investments in the power generation projects and development projects in the State of Madhya Pradesh. It is the case of the petitioner that it has set up a Thermal Power Plant with a generating capacity of 135 MW i.e. 45×3 MW. The first Unit of the Power Plant was commissioned in the month of April, 2012 and the second unit was scheduled to be made operational by March, 2015. The petitioner claims to have obtained clearance for setting up of the third Unit and the construction work in that behalf was about to be started. The petitioner has entered into a Memorandum of Understanding dated 10.8.2007, with the State of Madhya Pradesh, whereby the State has agreed to provide all possible assistance to the petitioner for successful implementation of the petitioner's power project. Subsequently, an implementation agreement dated 01.02.2000 was entered into between the petitioner and the State of Madhya Pradesh.

5. According to the petitioner, for production of electricity in the petitioner's Power Plant continuous supply of Coal is essential. The petitioner was sourcing Coal extracted from the Coal Mine operated by BLA Industries Pvt. Ltd., which is a sister concern of the petitioner. The petitioner and the said BLA Industries Pvt. Ltd. have entered into a long term Fuel Supply Agreement (FSA), for continuous supply of coal from the subject Coal Mines to the petitioner. That agreement was duly approved by the Central Government on 2nd February, 2012. The Coal Mine operated by the said BLA Industries Pvt. Ltd. is located, at a distance, approximately 30 Kms. away from the petitioner's Power Plant. According to the petitioner, the Power Plant was set up at the said location only because of the proximity with the Coal Mines and for continuous and uninterrupted supply of Coal.

6. The other facts mentioned in the writ petition, are not so relevant except to note that the petitioner states that the allocation of Coal Mines to BLA Industries Pvt. Ltd. was annulled pursuant to the decision of the Supreme Court dated 25.08.2014 and 24.09.2014 in Writ Petition (Criminal) No.120/2012 in the case of *Manohar Lal Sharma vs. Principal Secretary and others*¹. Consequent to the said decision of the Supreme Court; and after annulment of allocation of Coal Mines in terms of that order including against BLA Industries Pvt. Ltd., the Government of India promulgated the Coal Mines (Special Provisions) Ordinance, 2014 (5 of 2014) on 21.10.2014, which Ordinance upon lapsing was replaced by Coal Mines (Special Provisions) Second Ordinance, 2014 (7 of 2014) on 26.12.2014. Subsequently, the Parliament passed the Coal Mines (Special Provisions) Act, 2015 (11 of 2015). By the said Act, while repealing the second Ordinance vide Section 33 of the Act, has saved all the actions taken under the said repeal law. As a result of that provision, the Rules and certain executive orders made under the repeal law, were deemed to have been saved, done or taken under the corresponding provisions of the Act of 2015, and without prejudice to the judgment of the Supreme Court dated 25.08.2014 and its order dated 24.09.2014 passed in Writ Petition (Criminal) No.120/2012.

7. It is stated that the order issued by the Central Government dated 18.12.2014 and Corrigendum dated 24.12.2014 purporting to classify the Coal Mines on the basis of regulated and non-regulated sector with reference to the end use specified in Section 3(1)(v)(ii) of the Act also remained operative. According to the petitioner, however, neither the provisions in the Act of 2015 nor the Rules of 2014 provide for classification on the basis of regulated and non-regulated sector. In other words, the appropriate Authority acted contrary to the spirit of the provisions of the Act and Rules made thereunder. On such erroneous basis, the nominated Authority has issued tender document dated 27.12.2014 inviting bid for the subject Coal Mines. As per the tender document, though the subject Coal Mines are being auctioned as per the provisions of the Act of 2015, the petitioner was likely to be considered as ineligible to participate in the said auction process, even though the petitioner has its Power Plant in close proximity to the said Coal Mines and more so fully dependent on the coal extracted from those Mines. In that, as per the tender document, the subject Coal Mines have been made available for auction

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to the non-regulated sector (iron and steel, cement and captive power plants only) as per the order dated 18.12.2014 read with corrigendum dated 24.12.2014. According to the petitioner, since the petitioner would be consuming the coal for generation of power and supply to consumers/grid (regulated sector), would not be entitled to participate in the auction process.

8. Accordingly, the petitioner has approached this Court by way of two writ petitions for the reliefs as mentioned hitherto.

9. The counsel for the petitioner besides oral arguments, has submitted final written submissions on 29th July, 2015, contending as under:-

"Legal Propositions

The legal propositions that support the case of the Petitioner are as follows :

- A. In view of Section 3 (1) (v) (ii) of the Act, 2015, the Central Government and the nominated authority do not have the power/jurisdiction to classify (by an order or otherwise) the specified end use of a coal mine only for "generation of power for captive use" and exclude the main classification i.e. generation of power. This violates the right of the petitioner under Section 4 (3) read with Section 3 (1) (v) (ii) of the Coal 2015, Act.
- B. The order of the Central Government dated 18.12.2014, Corrigendum dated 24.12.2014 and the terms of the tender dated 27.12.2014 issued by the Nominated Authority to the extent it creates a classification of "regulated" and "non regulated sector" and, then proceeds to classify the subject coal mines as being available for auction only "generation of power for captive use"(being a "non regulated" sector) is illegal and ultra vires the Coal Act, 2015 and the Rules made thereunder.
- C. When Section 7 (1) of the Coal Act, 2015 expressly provides that the Central Government prior to an auction may classify mines identified from Schedule I coal mine as earmarked for the same class of specified

uses, the Central Government cannot then ignore the fact that Coal from the subject coal mine was being used for generation of power. The process adopted by the Central Government for the purposes of classification is arbitrary.

- D. The Expert Technical Committee set up by the Central Government admittedly while classifying the coal mines for auction has not considered the interest of the stakeholders (particularly those who were using the coal from the coal mines). This is admitted in the Affidavit to the Central Government dated 10.07.15 at p. 3 to 8. The process adopted by the Central Government and the Expert Technical Committee goes against the core principle and object of Coal Act, 2015 as contained in the preamble and the second recital.
- E. Apart from the aforesaid, the ground/reason of classifying mines for purposes of auction on the basis of grade of coal as submitted by the Central Government/Expert Technical Committee is also arbitrary and unreasonable. There is no explanation as to how a particular grade of coal suitable for generation of power for captive use is unsuitable for generation of power other than for captive use. The end use of power generated has no nexus with the quality of coal. The specific grounds of challenge relating to the arbitrary manner in which the Expert Technical Committee has conducted itself is set out in paragraph 5.11-A of the amended writ petition.
- F. The Central Government has submitted that mines with a reserve of 100 million tons and above have been earmarked and classified for power sector. It is submitted that for a power company in order to bid for a mine of aforesaid capacity has to have a power plant of 600 MW and above. This aspect is evident from reading the terms of the tender for power. While fixing this bench mark, Technical Committee did not

consider the viability/survival of smaller or mid-sized power plants. Such small and mid sized power plants also have no access to "linkage" coal. The Technical Committee had no rational and comprehensive policy for classifying the mines. The purported classification is thus arbitrary.

G Alternatively, keeping in view the actions of Central Government, if Section 7 (1) of the Coal Act, 2015 can be interpreted to allow creation of a further category of "non regulated sector"(and a category of captive power excluding generation of power) amongst the specified end users as defined in the statute, then the Section will suffer from the vice of excessive delegation.

H. Neither the Coal Act, 2015 nor the Rules envisage the concept of reverse auction. For purposes of reverse auction, by an executive order/memo the Central Government has provided a methodology for determination of "ceiling price", under which reverse auction will take place. Since the Coal Act, 2015 and Rules only provides for "floor price"(for auction under Section 4) and "reserve price" (for allocation under Section 5), there is no power or ability with the Central Government to introduce a ceiling price. This constitutes adding a provision in the statute and rules by the executive, which is not permissible. When the method of auction with a floor price is provided in the statute, where is the jurisdiction to do a reserve auction on the basis of ceiling price? Therefore, the process of reverse auction for coal mines for power (i.e. regulated sector) against a ceiling price determined by the Nominated Authority is illegal for want of legislative mandate. This actually offends the law itself. The Central Government is doing a "reverse" of what the law requires it to do.

4. In furtherance of the aforesaid propositions, reference may be made to the following parts/provisions of the

Act, 2015 :

- The Preamble of the Coal Act, 2015 expressly provides that the Coal Act, 2015 aims to ensure continuity in mining operation and production of coal and for optimum utilization of coal resources consistent with the requirement of the country.
- In the 2nd Recital of the Coal Act, 2015, it is recorded that it is expedient in public interest for the Central Government to take immediate action to allocate coal mines to successful bidders and allottees keeping in view energy security of the country and to minimize any impact on core sectors such as steel, cement and power utilities, which are vital for the development of the nation.

Section 4 (3) of the Coal Act, 2015 deals with eligibility to participate in the auction. The petitioner a person engaged in generation of power is eligible to participate in the auction.

- Section 3 (1) (v) of the Coal Act, 2015 defines "specified end uses". Generation of power is a specified end use under Section 3 (1) (v) (ii). Since the petitioner is a specified end user, the Petitioner is eligible to participate in the auction for coal mine classified for power. The special law regulates the end use of coal. The legislative mandate for distribution of coal does not extend to the manner in which product of the end user industry is sold. Whether the product of the end user is regulated or unregulated is of no concern to the special coal law.
- In Section 3 (1) (v) (ii) the word "..... including generation of power for captive use" cannot exclude "generation of power", which is the main/primary category. The word including" expands the definition. The Central Government cannot seek

to sub-classify generation of power into two categories— such purported sub-classification is ultra vires the Coal Act, 2015 and violates the right of the petitioner *inter alia* under Section 4 (3) of the Coal Act, 2015.

- Section 6 empowers the Central Government to appoint and act through a nominated authority.
- In Section 7 (1) of the Coal Act, 2015 the Central Government has been vested with the power to classify mines. The legislative mandate requires that the mines identified from Schedule I coal mines be as earmarked for the same class of specified end uses. Classification of the subject mine as "non regulated sector", which is available for bid by company generating power for captive use (and not a company which is engaged in generation of power) is arbitrary. More so when the power generation company (i.e. 'the Petitioner') has been using coal from the mine from its very inception.
- The Coal Act, 2015 does not envisage creation of a "non regulated sector" amongst the specified end users.
- Section 8 (1) enables the nominated authority to determine, in consultation with the Central Government the "floor price" and the "reserve price", as the case may be. The Coal Act, 2015 does not envisage a "ceiling price", which is the basis for reverse auction of coal mine earmarked for power.
- Section 18 (1) provides that if the auction or allotment of Schedule I coal mines is not complete, the Central Government shall appoint any person as a designated custodian to manage and operate such mines, as may be notified by the Central Government. Coal India is therefore only a

custodian of the mine pending completion of the auction process.

5. The Central Government had framed Rules, which are called the Coal Mines (Special Provision) Rules, 2014. Although these Rules were framed under the First Ordinance promulgated on 21.10.2014, the Rules have been saved under section 33 (2) (the Repeal and Savings Provisions) of the Coal Act of 2015.

- Rule 2(f) and 2 (k) defines "floor price" and "reserve price". There is no mention of "ceiling price". Floor price is the price fixed by the Central Government for allocation by the auction route, while reserve price is the price fixed by the Central Government for allocation by allotment route.
- Rule 8 provides for allocation process. Rule 8 (2) empowers the Central Government to issue an order to the Nominated Authority. The orders impugned in the present Petition have been purportedly issued under Rule 8 (2). There is no provision in the Rule that allows (a) creation of a "non regulated sector" amongst the specified end users and (b) creation of generation of power for captive use as a separate category, distinct from generation of power. The category of generation of power for captive use cannot exclude the main/ primary category, i.e. generation of power.

Rule 8 (3) requires the Central Government to recommend methodology for "reserve" and "floor price". There is no mention of ceiling price.

Also, in the alternative, the order dated 26.12.14 providing the methodology for floor price etc. issued by the Respondents is also illegal as Section 8 sub-section 5 empowers the Nominated Authority, in consultation with the Central Govt in determining the floor or reserve price (not the ceiling price). Further,

such determination is to be in accordance with the Rules "as may be prescribed". Further, Section 31 (2) (k) provides that the rule making power of the Central Govt. extends inter alia to the determination of floor price. The Central Govt. has on 11 Dec 2014 notified the Coal Mines (Special Provisions) Rules, 2014 ("Rules"). It is submitted that Rule 8(3) does not provide for any methodology for determination of the floor price or reserve price. The Rule only provides that it will be open to the Central Govt. to recommend such methodology. The Rules are thus not consistent with the Coal Act, 2015. The executive order of 26.12.2015 goes beyond both the Coal Act, 2015 and the rules.

- Rule 10 provides for the manner of conducting auction.

6. Once section 3 (1) (v) of the Coal Act, 2015 provides that "generation of power" is a specified end-use, there is no power available either with the Central Government or with the nominated authority to exclude "generation of power for non-captive use" and create a separate and distinct category of power generation for captive use. Generation of power is the primary category of specified end-use that has been created by the legislatures. This category has been further expanded to include "generation of power for captive use. The use of the word 'including' in section 3 (1) (v) (ii) only expands and clarifies that even if a power plant is not selling power to the distribution company or the public at large, but is self consuming the power to support its industrial activity, such person will be eligible to participate in the auction process. This is a clear reading of section 4 (3) read with section 3 (1)(v) (ii).

7. An expansive definition of "generation of power" would mean that, if for example, BALCO, which is engaged in the production of aluminium has set up a

power plant to support the aluminium manufacturing process then BALCO will also be eligible for participating in the auction for coal (to the extent it requires coal for generation of power), even if aluminium production is not a specified end-use. In the aforesaid context, to segregate generation of power for captive use and put it in the non-regulated sector category runs counter to the legislative mandate/policy.

8. When the Coal Act, 2015 specifies the end users of coal who are eligible to participate in the auction, the Central Government by an order cannot then classify the specified end-users further on the basis of the specified end-user being engaged in a business that is regulated or non-regulated. The Coal Act, 2015 is a law that deals with allocation of coal mines and not the regulation of the industry that uses coal. Whether the specified end-users sector is regulated or not is certainly within the object and scope of the Coal Act, 2015.

The purpose of the Coal Act, 2015 is to secure maximum participation in the transparent auction process, so that Government revenues will be augmented. The provisions of the Coal Act, 2015 have to be interpreted in a manner that promotes the object of the Act, 2015.

9. Section 7 (1) only empowers the Central Government to formally classify mines identified from Schedule 1 coal mines as earmarked for the same class of the specified end-users. The power to classify under 7 (1) cannot be read to do violence to the definition of specified end-uses. The power to classify mines vested with the Central Government in section 7(1) cannot include the power to add, alter or amend any provision of the statute.

Also, Section 7 (1) requires the Central Government to classify mines identified from Schedule 1 as

earmarked for the 'same class of specified end-uses'. The process of classification is arbitrary, because the Central Government while recognizing the fact that coal from the subject mine was used for power generation by the Petitioner and not generation of power for captive use.

10. If it is read that section 7 (1) gives unbridled power to the Central Government to classify mines for auction in a manner different to what is provided in section 4(3) read with section 3 (1) (v) then section 7 (1) will itself be liable to be declared arbitrary, has suffering from the vice of excessive and unbridle delegation of power.

11. It is necessary to appreciate that "generation of power for captive use" is not defined in the Coal Act, 2015. A review of the laws relating to coal mines (as provided in Section 3 (2)) will also confirm that there is no such definition in those statutes. However, Section 2 (8) of the Electricity Act, 2003 defines captive generating plant. In 2005 the Central Government issued the Electricity Rules, 2005, in which the requirement of captive generating plant is provided.

A reading of the Electricity Rules, 2015 will show that generation of power for captive use is only in relation to 51% of the power that is generated and not the entire power. Hence 49% of the power is capable for being sold to the distribution licensee or the public at large, much like generation and sale by any other power utility. Further, Rule 3 (2) of the Electricity Rule, 2005 provides that whether the power plant is captive or not has be checked on an annual basis, depending upon whether self consumption has been beyond 51% or more. Clearly, the definition of captive use its dynamic and may change on a year to year basis and cannot be easily determined.

12. Clearly, there is non-application of mind in issuing the

order dated 18.12.2014 and the Corrigendum dated 24.12.2014. the tender terms as result are also contrary to the provisions of the Coal Act, 2015.

13. A Division Bench of the Hon'ble High Court of Delhi at New Delhi has, vide judgment dated 11 February 2015 in the case of Jindal Steel & Power Ltd. v. Union of India, held as follows :

- The Hon'ble Delhi High Court has held that the Hon'ble Supreme Court in passing the judgment dated 25 August 2014 and order dated 24 September 2014 was only concerned with the legality of the allocations/allotments of coal blocks made between 1993 and 2010 through the Screening Committee process. The Supreme Court was not concerned with the future manner of allocations/allotments/utilization of the coal blocks. The cancellation of the coal block allocations cannot be regarded as a circumstance which would make the consideration of end-use for the purposes of future allocation irrelevant (Para 20 @ pg. 27 of the judgment).
- After discussing the various meetings of the Technical Committee (Para 29 @ pg. 47 onwards of the judgment), the Hon'ble Delhi High Court has severely criticized the same and found the methodology and criteria adopted to be flawed. (Paras 45 to 50 @ pgs. 61 to 66 of the judgment).
- The Hon'ble Delhi High Court further held that "generation of power" is one category and includes generation of power for captive use. (Paras 56, 57 @ pgs. 70-72 of the judgment).

It is pertinent to add that though the judgment of the Hon'ble Delhi High Court has been challenged before the Hon'ble Supreme Court and notice has been issued, no stay has been granted over the operation of the

10. These petitions have been resisted by the respondents by filing reply-affidavit. The respondents have raised preliminary objection about the locus of the petitioner. Firstly, because the petitioner is a sister concern of BLA Industries Pvt.Ltd; who is a prior allottee and the allocation of the Coal Mine to the said Company has been annulled in terms of the judgment of the Supreme Court. The said prior allottee has failed to pay the additional levy as directed by the Supreme Court and is already facing contempt action in that behalf. The Petitioner, being a sister concern or associate/affiliate company of the prior allottee, is ineligible to participate in the auction process in terms of Section 4(4) of the said Act. Secondly, the subject Mines have been classified for the end use of non-regulated sector only – such as iron and steel, cement. Since the petitioner is engaged in generation of power (regulated sector) *per se*, was not eligible to participate in the auction process and at the instance of such ineligible person, no other question should be examined. Even on merits, the respondents have demonstrated that the grounds urged by the petitioner are devoid of merits.

11. After arguments were concluded, the counsel for the petitioner prayed for time to file written submissions. That request was acceded to. Accordingly, the written submission of the petitioner was filed on 29th July, 2015 and the respondents on 6th August, 2015.

12. In the context of the first preliminary issue regarding the locus of the petitioner, at the outset, we may have to examine two aspects. Firstly, the purport of Section 4(4) of the Act, and if, the interpretation of the said provision, is against the petitioner, then the question about the validity of the said provision, being unconstitutional will have to be tested. Incidental to that, we may also have to consider the validity of clause 4.1.2(a)(i) of the tender documents dated 27.12.2014.

13. We shall first advert to the sweep of Section 4(4) of the Act. Section 4 of the Act reads thus:-

"4.(1) Subject to the provisions of section 5, Schedule I coal mines shall be allocated by way of public auction in accordance with such rules, and on the payment of such fees which shall not exceed five crore rupees, as may be prescribed.

(2) Subject to the provisions in sub-section (3) of

this section and section 5, the Central Government may, for the purpose of granting reconnaissance permit, prospecting licence or mining lease in respect of any area containing coal, select any of the following companies through auction by competitive bidding, on such terms and conditions as may be prescribed —

(a) a Government company or corporation or a joint venture company formed by such company or corporation or between the Central Government or the State Government, as the case may be, or any other company incorporated in India; or

(b) a company or a joint venture company formed by two or more companies, that carry on coal mining operations in India, in any form either for own consumption, sale or for any other purpose in accordance with the permit, prospecting licence or mining lease, as the case may be, and the State Government shall grant such reconnaissance permit, prospecting licence or mining lease in respect of any area containing coal to such company as selected through auction by competitive bidding under this section.

(3) Subject to the provisions of section 5, the following persons who fulfil such norms as may be prescribed, shall be eligible to bid in an auction of Schedule II coal mines and Schedule III coal mines and to engage in coal mining operations in the event they are successful bidders, namely:-

(a) a company engaged in specified end-use including a company having a coal linkage which has made such investment as may be prescribed.

Explanation.— A "company with a coal linkage" includes any such company whose application is pending with the Central Government on the date of commencement of this Act;

(b) a joint venture company formed by two or

more companies having a common specified end-use and are independently eligible to bid in accordance with this Act;

(c) a Government company or corporation or a joint venture company formed by such company or corporation or with any other company having common specified end-use:

Provided that nothing contained in sub-section (2) shall apply to this sub-section.

(4) A prior allottee shall be eligible to participate in the auction process subject to payment of the additional levy within such period as may be prescribed and if the prior allottee has not paid such levy, then, the prior allottee, its promoter or any of its company of such prior allottee shall not be eligible to bid either by itself or by way of a joint venture.

(5) Any prior allottee who is convicted for an offence relating to coal block allocation and sentenced with imprisonment for more than three years, shall not be eligible to participate in the auction."

(emphasis supplied)

14. Section 4 *inter alia* provides for the eligibility to participate in the auction process. Sub-section (1) makes it amply clear that Coal Mines referred to in Schedule-I shall be allocated only by way of public auction in accordance with the Rules and on payment of such fees, which, however, shall not exceed five crore rupees, as may be prescribed. All Coal Mines covered by the decision of the Supreme Court have been placed under Schedule-I. Section 3(1)(p) of the said Act defines Schedule-I Coal Mines, which reads thus:-

"3(1)

(p) "Schedule I coal mines" means,—

(i) all the coal mines and coal blocks the allocation of which was cancelled by the judgment dated 25th August, 2014 and its order dated 24th September, 2014 passed in Writ Petition (Criminal)

No.120 of 2012, including those allotments which may have been de-allocated prior to and during the pendency of the said Writ Petition;

(ii) all the coal bearing land acquired by the prior allottee and lands, in or adjacent to the coal mines used for coal mining operations acquired by the prior allottee;

(iii) any existing mine infrastructure as defined in clause (j)."

15. Now, we may advert to the definition of Schedule-II Coal Mines as well as Schedule-III Coal Mines given in Section 3(1)(q) and 3(1)(r), respectively. The same read thus:-

"3(1)(a)

(b)

(q) "**Schedule II coal mines**" means the forty-two Schedule I coal mines listed in Schedule II which are the coal mines in relation to which the order of the Supreme Court dated 24th day of September, 2014 was made;

(r) "**Schedule III coal mines**" means the thirty-two Schedule I coal mines listed in Schedule III or any other Schedule I coal mine as may be notified under sub-section (2) of section 7.

(s)"

16. Sub-section (2) of Section 4 authorizes the Central Government to select specified Companies for grant of reconnaissance permit, prospecting licence or mining lease through auction by competitive bidding on such terms and conditions, as may be prescribed, amongst the companies who carry on coal mining operations in any form either for own consumption, sale or for any other purpose in accordance with the permit, prospecting licence or mining lease, as the case may be.

17. Sub-section (3) of Section 4 provides for the qualification or eligibility of persons who can bid in the auction for Schedule-II and Schedule-III Coal Mines; and to engage in coal mining operations in the event they are the

successful bidders.

18. For the time being, we need not stress on the efficacy of other provisions, as the preliminary issue requires us mainly to construe the sweep of Section 4(4) of the Act, which, we find, is in two parts. The first part is in the nature of removing disqualification of the prior allottee. The expression "prior allottee" has been defined in Section 3(1)(n) as under:-

"(3)(1)(a)

(n) "**prior allottee**" means prior allottee of Schedule I coal mines as listed therein who had been allotted coal mines between 1993 and 31st day of March, 2011, whose allotments have been cancelled pursuant to the judgment of the Supreme Court dated the 25th August, 2014 and its order dated 24th September, 2014 including those allotments which may have been de-allocated prior to and during the pendency of the Writ Petition (Criminal) No.120 of 2012.

Explanation.— In case a mining lease has been executed in favour of a third party, subsequent to such allocation of Scheduled I coal mines, then, the third party shall be deemed to be the prior allottee."

19. The first part of sub-section (4) of Section 4 envisages that the prior allottee, who has fully paid the additional levy within time, as may be prescribed, is eligible to participate in the auction process. The second part of sub-section (4) is in the nature of disqualification clause. It envisages that a prior allottee who has "failed to pay" the additional levy within the prescribed time, is ineligible to participate in the auction process. Besides the prior allottee, even the promoter or any of its Company – of such prior allottee – is rendered ineligible to bid in the auction process either itself or by way of a joint venture. This provision is enacted to make the defaulter prior allottee ineligible to participate in the auction process, either directly or indirectly.

20. The petitioner, before us, is certainly not a prior allottee. The question is: whether the petitioner fits into the expression "its promotor" or "any of its company" – of such prior allottee? If the answer is yes, it would necessarily follow that the petitioner is ineligible to participate in the subject auction process by virtue of Section 4(4) of the Act. What is significant to note, is, the expression used in Section 4(4). It is wide enough to also encompass "any

company" in which the "prior allottee" may have substantial fiduciary or business interests or control thereof. We have no manner of doubt that the expression used has been intentionally made expansive to completely rule out or bar the participation of the defaulter prior allottee in the auction process, directly or indirectly. For, it is not limited to the expressions found in the Companies Act, such as, "subsidiary company", "holding company" or "associate company".

21. Notably, the expression "any of its company of such prior allottee" has not been defined in the Act of 2015 nor so referred to in Section 3(n) defining the expression "prior allottee". Therefore, we may have to understand the meaning of that expression, as understood in common parlance. Firstly, the meaning of word "its" given in the Major Law Lexicon by P. Ramanatha Aiyar 4th Edition 2010 at page 3588 reads thus:-

"Its. The use of the term 'its' in the exception 2 to clause 2(a) of the order would mean that the storage depot or installation should belong to the oil company and not any storage depot or installation. [Holani Auto Links (P.) v. State of M.P., (2008) 13 SCC 185, 194, para 23] [M.P. Essential Commodities (Exhibition of Price and Price Control) Order, 1977, Cl.2(a) Exception-2]"

(emphasis supplied)

The Webster's Dictionary and Thesaurus & Medical Dictionary at page 208, mentions the meaning of expression "its" as follows:-

"its (its) the *possessive case of pron. it. itself pron.* the neuter reciprocal pronoun applied to things; the reflexive form of it."

The Oxford English-English-Hindi Dictionary first published in 2008, at page 653, mentions the meaning of expression "its", "it's" and "itself" as follows:-

"its/its इट्स/ det. of or belonging to a thing किसी वस्तु का या उससे संबंधित *The club held its Annual General Meeting last night.*
→ It's पर नोट देखिए ।"

"It's/its इट्स / → it is; it has का संक्षिप्त रूप

NOTE /ध्यान रखिए it's 'it is' या 'it has' का संक्षिप्त रूप है ।

Its का अर्थ है 'it' से संबंधित (इसका)— *The bird has broken its wings.*"

"**Itself/it self** इट् सेल्फ/pronoun 1 used when the animal or thing that does an action is also affected by it किसी पशु या वस्तु का निर्देश करने के लिए प्रयुक्त जब अपनी क्रिया से वह स्वयं प्रभावित हो, (आप) को, स्वयं को The company has got itself. The company has got itself into financial difficulties. 2 used to emphasize sth किसी बात पर बल देने के लिए प्रयुक्त The building itself is beautiful, but it's in a very ugly part of town".

22. Indubitably, the expression "its", in the setting in which it is placed in Section 4(4) of the said Act, would primarily mean a Company belonging to or of the prior allottee. It would, however, also include any company in which the prior allottee (BLA Industries Pvt. Ltd.) may have a substantial or significant fiduciary or business interests or control thereof.

23. Let us now consider the definition of company, existing company, private company and public company in Section 3 of the Companies Act, 1956 and holding company and subsidiary company defined in Section 4 of the same Act of 1956. The corresponding relevant provisions of the Companies Act, 2013 (which have come into force w.e.f. 12th September 2013, vide Notification No.S.O. 2754(E) dated September 12, 2013, published in the Gazette of India, Extra, Part II, on the same date), may throw some light on the interpretation of expression "its" found in Section 4(4) of the Act, which are reproduced as follows:-

"2(6) "associate company", in relation to another company, means a company in which that other company has a significant influence, but which is not a subsidiary company of the company having such influence and includes a joint venture company.

Explanation.— For the purposes of this clause, "significant influence" means control of at least twenty per cent of total share capital, or of business decisions under an agreement."

"2(10) "Board of Directors" or "Board", in relation to a company, means the collective body of the directors of the company."

"2(20) **"company"** means a company incorporated under this Act or under any previous company law."

"2(26) **"contributory"** means a person liable to contribute towards the assets of the company in the event of its being wound up.

Explanation.— For the purposes of this clause, it is hereby clarified that a person holding fully paid-up shares in a company shall be considered as a contributory but shall have no liabilities of a contributory under the Act whilst retaining rights of such a contributory."

"2(27) **"control"** shall include the right to appoint majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner."

"2(34) **"director"** means a director appointed to the Board of a company."

"2(37) **"employees' stock option"** means the option given to the directors, officers or employees of a company or of its holding company or subsidiary company or companies, if any, which gives such directors, officers or employees, the benefit or right to purchase, or to subscribe for, the shares of the company at a future date at a pre-determined price.

"2(46) **"holding company"**, in relation to one or more other companies, means a company of which such companies are subsidiary companies."

"2(54) **"managing director"** means a director who, by virtue of the articles of a company or an agreement with the company or a resolution passed in its general meeting, or by its Board of Directors, is entrusted with substantial powers of management of the affairs of the company and includes a director occupying the position of managing director, by whatever name called.

Explanation .— For the purposes of this clause, the power to do administrative acts of a routine nature when so authorised by the Board such as the power to affix the common seal of the company to any document or to draw and endorse any cheque on the account of the company in any bank or to draw and endorse any negotiable instrument or to sign any certificate of share or to direct registration of transfer of any share, shall not be deemed to be included within the substantial powers of management."

"2(55) **"member"**, in relation to a company, means—

- (i) the subscriber to the memorandum of the company who shall be deemed to have agreed to become member of the company, and on its registration, shall be entered as member in its register of members;
- (ii) every other person who agrees in writing to become a member of the company and whose name is entered in the register of members of the company;
- (iii) every person holding shares of the company and whose name is entered as a beneficial owner in the records of a depository;

"2(59) **"officer"** includes any director, manager or key managerial personnel or any person in accordance with whose directions or instructions the Board of Directors or any one or more of the directors is or are accustomed to act."

"2(68) **"private company"** means a company having a minimum paid-up share capital of one lakh rupees or such higher paid-up share capital as may be prescribed, and which by its articles,—

- (i) restricts the right to transfer its shares;
- (ii) except in case of One Person Company, limits the number of its members to two hundred:

Provided that where two or more persons hold one or more shares in a company jointly, they shall, for the purposes of this clause, be treated as a single member:

Provided further that—

(A) persons who are in the employment of the company; and

(B) persons who, having been formerly in the employment of the company, were members of the company while in that employment and have continued to be members after the employment ceased,

shall not be included in the number of members; and

(iii) prohibits any invitation to the public to subscribe for any securities of the company."

"2(69) "promoter" means a person—

(a) who has been named as such in a prospectus or is identified by the company in the annual return referred to in section 92; or

(b) who has control over the affairs of the company, directly or indirectly whether as a shareholder, director or otherwise;
or

(c) in accordance with whose advice, directions or instructions the Board of Directors of the company is accustomed to act;

Provided that nothing in sub-clause (c) shall apply to a person who is acting merely in a professional capacity."

"2(71) "public company" means a company which—

(a) is not a private company;

- (b) has a minimum paid-up share capital of five lakh rupees or such higher paid-up capital, as may be prescribed:

Provided that a company which is a subsidiary of a company, not being a private company, shall be deemed to be public company for the purposes of this Act even where such subsidiary company continues to be a private company in its articles."

"2(76) "related party", with reference to a company, means—

- (i) a director or his relative;
- (ii) a key managerial personnel or his relative;
- (iii) a firm, in which a director, manager or his relative is a partner;
- (iv) a private company in which a director or manager is a member or director;
- (v) a public company in which a director or manager is a director or holds along with his relatives, more than two per cent. of its paid-up share capital;
- (vi) any body corporate whose Board of Directors, managing director or manager is accustomed to act in accordance with the advice, directions or instructions of a director or manager;
- (vii) any person on whose advice, directions or instructions a director or manager is accustomed to act;

Provided that nothing in sub-clauses (vi) and (vii) shall apply to the advice, directions or instructions given in a professional capacity;

(viii) any company which is—

(A) a holding, subsidiary or an associate company of such company; or

(B) a subsidiary of a holding company to which it is also a subsidiary;]

(ix) such other person as may be prescribed."

"2(77) **"relative"**, with reference to any person, means any one who is related to another, if—

(i) they are members of a Hindu Undivided Family;

(ii) they are husband and wife; or

(iii) one person is related to the other in such manner as may be prescribed."

"2(87) **"subsidiary company"** or **"subsidiary"**, in relation to any other company (that is to say the holding company), means a company in which the holding company—

(i) controls the composition of the Board of Directors; or

(ii) exercises or controls more than one-half of the total share capital either at its own or together with one or more of its subsidiary companies:

Explanation.—For the purposes of this clause,—

(a) a company shall be deemed to be a subsidiary company of the holding company even if the control referred to in sub-clause (i) or sub-clause (ii) is of another subsidiary company of the holding company;

(b) the composition of a company's Board of Directors shall be deemed to be controlled by another company if that other company by exercise of some power exercisable by it at its

discretion can appoint or remove all or a majority of the directors;

- (c) the expression "company" includes any body corporate."

"2(93) **"voting right"** means the right of a member of a company to vote in any meeting of the company or by means of postal ballot."

The following definitions have been brought into force w.e.f. 1.4.2014, of the Companies Act, 2013:-

"2(62) **"One Person Company"** means a company which has only one person as a member."

"2(85) **"small company"** means a company, other than a public company, -

- (i) paid-up share capital of which does not exceed fifty lakh rupees or such higher amount as may be prescribed which shall not be more than five crore rupees; or
- (ii) turnover of which as per its last profit and loss account does not exceed two crore rupees or such higher amount as may be prescribed which shall not be more than twenty crore rupees:

Provided that nothing in this clause shall apply to-

- (A) a holding company or a subsidiary company;
- (B) a company registered under section 8; or
- (C) a company or body corporate governed by any special Act."

24. The expression "promoter" as defined in the Companies Act, 2013 in Section 2(69) would necessarily mean promoter of the prior allottee. For the purpose of Section 4(4) of the Act of 2015, that promoter by himself or by way of a joint venture has been made ineligible to participate in the auction

process if the prior allottee is a defaulter.

25. The question is: when the promoter of a defaulter prior allottee, who incidentally is also the promoter of the Company, intending to participate in the auction process, is common, would such company become ineligible? This question arises as we find there is a comma (,) which separates the word "prior allottee" from the expression "its promoter or any of its company of such prior allottee". The law as enacted, unmistakably, not only debars the prior allottee, who has failed to make the payment of additional levy, within the prescribed time, but also its promoter or any of its company of such prior allottee. If the promoter is common to both the Companies; but has no significant role or stakes in the Company, intending to participate in the auction process, may be an argument available to such a Company to persuade the Authorities to treat the Company as eligible to participate in the auction process. We need not deal with that aspect in detail in the light of the facts on hand. For, in the present case, the promoter of the prior allottee, is not only common in both the Companies, but also wields significant influence and control in both the companies.

26. Notably, the petitioner has conceded in the petition, by describing the petitioner company to be a sister company of the prior allottee (BLA Industries Pvt. Ltd.). There is no concept of a "sister company", known to the Companies Act – be it Act of 1956 or Act of 2013. The expression "associate company", however, finds place in the Act of 2013 to mean a Company in which that other company has a significant influence, but which is not a subsidiary company of a company having such influence and include a joint venture company. Further, the definition of expressions– "control", "director", "managing director", "promoter", "related party", and "relative" in the Companies Act, 2013, may have to be conjointly read to understand the structure of the two companies, for discerning as to whether the company is an associate company of the other company.

27. Indubitably, the associate company must be held to be covered by the expansive expression used in Section 4 (4) of the Act of 2015 – "its promoter or any of its company of such prior allottee". The petitioner has, therefore, advisedly described itself as a sister company of the defaulter prior allottee. In the context of the Companies Act, however, it would mean an associate company of the prior allottee. Not only there is an admission of the petitioner being a sister company of the defaulter prior allottee, but also there is no denial of the fact stated in the reply disclosing the significant influence and control of the common promotor and his financial stakes and including the

fact that the petitioner-company was dependent on the supply of coal from the prior allottee only. As a concomitant, the petitioner company would certainly fit into the expansive expression "its promoter or any of its company of such prior allottee". Thus understood, the petitioner company is ineligible to participate in the subject auction process – because of the default in payment of the additional levy by the prior allottee.

28. It was justly argued by the respondents that lifting of corporate veil is a well-known and well established principle. By invoking that principle also, the petitioner-Company would qualify the expression "its promoter or any of its company of such prior allottee". In that, the writ petitioner has not only admitted that it is a sister concern of the prior allottee. It has also admitted that the prior allottee has not paid/deposited the additional levy as directed by the Supreme Court. The share holding pattern of both the companies would plainly reinforce the position that the petitioner-Company is an alter-ego of the defaulter prior allottee. In the reply-affidavit dated 09.02.2015, in para 15, 16, 19 and para 5.18, to oppose Writ Petition No.850/2015, the respondents No.1 and 2 have stated as under:-

"15. Petitioner Company, the Prior Allottee and M/s BLA Power Holdings Ltd. are part of same Group. A table consisting of the list of directors and the shareholding pattern of the three companies is as follows:

<u>COMPANY</u>	<u>LIST OF DIRECTORS</u>		
BLA Industries Private Limited	Anup Aggarwalla (Director)	Kishore Vishwanath Mittal (Director)	Mishra Ram Mishra (Whole Time Director)
BLA Power Industries Private Limited (Petitioner)	Anup Aggarwalla (Managing Director)	Ramchandra Mukunda (Director)	Nagendra Subedar Singh (Whole Time Director)

BLA Power Holding Private Limited	Anup Aggarwalla (Director)	Rajesh Bhojilal Punjani (Director)

SHAREHOLDING PATTERN OF BLA POWER**PRIVATE LIMITED (Petitioner)**

Total issued Equity Share Capital of Rs.85,00,00,000 with 8,50,00,000 shares with nominal value of Rs.10 each.

S.No.	<u>SHARE HOLDER NAME</u>	<u>NO. OF EQUITY SHARES</u>	<u>% OF TOTAL EQUITY SHARES</u>
1.	<u>Anup Aggarwalla</u>	1,900	0.0022
2.	BLA Power Holding Private Limited	84,991,479	99.9900
3.	Central Indian Energy Private Limited	6,521	0.0077
4.	Banyantree Bank Limited	100	0.0001
	Total	85,000,000	100

SHAREHOLDING PATTERN OF BLA POWER**HOLDING PRIVATE LIMITED**

S. No.	<u>SHAREHOLDER NAME</u>	<u>NO. OF EQUITY SHARES</u>	<u>% OF TOTAL EQUITY SHARES</u>
1.	<u>Anup Aggarwalla</u>	100	1
2.	<u>Anup Aggarwalla, Namrata Aggarwalla (on behalf of Anup</u>	9,900	99

<u>Aggarwalla Trust</u>		
Total	10,000	100

SHAREHOLDING PATTERN OF BLA

INDUSTRIES PRIVATE LIMITED (Prior Allottee)

Total Issued Equity Share Capital of Rs.5,78,95,250 with 57,89,525 shares with nominal value of Rs.10 each.

S. No.	<u>SHAREHOLDER NAME</u>	<u>NO. OF EQUITY SHARES</u>	<u>% OF TOTAL EQUITY SHARES</u>
1.	Anup Aggarwalla (S/o Late Parmeshwar Kumar Aggarwalla)	644,300	11.13
2.	Anup Aggarwalla, HUF	700,625	12.10
3.	Namrata Aggarwalla	20,000	0.35
4.	Shreya Aggarwalla	400,000	6.91
5.	Urmi Aggarwall	400,000	6.91
5.	Abha Dayanand Aggarwal	17,000	0.29
6.	Advaita Holding Private Limited (Anup Agarwalla is a Director in this Company)	3,600,100	62.18
7.	Vibha Mittal	7,500	0.13
	TOTAL	5,789,525	100

The Petitioner Company is barred under Section 4 (4) of the Ordinance to bid in the auction as the promoter of M/s BLA Industries Limited and that of the Petitioner Company is

common i.e. Mr. Anup Agarwalla. As admitted by the Petitioner, 99.99% of its shareholding is with M/s BLA Power Holding Private Limited and 0.01% of the shares are held by Mr. Anup Agarwalla. The Petitioner intentionally has not disclosed the shareholding of its sister concerns i.e. M/s BLA Industries and M/s BLA Power Holding Pvt. Limited in which common promoter/shareholder is Mr. Anup Agarwalla and the said person, directly or indirectly, holds majority of the shareholding of all three companies including the Petitioner Company.

Thus it clearly emerges that the Petitioner has not approached the Hon'ble Court with clean hands as the Petitioner has filed the present petition on 15.01.2015 and has not deliberately disclosed the fact of dismissal of the Interim Application filed by their sister concern vide order dated 18.12.2014 of Hon'ble Supreme Court in order to misguide and obtain sympathy of this Hon'ble Court. This act on the part of the petitioner ought to be dealt severely by this Hon'ble Court.

16. The information stated in above tables is evocative of the fact that the Petitioner Company is an extended arm of BLA Industries Ltd., which as stated above is a Prior Allottee and a defaulter of the direction of Hon'ble Supreme Court. It has further become evidence that Mr. Anup Agarwalla is a common thread between Petitioner Company and Prior Allottee. Thus it is a fit case for lifting of corporate veil in the facts and circumstances disclosed above, it is absolutely essential that this Hon'ble Court takes cognizance of link between following companies:

- (i) BLA Industries Pvt. Ltd.
- (ii) BLA Power Pvt. Ltd.
- (iii) BLA Power Holdings Pvt. Ltd.

The shareholding pattern and particulars of Directors leads to an unmistakable conclusion that it has close connection and commonality with Prior Allottee namely BLA Industries

Ltd. It need not be over emphasized that Petitioner Company has participated in the auction process with the sole purpose of avoiding compliance of the directions of the Hon'ble Supreme Court.

Courts have always loathed such practices and have come down heavily whenever there is any attempt to defy or frustrate the court order and any such attempt deals irretrievably on the Majesty of the court.

19. If the interpretation as sought for by the Petitioner is to be given to Section 4(4) it would render the Section redundant and defeat the very purpose of having it as it would easily allow the prior allottees to either create shell companies or bid through existing 'associated companies' in order to circumvent the payment.

1) 5.18. The contentions of this para are incorrect and are denied. The comments to para 5.13 above may be referred. The Petitioner has chosen to give his own erroneous interpretation to Section 4 (4) of the Ordinance which is completely misconceived and misplaced. The said section nowhere mentions or confers the meaning that the expression "*any of its company of such prior allottee*" only includes subsidiary of the allottee. Clause 4.1.2 (a)(i) of the Standard Tender Document only elaborates the meaning of the phrase "*any of its company of such prior allottee*". The Petitioner is trying to give a restricted meaning to the said phrase by saying that it only means a subsidiary company. It is in this backdrop that the said Clause needs to be interpreted by the Ld. High Court.

2) By contending that that the Ordinance does not debar an "Affiliate" of a prior allottee from bidding, the Petitioner is himself admitting that the petitioner company is in fact an "Affiliate" of the M/s BLA Industries which was a prior allottee. It is submitted that the shareholding pattern mentioned in the comments to Para 5.2 and 5.3 also makes it clear that Petitioner company is an "affiliate" of M/s BLA Industries, which was a prior allottee.

3) The definition of "Affiliate" as given in Clause 1.1.2 of the Standard Tender document also includes an "associate company". In such context "associate company" in relation to another company means a company in which that other company has a significant influence, but which is not a subsidiary company. Thus, the intention has never been to restrict the meaning to include only a subsidiary company.

4) For the afore-mentioned reasons, it cannot be said that the Clause 4.1.2 (a)(i) of the Tender document is ultra vires Section 4(4) of the Ordinance."

(emphasis supplied)

29. In view of these indisputable facts and the expansive expression used in Section 4(4) – "its promoter or any of its company of such prior allottee", there is no room to extricate or exclude the petitioner-Company from the application of the second part of Section 4(4) of the Act. We are conscious that, while interpreting provision specifying disqualification or ineligibility, it should be construed with circumspection. However, the setting in which the expression "its promoter or any of its company of such prior allottee" has been placed, no other interpretation is possible. More particularly, keeping in mind the background in which; and the purpose for which the Act of 2015 has come into being, because of the pronouncement of the Supreme Court dated 25.08.2014 read with its order dated 24.09.2014 annulling the allocations of all the Coal Blocks and directions to auction those Coal Blocks including to recover additional amount from those operators in national interests (the additional levy has been specified by the Supreme Court as Rs.295/- per metric tonne of Coal extracted).

30. On the question of lifting of corporate veil, in response, counsel for the petitioner placed reliance on the decision of the Supreme Court in the case of *Technip SA Vs. SMS Holding (P) Ltd and others*². The question considered in the said decision was that the two companies must have commonality of objectives and a community of interest and their act of acquiring the shares or voting rights in a company must serve this common objective. In paragraph 54 and 55 the Supreme Court noted that in Indian law the standard of proof required to establish such concert is one of the probability and may

be established if having regard to their relation etc., their conduct, and their common interest, it may be inferred that they must be acting together. The Court observed that evidence of actual concerted acting is normally difficult to obtain and is not insisted upon. The test is not whether the parties have actually acted in concert but whether the circumstances are such that human experience tells us that it can safely be taken that they must be acting together. That will depend on the facts of each case. In the context of the facts in this case, the sole question to be considered is whether the prior allottee (B.L.A. Industries Private Limited) can be said to have any significant influence on the business or fiduciary interests in and control over the petitioner company. The factual circumstances pointed out in the reply affidavit and the admission of the petitioner that it is a sister concern of the prior allottee leaves no manner of doubt that the petitioner qualifies the expression "its promoter or any of its company of the prior allottee" predicated in Section 4 (4) of the said Act.

31. The petitioner has also invited our attention to the judgment of the Supreme Court in the case of *Ashwin S. Mehta and another Vs. Custodian and others*³ to buttress the argument, that the Custodian in that case had clubbed all the notified entities in one block so as to term as Harshad Mehta Group and/or to club their assets and liabilities jointly to proceed against them. That argument was considered by the Supreme Court. It held that even if it is permissible to invoke the principles of lifting of corporate veil in relation to a body corporate incorporated and registered under the Companies Act, that cannot be applied in case of individuals. Thus, the liability of individual cannot be clubbed for the purpose of directing attachment and consequent sale of the properties which exclusively belong to them. In the present, we are called upon to consider the express stipulation contained in Section 4 (4) of the Act, which not only disentitles the defaulter prior allottee but also its promoter or any of its company of such prior allottee to participate in the auction process. This provision is to ensure that the defaulter prior allottee does not participate in the auction process directly or indirectly, in respect of coal mines required to be auctioned pursuant to the direction of the Supreme Court, after annulling the allotment in favour of the defaulter prior allottee. In our opinion, this judgment will also be of no assistance to the petitioner.

32. Relying on the decision of the Supreme Court in the case of *Electronics Corporation of India Ltd. and others Vs. Secretary, Revenue Department*,

3. (2006) 2 SCC 385

*Govt. of Andhra Pradesh and others*⁴, in particular para 15 and 21 thereof, it was argued that there is clear distinction between the company and its shareholders, even though that shareholder may be anybody. In the eye of law, a company registered under the Companies Act is a distinct legal entity other than the legal entity or entities that hold its shares. In the present case, however, the question is not of disregarding the legal entity of the two companies, but will have to be answered on the basis of the purport of Section 4 (4) of the said Act which has been enacted to keep the defaulter allottee away from the auction process in respect of the same coal mine, directly or indirectly. For that, the dispensation predicated is not only the defaulter prior allottee, but also its promoter or any of its company of such prior allottee, ineligible. This is to prevent the defaulter prior allottee from participating in the auction process directly or indirectly. In the facts of the present case, it is noticed that the defaulter prior allottee not only has significant influence on the business interests of the petitioner but also is controlled by the same set of Director spear heading both the companies. In such a case, the expansive provision would come into play to ensure that the defaulter prior allottee does not indirectly participate in the auction process, until the defaulter prior allottee fulfills the obligation in terms of the direction given by the Supreme Court whilst annulling allotment of the same coal mine in its favour.

33. Reliance has also been placed on another decision of the Supreme Court in the case of *Patel Engineering Limited Vs. Union of India and another*⁵. This decision has dealt with the question of blacklisting of successful bidder for not entering into contract after succeeding in tender. The Supreme Court has held that everybody has a right to be treated equally when the State seeks to establish contractual relationships. The effect of excluding a person from entering into contractual relationship with the State would be to deprive such person to be treated equally with those who are also engaged in similar activity. In that case, the Court found that there was no express stipulation in the bid document about the consequence of failure of the successful bidder, to execute the necessary document to conclude the contract. In the context of the provisions of National Highways Authority of India Act, 1988, the issue was considered by the Supreme Court. In the present case, it is not action of blacklisting of the petitioner but it is a statutory provision regarding eligibility of persons who may qualify to participate in the auction process. It is nobody's

4. (1999) 4 SCC 458

5. (2012) 11 SCC 257

case that one set of defaulter prior allottee are allowed to participate in the auction process directly or indirectly leaving out the other set of defaulter prior allottees, so as to complain about discriminatory approach. On the other hand, it is a provision to ensure that no defaulter prior allottee participates in the auction process directly or indirectly either itself or through any of its company. We have elaborately examined as to how the petitioner can be said to be associate or affiliate company of the defaulter prior allottee, thus has incurred disqualification to participate in the subject auction process, until the disqualification of the prior allottee is removed.

34. Ordinarily, the persons who have benefited from the transactions which have been held to be nullity and against national interests by the Supreme Court, must be considered as disqualified to participate in the auction process for the same activity. But, for adjusting equities, the prior allottees have been permitted to participate in the auction process on condition that they must first pay the prescribed additional levy within the specified time. For that, the first part of Section 4(4) is in the nature of removing the disqualification of such persons (prior allottee) and making them eligible to participate in the auction process, subject to fulfillment of the condition of payment of additional levy - which has been made *sine qua non*. Keeping the spirit of the decision of the Supreme Court, in mind, and to ensure that the loose ends are fully tied; and to completely snap the possibility of the prior allottee, directly or indirectly participating in the auction process, without fulfillment of the precondition, the expansive provision in the second part of Section 4(4), has been enacted. The purposive construction of this provision, therefore, must include any company, in which the defaulter prior allottee has significant influence either by itself or through its promoter. Even such companies have been kept away from participating in the auction process and made ineligible for that purpose. On this finding, it may not be necessary for us to dwell upon any other ground(s) urged by the petitioner.

35. Counsel for the petitioner placed reliance on the decision of the Supreme Court in the case *Ranjeet Singh Vs. Harmohinder Singh Pradhan*⁶. This decision has considered the necessity of purposive interpretation in respect of provision imposing disqualification. The Supreme Court dealt with disqualification provision, Section 9-A of the Representation of the People Act, 1951. In the context of the that provision, the Supreme Court observed

6. (1999) 4 SCC 517

that it would, therefore, be unreasonable to take a general or broad view, ignoring the essentials of the section and the intention of the legislature. The Supreme Court has adverted to its earlier decision in the case of *Dewan Joynal Abedin Vs. Abdul Wazed*⁷ which had dealt with Section 9-A of the Act. In the present case, even though the second part of Section 4 (4) of the Act of 2015 is in the nature of providing disqualification, the purpose or background in which such provision has been enacted cannot be completely ignored. Further, in the present case, it has been established that the defaulter prior allottee has significant influence on the business and fiduciary interests and also has control over the affairs of the petitioner company through the same set of Director and even the petitioner company has admitted that it is a sister company of the prior allottee and was fully dependent on the supply of coal from the defaulter prior allottee for doing its business of generation of power. In that sense, it fits into the term of "its promoter or any of its company of such prior allottee". As a result, just as the defaulter prior allottee, even the petitioner cannot be permitted to participate in the subject auction process until the disqualification of the prior allottee is completely removed.

36. The provision regarding eligibility conditions in the tender document, has been incorporated, which, we find is in consonance with the statutory provision. The same reads thus:-

"4 Bid Criteria

4.1 Eligibility Conditions

4.1.1 Section 4(3) of the Ordinance and Rule 10(4)(d) of the Rules prescribes eligibility to bid in an auction of Schedule II coal mine; which includes the Coal Mine. Bidders are required to ensure that they meet the conditions mentioned in Section 4(3) of the Ordinance and Rule 10(4)(d) of the Rules which are quoted below for reference:

Section 4(3) of the Ordinance:

"(3) Subject to the provisions of section 5, the following persons who fulfil such norms as may be prescribed, shall be eligible to bid in an auction of Schedule II

coal mines and Schedule III coal mines and to engage in coal mining operations in the event they are successful bidders, namely:—"

- (a) *a company engaged in specified end use including a company having a coal linkage which has made such investment as may be prescribed;*

Explanation.—A "company with a coal linkage" includes any such company whose application is pending with the Central Government on the date of commencement of this Ordinance.

- (b) *a joint venture company formed by two or more companies having a common specified end use and are independently eligible to bid in accordance with this Ordinance;*
- (c) *a Government company or corporation or a joint venture company formed by such company or corporation or with any other company having common specified end use."*

Rule 10(4)(d) of the Rules:

"A person who is eligible under sub-section (3) of section 4 of the Ordinance shall also meet the following eligibility criteria, namely:—

- (i) *a company eligible to bid for any Schedule II coal mine under sub-section (3) of Section 4 of the Ordinance shall have incurred an expenditure of not less than eighty per cent of the total project cost of the unit or phase of the specified end use plant for which the company is bidding,*

Explanation.— For the purposes of this sub-clause in case the end use project is being commissioned in units or phases and one or more units or phases are eligible under the provisions of this sub-clause,

the other unit or phase shall also be eligible provided that not less than forty per cent expenditure of the cost has been incurred for such other unit or phase;

- (ii) *a company eligible to bid for any Schedule III coal mine under sub-section (3) of Section 4 of the Ordinance shall have incurred an expenditure of not less Standard Tender Document (For Power Sector) than sixty per cent of the total project cost of the unit or phase of the specified end use plant for which the company is bidding,*

Explanation.- For the purposes of this sub-clause in case the end use project is being commissioned in units or phases and one or more units or phases are eligible under the provisions of this sub-clause, the other unit or phase shall also be eligible provided that not less than thirty per cent expenditure of the cost has been incurred for such other unit or phase;

- (iii) *capacity of the specified end use project shall be in proportion to the capacity of the Schedule II coalmine or Schedule III coal mine, as the case may be, for which a company is bidding;*
- (iv) *in case a company is the successful bidder, then the entitlement to receive coal pursuant to such coal linkage shall stand proportionately reduced on the basis of the requirement of coal being met from the mine allocated to such company;*
- (v) *for the purposes of sub-clauses (i) and (ii), the total project cost and expenditure incurred shall be determined on the basis of a certificate issued by the relevant company, duly certified by the statutory auditors and/ or secured creditors, if any, of the relevant company."*

4.1.2 In addition to the aforementioned conditions, a Bidder would also be required to comply with the following eligibility conditions:

(a) **Additional conditions for Prior Allottee:**

In the event the Bidder is a Prior Allottee, then such Bidder must also meet the following conditions for being eligible to participate in the tender process:

- (i) The Bidder who is a Prior Allottee must have paid the additional levy within the time period prescribed under Rule 18 of the Rules. It is clarified that if a Prior Allottee has not made payment of the applicable additional levy within the time prescribed under Rule 18 of the Rules, then such Prior Allottee shall not be eligible to participate in the auction process either directly or indirectly, including without limitation as a JV Partner of a joint venture, or through any Affiliate.
- (ii) The Bidder who is a Prior Allottee, who is convicted of an offence relating to coal block allocation and sentenced with imprisonment for more than three years, shall not be eligible to participate in the auction.

(b) **Eligibility on the basis of coal requirements:**

A Bidder shall be considered eligible for bidding for the Coal Mine only if its requirement of coal for Specified End Use matches the reserves of the Coal Mine, in accordance with the parameters specified below:

Extractable reserves of the Coal Mine should not exceed 150% of the annual coal requirement of the Specified End Use Plant(s), taken over a period of 30 (thirty) years, *less* the requirement of coal of such Specified End Use Plant met from any other coal mine allocated to the Successful Bidder pursuant to any other auction process conducted by the Nominated Authority under the Ordinance and the Rules.

For the purposes of this Clause, the annual coal requirements of the Specified End Use Plant would be determined on the basis of a certificate from the Bidder

regarding its entire coal requirements at 85% of plant load factor or capacity utilization as the case may be. Such self certification shall be required to be in conformity with the benchmark coal requirement provided by Central Electricity Authority/ MECON Limited / relevant Ministry or agency of the Central Government, as applicable.

It is clarified that a Bidder shall not be eligible to participate in any other auction conducted by the Nominated Authority for the same End Use Plant if such participation may result in the Bidder holding coal mines capable of generating coal in excess of 150% of its annual coal requirement as specified above.

(c) **Additional Eligibility conditions for Bidders which is a joint-venture:**

In the event that, a Bidder is a joint venture company formed by two or more companies ("JV Partners"), then each such JV Partner should: (i) independently meets all the Eligibility Conditions as mentioned in this Clause 4.1; and (ii) hold at least twenty per cent of voting rights and economic interest in the joint venture company.

It is clarified that in such cases, the JV Partners would be required to independently meet the requirements regarding specified expenditure of the total project cost. However, for the purposes of Clause 4.1.2(b), the coal requirements for Specified End Use Plant of each of the JV Partners shall be considered collectively.

(d) **Limitations on total number of Bids**

With respect to one Specified End Use Plant only one Bid may be submitted for the Coal Mine, either individually or as a part of joint-venture, either directly or indirectly.

(e) **Certification of total project cost and expenditure**

In the event a Bidder is eligible for participating in the auction, pursuant to Rule 10(4)(d) of the Rules i.e. on the basis of having made an expenditure of the total project cost, then each such Bidder would be required to submit:

- (i) a certificate confirming the total project cost issued by the Bidder and duly certified by the lead secured creditor (in case of consortium lending) or the secured creditor with the highest exposure (in case of multiple banking), where the Specified End Use Plant is financed by creditors. In case the Specified End Use Plant has not been financed by creditors then such certificate should be duly certified by the statutory auditors of the Bidder. In case of a joint venture company, the aforementioned certificate should be issued by the Bidders and duly supported by confirmations issued by the secured creditors and/or statutory auditors of the JV Partners, as the case may be; and
- (ii) a certificate confirming the actual expenditure incurred towards the Specified End Use Plant, issued by the Bidder and duly certified by the statutory auditor of the Bidder. In case of a joint venture company such certificate should be issued by the Bidder and supported by confirmation issued by the statutory auditor of the JV Partner, as the case may be.

The actual expenditure incurred with respect to the Specified End Use Plant until December 31, 2014 or the date of submission of the Technical Bid, shall be considered relevant for the purposes of this Clause.

The Nominated Authority may direct the Bidder to submit such additional documents as may be required to verify the total project cost.

In case of Specified End Use Plant which has been developed or is being developed in units or phases, and one or more units or phases are eligible on the

basis of having made an expenditure of eighty per cent of the total project cost, then the other units or phases of such project shall also be eligible, if with respect to each such other units or phases an expenditure of at least forty per cent of total project cost has independently been incurred and a certificate is provided to substantiate such expenditure for each such other units or phases, in the manner provided above."

(emphasis supplied)

37. Realising the hurdle in the way of the petitioner, the petitioner has been advised to challenge the eligibility condition in the tender document, in particular, clause 4.1.2(a)(i). This condition, as aforesaid, is in consonance with the purport of Section 4(4) of the Act. It is only if we find merits in the challenge to the validity of section 4(4) pressed into service by the petitioner, the question of striking down clause 4.1.2(a)(i), can be considered and not otherwise.

38. As regards challenge to Section 4(4) of the Act, it is urged that the petitioner is neither a prior allottee, a promoter of any prior allottee, nor a company of any prior allottee. The petitioner is neither a subsidiary of any prior allottee. The petitioner is a separate juristic person, distinct from the prior allottee (BLA Industries Pvt. Ltd.). The Board of Directors of the two companies comprises of different individuals. The petitioner is carrying on its independent business of power generation. Whereas, the prior allottee, BLA Industries Pvt. Ltd., is carrying on the business of washing coal and mining coal. Further, the said Act does not debar the affiliate of a prior allottee from bidding, if prior allottee fails to pay the additional levy within the prescribed time. According to the petitioner, therefore, clause 4.1.2(a)(i) of the tender document is *ultra vires* Section 4(4) of the Act and liable to be quashed.

39. The petitioner relied on the decision of the Supreme Court in the case of *State of Karnatak and another Vs. H. Ganesh Kamath and others*⁸. That decision deals with the right of an applicant for a licence to drive heavy motor vehicle under Section 7(8) of the relevant Act, consequent to satisfying the conditions provided thereunder. The Supreme Court also dealt with the question whether the Rules must be intra vires and consistent with the statute

under which they are framed. However, in the present case, we find that the Rules are in furtherance of the provisions of the Act of 2015 and are in no way in conflict thereto, in so far as the question dealt with at the instance of the petitioner about the eligibility and entitlement to participate in the auction process. The petitioner relies on the principles to be borne in mind for interpretation of statute and the conferment of rule-making power. Further, Rule-making power bestowed by the Act cannot enable the Rule-making Authority to make Rules which travel beyond the scope of the enabling Act or which is inconsistent thereto.

40. It is then urged that Section 4(4), in so far as it curtails the right of participation of persons such as the petitioner, is unconstitutional, being arbitrary as also violative of Articles 14, 19(1)(g) and 21 of the Constitution.

41. We must first answer the argument of validity of Section (4) of the Act. The argument, is that, the stipulation in the said provision, making even the affiliate of the prior allottee ineligible, is unconstitutional and violative of Articles 14, 19(1)(g) and 21 of the Constitution of India. This ground is raised in ground No. 6.14 of the W.P. No.850/2015. The same reads thus:-

"6.14 That the Act and in particular Section 4(4) thereof in so far as it purports to curtail the rights of participation of applicants/bidders in the auction process is unconstitutional as being entirely arbitrary as also violative of Article 14, 19(1)(g) and Article 21 of the Constitution of India."

42. Assuming that we have to read the writ petition as a whole, the case made out by the petitioner is that the petitioner has no causal connection with the prior allottee—except the fact that the coal supply for generation of power by the petitioner was received from the prior allottee. In the first place, this plea is not full disclosure of the relevant facts. We have already dealt with that aspect in the earlier part of this decision.

43. It is well settled that a company, not being a citizen, has no fundamental rights under Article 19 of the Constitution of India. (see *Shree Sidhali Steels Ltd. and ors. Vs. State of U.P. and ors.*⁹). As a result, challenge of this petitioner will have to be limited to infraction of right guaranteed under Article 14 or at

best under Article 21 of the Constitution of India. After analyzing the impugned provision on the touchstone (sic:touchstone) of justness and reasonableness and the view taken by us that there is direct nexus with the object sought to be achieved, to keep away the defaulter prior allottees from participating in the auction process directly or indirectly, even the challenge on the basis of Articles 14 and 21 pressed into service cannot be taken forward.

44. Be that as it may, it is not the case of the petitioner that the Parliament is not competent to legislate on the subject. In other words, lack of legislative competence is not the ground pressed into service. The question is: whether the provision in Section 4 (4), can be said to be just and reasonable and more so having reasonable or direct nexus with the object sought to be achieved. We have already noticed the background in which the Act of 2015 has come into being. In that, the Supreme Court has held that the allocation of all the coal mines was nullity; and against national interests. As a result, the allotments of all the coal blocks came to be annulled as nonest in law. That necessitated enacting a law on the subject. The provision such as Section 4(4) in that Act provides for eligibility of persons who could participate in the auction process for fresh allocation. By virtue of the Supreme Court decision and the conclusion reached therein all the erstwhile Coal Mine operators (prior allottees), to whom, such allocation was done illegally, being party to that process, could have incurred disqualification to participate in the fresh auction process, directed to be held by the Supreme Court. Therefore, the first part of Section 4(4) has been enacted to remove that disqualification of the prior allottees and permit them to participate in the auction process subject to fulfilling their obligation to pay the additional levy in the prescribed time and, in particular, before participating in the auction process. The second part of Section 4(4) provides for disqualification of the defaulter "prior allottees" and any of its promoter or company associated with such prior allottee by directly or indirectly participating in the auction process – such as its promoter or any of its company of such prior allottee. This provision has been incorporated in the Act of 2015 in larger public interest and more so is in consonance with and in compliance of the dictum of the Supreme Court on the subject, in its letter and spirit.

45. As regards to the process of statutory construction, the respondents have rightly relied on the Supreme Court decision in the case of *State of Gujarat and another Vs. Justice R.A. Mehta (Retired) and others*¹⁰. In

Paragraph 96 to 98, the Court emphasized that the interpretation of the statute must be purposive construction. We deem it apposite to reproduce the same as follows:-

"96. In the process of statutory construction, the court must construe the Act before it bearing in mind the legal maxim *ut res magis valeat quam pereat* which means it is better for a thing to have effect than for it to be made void i.e. a statute must be construed in such a manner so as to make it workable. *Viscount Simon, L.C. in Nokes vs. Doncaster Amalgamated Collieries Ltd.*— 1940 AC 1014 : (1940) 3 All ER 549 (HL) stated as follows:

"..... if the choice is between two interpretations, the narrow of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result."

97. Similarly in *Whitney Vs. IRC* – 1926 AC 37 (HL) it was observed as under:-

".....A statute is designed to be workable, and the interpretation thereof by a court should be to secure that object, unless crucial omission or clear direction makes that end unattainable."

98. The doctrine of purposive construction may be taken recourse to for the purpose of giving full effect to statutory provisions, and the courts must state what meaning the statute should bear, rather than rendering the statute a nullity, as statutes are meant to be operative and not inept. The courts must refrain from declaring a statute to be unworkable. The rules of interpretation require that construction which carries forward the objectives of the statute, protects interest of the parties and keeps the remedy alive, should be preferred looking into the text and context of the statute. Construction given by the court must promote the object of the statute and

serve the purpose for which it has been enacted and not efface its very purpose. "The courts strongly lean against any construction which tends to reduce a statute to futility. The provision of the statute must be so construed as to make it effective and operative." The court must take a pragmatic view and must keep in mind the purpose for which the statute was enacted as the purpose of law itself provides good guidance to courts as they interpret the true meaning of the Act and thus legislative futility must be ruled out. A statute must be construed in such a manner so as to ensure that the Act itself does not become a dead letter and the obvious intention of the legislature does not stand defeated unless it leads to a case of absolute intractability in use. The court must adopt a construction which suppress the mischief and advances the remedy and "to suppress subtle inventions and evasions for continuance of the mischief, and *pro private commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*". The court must give effect to the purpose and object of the Act for the reason that legislature is presumed to have enacted a reasonable statute. (Vide *M. Pentiah Vs. Muddala Veeramallappa* – AIR 1961 SC 1107; *S. P. Jain Vs. Krishna Mohan Gupta* – (1987) 1 SCC 191; *RBI Vs. Peerless General Finance and Investment Co. Ltd.* - (1987) 1 SCC 424; *Tinsukhia Electric Supply Co. Ltd. Vs. State of Assam* – (1989) 3 SCC 709; *UCO Bank Vs. Rajinder Lal Capoor* – (2008) 5 SCC 257 and *Grid Corpn. Of Orissa Ltd. Vs. Eastern Metals and Ferro Alloys* – (2011) 11 SCC 334."

46. In the present case the said Act has been enacted in furtherance of the decision of the Supreme Court to suppress the continuance of the mischief, and *pro private commodo*. Further, to add force and life to the cure and remedy, the provision of Section 4 (4) of the Act must be interpreted in the light of the Legislative intent, *pro bono publico*, as expounded by the Supreme Court. We may hasten to add that any other interpretation of Section 4(4) of the said Act would not only render the said provision futile but encourage the defaulter prior allottees to resort to different ways and means to continue to remain in the same business through their alter ego. For suppressing such

subtle inventions and evasions, any other view of the said provision would be counter productive and result in doing violence to the legislative intent.

47. Thus understood, it is unfathomable, as to how, the provision can be said to be irrational, arbitrary and unreasonable. It certainly has reasonable or direct nexus with the object sought to be achieved, to keep away the defaulter prior allottees from participating in the auction process directly or indirectly, through the cobweb of Companies created or in existence to defeat the direction of the Supreme Court regarding payment or recovery of additional levy from them.

48. In our opinion, therefore, the challenge to Section 4(4) on the touchstone of Articles 14, 19(1)(g) and 21 of the Constitution; is devoid of merits. In that, the stipulation in Section 4 (4) as construed on its plain language, is in the interests of the general public and is a reasonable restriction on the exercise of the right to engage in trade or business conferred by the Constitution. The fact that the petitioner company was not the prior allottee itself, would make no difference as the petitioner was the recipient of the benefit of allocation of coal mine to the prior allottee (BLA Industries Pvt. Ltd.).

49. Having said this, the challenge to clause 4.1.2(a)(i) of the tender document, must also fail for the same reasons. We find that the said clause is in conformity with the provisions of the Act of 2015 and the Rules framed thereunder and more so mirrors the legislative intent of enacting Section 4(4) of the Act of 2015 making the defaulter prior allottees and its promoter or any of its company ineligible. Since the challenge to Section 4(4) of the Act of 2015 has been negated, on the finding that the provision is in larger public interests and a reasonable restriction imposed for exercise of the right guaranteed under the Constitution, the challenge to the stipulation specified in the tender document which is in conformity with those provisions, also must fail.

50. A priori, it must be held that the petitioner company is disqualified from participating in the auction process; being sister concern or associate company of the defaulter prior allottee and that the promoter of both the companies is common having significant influence on the business interests of the said companies. As a result, the petitioner company has no locus to question the validity of the terms of the subject tender document on any other count.

51. There is another ground pressed into service by the respondents in support of the argument that the petitioner company has no locus to question the subject auction process and the conditions of the tender document concerning thereto. It is submitted that the petitioner company admittedly is engaged in generation of power which is supplied to the consumers/grid. It is thus operating in a regulated sector, regulated under the provisions of the Electricity Act. The tender process in question is in respect of coal mines earmarked for non-regulated sector. Thus, the petitioner company is not eligible to participate in the auction process meant for non-regulated sector, which is based on upward bidding pattern. In the context of this objection, the argument of the petitioner is that it is not open to the Authorities to make such distinction in allocation of coal mine. The allocation of coal mine is only restricted to specified end use and generation of power is one such use. This argument is based on the definition of expression "specified end-use" in Section 3(v), which reads thus:-

"3(v) **"specified end-use"** means any of the following end-uses and the expression **"specified end-user"** shall with its grammatical variations be construed accordingly, -

- (i) production of iron and steel;
- (ii) generation of power including the generation of power for captive use;
- (iii) washing of coal obtained from a mine;
- (iv) cement;
- (v) such other end-use as the Central Government may, by notification, specify."

52. Reliance is also placed on Section 7 of the Act which reads thus:-

7.(1) The Central Government may, before notifying the particulars of auction, classify mines identified from Schedule I coal mines as earmarked for the same class of specified end-uses.

(2) The Central Government may in public interest, by notification, modify Schedule III coal mines by adding any other Schedule I coal mine for the purposes of specified end-use."

(emphasis supplied)

On conjoint reading of these provisions, it is seen that the Central Government is empowered to notify the auction of the given coal mine as earmarked for the "same class of" specified end uses. This would include classification on the basis of different uses referred to in Section 3 (v) singularly or otherwise. Incidentally, except the category "generation of power" per se, rest of the categories are ascribable to non-regulated sectors. Reliance has been rightly placed on the decision of Supreme Court in the case of *Shree Sidhballi Steels Ltd.* (supra) by the respondents to buttress the argument that there was ample power in the Central Government and including the Expert's Committee for classification of the Coal Mines and specify the end use by virtue of the provisions General Clauses Act. So long as the action taken by the Authorities was not prohibited by law or for that matter inconsistent with the mandate of the Act of 2015, there was intrinsic power vesting in the Central Government regarding classification of the coal mines to earmark for the same class of specified end uses, by virtue of Section 7. Reliance is also placed on the decision of the Supreme Court in the case of *Chandigarh Administration through the Director Public Instructions (College), Chandigarh Vs. Usha Kheterpal WAIE and others*¹¹, wherein it is held that if the State was competent to prescribe educational qualification in advertisement under the Rules for post falling vacant when Rules were still pending consideration, the advertisement so issued would be valid as the Administration had clear intention to enforce the Rules. It was submitted that on applying the said principle also, the action of the Authorities of classification of the Coal Mines and to earmark the same for specified end use, cannot be doubted.

53. Counsel for the petitioner relied on the unreported decision of Delhi High Court in the case of *Jindal Steel & Power Limited & Others Vs. Union of India & Another*¹² dated 11.02.2015. The validity of Section 7 read with Rule 8 (2) was *inter alia* questioned before the Delhi High Court. Even the Delhi High Court interpreted Section 7 to mean that the Central Government has right to classify the Schedule I mines for specified end-use, which may be different from the end-use prescribed prior to cancellation. The Delhi High Court went on to observe that the Central Government, however, cannot ignore or be oblivious to the earlier end-use. The petitioner in this case, however, is not a prior allottee. Hence, the said principle cannot be invoked by the petitioner. Suffice it to observe that the judgment of the Delhi High

11. (2011) 9 SCC 645

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Court was on the facts of that case. Therefore, it will be of no avail to the petitioner to pursue the argument under consideration.

54. The petitioner relies on the decision in the case of *Global Energy Limited and another Vs. Central Electricity Regulatory Commission*¹³, in particular paragraphs 24, 25 and 27 thereof to contend that the tender document cannot prescribe condition providing for additional qualification beyond the statute/ordinance and to buttress the argument that the Act does not authorise the Central Government to classify the coal mines for specified end-use of regulated or unregulated sectors. This argument has already been considered and rejected on the basis of the express power flowing from Section 7 of the said Act of 2015, bestowed on the Central Government in that behalf read with Section 3 (v) defining the term specified 'end use'. The definition specified end use differentiates the end use for different activities which may be regulated or non-regulated. Indeed, amongst the different end uses, generation of power *per se* alone is a regulated sector. But, clause (ii) of that definition also encompasses the category of generation of power for captive use which is a non-regulated sector. In that sense, there are two different categories of end uses in clause (ii), albeit dealing with the activity of generation of power. In our opinion, therefore, the principles stated in the decision relied upon will not take the matter any further for the petitioner.

55. The petitioner has then relied on the decisions of the Supreme Court in the case of *V.K.Ashokan Vs. Assistant Excise Commissioner and others*¹⁴ in particular, para 54 of this judgment, where the Court has held that it is well settled principle of law that a statutory authority must exercise its jurisdiction within the four corners of the statute. Any action taken which is not within the domain of the said authority would be illegal and without jurisdiction. For the reasons already recorded, this judgment will be of no avail to the petitioner who is ineligible to participate in the subject auction process. On the same lines, the decision of the Supreme Court in the case of *State of Andhra Pradesh Vs. Viswanadula Chetti Babu*¹⁵ was pressed into service to contend that the statutory authority is required to do a particular thing in a particular manner the same should be done in that manner only. In view of the findings recorded against the petitioner in the context of the question arising for our consideration, even this judgment will be of no avail to the petitioner.

13. (2009) 15 SCC 570

14. (2009) 14 SCC 85

15. (2010) 15 SCC 103

56. The argument, therefore, proceeds that generation of power *per se* and generation of power for captive use has been placed under one head in sub-clause (ii) of clause (v) of Section 3 of the Act of 2015. The expression "captive use" has not been defined in the Act of 2015. Widely read, it would mean that the coal is used for generation of power. The fact whether the power is used within the company generating the same or supplied to the consumer/grid, would make no difference. In that, even the companies engaged in generation of power for captive use are free to supply 49% of the power generated by them to consumers of their choice.

57. The argument though attractive, at the first blush, needs to be considered in the context of the scope of activity of the company generating power for itself or for captive use and on the other hand for supply to consumers/grid. The power used in-house or known as captive use, is not regulated by the provisions of the Electricity Act and the Regulations and Rules framed thereunder. However, the power supplied to consumers/grid is fully regulated and can be so supplied on the basis of terms and conditions specified by the Regulator under the Electricity Act. That power is used by the common man, for which, regulated tariff is indispensable. While prescribing tariff, the Regulator reckons all factors including the cost of raw material (coal) used by the company in generation of power. For that purpose, the policy of the respondents is to group the two categories separately for the purpose of auction of coal mines, though both forming part of clause (ii) of Section 3 (v). The provisions of the Act of 2015 do not preclude the Authorities from classifying the specified end uses of the concerned Coal Mine - which classification can be on the basis of coal used for generation of power *per se* (for consumers/grid) and the other as generation of power for captive use. The former requires low cost of production for generation of power. In the case of latter, the power is predominantly consumed by the company itself for its main industrial or related activities and supply of surplus power to its consumers/grid is only its incidental activity. The relatively high cost of generation of power would make no difference to such a company. This is a just reason to make the distinction. It is, therefore, open to the Central Government to classify the Coal Mines for non regulated category of generation of power for captive use and for regulated category of generation of power *per se*. For doing so, the Committee factors in several aspects including the quantity, quality and grade of Coal available in the concerned Mine. The Technical Committee, in the present case, has broadly taken into account and

reckoned the grade of Coal and quantum of reserves and size of Blocks as the key parameters. It is of the view that generally 'E', 'F' and 'G' grade quality Coal must be reserved for generation of Power and 'D' Grade and superior (i.e. A to D) grade Coal for DRI, steel and cement industries. In case of Coal Mines reserved for Power Industry, the blocks must have more than 100 million tonnes of coal depositories. At the same time, if the part of the reserve contains better grade of coal, such as 'E' or superior grade, it could also be considered for end use of captive power along with iron and steel and cement.

58. The subject Coal Mines, according to the Technical Committee, contains geological reserves at around 9.35 MT and grade of Coal is superior —'A' to 'G' grade, therefore, the inter-ministerial expert Technical Committee took a decision to allocate the said Mine for non-regulated sector. According to the Committee, if the Mine was allocated for Power sector *per se*, the same would not ensure optimum utilization of the national coal reserves. This being an experts' opinion, is not amenable to challenge nor can be questioned in writ jurisdiction.

59. Counsel for the respondents has justly relied on the dictum of the Supreme Court in the case of *Union of India and others Vs. S. L. Dutta and another*¹⁶ to contend that the Court should be loath in examining the technical aspects considered by the Technical Committee for classification of the Coal Mines for specified end use. In Paragraphs No.9 and 10 of this decision the Supreme Court has adverted to the exposition in the case of *Vincent Panikurlangara Vs. Union of India*¹⁷, in particular, paragraphs No.15 and 17 thereof. In paragraph No.11, the Supreme Court then adverted to the dictum in the case of *Liberty Oil Mills Vs. Union of India*¹⁸, para 6 thereof, which reads thus:-

"6. There must also be a considerable number of other factors which go into the making of an import policy. Expertise in public and political, national and international economy is necessary before one may engage in the making or in the criticism of an import policy. Obviously courts do not possess the expertise and are consequently incompetent to pass judgment on the appropriateness or the adequacy of a particular import policy."

(emphasis supplied)

16. (1991) 1 SCC 505

17. (1987) 2 SCC 165

18. (1984) 3 SCC 465

60. In Paragraph No.12, the Supreme Court has referred to its earlier decision in the case of *Shri Sitaram Sugar Co. Ltd. Vs. Union of India*¹⁹. In Paragraph No.56 of that decision, the Court observed thus:-

"The court has neither the means nor the knowledge to re-evaluate the factual basis of the impugned orders. The court, in exercise of judicial review, is not concerned with the correctness of the findings of fact on the basis of which the orders are made so long as those findings are reasonably supported by evidence."

61. Further reference is made to the decision of U. S. Supreme Court in *Rail-road Commission of Texas Vs. Rowan and Nichols Oil Company*²⁰, where the Court has observed thus:-

"Nothing in the Constitution warrants a rejection of these expert conclusions. Nor, on the basis of intrinsic skills and equipment, are the federal courts qualified to set their independent judgment on such matters against that of the chosen State authorities..... When we consider the limiting conditions of litigation the adaptability of the judicial process only to issues definitely circumscribed and susceptible of being judged by the techniques and criteria within the special competence of lawyers it is clear that the Due Process Clause does not require the feel of the expert to be supplanted by an independent view of judges on the conflicting testimony and prophecies and impressions of expert witnesses."

62. In the case of *Secretary and Curator, Victoria Memorial Hall Vs. Howrah Ganatantrik Nagrik Samity and others*²¹ relied by the respondent, in Paragraph No.37 the Court after adverting to the series of Supreme Court decisions observed thus:-

"37. The Constitution Bench of this Court in *University of Mysore Vs. C.D. Govinda Rao* - AIR 1965 SC 491 held that (AIR p.496, para 13) 'normally the courts should be slow to interfere with the opinions expressed by the experts'. It would normally be wise and safe for the courts to leave the decision

to experts who are more familiar with the problems they face than the Courts generally can be. This view has consistently been reiterated by this Court as is evident from the judgments in *State of Bihar Vs. Asis Kumar Mukherjee* – (1975) 3 SCC 602; *Dalpat Abasaheb Solunke Vs. Dr. B.S. Mahajan* – (1990) 1 SCC 305; *Central Areca Nut & Cocoa Marketing & Processing Co-operative Ltd. Vs. State of Karnataka & Ors.* – (1997) 8 SCC 31; and *Dental Council of India Vs. Subharti K.K.B. Charitable Trust* – (2001) 5 SCC 486.

63. Reliance has also been placed on the decision of the Supreme Court in the case of *Tata Cellular Vs. Union of India*²² in support of the argument that the Court may examine only the decision making process and not the merits of the decision itself. The merits of the decision taken by the Technical Committee is not reviewable as the Court does not sit as an Appellate Court while exercising power of review. Further, it is argued by the respondents that in the present case the petitioner has failed to demonstrate that the decision taken by the Expert Committee and, in particular, by the Central Government to classify the subject Coal Mines for specified end use for non-regulated sectors is vitiated by arbitrariness, unfairness, illegality, irrationality or 'Wednesbury unreasonableness'. The broad principles delineated by the Supreme Court in Paragraph No. 94, regarding the scope of judicial review, read thus:-

"94. The principles deducible from the above are :

- (1) The modern trend points to judicial restraint in administrative action.
- (2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.
- (3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.
- (4) The terms of *the invitation to tender* cannot be open to judicial scrutiny because the invitation to tender is in the

realm of contract.

Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

Based on these principles we will examine the facts of this case since they commend to us as the correct principles."

64. None of the above grounds are available to the petitioner to question the decision of the Technical Expert's Committee or that of the appropriate Authority on matters in issues.

65. Reliance is also placed on the decision of *Directorate of Education and others Vs. Educomp Datamatics Ltd. and others*²³, which has restated the legal principle expounded in the case of *Tata Cellular* (supra), regarding the scope of judicial review.

66. The argument then proceeds that the Supreme Court decision does not completely undo the allocation. Instead, it postulates conducting the auction of the respective Coal Mine without changing the end use of Coal, if was for generation of power for captive use. It must be continued for that purpose only. It is not possible to countenance this submission and in particular at the instance of this petitioner. Firstly, the decision of the Supreme Court proceeds on the finding that the allocations were done

arbitrarily and without following due process and against national interests. Further, the Act of 2015 gives ample power to the Central Government to notify the auction by classifying the Mines in Schedule I and earmark the same for specified end uses which are more beneficial to the public at large including to minimize any impact on core Sectors such as iron and steel, cement and power utilities, which are vital for development of the nation. It is for the Expert Committee to decide the purpose of end use of the national resources which would be more beneficial and subserve the national interests. That decision, having been taken by the expert Technical Committee, it is not open for this Court to sit over the same as a Court of appeal. In the case of *Jyoti Pershad and others Vs. Administrator for the Union Territory of Delhi and others*²⁴, the Court was called upon to consider whether Section 19 of the Slum Areas (Improvement and Clearance) Act violates equal protection of laws guaranteed under Article 14 of the Constitution. The Supreme Court noted that in the construction of such laws and in particular in judging of their validity the Courts have necessarily to approach it from the point of view of furthering the social interest which it is the purpose of the legislation to promote, for the Courts are not, in these matters, functioning as it were in vacuo, but as parts of the society which is trying, by enacted law, to solve its problems and achieve social concord and peaceful adjustment and thus furthering the moral and material progress of the community as a whole. In para 17, the Supreme Court observed that in the context of modern conditions and variety and complexity of the situations which present themselves for solution, it is not possible for the Legislature to envisage in detail every possibility and make provision for them. The Legislature, therefore, is forced to leave the Authorities created by it an ample discretion limited, however, by the guidance afforded by the Act. Further, so long as the Legislature indicates, in the operative provisions of the statute with certainty, the policy and purpose of the enactment, the mere fact that the legislation is skeletal, or the fact that a discretion is left to those entrusted with administering the law, affords no basis either for the contention that there has been an excessive delegation of the legislative power as to amount to an abdication of its functions, or that the discretion vested is uncanalised and unguided as to amount to a carte blanche to discriminate. Further, if the power or discretion has been conferred in a manner which

is legal and constitutional, the fact that Parliament could possibly have made more detailed provisions, could obviously not be a ground for invalidating the law. Applying these principles, the argument of the petitioner that the Act does not make distinction between the regulated and non-regulated sectors for the purposes of specified end use and, therefore, the Central Government could not have made such distinction, will have to be stated to be rejected, as we find that the Act vests authority in the Central Government to make classification of the coal mines in Schedule I and to earmark the same for the same class of specified end uses.

67. Reliance was also placed by the petitioner on the decision of the Supreme Court in case of *Delhi Development Authority and another Vs. Joint Action Committee Allottee of SFS Flats and others*²⁵ in particular paragraph 64 to 68 and 77 dealing with the framework of policy decision and judicial review in that regard. In paragraph 65, the Court observed thus:-

"65. Broadly, a policy decision is subject to judicial review on the following grounds:

- (a) if it is unconstitutional;
- (b) if it is de hors the provisions of the Act and the regulations;
- (c) if the delegatee has acted beyond its power of delegation;
- (d) if the executive policy is contrary to the statutory or a larger policy."

68. In the context of the issues that have been considered in this judgment at the instance of the petitioner, we may observe that the question is not about the policy decision but about the application of eligibility condition specified in Section 4(4) of the Act of 2015 and the Rules framed thereunder. Having held that the petitioner is not eligible to participate in the auction process, further inquiry into the approach of the Authorities in application of the relevant enactment, does not merit consideration. As a result, it is not necessary to elaborate further on the principles expounded in this decision as well.

69. As noted earlier, the argument pressed into service by the petitioner that the Coal Mine should be used for the same purpose for which it was

earlier used, cannot be countenanced. No such direction can be deduced from the said decision of the Supreme Court nor such meaning can be ascribed even on harmonious reading of the provisions of the Act of 2015. As a matter of fact, this argument cannot be pursued by the petitioner. It will be available at best to the prior allottee and not to someone who was dependent on the supply of Coal from the prior allottee. The petitioner company is free to receive Coal extracted from some other Coal Mine, which can be used for generation of power *per se* (regulated sector) and can also bid in the auction process of such a Coal Mine earmarked for that specified end use— provided, however, the disqualification incurred by the prior allottee (BLA Industries Pvt. Ltd.) is removed and not otherwise.

70. The petitioner, no doubt, has raised several other issues about the appropriateness of the decision of the expert Technical Committee. However, as noticed earlier, it is not as if the Central Government has no power to classify the Coal Mines for specified end uses. Once we hold that such power vests in the Central Government, so long as the classification done by the Authority remains and it must, being reasonable; and that as it is not shown to be unreasonable or arbitrary, it would necessarily follow that the petitioner who intends to use the Coal for generation of power *per se* (regulated sector), is not qualified to participate in the auction process of the subject Coal Mines, which is earmarked for end use of non regulated sector, for optimum utilization of the national resources.

71. The petitioner, however, submits that no explanation is given as to how a particular grade of Coal is suitable for captive use and is unsuitable for generation of power other than the captive use. This submission completely overlooks the various factors reckoned by the Technical Committee. It is not only the grade of Coal, but also its location, quantities of the Coal depositories and the size of Blocks or size of coal depositories was less than 100 MT, have been taken into account by the Technical Committee so that the same can be better utilised for non-regulated sector (iron and steel, Cement). The end use of coal in that sense must also have nexus with the optimum utilization of the coal depositories or national resources. The fact that to utilize the reserve of 100 MT and above, the power company must have a Power Plant of 600 MW and above – to make it a viable Power Plant, that, by itself, cannot be the basis to question the classification of the subject Coal Mine for specified use of non regulated sector.

72. The argument of the petitioner that the petitioner can be permitted to participate in the auction process, even if it is a case of upward bidding, would be disregarding the purpose of classification of the subject Coal Mine for specified end use of non regulated sector. If the petitioner is allowed to participate in the subject auction process, it would not only impel us to overlook the several factors considered by the Technical Committee including of optimum utilization of the national resources but also the price that will be paid by the petitioner for sourcing the coal from these mines. That would inevitably result in high priced tariff of electricity to be supplied by the petitioner company to its consumers/grid. The petitioner has not given any assurance or undertaking that irrespective of high priced coal sourced from the subject Coal Mines, the petitioner would abide by the tariff as would be prescribed by the Regulator, in respect of other power generating companies in the immediate neighbourhood for supply of power to the consumers/grid.

73. We may usefully refer to the recent decision of the Supreme Court relied by the respondents in the case of *Michigan Rubber (India) Limited Vs. State of Karnataka and others*²⁶. In Paragraph No. 23 the Court has delineated the principles emerging from the various Supreme Court decisions regarding the scope of judicial review in respect of contract matters, which reads thus:-

"23. From the above decisions, the following principles emerge:

(a) The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) Fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government

acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by Court is very restrictive since no person can claim fundamental right to carry on business with the Government."

74. Considering the fact that the petitioner is engaged in generation of power *per se* for supply of power to the consumers/grid (regulated sector), is ineligible to participate in the subject auction process of the Coal Mines earmarked for specified end use of non-regulated sector. Hence, even for this reason, the petitioner has no locus to question the tender process in respect of the subject Coal Mines.

75. For the view taken by us, that the petitioner has no locus to maintain this petition, being ineligible, to participate in the subject auction process, it is not necessary for us to dilate on other contentions raised by the petitioner which in any case need not be answered at the instance of this petitioner.

76. While parting, we direct the Registry to forthwith return the sealed envelope containing the record and minutes of the Technical Committee meeting handed in to us by the counsel for the respondents during the hearing. We may add that for the view taken by us, it was not necessary for us to examine the record and minutes of the said Committee/original record.

77. Accordingly, these writ petitions must fail and the same are **dismissed** with no order as to costs.

Petition dismissed.

I.L.R. [2016] M.P., 193

APPELLATE CIVIL

Before Mr. Justice Rohit Arya

S.A. No. 437/2012 (Gwalior) decided on 30 July, 2014

SUNIL ENTERPRISES

...Appellant

Vs.

SMT. MITHILA DEVI & ors.

....Respondents

Civil Procedure Code (5 of 1908), Section 100 - Second appeal - Suit for declaration that appellant be declared as tenant - Both the courts below held that appellant has failed to establish landlord-tenant relationships - Landlord has already filed a suit for eviction as appellant was never inducted by landlord but in fact is a sub-tenant without the permission of landlady - Where both the courts below recorded concurrent findings of facts which are in fact and in effect impregnable in the nature - Do not warrant any interference as no question of law is involved.

(Paras 7, 10 & 11)

सिविल प्रक्रिया संहिता (1908 का 5), धारा 100 - द्वितीय अपील - इस घोषणा हेतु वाद कि अपीलार्थी को किरायेदार घोषित किया जाये - दोनों निचली अदालतों ने यह अभिनिर्धारित किया कि अपीलार्थी मकानमालिक-किरायेदार के संबंधों को स्थापित करने में असफल रहा है - मकानमालिक ने पहले ही बेदखली हेतु वाद प्रस्तुत कर दिया है जबकि अपीलार्थी को कभी भी मकानमालिक द्वारा प्रतिष्ठापित नहीं किया गया था किंतु वास्तव में वह मकानमालिक की अनुमति के बिना उपकिरायेदार है - जहां दोनों निचली अदालतों ने तथ्यों के समवर्ती निष्कर्ष अभिलिखित किये हैं जो कि वास्तव में एवं प्रभाव में अशेद्य स्वरूप के हैं - किसी हस्तक्षेप की आवश्यकता नहीं क्योंकि विधि का कोई प्रश्न अंतर्गुह्य नहीं है।

Cases referred :

(2004) 4 SCC 794 (para 8), (2010) 9 SCC 129 (para 18, 19).

Sanjay Bahirani, for the appellant.*B.D. Jain*, for the respondents.*(Supplied: Paragraph numbers)***ORDER****ROHIT ARYA, J. :-** Heard.

2. This appeal by the plaintiff under Section 100 of CPC is directed

against the concurring judgment and decree dated 1/9/2012 passed by XIV Additional District Judge, Gwalior in Civil Appeal No. 25-A/12, confirming the judgment and decree of the trial Court dated 31/3/2010 passed by Sixth Civil Judge, Class-II, Gwalior in Civil Suit No. 96-A/2009. By the impugned judgment and decree passed by trial Court the suit filed by the plaintiff for declaration and permanent injunction has been dismissed.

3. In the aforesaid suit, plaintiff has inter alia contended that plaintiff is running a cloth business in the name and style of Sunil Enterprises in shop No. 4-A, situated at Narayan Das Cloth Market, Near Central Library, Jiwaji Chowk, Gwalior since 1/4/1978 and paying rent. As on date the rent was to the tune of Rs. 325/- per month. It is further pleaded that at the time of commencing tenancy, an amount of Rs. 4,000/- was paid to Landlady Smt. Mithila Devi in advance. Up to 31/3/1999, plaintiff has paid the rent to the tune of Rs. 15,600/-. It is alleged that after 31st March, 1999 no receipt was given in token of the rent as paid. As now the value of the shop has gone up, therefore, defendants are trying to forcibly dispossess the plaintiff from the suit shop, therefore, the instant suit has been filed for declaration and permanent injunction.

4. Defendant No. 2 has filed written statement. It was contended that suit shop was given to one Nareshchandra, who had started the business under the name and style of M/s. Sunil Enterprises, a proprietorship firm. However, without notice, knowledge and consent of defendants, said Nareshchandra handed over the possession of the suit shop to Pratapchandra Jethwani, the plaintiff, as a sub-tenant, contrary to the terms and conditions of tenancy. It is denied that plaintiff has ever paid rent to the defendants. Rent has been paid only by Nareshchandra till the time he was in occupation of the suit shop. It is denied that plaintiff is a tenant of defendants and any attempt has been made by the defendant to forcible dispossession the plaintiff. In fact it is contended that as a matter of fact defendants have filed a suit vide Civil Suit No. 67-A/04 pending before the Court of 8th Civil Judge, Class-II, Gwalior, for eviction of Nareshchandra or the plaintiff and therefore, there is no reason for defendants to seek forcible dispossession of the plaintiff as alleged in the plaint. With the aforesaid pleadings, the defendants have prayed for dismissal of the suit.

5. Upon such pleadings, trial Court framed issues and allowed parties to

lead evidence. On critical evaluation of the oral and documentary evidence brought on record, trial Court dismissed the suit holding that landlord-tenant relationship is not established between the defendants and plaintiff.

6. On appeal, first appellate Court again reappreciated the entire evidence on record to address upon three fold questions namely (i) Whether, landlord-tenant relationship exists in respect of suit shop between parties; (ii) Whether, defendants are trying to dispossess the plaintiff without following due procedure of law; and (iii) Whether, the judgment of trial Court is sustainable in the eyes of law.

7. The first appellate court has once again threadbare discussed the evidence brought on record to ascertain whether there is any landlord-tenant relationship between the parties. It has been found that no documentary evidence is brought on record to establish the assertion that the plaintiff is proprietor of M/s. Sunil Enterprises since it is inception and the same proprietary firm had taken the suit premises on rent from defendant Mithiladevi. There is no documentary evidence as regards payment of rent by plaintiff to defendants. Plaintiffs may be running a business of cloth under the name and style of M/s. Sunil Enterprises in the Narayandas Market but for want of any documentary evidence on record, it cannot be held that there was landlord-tenant relationship between defendants and plaintiff in respect of suit shop. Documents related to income tax return, sales tax return in respect of the M/s. Sunil Enterprises (sic:Enterprises), orders passed by Sales Tax Officer are of no relevancy as those documents neither prove the tenancy nor relevant to establish the tenancy as regard the suit shop in favour of plaintiff for establishing landlord-tenant relationship. Plaintiff himself in his cross-examination has admitted that at the time of commencement of tenancy, Kirayanama was executed. He has not produced the same. Even partnership deed as claimed by the plaintiff in respect of the business being run in the name and style of M/s. Sunil Enterprises before the Court has not been produced. Plaintiff has expressed ignorance as regards the execution of rent deed by Nareshchandra with the defendants. He further submitted that in year 1991, said Nareshchandra has separated himself from the said business. He admits that defendants have filed a suit for eviction against Nareshchandra in which plaintiff is also a party. He further admits that Nareshchandra does not sit in the suit shop after having

separated from the business, though he has not produced any documents relating to tenancy. He admits that Ex. P/4 and P/5, the orders passed by Sales Tax Department do not bear his name after the firm's name M/s. Sunil Enterprises and likewise those documents do not bear such stipulations that plaintiff is tenant in suit shop. With the aforesaid discussion, the first appellate Court in para 15 has concluded to the effect that the suit shop in fact was taken on rent by Nareshchandra, thereafter, he formed a proprietary firm M/s Sunil Enterprises and was doing business. He has been paying rent to the defendants. Thereafter, it appears that he has allowed (sic:allowed) plaintiff in his business and with the passage of time, he separated himself from business without knowledge of the defendants. The fact that the plaintiff by expressing his ignorance as regards tenancy right of Nareshchandra reflects conduct of plaintiff hiding facts. On the contrary, he was inducted as sub-tenant in the suit shop without knowledge, notice and consent of the defendants and appears to be doing cloth business in the suit shop. As a matter of fact, as the plaintiff has filed the suit seeking declaration that he is a tenant of the defendants, the burden was upon him to establish the landlord-tenant relationship with the defendants but he has failed to discharge the burden as neither any rent deed nor any rent receipts have been produced in support of assertion of the tenancy. Accordingly, first appellate Court has dismissed the suit for want of evidence as regard landlord-tenant relationship.

8. Law as regards sub-tenancy is well settled by the Hon. Apex Court in series of judgments namely *Parvinder Singh Vs. Renu Gautam and others*, (2004) 4 SCC 794 (para 8) and *Vinaykishore Punamchand Mundhada and another Vs. Shri Bhumi Kalpataru and others*, (2010) 9 SCC 129 (para 18, 19). For ready reference relevant para of aforesaid judgments as mentioned hereinabove are quoted hereinbelow:-

Para 8 of *Parvinder Singh* (supra) case:-

"8. The rent control legislations which extend many a protection to the tenant, also provide for grounds of eviction. One such ground, most common in all the legislations, is subletting or parting with possession of the tenancy premises by the tenant. Rent control laws usually protect the tenant so long as he may himself use the premises but not his transferee inducted into possession of the premises, in breach of the contract or the

law, which act is often done with the object of illegitimate profiteering or rack renting. To defeat the provisions of law, a device is at times adopted by unscrupulous tenants and sub-tenants of bringing into existence a deed of partnership which gives the relationship of tenant and sub-tenant an outward appearance of partnership while in effect what has come into existence is a sub-tenancy or parting with possession camouflaged under the cloak of partnership. Merely because a tenant has entered into a partnership he cannot necessarily be held to have sublet the premises or parted with possession thereof in favour of his partners. If the tenant is actively associated with the partnership business and retains the use and control over the tenancy premises with him, may be along with the partners, the tenant may not be said to have parted with possession. However, if the user and control of the tenancy premises has been parted with and deed of partnership has been drawn up as an indirect method of collecting the consideration for creation of sub-tenancy or for providing a cloak or cover to conceal the transaction not permitted by law, the Court is not estopped from tearing the veil of partnership and finding out the real nature of transaction entered into between the tenant and the alleged sub-tenant.

9. Para 18 and 19 of *Vinaykishore Punamchand Mundhada* (supra) case.

18. It is well settled that sub-tenancy or sub-letting comes into existence when the tenant voluntarily surrenders possession of the tenanted premises wholly or in part and puts another person in exclusive possession thereof without the knowledge of the landlord. In all such cases, invariably the landlord is kept out of scene rather, such arrangement whereby and whereunder the possession is parted away by the tenant is always clandestine and such arrangements take place behind the back of the landlord. It is the actual physical and exclusive possession of the newly inducted person, instead of the tenant, which is material and it is that factor which reveals to the landlord that the tenant has put some other person into possession of the tenanted property.

19. It would be impossible for the landlord to prove, by direct evidence, the arrangement between the tenant and sub-tenant. It would not be possible to establish by direct evidence as to whether the person inducted into possession by the tenant had paid monetary consideration to the tenant. Such arrangement which may have been made secretly, cannot be proved by affirmative evidence and in such circumstances, the Court is required to draw its own inference upon the facts of the case proved at the enquiry. Delivery of exclusive possession by the tenant to a stranger to the landlord and without the prior permission of the landlord is one dominant factor based on which the Court could infer as to whether the premises was sub-let.”
10. If factual matrix in hand is read in juxtaposition with law laid down by Supreme Court in above mentioned cases, it is found that the occupation of the suit shop by the plaintiff cannot be said to be in the capacity of tenant but as sub-tenant who has been put into possession of suit shop secretly by the original tenant-Nareshchandra without notice, knowledge and consent of the defendants. Nareshchandra, the original tenant is now not occupying the suit shop since 1991. He has no control over it. Possession of suit shop has been handed over to plaintiff by Nareshchandra ..behind the back of defendant-landlady. Hence, it is a case of sub-letting of suit shop more particularly for want of any rent agreement and rent receipts. Plaintiff himself has stated that since 1991, Nareshchandra has withdrawn from business and the partnership. However, no documentary evidence is brought on record regarding proprietary firm in the name of plaintiffs under the name and style of M/s. Sunil Enterprises. Therefore, both the Courts below were justified in holding that there was no landlord tenant relationship and rightly refused the protection as sought for.
11. Having perused the aforesaid settled dictum of law, impugned judgments and record, both the Courts below have recorded concurrent findings of fact which are in fact and in effect impregnable in the nature and are in the realm of facts. Findings so recorded do not warrant any interference under Section 100 of CPC by this Court. No question of law, much less substantial question of law arises in this appeal, same is therefore, dismissed.

Appeal dismissed.

I.L.R. [2016] M.P., 199

APPELLATE CIVIL

Before Mr. Justice S.K. Gangele & Mr. Justice S.K. Palo

F.A. No. 431/2006 (Gwalior) decided on 13 August, 2014

SATISH KUMAR JAIN

...Appellant

Vs.

SMT. USHA JAIN

...Respondent

Hindu Marriage Act (25 of 1955), Sections 13(1)(1-A) & (1-B) - Cruelty and desertion - Respondent left her matrimonial home and does not join her husband for more than two years, without any reasonable excuse - She is guilty of desertion - It is total repudiation of the obligation of marriage - Further respondent lodged FIR against appellant and his family members u/s 498A of IPC after 17 years of marriage - Respondent guilty of desertion and cruelty - Decree of divorce passed. (Paras 16 to 20)

हिन्दू विवाह अधिनियम (1955 का 25), धाराएं 13(1)(1-ए) व (1-बी) - क्रूरता एवं अमित्यजन - प्रत्यर्थी ने ससुराल छोड़ा और दो वर्ष से अधिक समय तक बिना किसी युक्तियुक्त कारण के अपने पति के पास नहीं आयी - वह अमित्यजन की दोषी है - यह वैवाहिक दायित्वों का पूर्ण प्रत्याख्यान है - इसके अतिरिक्त प्रत्यर्थी ने विवाह के 17 वर्ष पश्चात् भारतीय दंड संहिता की धारा 498ए के अंतर्गत अपीलार्थी एवं उसके परिवार के सदस्यों के विरुद्ध प्रथम सूचना प्रतिवेदन दर्ज किया - प्रत्यर्थी अमित्यजन एवं क्रूरता की दोषी - विवाह-विच्छेद की डिक्री पारित।

Cases referred :

AIR 1981 Delhi 53, AIR 1982 Delhi 240, AIR 1975 SC 176.

Anand Purohit, 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. :- Feeling aggrieved by the judgment pronounced on 1st November, 2006 by the District Judge, Bhind, in Civil Suit No.10/06 (Hindu Marriage Act) by which the petition under Section 13 of the Hindu Marriage Act, 1955, filed by the husband/appellant was rejected, the appellant has filed this appeal under Section 28 of the Hindu Marriage Act, 1955.

2. Before the learned Trial Court it was not disputed that appellant married the respondent on 09.05.1983 according to Hindu rites. The parents and younger and elder brothers are also residing with the appellant. It is also not disputed that before filing of the petition, an effort was made by the relatives to keep the respondent separately in the parental house of the appellant and for some time 500/- rupees per month was being given to her as maintenance by the appellant. No child is born due to the wedlock of the appellant and respondent.
3. The appellant/husband filed the petition before the learned District Judge, Bhind, on the ground that after their marriage in the year 1983, they lived together for two years. The respondent often used to visit her maternal home. She started quarelling with the appellant and was pressurizing him to live separately. The appellant did not succumb to her pressure. But she was bent upon and was not prepared to live with the appellant's family. To avoid any untoward situation, the appellant made arrangements in his parental house so that the respondent can live separately in a portion. This arrangement was made as back as 18-19 years. Even then, she was not happy and she used to leave the house and visit her uncle (*Mausa*) Gyanchand Jain and to her maternal home.
4. After making arrangements for the respondent to live separately and giving all the articles received during the marriage she deprived the appellant of his marital life.
5. The appellant submitted an application before the Superintendent of Police, Bhind. In this regard, on the respondent appeared before the Superintendent of Police on 28.09.1998 and admitted that she has no complaints against her husband and she expressed her willingness to live with the appellant and lived in the matrimonial home. But again no change has been seen in the nature of the respondent. She was also pressurizing the appellant to get his share of his parental property and live with her in her parental house. Few members of his *Samaj* suggested the appellant to let her live as she wants to live. The appellant from 1st March, 1999, provided her 500/- rupees per month as maintenance. Till 16.12.2002, it was being paid. The respondent wife lodged a report against the appellant and his family members. A criminal case was registered. The respondent quarreled with "Renu" the wife of the younger brother of the appellant on 06.05.2002. She deprived the appellant his marital life since 1989 and is not willing to live with him, whereas

the appellant has been willing to keep her as his wife. On 1st August, 2004, she refused to live with the appellant, therefore, the appellant has filed this petition for divorce.

6. Per contra, the respondent-wife, except the admitted facts denied all averments and has submitted that she lived in her matrimonial home performing her duties. Parents and brother-in-law, sister-in-law of the appellant harassed her demanding dowry. She started living separately in the front portion of the parental house of the appellant on the promise that separate toilet, bath room, kitchen would be constructed and separate connection of water and electricity would be given. But these facilities were not provided and she was feeling uneasiness in the small room. The family members of the appellant beaten her so many times for demand of dowry. After two years of paying maintenance, the appellant stopped paying the maintenance. When she left to village Porsa to attend the marriage of her sister, a false report was lodged by Renu (sister-in-law of the appellant) to harass her. The appellant himself has been living separately without any reasonable cause.

7. On the basis of these averments, the learned District Judge allowed both the parties to adduce their evidence and pronounced the impugned judgment on 1st October, 2006. The learned District Judge has found that the appellant has failed to prove his case.

8. The appellant has assailed this judgment on several grounds. It is urged by the appellant that on the basis of "cruelty", the learned Trial Court did not appreciate the evidence. The respondent withdrew herself from the society of the appellant, depriving him of his marital life constituting "cruelty". This aspect has also been not dealt with. The false report lodged by the respondent against the appellant and his family members alleging demand of dowry etc. also amounts to "cruelty". Though, their marriage was sermonized in the year 1983, no child has been born as the respondent has been living separately. The marriage of the appellant and the respondent has been irretrievably broken. Therefore, prayed to allow this appeal and grant decree of divorce.

9. We have given thoughtful consideration on the submissions made by the learned counsel for the appellant and perused the record. In our considered view that the learned Trial Court has erred in appreciating the evidence.

10. The appellant has examined himself and has reiterated that the respondent has left the matrimonial home as back as 19-20 years. On her

report a crime was registered at Police Station Kotwali, Bhind, which was registered as Criminal Case No.44/01. She also filed an application for maintenance before A.C.J.M., Bhind. She has been given separate room since 1983. Manoj Kumar Jain (PW-2), the brother of the appellant has also narrated the applicant's version. The non-applicant/wife has admitted that she has no issues. She was living in a separate portion in the house of the appellant. She has also admitted that a case with regard to her assaulting the wife of Manoj (younger brother of the applicant) is also pending. A Panchayat was called 8-9 years back. Exhibit NA-1C and Exhibit NA-2C were executed by her. During the course of her statement in the Trial Court she was not answering the questions timely. After a pause she was replying to the questions. The demeanor of the respondent was also noted by the Court. Exhibit NA-1C and Exhibit NA-2C are reproduced for better understanding of the matter.

“मैं घर में सुखी हूँ। मैंने जो भी किया ज्ञानचंद्र के कहने पर किया। दहेज का कोई मामला नहीं है। मैंने जो भी किया अनजाने में किया। अब कोई गलती नहीं होगी। मैंने जो भी किया भूलवश किया के कहने में नहीं चलगे। अन्य लोगो के कहने में किया। मैंने जी भी किया ज्ञानचंद्र पीपरी वाले तुम घर में सुखी है मैं बाहर के लोगो के कहने पर जैसे हमारे पति रखेंगे वैसी हूँ रहगू। मैंने जो भी किया भूल बस किया। मैं मायके वालों की कोई बात नहीं मानूगी। मैं हमने सुसराल में सुखी हूँ। मैंने जो भी किया इन लोगो के कहने पर किया। मेरा सुसराल पक्ष कोई लेना देना नहीं है। मैं सुखी हूँ।”

“हमें इनसे कोई शिकायत नहीं। मेरे पति जिस हाल में रखेंगे, जहां रखेंगे, मैं रहने को राजी हूँ। जो कुछ हुआ ”.....मुझे थाने में जवर जस्ती ले जाया गया यह मेरी नादानी थी। जो भी किया परिवालों के कहने पर किया। अगर मैं अपने पति के साथ जाती हूँ तो मैं प्रेम से रहूंगी। मायके लिय जिद नहीं करूंगी। मेरे पति मेरा लालन पोषण करने में सक्षम है। मुझे जिस हालल में रखेंगे मैं रहने को तैयार हूँ। इसमें मेरे सुसराल वालों का कोई हाथ नहीं। और मुझे कुछ नहीं चाहिये। मुझे केवल पति का साथ चाहिए। मेरे सुसराल वालों ने दहेज की कोई मांग नहीं की। मैं लोगो के कहने पर आगई। मैं अपने भूल पे पछता रही हूँ। ऐसी गलती दुबारा नहीं करूंगी।”

11. DW-2 Pramod Kumar Jain, is the brother of respondent. He has admitted that till 17-18 years after the marriage, there was no report regarding any harassment or any maltreatment to her sister. In the Panchayat, it was decided that the appellant would pay Rs.500/- per month to her sister as maintenance and it was also decided that she would be living in a separate portion in the parental house of the appellant. He has also admitted that a

criminal case is pending against the respondent for beating her sister-in-law "Renu".

12. All these goes to show that there has been strained relationship between the respondent and the family members of the appellant. The respondent's cruelty behaviour can be ascertained by the following:-

- (1) She was not performing her duties.
- (2) She pressurized the appellant to live separately from his parents and other family members.
- (3) She lodged a false report against the appellant and his family members in the year 2001 regarding demand of dowry.
- (4) Needless to say that the marriage was performed in the year 1983, the allegation of demand of dowry was made in the year 2001.

13. In *Smt. Shakuntala Kumari Vs. Om Prakash Ghai*, AIR 1981 Delhi 53, it has been held thus:

"A normal and healthy sexual relationship is one of the basic ingredients of a happy and harmonious marriage. If this is not possible due to ill health on the part of one of the spouses, it may or may not amount to cruelty depending on the circumstances of the case. But wilful denial of sexual relationship by a spouse when the other spouse is anxious for it would amount to mental cruelty, especially when the parties are young and newly married".

14. In *Smt. Maya Vs. Brij Nath*, AIR 1982 Delhi, 240, while dealing with the concept of "cruelty" it is observed that,

"Cruelty has not been defined in the Act. But it is now well settled that the conduct should be grave and weighty so as to make cohabitation virtually unendurable. It must be more serious than the ordinary wear and tear of marriage. The cumulative conduct taking into consideration the circumstances and the background of the parties has to be examined to reach a conclusion whether the act amounts to cruelty. The petitioner in a divorce petition has to prove that he was treated with cruelty. The burden of proving the cruelty lies on him".

15. In the case of *Bipin Chander Vs. Prabhawati*, reported as AIR 1975 SC 176, the Apex Court has summarized desertion referring (sic:referring) in Halsbury's Laws of England regarding desertion:

“In its essence desertion means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent and without reasonable cause. It is a total repudiation of the obligations of marriage. In view of the large variety of circumstances and of modes of life involved, the Court has discouraged attempts at defining desertion, there being no general principle applicable to all cases.

Desertion is not the withdrawal from a place but from the state of things, for what the law seeks to enforce is the recognition and discharge of the common obligations of the married state; the state of things may usually be termed, for short, 'the home'. There can be desertion without previous cohabitation by the parties, or without the marriage having been consummated.

The person who actually withdraws from cohabitation is not necessarily the deserting party. The fact that a husband makes an allowance to a wife whom he has abandoned is no answer to a charge of desertion.”

16. When the respondents left matrimonial home for her parents house and does not join her husband for more than two years, without any reasonable excuse then she is guilty of desertion.

17. “Desertion” means the intentional permanent forsaking and abandonment of one spouse by the other without other's consent and without reasonable cause. It is a total repudiation of the obligations of marriage. In the present case also the respondent leaving matrimonial home constitute “desertion”.

18. The statement of the respondent is contradictory and her lodging a false report of harassment in the year 2001 under Section 498-A IPC, against the appellant and his family members almost 17 years after the marriage amounts to “cruelty”. It is apparent that the respondent is responsible for the mental agony of the appellant and that amounts to “cruelty”.

19. Thus, the grounds under Section 13 (1) (1-A) and 13(1) (1-B) of Hindu Marriage Act, 1955 as regarding 'cruelty' and 'desertion' has been made out.

20. Consequently, the appeal succeeds. The judgment and decree passed by the learned District Judge is hereby set-aside. The petition filed by the appellant is hereby allowed under Section 13(1) (1-A) and 13(1) (1-B) of the Hindu marriage Act, 1955. Accordingly, the marriage solemnized between the parties on 09.05.1983 is hereby dissolved by the decree of divorce.

21. Keeping in view the peculiar circumstances in this case, parties to bear their own costs.

Appeal allowed

I.L.R. [2016] M.P., 205

APPELLATE CIVIL

Before Mr. Justice Sanjay Yadav

M.A. No. 1184/2014 (Jabalpur) decided on 29 September, 2014

HARIRAM

...Appellant

Vs.

UNION OF INDIA

...Respondent

A. Railways Act (24 of 1989), Sections 123(2) & 124 - Untoward incident - Tribunal - Finding - Case of runover - Written statement and Naksha Panchayatnama - Railways admitting that deceased fallen down from an unknown train - Held - The incident was an untoward incident - Appeal allowed. (Paras 7, 8 & 9)

क. रेल अधिनियम (1989 का 24), धाराएं 123(2) व 124 - अप्रिय घटना - अधिकरण - निष्कर्ष - कुचल कर निकलने का प्रकरण - लिखित कथन तथा नक्शा पंचायतनामा - रेलवे ने यह स्वीकार किया है कि मृतक एक अज्ञात रेलगाड़ी से गिरा था - अभिनिर्धारित - घटना एक अप्रिय घटना थी - अपील मंजूर।

B. Railways Act (24 of 1989), Sections 123(2) & 124 - Bonafide passenger - Railways - No witness examined - Burden of proof - Held - Burden of proof cannot be placed on the dependants and also the fact that deceased boarded the train, so presumption would be that he had valid authority to travel. (Paras 14 & 15)

ख. रेल अधिनियम (1989 का 24), धाराएं 123(2) व 124 - वास्तविक

यात्री – रेलवे – किसी साक्षी का परीक्षण नहीं किया गया – सबूत का भार – अभिनिर्धारित – सबूत का भार आश्रितों पर नहीं डाला जा सकता और यह तथ्य भी कि मृतक रेलगाड़ी में सवार हुआ था, अतः यह उपधारणा की जायेगी कि उसके पास यात्रा करने का वैध प्राधिकार था।

C. Railway Claims Tribunal Act, (54 of 1987), Section 16 - Application for compensation - Interest - Held - Appellant entitled for interest @ 7.5% p.a. from the date of filing of claim application till its final payment. (Para 18)

ग. रेल दावा अधिकरण अधिनियम (1987 का 54), धारा 16 – प्रतिकर हेतु आवेदन – ब्याज – अभिनिर्धारित – अपीलार्थी दावा आवेदन प्रस्तुत करने की तिथि से उसके अंतिम भुगतान तक 7.5% प्रतिवर्ष की दर से ब्याज के लिये हकदार।

Case referred :

2003 (4) MPLJ 306.

M. Shafiqullah, for the appellants.

G.P. Patel, standing counsel for the Railways.

(Supplied: Paragraph numbers)

O R D E R

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

2. Appeal under Section 23 of the Railway Claims Tribunal Act, 1987 (hereinafter referred to as 'the 1987 Act') is directed against the order dated 13.03.2014 passed by Railway Claims Tribunal in Claim Case No.OA/IIU/2010/0001; whereby, claim application filed by the appellants/claimants under Section 16 of the 1987 Act for compensation in lieu of death of their son Nirbhay Singh has been rejected.

3. Facts adverted to before the Tribunal, as borne out from impugned order, are that Nirbhay Singh, son of appellants on 05.09.2009 while traveling ex-Bina to Janshi (sic:Jhansi) by Dakshin Express died in an untoward incident as he fell down from the general coach of the train which was over-crowded and was compelled to stand near the door of the coach. The dead body was found between Agasaud and Karonda stations. General Railway Police, Bhangarh registered a case vide Merg No.28/2009 and conducted Naksha Panchayatnama and the post-mortem was done at District Civil Hospital, Bina.

4. Appellants/claimants filed a claim for compensation in lieu of death of Nirbhay Singh which as per them was due to untoward incident. In support of claim, appellants had filed the following documents namely : Merg Intimation - Exhibit A/1, Naksha Panchayatnama - Exhibit A/2, Application for Post Mortem - Exhibit A/3, Post Mortem Report - Exhibit A/4, Ration Card - Exhibit A/6), Voter ID card of the deceased - Exhibit A/7 and Mark Sheet of the deceased - Exhibit A/8.

5. Respondent-Railways in the written statement, while not disputing that the deceased was travelling in an unknown train and by standing at the gate of the coach had fallen down resulting in his death, however, stated that it was due to his own negligence that he died by standing at the door of the coach and that due to his own negligence, the Railway cannot be held liable for compensation.

6. On the basis of rival contentions Tribunal framed following issues :

1. Whether the applicant proves that the deceased was traveling as bonafide passenger of the train at the time of occurrence of the untoward incident?

2. Whether the applicant proves that the death of the deceased was caused due to accidental fall as defined under Sec.123(c)(2) of the Railways Act, 1989?

3. Whether the applicant are the only dependants of the deceased to receive the compensation as claimed?

4. Whether the respondent Railway is protected under the exemption clause to Sec.124 A of the Railways Act and is not liable to pay any compensation to the applicants?

5. Relief & Costs?

7. The Tribunal on a finding that there being no direct evidence of the deceased having traveling in the train declined to accept the plea that the death of Nirbhay Singh was due to untoward incident. Instead the Tribunal drew a presumption that the deceased was run over by a train while crossing railway track.

8. These findings have been questioned by the appellants. It is urged that it is clear from the written statement filed by the respondent-Railways that

they have admitted that the deceased having travelled in an unknown train had fallen down which resulted in his death. Referring to Exhibit Annexure A/2 – Naksha Panchayatnama conducted at the place of incident, it is contended that there is clear mention that the deceased had fallen down from the running train. It is urged that the Tribunal grossly erred in drawing a presumption that he was run over by a train while crossing railway track. It is urged that Railways having failed to establish that the deceased was a resident of a place where the accident occurred, the finding arrived at by the Tribunal is a piece of fiction that he was run over by a train while crossing railway track.

9. Naksha Panchaytnama – Exhibit A/2 records : “हम सभी पंचों ने अज्ञात मृतक पुरुष के शव का निरीक्षण बारीकी से किया गया जो मृतक अज्ञात की मौत ट्रेन से गिरने के कारण होना प्रतीत होती है फिर भी मौत का सही कारण जानने के लिए P.M. करा लिया जावे।”

10. Furthermore, a communication dated 29.03.2010 entered into between the Authorities also reveals that death of Nirbhay Singh was due to accidental falling from the train. It records : “धारा 124 (ए) के अर्न्तगत प्रदत्त शक्तियों के तहत निरीक्षक रे0सु0ब0 ललितपुर के द्वारा जाँच की गई मामले में संलग्न पत्रावली का अवलोकन तथा पुलिस रिकार्ड से स्पष्ट होता है कि मृतक निर्भय सिंह पुत्र श्री हरीराम आदिवासी उक्त दिनांक को किसी अज्ञात गाडी के दरवाजे के पास खड़े होकर बिना टिकट यात्रा कर रहा था किसी कारण वश वह चलती गाडी से नीचे गिर गया और उसकी मृत्यु हो गई । जिसके लिये वह स्वयं जबाबदार है रेल प्रशासन की कोई जबाबदारी नहीं है। ”

11. The said report has been verified and certified by the Additional Divisional Railway Manager, Jhansi. It is further borne out from record that respondent-Railways in paragraph 3 of the written statement has clearly admitted - “It is submitted that the deceased was travelling an unknown train by standing at the gate of the coach and fallen down because of his own negligent act and died on the spot.”

12. These facts on record thus goes a long way to belie the findings arrived at by the Tribunal that the death of Nirbhay Singh was due to crossing of railway track, and being perverse is not sustainable.

13. The question, however, remains to be answered is as to whether Nirbhay Singh while travelling was a bonafide passenger with a valid ticket. Though no direct evidence has been led by the appellants/claimants nor the ticket has been recovered from the dead body, the fact remains that the deceased was travelling in a train when he fell down between Agasaud and

Karonda stations which resulted in his death.

14. The Railway has failed to examine any of its witnesses to establish the fact that the deceased was travelling without ticket. And since the deceased had boarded the train, the presumption would be that he had valid authority to travel. The Tribunal, therefore, was not justified in holding that the deceased was not a bonafide passenger.

15. In this context reference can be had of a decision rendered by a Division Bench of this Court in *Union of India vs. Satish Patidar* 2003 (4) M.P.L.J. 306; wherein it is held :

"27. This brings us to point No.4. Learned Counsel for the appellants contended that the deceased was not a bona fide passenger, as the claimants could not establish that he purchased the ticket. The burden to prove that the deceased had a valid ticket during his journey which he proceeded cannot be placed on dependents. Obviously, such burden of proof is impossible to be discharged by the dependents who can have no means of knowledge whether the deceased before boarding the train had purchased the valid ticket. It is likely that such a deceased passenger had a valid ticket but the same was lost in accident. To place the onus of proof dependents would amount to denial of the benefit of legislation to them for reasons beyond their control. In the case before us, the presumption has to be drawn that the deceased was a bona fide passenger. Therefore, we affirm the finding of the Tribunal that the deceased was a bona fide passenger."

16. In the case at hand, situation is not different than that of *Satish Patidar* (supra), infact, is better in the present case; wherein, the respondent-Railways in the written statement has admitted that the deceased was travelling in an unknown train.

17. In view whereof, it is held that the deceased was a bonafide passenger and died due to accidental falling from the train which being an untoward incident under Section 123(2) read with Section 124 of the Railways Act, 1989. Therefore, the Tribunal grossly erred in non-suiting the appellants.

18. Consequently, the impugned order passed by the Railway Claims Tribunal is set aside. Application for compensation preferred by the appellants/

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claimants is allowed. The claimants are therefore entitled for compensation of Rs.4,00,000/- as provided in schedule appended with the Railway Accidents and Untoward Incidents (Compensation) Rules, 1990. The claimants shall also entitled for 7.5% interest from the date of filing of application for compensation till its final payment.

Appeal is allowed to the extent above.

Appeal allowed.

I.L.R. [2016] M.P., 210

APPELLATE CIVIL

Before Mr. Justice Sanjay Yadav

S.A. No. 286/2008 (Jabalpur) decided on 31 October, 2014

VIMLA SONDHIA (SMT.)

...Appellant

Vs.

DOOR SANCHAR ZILA PRABANDHAK

...Respondent

A. *Telegraph Act, (13 of 1885), Section 7-B - Arbitration of disputes - Civil Suit for recovery towards the use of telephone by defendant - Concurrent findings of fact - Whether Civil Court is divested for its jurisdiction to try a Suit for recovery of bills for user of telephone in the light of provisions of Section 7-B - Held - No, appellant failed to establish clear bar for the civil Court to adjudicate as regard to recovery of bills. (Paras 2 & 14)*

क. तार अधिनियम, (1885 का 13), धारा 7-बी - विवादों का माध्यस्थता - प्रतिवादी द्वारा दूरभाष के उपयोग पर वसूली के लिए सिविल वाद - तथ्य के समवर्ती निष्कर्ष - क्या धारा 7-बी के उपबंधों के आलोक में दूरभाष के उपभोक्ता के बिल की वसूली के वाद का विचारण करने की अधिकारिता सिविल न्यायालय से छीन ली गयी है - अभिनिर्धारित - नहीं, बिलों की वसूली के संबंध में सिविल न्यायालय द्वारा न्याय निर्णयन करने की स्पष्ट रोक को स्थापित करने में अपीलार्थी असफल रहा।

B. *Interpretation of statutes - Jurisdiction of Civil Courts - Provisions excluding jurisdiction of civil courts and provisions conferring jurisdiction on authorities and Tribunals other than civil courts are to be strictly construed as the Civil Courts are the Courts of general jurisdiction. (Para 12)*

ख. कानूनों का निर्वचन - सिविल न्यायालयों की अधिकारिता - सिविल

न्यायालयों की अधिकारिता अपवर्जित करने वाले उपबंधों तथा सिविल न्यायालय को छोड़कर प्राधिकारियों को एवं अधिकरण को अधिकारिता प्रदत्त करने वाले उपबंधों का अर्थान्वयन कड़ाई से करना चाहिए क्योंकि सिविल न्यायालय, सामान्य अधिकारिता के न्यायालय होते हैं।

C. Words & Phrases - 'Telegraph line', 'Appliance' or 'Apparatus' - Definition - Wide connotation given. (Paras 6 and 7)

ग. शब्द और वाक्यांश - 'तारयंत्र लाईन', 'साधित्र' या 'यंत्र' - परिभाषा - विस्तृत अर्थ दिया गया।

Cases referred :

1964 MPLJ 831, AIR 1994 All 325, 1991 MPLJ 98, AIR 1988 J & K 17, (2000) 4 SCC 539, AIR 2005 SC 2392, (2008) 5 SCC 542, (2008) 7 SCC 454.

M.S. Bhatti, for the appellant.

(Supplied: Paragraph numbers)

ORDER

SANJAY YADAV, J. :- Heard on admission.

2. Placing reliance on Section 7 B of the Indian Telegraph Act, 1885 and stating that by virtue of the provisions therein, the Civil Court is divested of its jurisdiction to try a Suit for recovery of bills for user of telephone, the defendant seeks indulgence vide this second appeal directed against the Judgment and Decree dated 20.11.2007 passed in Civil Appeal No.1-B/2006 by Fifth Additional District Judge, (Fast Track Court) Rewa, affirming the Judgment and Decree dated 27.9.2006 in Civil Suit No.28-B/2004 by Civil Judge Class-I, Rewa.

3. It being a matter of record that the suit pertained to recovery of Rs.41,717/- for a period from 18.5.2000 till 11.10.2001 towards the use of telephone No.258111 installed at the defendants residence. Both the Courts returned the findings against the defendant and has held him liable for the payment. These findings of fact are based on cogent material evidence on record as would warrant an interference.

4. As regard to jurisdiction of the Civil Court in the light of Section 7 B of 1885 Act the provision stipulates-

"7 B. Arbitration of disputes-

(1) Except as otherwise expressly provided in this Act, if any dispute concerning any telegraph line, appliance or apparatus arises between the telegraph authority and the person for whose benefit the line, appliance or apparatus is, or has been, provided, the dispute shall be determined by arbitration and shall, for the purposes of such determination, be referred to an arbitrator appointed by the Central Government either specially for the determination of that dispute or generally for the determination of disputes under this section.

(2) The award of the arbitrator appointed under subsection (1) shall be conclusive between the parties to the dispute and shall not be questioned in any Court]."

5. "Thus, though the provisions expressly does not include the arrears of bills; however, certain judicial pronouncements' have expanded the meaning of "telegraph line, appliance or apparatus."

6. In *Rasiklal Jethu Bhai Prakash & ors. vs. Divisional Engineer, Telegraphs, Raipur Division* 1964 MPLJ 831, a Division Bench of this Court while dwelling on the aspect as to telegraph line "would include telegraph wire" opined:

"6- The definition of the word 'telegraph' given in Section 3 (1) is wide enough to include "telephone". A telephone appliance or apparatus is clearly an appliance or instrument or apparatus used for transmission and reception of "sounds or intelligence". If the definition of "telegraph" embraces "telephone", then it is obvious that a "telegraph line" as defined in section 3 (4) would also include "telephone line". That the definition of "telegraph" is wide enough to include telephone appliance or apparatus becomes clear from the fact that in the Act as it was originally enacted in 1885 "telegraph" was defined as "including appliances and apparatus for transmitting or making telegraphic, telephonic or other communications by means of electricity, galvanism or magnetism." This definition of was further amended by Act VII of 1914 by substituting the words "making, transmitting or receiving" for the words "transmitting".

This definition of "telegraph" was further widened by the new definition inserted by the Telegraph Laws (Amendment) Act, 1961, in place of the old one contended that the new definition was intended to curtail the scope of the definition of "telegraph" so as to exclude telephonic communications. In our opinion, the dispute between the petitioners and the telegraph authority, namely, whether the telephones installed at the petitioners' business premises could or could not be disconnected is a dispute falling under Section 7-B of the Act. Section 7-B clearly requires that this dispute has to be determined by arbitration in the manner laid down in that provision."

7. Similarly a Division Bench of Allahabad High Court in *Pradeep Kumar Tripathi vs. Telecom District Manager* : AIR 1994 All 325 observed:

"11. We may now come to the question of dis-connection. In this respect the learned counsel for the petitioner has urged on the basis of *Santokh Singh v. Divisional Engineer, Telephones, Shillong*, AIR 1990 Guahati 47 that Section 7B of the Indian Telegraphs Act does not cover a dispute regarding dis-connection of telephone for default. We have considered this argument and we find that in this decision while discussing the matter the Division Bench concerned remarked that it may also be observed that even if a dispute regarding excess billing can be subject matter of arbitration under Section 7B, it would not take away the jurisdiction of the High Court to exercise its jurisdiction under Art. 226 of the Constitution of India. Thus this decision does not finally adjudicate upon the question whether Section 7B of the Indian Telegraphs Act is available as an alternative remedy to the petitioner. We are of the opinion that Section 7B of the aforesaid Act covers a dispute regarding dis-connection and excess billing because it is a dispute concerning any telegraph line, appliance or apparatus arising between the telegraph authority and the person for whose benefit the telegraph line, appliance or apparatus is, or stands provided. The word 'concerning' used in Section 7B means 'about', 'regarding' 'pertaining to' according to New Lexicon Webster Dictionary 1987 Edition. Thus dispute regarding safe custody, disconnection, excess billing etc. of the telegraph line,

appliance or apparatus is certainly a dispute covered by Section 7B of the Telegraph Act.

8. In *J. N. Seth vs. Union of India & another*: 1991 MPLJ 98, learned Single Judge while affirming the principle of law laid down by High Court of Jammu and Kashmir in *Prithvi Raj Kohli vs. Union of India* AIR 1988 J & K 17 on an interpretation of Section 7B of 1885 Act that it does not oust the jurisdiction of the Civil Court, made the forum of Arbitration under Section 7B available.

9. Thus, none of the decisions relied on by the Appellate Courts suggest ouster of Civil Courts jurisdiction.

10. Reliance on the decision in *P. Anand Gajapathi Raju and others vs. PVC. Raju (Dead) And Others*: (2000) 4 SCC 539 is also of no assistance, because of the observation therein qua the scope of Section 5 and 8 of the Arbitration and Conciliation Act, 1996 was in the peculiar facts in the Appeal before Supreme Court, during pendency whereof the parties to the lis had entered into an agreement to refer the matter to Arbitrator, whether the same could be permissible in pending Appeal was the question which led to the interpretation.

11. In *Swamy Atmananda vs. Sri Ramkrishna Tapovanam* : AIR 2005 SC 2392 it is held:

"56. In *Dhulabhai and Others vs. The State of Madhya Pradesh and Another* [(1968) 3 SCR662], Hidayatullah, CJ summarized the following principles relating to the exclusion of jurisdiction of civil courts:

(a) Where the statute gives a finality to the orders of the special tribunals, the civil court's jurisdiction must be held to be excluded if there is adequate remedy to do what the civil courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunals has not acted in conformity with the fundamental principles of judicial procedure.

(b) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to

find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the Civil Court.

Where there is no express exclusion, the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case, it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in Civil Courts are prescribed by the said statute or not.

(c) Challenge to the provisions of the particular Act as ultra vires cannot be brought before tribunals constituted under that Act. Even the High Court cannot go into that question on a revision or reference from the decision of the tribunals.

(d) When the provision is already declared unconstitutional or the constitutionality of any provision is to be challenged, a suit is open. A writ of certiorari may include a direction for refund if the claim is clearly within the time prescribed by the Limitation Act but it is not a compulsory remedy to replace a suit.

(e) Where the particular Act contains no machinery for refund of tax collected in excess of constitutional limits or illegally collected, a suit lies.

(f) Questions of the correctness of the assessment, apart from its constitutionality, are for the decision of the authorities and a civil suit does not lie if the orders of the authorities are declared to be final or there is an express prohibition in the particular Act. In either case, the scheme of the particular Act must be examined because it is a relevant enquiry

(g) An exclusion of the jurisdiction of the civil court is not readily to be inferred unless the conditions above set down apply. [See *Rajasthan State Road Transport Corporation*

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and Another vs. Krishna Kant and Others (1995) 5 SCC
75, *Dwarka Prasad Agarwal vs. Ramesh Chand Agarwal*
- (2003) 6 SCC 220, *Sahebgouda vs. Ogeppa* (2003) 6 SCC
151 and *Dhruv Green Field Ltd. vs. Hukam Singh* (2002)
6 SCC 416]."

12. In *Rajasthan State Transport Corp. & ors. vs. Mohar Singh* :(2008)
5 SCC 542 it is held-

"21. We may in this behalf profitably notice the following excerpts from the Principles of Statutory Interpretation (11th Edn) by Justice G.P Singh 'It is a principle by no means to be whittled down' and has been referred to as a "fundamental rule". As a necessary corollary of this rule provisions excluding jurisdiction of civil courts and provisions conferring jurisdiction on authorities and tribunals other than civil courts are strictly construed. The existence of jurisdiction in civil courts to decide questions of civil nature being the general rule and exclusion being an exception, the burden of proof to show that jurisdiction is excluded in any particular case is on the party raising such a contention. The rule that the exclusion of jurisdiction of civil court is not to be readily inferred is based on the theory that civil courts are courts of general jurisdiction and the people have a right, unless expressly or impliedly debarred to insist for free access to the courts of general jurisdiction of the State. Indeed, the principle is not limited to civil courts alone, but applies to all courts of general jurisdiction including criminal courts. The rule as stated above relating to strict construction of provisions excluding jurisdiction of courts of general jurisdiction was recently expressly approved by the Supreme Court."

(emphasis supplied)

13. In *United India Insurance Company Ltd. vs. Ajay Sinha & another* : (2008) 7 SCC 454 it has been held:

"35- Therefore, it is a fundamental presumption in statutory interpretation that ordinary civil courts have jurisdiction to decide all matters of a civil nature. As a corollary,

(i) provisions excluding jurisdiction of civil courts should receive strict construction. (See *Bhagwat Singh vs. State of*

Rajasthan and Raichand Amulakh Shah vs. Union of India), and

(ii) provisions conferring jurisdiction on authorities and tribunals other than civil courts (See *Kasturi and Sons (P) Ltd. vs. N Salivateswaran and Upper Doab Sugar Mills Ltd. vs. Shahdara (Delhi) Saharanpur Light Railway*) have to be strictly construed. This principle, taken from Principles of Statutory Interpretation by G.P Singh, Ninth Edition, page 630, was cited with approval in *Swamy Atmananda and Ors. vs. Sri Ramakrishna Tapovanam*.

14. In the case at hand, the Appellant having failed to establish a clear bar for the Civil Court to adjudicate as regard to excess billing. Expansion of the jurisdiction by the Judicial interpretation by the Courts ipso facto does not tantamount to exclusion of Civil Court jurisdiction.

15. In view whereof, no substantial question of law arises for consideration.

16. Consequently, Appeal fails and is dismissed. No costs.

Appeal dismissed.

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APPELLATE CIVIL

*Before Mr. Justice A.M. Khanwilkar, Chief Justice &
Mr. Justice J.K. Maheshwari*

F.A. No. 323/2014 (Jabalpur) decided on 18 August, 2015

AKSHAY DOOGAD

Vs.

STATE OF M.P. & ors.

...Appellant

...Respondents

Specific Relief Act (47 of 1963), Section 34, Civil Procedure Code (5 of 1908), Section 96 and Registration Act (16 of 1908), Sections 17 & 49 - Specific performance of contract - Suit was dismissed only on the ground that agreement to sell was unregistered document and hence inadmissible in evidence - Held - Document required to be registered, if unregistered, can be admitted in evidence as evidence of a contract in a suit for specific performance - Suit filed by the appellant is decreed and impugned judgment and decree set aside. (Paras 2, 8 & 13)

विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 34, सिविल प्रक्रिया संहिता (1908 का 5), धारा 96 एवं रजिस्ट्रीकरण अधिनियम (1908 का 16), धाराएं 17 व 49 – संविदा का विनिर्दिष्ट पालन – वाद केवल इस आधार पर खारिज किया गया कि विक्रय का अनुबंध अपंजीकृत दस्तावेज था और इस वजह से साक्ष्य में अग्राह्य है – अभिनिर्धारित – दस्तावेज का पंजीकृत होना अपेक्षित है, यदि अपंजीकृत है, विनिर्दिष्ट पालन के लिये वाद में संविदा के साक्ष्य के रूप में साक्ष्य में स्वीकार किया जा सकता है – अपीलार्थी द्वारा प्रस्तुत वाद डिक्लीत तथा आक्षेपित निर्णय एवं डिक्ली अपास्त।

Cases referred :

2009 (1) MPWN 29, 2013 (4) MPHT 432, 2010 (3) MPLJ 500.

Sanjay Kumar Verma, for the appellant.

Sanjay Kumar Malvia, for the respondents.

J U D G M E N T

The Judgment of the Court was delivered by : **A.M. KHANWILKAR, C.J. :-** This first appeal takes exception to the judgment and decree passed by the 3rd Additional District Judge, Chhindwara in Civil Suit No.22-A/12. The said suit was filed by the appellant for relief of specific performance of agreement executed between the parties on 17.2.2010, in respect of property situated in Ward No.32, P.H. No.22, B.No.177, R.N.M. Chhindwara-1. The suit was resisted by the respondents/defendants.

2. The trial Court framed issues relevant to the relief claimed in the suit. As regards the issue whether the suit agreement was executed between the parties, the same has been answered in favour of the appellant/plaintiff. Even the issue of readiness and willingness has been answered in favour of the plaintiff. The trial Court after analyzing the evidence on record has also noticed that the defendants have only questioned the value of the property in the entire cross examination and not the factum of execution of the agreement or about their commitment to transfer the property in favour of the plaintiff. Although, the trial Court in the impugned judgment answered all the issues in favour of the plaintiff, rejected the relief of specific performance on the sole ground that the agreement executed between the parties was unregistered document and as such it was inadmissible in evidence. The trial Court in support of that opinion has placed reliance on the decision of the learned Single Judge of this Court in the case of *Narbada Prasad Agrawal Vs. Omprakash Bhavsar*¹ and on another decision in the case of *Kailashchandra*

*Vs. Dwarkadheesh and others*². As a result, the suit came to be dismissed with direction to the respondents/defendants to refund the earnest money amount received by them at the time of execution of the agreement along with interest @ 6% per annum thereon with costs of the suit. This decree is the subject matter of challenge in the present appeal.

3. After the notice of appeal was served on the Respondents/Defendants No.1 to 3, the respondents filed cross objection under Order 41 Rule 22 on 7.7.2014, bearing Document No.4697/2014. Notably, the cross objection is only about the quantum of costs and the direction to refund the earnest money amount with interest. No other ground has been taken in the cross objection, in particular, to question the finding of the trial Court on the other relevant issues such as factum of execution of agreement and on readiness and willingness to perform the obligation under the said agreement of the plaintiff.

4. Counsel for the appellant submits that the view taken by the trial Court is in the teeth of Supreme Court's decision in the case of *S. Kaladevi Vs. V. R. Somasundaram and others*³. According to the appellant, this decision was pressed into service before the trial Court but the trial Court has failed to analyse the same, though directly on the point and in favour of the appellant. Further, as the cross objection has been filed by the defendant limited to the direction to refund the earnest money amount alongwith interest and costs of the suit, no other issue arises for consideration of this Court; and that if the appellant succeeds in questioning the erroneous view taken by the Trial Court, must succeed in getting complete relief as prayed in the suit – of decree of specific performance.

5. Counsel for the respondent in his argument did make an unsuccessful and feeble attempt to question the finding recorded by the trial Court on other issues, besides the grounds urged in the cross objection filed by the defendant.

6. Having considered the rival submissions, the moot question which arise for our reconsideration is, whether the opinion recorded by the trial Court that the suit agreement being unregistered document, relief of specific performance cannot be granted to the plaintiff, is correct?

7. We find force in the submission of the appellant that the only issue that needs to be decided in the appeal is about the correctness of the said finding and nothing more; as no cross objection has been filed by the Respondents/

Defendants No.1 to 3 to question the correctness of the finding of fact recorded by the trial Court on other issues. Moreover because, the trial Court after thorough analysis of the evidence on record has rightly found as of fact that the suit agreement was executed between the parties. Even on the factum of readiness and willingness of the plaintiff to discharge his obligation under the suit agreement, has been rightly answered in favour of the plaintiff. We have no hesitation in affirming the said findings of the trial Court.

8. The plaintiff has been non-suited only on the ground that the suit agreement being unregistered document was inadmissible in evidence and, therefore, decree of specific performance on the basis of such agreement cannot be granted. This view taken by the Trial Court is in the teeth of the exposition of the Supreme Court in the case of *S. Kaladevi* (supra). This very contention has been negatived by the Supreme Court in Paragraph Nos.11, 12 and 16 of the said decision, in particular, which read thus:-

“11. The main provision in Section 49 provides that any document which is required to be registered, if not registered, shall not affect any immovable property comprised therein nor such document shall be received as evidence of any transaction affecting such property. Proviso, however, would show that an unregistered document affecting immovable property and required by 1908 Act or the Transfer of Property Act, 1882 to be registered may be received as an evidence to the contract in a suit for specific performance or as evidence of any collateral transaction not required to be effected by registered instrument. By virtue of proviso, therefore, an unregistered sale deed of an immovable property of the value of Rs. 100/- and more could be admitted in evidence as evidence of a contract in a suit for specific performance of the contract. Such an unregistered sale deed can also be admitted in evidence as an evidence of any collateral transaction not required to be effected by registered document. When an unregistered sale deed is tendered in evidence, not as evidence of a completed sale, but as proof of an oral agreement of sale, the deed can be received in evidence making an endorsement that it is received only as evidence of an oral agreement of sale under the proviso to Section 49 of 1908 Act.

12. Recently in the case of *K.B. Saha and Sons Private*

Limited v. Development Consultant Limited, (2008) 8 SCC 564 this Court noticed the following statement of Mulla in his Indian Registration Act, 7th Edition, at page 189:-

".....The High Courts of Calcutta, Bombay, Allahabad, Madras, Patna, Lahore, Assam, Nagpur, Pepsu, Rajasthan, Orissa, Rangoon and Jammu & Kashmir; the former Chief Court of Oudh; the Judicial Commissioner's Court at Peshawar, Ajmer and Himachal Pradesh and the Supreme Court have held that a document which requires registration under Section 17 and which is not admissible for want of registration to prove a gift or mortgage or sale or lease is nevertheless admissible to prove the character of the possession of the person who holds under it....."

This Court then culled out the following principles:-

"1. A document required to be registered, if unregistered is not admissible into evidence under Section 49 of the Registration Act.

2. Such unregistered document can however be used as an evidence of collateral purpose as provided in the proviso to Section 49 of the Registration Act.

3. A collateral transaction must be independent of, or divisible from, the transaction to effect which the law required registration.

4. A collateral transaction must be a transaction not itself required to be effected by a registered document, that is, a transaction creating, etc. any right, title or interest in immovable property of the value of one hundred rupees and upwards.

5. If a document is inadmissible in evidence for want of registration, none of its terms can be admitted in evidence and that to use a document for the purpose of proving an important clause would not be using it as a collateral purpose."

To the aforesaid principles, one more principle may be added, namely, that a document required to be registered, if unregistered, can be admitted in evidence as evidence of a

contract in a suit for specific performance.

.....

16. The argument of learned counsel for the respondents with regard to Section 3(b) of 1963 Act is noted to be rejected. We fail to understand how the said provision helps the respondents as the said provision provides that nothing in 1963 Act shall be deemed to affect the operation of 1908 Act, on documents. By admission of an unregistered sale deed in evidence in a suit for specific performance as evidence of contract, none of the provisions of 1908 Act is affected; rather court acts in consonance with proviso appended to Section 49 of 1908 Act.”

9. The Supreme Court has opined that when an unregistered document is tendered in evidence, not as evidence of a completed sale, but as proof of an agreement of sale, the deed can be received in evidence making an endorsement that it is received only as evidence of an oral agreement of sale under the proviso to Section 49 of the Act of 1908. The Court went to observe that admission of an unregistered sale deed by the Court in such cases would be in consonance with the proviso appended to Section 49 of the Act of 1908. Considering this decision, the view taken by the trial Court on the issue under consideration will have to be overturned. The reason why the trial Court has not adverted to this Supreme Court decision has remained unexplained. We need not dilate on that matter as we have no hesitation in accepting the argument of the appellant that the sole basis on which the relief claimed by the appellant in the suit for specific performance has been rejected cannot be countenanced.

10. We, accordingly, reverse the said opinion of the trial Court and as a necessary corollary decree the suit in its entirety by granting relief of specific performance to the appellant as prayed.

11. The next question is whether the respondents/ defendants can be permitted to question the finding of fact recorded by the trial Court on other issues. As aforesaid, the respondent has filed cross objection limited to challenge to the direction issued by the trial Court to refund the earnest money amount along with interest and costs of the suit and nothing more. In absence of challenge to the said findings, it is not necessary for us to examine the matter any further. In any case, the finding of fact recorded by the trial Court on the said two crucial issues, is founded on cogent evidence as analyzed by the trial Court including the defendants having questioned the agreement only

on the quantum mentioned therein and not on any other count. Accordingly, those findings will have to be affirmed and it will have to be held that those issues have been correctly answered by the trial Court.

12. As regards the grounds urged in the cross-objection, the same do not survive for consideration in view of the opinion already expressed hitherto. The question of correctness of the direction given by the trial Court to refund the earnest money amount along with interest and costs of the suit would have arisen, if the findings of the trial Court on the issue under consideration was to be confirmed. As indicated earlier, the suit deserves to be decreed in its entirety by granting relief of specific performance as claimed by the appellant/plaintiff.

ORDER

13. Accordingly, the impugned judgment and decree passed by the trial Court is quashed and set aside. Instead, the suit bearing No. 22-A/2012 filed by the appellant is decreed and the relief of specific performance, as prayed, is granted on condition that the appellant/plaintiff shall deposit the balance/outstanding agreement amount, if already not deposited, along with interest on such amount at the rate of 12% per annum (which is commensurate with the Nationalized Bank lending rate) from the date of the suit to the date of the decree and in addition further interest at the rate of 6% per annum from the date of the decree to the date of payment. The amount already paid by the appellant pursuant to the impugned decree, will have to be given adjustment in the final decretal amount to be paid by the appellant. The cross-objection is also disposed of on the above terms. No order as to costs. Parties to bear their own costs of the proceedings.

Order accordingly.

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CIVIL REVISION

Before Mr. Justice S.K. Gangele

C.R. No. 135/2015 (Jabalpur) decided on 29 July, 2015

RAJESH PANDEY

...Applicant

Vs.

GEETA DEVI PODDAR

...Non-applicant

A. Accommodation Control Act, M.P. (41 of 1961), Section 23-A - Landlord - Application for eviction filed in October, 2011 - Maintainability - Accommodation is coparcenary property - Husband

died on 06.07.2007 - Partition held on 29.03.2011 - Applicant became owner - The applicant (landlord) had right of ownership in coparcenary property which became absolute after partition - One of the coparceners can file suit for eviction if others have no objection - Hence application is maintainable. (Para 9)

क. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 23-ए - मकानमालिक - बेदखली हेतु आवेदन अक्टूबर, 2011 में प्रस्तुत किया गया - पोषणीयता - निवास स्थान सहदायिकी संपत्ति है - पति की मृत्यु 06.07.2007 को हुई - विभाजन 29.03.2011 को किया गया - आवेदक स्वामी बना - आवेदक (मकानमालिक) को सहदायिकी संपत्ति में स्वामित्व का अधिकार था जो विभाजन पश्चात् पूर्ण हो गया - यदि दूसरे सहदायिकों को आपत्ति न हो तो एक सहदायिक बेदखली हेतु वाद प्रस्तुत कर सकता है - अतः आवेदन पोषणीय है।

B. Accommodation Control Act, M.P. (41 of 1961), Section 23-A - Coparcenary property - Partition held - The application for eviction filed before completion of one year from the date of partition - The landlord has right of ownership which became absolute upon partition - One coparcener can file suit for eviction - Application maintainable. (Para 9)

ख. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 23-ए - सहदायिकी संपत्ति - विभाजन हुआ - बेदखली का आवेदन विभाजन की तिथि से एक वर्ष पूर्ण होने के पूर्व प्रस्तुत किया गया - मकानमालिक को स्वामित्व का अधिकार है जो विभाजन होने पर पूर्ण हो जाता है - एक सहदायिक बेदखली हेतु वाद प्रस्तुत कर सकता है - आवेदन पोषणीय।

C. Accommodation Control Act, M.P. (41 of 1961), Section 23-A - Bonafide need - Agreement to sale executed - During pendency of proceedings it is cancelled - Need is bonafide. (Para 10)

ग. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 23-ए - वास्तविक आवश्यकता - विक्रय का करार निष्पादित - कार्यवाहियां लंबित रहने के दौरान इसे निरस्त किया गया - आवश्यकता वास्तविक है।

D. Accommodation Control Act, M.P. (41 of 1961), Section 23-A - Bonafide need - Applicant old lady - Living in second floor - Difficult to climb second floor - Need - Not whimsical or fanciful - Genuine. (Para 11)

घ. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 23-ए -

वास्तविक आवश्यकता - आवेदिका वृद्ध महिला - द्वितीय मंजिल पर निवासरत - द्वितीय मंजिल चढ़ने में कठिनाई - आवश्यकता - सनकी या काल्पनिक नहीं - वास्तविक।

E. Procedure - Revision - Listed for admission - Not necessary to consider the argument of respondent. (Para 7)

उ. प्रक्रिया - पुनरीक्षण - ग्राह्यता के लिये सूचीबद्ध - प्रत्यर्थी के तर्क पर विचार करना आवश्यक नहीं।

Cases referred :

2011 (4) MPLJ 191, 2011 (4) MPLJ 195, 2004 (4) MPLJ 354, 2004 (4) MPLJ 359, AIR 2004 SC 3484, MPWN 1993 (1) Note 133, (2008) 6 SCC 745, AIR 1990 SC 540, 1995 (1) SCC 198, 2008 (15) SCC 538, 1953 SC 235.

Amit Sahni, for the applicant.

R.K. Verma with Ashish Kumar Nema, for the non-applicant.

ORDER

S.K. GANGELE, J. :- The petitioner has filed this revision petition against the order dated 09.03.2015 (Annexure-A-11) passed by the Rent Controlling Authority in Case No.08/A-90/2012.

2. The respondent filed a suit for eviction under Section 23-J of M.P. Accommodation Control Act 1961 (hereinafter in short 'the Act 1961'). She pleaded that she is aged about 88 years. Her husband was died on 06.07.2007, and she belongs to special category of landlord as defined under Section 23-J of the Act 1961 hence, she is entitled to file the suit for eviction before the Authority.

3. The suit accommodation was rented out initially at the rate of Rs.20/- per month. Subsequently, rent of the accommodation was enhanced at the rate of Rs.75/- and Rs.500/- per month respectively. The suit accommodation was rented out for residential purpose, however, the petitioner had changed the purpose and also constructed two shops and has been doing business in the aforesaid shops. The respondent has been suffering from the diecease of paralysis and she has been residing in the second floor along with his son in her house No. 888, in front of Police Station Kotwali, Ghamandi Chowk, Jabalpur. It is not possible

for her to climb the stairs. She received right of ownership of the house in a partition which was made between the parties on 29.03.2011. Earlier an agreement was executed with one Builder to sell the property, however, the agreement was subsequently cancelled. The respondent pleaded that the suit accommodation is required for her for bonafide need.

4. The petitioner/defendant denied the claim of the plaintiff/respondent. The defendant submits that the plaintiff is not eligible to invoke the jurisdiction of the authority. The plaintiff does not belong to special category of landlord hence, the suit filed by the respondent-plaintiff is not maintainable. He further pleaded that he had constructed the shops in the premises with the consent of the landlord and his father. The defendant further denied the fact that the plaintiff has been suffering from the ailment of paralysis.

5. The Rent Controlling Authority after appreciation of evidence has held that the plaintiff is entitled to invoke the jurisdiction of the authority being a specified category of landlord under Section 23-J of the Act 1961. There is a bonafide need to the plaintiff. She is an old lady and has been suffering from ailment of paralysis hence it is not possible for her to live in the second floor of the house. On the basis of aforesaid findings, the authority allowed the suit in favour of the respondent and passed an order of eviction.

6. Learned counsel appearing on behalf of the petitioner has submitted that the provisions of Section 23-J of the Act 1961 are not applicable in the present case. The respondent-plaintiff failed to prove her bonafide need of the suit accommodation. Actually, she wants to sell the property to other persons and Builders. Earlier an agreement was executed in this regard. That agreement was not cancelled by the valid agreement hence, there is no bonafide need to the plaintiff. In support of his contentions learned counsel relied on the following judgments.

(1) *Dilip Baghela vs. Virendra Kumar Choubey*, reported in 2011 (4) MPLJ 191.

(2) *Kasturi Devi Jain vs. Union Bank of India and others* reported in 2011 (4) MPLJ 195.

(3) *Chainmal vs. Rani Bai*, reported in 2004 (4) MPLJ 354.

(4) *Rahul Banerjee and others vs. State of M.P.* Reported

in 2004 (4) MPLJ 359.

- (5) *Shakuntla Bai and others vs. Narayan Das and others* reported in AIR 2004 SC 3484.
- (6) *Baboolal Shrivastava vs. Smt. Jamuna Bai*, reported in MPWN 1993 (1) Note 133.
- (7) *Chandrakant Shankarrao Machale vs. Parubai Bhairu Mohite* reported in (2008) 6 SCC 745.
- (8) *Smt. Bismillah vs. Janeshwar Prasad and others*, reported in AIR 1990 SC 540.
- (9) *Ramti Devi (Smt) vs. Union of India* reported in 1995 (1) SCC 198.
- (10) *Sulochana vs. Rajinder Singh* reported in 2008 (15) SCC 538.
- (11) *Messrs Trojan & CO. vs. R.M.N.N. Nagappa Chettair* reported in 1953 SC 235.

7. Learned Senior counsel appearing on behalf of the respondent opposed the admission of this revision petition. However, the revision petition is being heard on admission hence, it is not necessary to consider the arguments of the learned Senior counsel of the respondent.

8. Section 23-J of the Act 1961 defines landlord of special category. Section 3 prescribes Special Category, a widow or divorce wife. Proviso of Section 23-A of the Act 1961 prescribes restriction in regard to submitting an application by the landlord in regard to bonafide requirement. The proviso reads as under:-

" Eviction of tenants on Grounds of bonafide requirement."

23-A. Special provision for eviction of tenant on ground of bonafide requirement.- Notwithstanding anything contained in any other law for the time being in force or contract to the contrary, a landlord may submit an application, signed and verified in a manner provided in Rules 14 and 15 of Order VI of the First Schedule to the Code of Civil Procedure, 1908,

(V of 1908) as if it were a plaint to the Rent Controlling Authority on one or more of the following grounds for an order directing the tenant to put the landlord in possession of the accommodation namely:-

(a) that the accommodation let for residential purpose is required "bonafide" by the landlord for occupation as residence for himself or for any member of his family, or for any person for whose benefit, the accommodation is held and that the landlord or such person has no other reasonably suitable residential accommodation of his own in his occupation in the city or town concerned.

(i) any accommodation which having been let for use as a residence is without the express consent of the landlord, used wholly or partly for any non-residential purpose;

(ii) any accommodation which has not been let under an express provision of contract for non-residential purpose;

(iii) That the accommodation let for non-residential purposes is required "bonafide" by the landlord for the purpose of continuing or starting his business or that of any of his major sons or unmarried daughters, if he is owner thereof or for any person for whose benefit the accommodation is held and that the landlord or such person has no other reasonably suitable non-residential accommodation of his own in his occupation in the city or town concerned:

Provided that where as person who is a landlord has acquired any accommodation or any interest therein by transfer, no application for eviction of tenant of such accommodation shall be maintainable at the instance of such person unless a period of one year has elapsed from the date of such acquisition."

9. The proviso mandates that no application for eviction of a tenant shall be maintainable unless a period of one year is elapsed from the date of acquisition. The arguments of the learned counsel for the petitioner is that the petitioner acquired the right of ownership by way of partition on 29.03.2011 thereafter, she filed the application in October, 2011. Earlier the house was in

the name of husband of the respondent. It was a coparcenary (sic:coparcenary) property. Her husband died on 06.07.2007 and thereafter, the suit accommodation came in the ownership of the respondent by way of partition dated 29.03.2011. The respondent had right of ownership in the coparcenary (sic:coparcenary) property and thereafter, her right of ownership become absolute after partition. It is well settled principle of law that a coparcenor (sic:coparcener) can file a suit for eviction if other co-parceners (sic:coparceners) have no objection. In such circumstances, in my opinion the arguments advanced by the learned counsel for the petitioner that the application filed by the respondent was not maintainable before the Rent Controlling Authority has no substance.

10. It is further contended by the counsel for the petitioner that the registered agreement was executed with Builder in regard to sell of the property on 07.04.2011 and that agreement was not cancelled by the respondent hence, the need of the respondent was not bonafide. However, it is a fact that the aforesaid agreement was cancelled subsequently during the pendency of the criminal proceedings. Hence, it cannot be said that there is no bonafide need to the respondent.

11. From the evidence it is clear that the respondent is an old lady. She deposed that she has been residing on the second floor and she is having the ailment of paralysis. That fact has been proved by way of evidence. Even though looking to the age of the land lady which is near about 80-82 years, if she wants to reside on the ground floor, her need cannot be said to be whimsical or fanciful rather it is genuine because in old age, it is very difficult to climb the stairs. It is also very difficult to reside in the second floor. The tenancy is 100 years old.

12. Looking to the over all facts of the case, in my opinion, there is no illegality or irregularity in the order impugned. Consequently, I do not find any merit in this revision petition. It is hereby dismissed.

13. Looking to the facts of the case, the petitioner is granted three months time to vacate the suit accommodation subject to condition that the petitioner shall pay the regular rent, arrears of rent and future rent, if any, and submit an undertaking before the Rent Controlling Authority that he shall vacate the suit accommodation peacefully within a period of three months from today. No order as to the costs.

Revision dismissed.

I.L.R. [2016] M.P., 230

CIVIL REVISION

Before Mr. Justice S.K. Gangele

Civil Rev. No. 537/2014 (Jabalpur) decided on 16 September, 2015

KAMAR MOHAMMED KHAN

...Applicant

Vs.

BEGUM SABIHA SULTAN & ors.

...Non-applicants

Civil Procedure Code (5 of 1908), Section 9 - Concealment of fact - Plaintiff filed civil suit for declaration and permanent injunction - Plaintiff concealed the fact that earlier also he had filed a suit in regard to same property and Court had refused to grant relief - Concealment of fact amounts to playing fraud with Court - Revision dismissed with cost of Rs. 10,000/-. (Paras 22 & 26)

सिविल प्रक्रिया संहिता (1908 का 5), धारा 9 - तथ्य का छिपाव - वादी ने घोषणा एवं स्थाई व्यादेश हेतु सिविल वाद प्रस्तुत किया - वादी ने इस तथ्य को छिपाया कि पूर्व में भी उसने समान संपत्ति के संबंध में वाद प्रस्तुत किया था और न्यायालय ने अनुतोष प्रदान करने से इंकार किया था - तथ्य का छिपाव, न्यायालय के साथ कपट करने की कोटि में आता है - रु. 10,000/- व्यय के साथ पुनरीक्षण खारिज।

Cases referred :

(1994) 1 SCJ 179, AIR 1995 SC 1795, 1995 Supp (2) SCC 388,
(2006) 7 SCC 416, (2003) Supp. 3 SCR 352, AIR 2011 Supreme Court
1989, AIR 1967 SC 1384.

June Choudhary with Jaya Laxshmi Iyer, for the applicant.

Rajesh Pancholi, for the non-applicants No. 1, 4, 5, 6 & 7.

Kapil Jain, for the non-applicant no. 8.

ORDER

S.K. GANGELE, J. :- This revision petition has been filed against the order dated 06/09/2014 by which the court admitted the first appeal filed by the respondent No. 1 against the judgment and decree dated 28/07/2006 passed in Civil Suit No.585/2006.

2. The present petitioner and respondent No. 2 filed a suit for declaration and permanent injunction. They pleaded that father of the plaintiffs were in possession on the suit land in the year 1943-44 on the basis of an Inayatnama. During life time

their father bequeathed the suit property by Hiba on 31st August, 1964 in favour of plaintiffs. The possession of the suit property was also handed over to the plaintiffs, since then the plaintiffs were in possession on the suit property.

3. The plaintiff inspected the revenue record and in the revenue record the name of respondent No. 1 Mehar Taj Smt. Sajida Sultan ruler of Bhopal was recorded as Bhoomiswami and the defendant No. 2. Mohammad Mansoor Ali Khan was the son of respondent No. 1 Mehar Taj Smt. Sajida Sultan.

4. Defendant no. 1 Mohammad Israr in his written statement pleaded that the plaintiffs are the owner of 2.35 acres of land and remaining portion of the land area 0.25 acres is in the possession of defendant No. 1. In the aforesaid suit, defendant No. 2 was ex-parte. On the basis of pleadings of the plaintiffs and the written statement filed by the defendant No. 1, the trial court has held that the suit land was given on Inayatnama to the father of the plaintiffs by Nabab Hameedullah Khan and Mehar Taj Smt. Sajida Sultan consented the said Inayatnama and thereafter father of the plaintiffs Mr. Mumtaz Mohammad Khan by Hibanama had given the suit land to the plaintiff since then they had been in possession on the suit land area 2.35 acres. Consequently, the trial court issued permanent injunction in favour of the plaintiffs and also declared that the plaintiffs are the owner of the suit land.

5. In the aforesaid proceedings, the respondent No. 1 Begum Sabiha Sultan was not a party. When she noticed the judgment and decree passed by the trial court, she filed first appeal. She pleaded that Nawab Mehar Taj Smt. Sajida Sultan expired on 04/09/1995 leaving following heirs:

Mehar Taj Smt. Sajida Sultan

Late Mansoor Ali
Khan Patodi (son)

Begum Sabiha Sultan
(Daughter)
(appellant)

Begum Saleha Sultan
(Daughter)
(Respondent No.8)

Smt. Sharmila
Tagore
(Widow)

Saif Ali Khan
(Son)

Ku. Sabah Ali
(Daughter)

Ku. Soha Ali
(Daughter)

(Respondent No.4) (Respondent No.5)

(Respondent No.6) (Respondent No.7)

She was owner and Bhoomiswami of the suit land along with other properties. The plaintiffs by playing fraud on the Court obtained the decree of declaration, title and permanent injunction by suppressing certain facts to the effect that the name of late Nawab Taj Smt. Sajida Sultan was recorded as Bhoomiswami in revenue record and earlier a civil suit No. 106/A/2003 was filed in regard to the same property. It was renumbered as Civil Suit No. 48-A/2004. The suit was instituted against Sabir Ali Asfaq Ali and State of M.P. and subsequently name of Mansoor Ali Khan Patodi was also added as party. The suit was decided vide judgment and decree dated 24/03/2005.

6. The suit was instituted by Kamar Mohammad Khan and Smt. Ashiya Sultan for declaration and permanent injunction. It was pleaded by the plaintiffs that the land was gifted to their father Mumtaz Mohammad Khan on 01.08.1944 by the then Nawab of Bhopal. Thereafter, the father of plaintiffs gifted the suit land to them on 31.08.1964. Since then the plaintiffs were in possession on the suit land. In the aforesaid Civil Suit No.48-A/2004 Sabir Ali, Ashfaq Ali, Mohammad Asrar Ali and Mansoor Ali Khan Patodi were the parties. Defendants No.1, 2, 4 and 5 were exparte in the aforesaid civil suit. A photocopy of the judgment dated 24.03.2005 passed in Civil Suit No.48-A/2004 has been filed in this revision as Annexure R/3 by the respondents. The Additional District Judge while deciding the case had held that the recorded Bhoomiswami of the land Mehar Taj Smt. Sajida Sultan was not joined as party in the suit. She was a necessary party. Plaintiffs did not disclose the fact that when the cause of action arose against the recorded Bhoomiswami. The Court further held that unless the recorded Bhoomiswami or her heirs be added as party in the suit, the suit was not maintainable. The trial Judge further held that plaintiffs did not prove the fact that how their father became Bhoomiswami of the land, hence, the claim of the plaintiffs that their father had gifted the suit land to them is not maintainable. The trial Court dismissed the suit in regard to grant of declaration of title and granted only the relief of permanent injunction. The trial Court specifically held that the plaintiffs failed to prove the fact of ownership, Bhoomiswami.

7. The present petitioner and respondent No.2 Begum Ayasha Sultan again filed another suit which is registered as Civil Suit No.585-A/2006 by suppressing the fact that earlier in regard to same land a civil suit was instituted and that was dismissed by the Additional District Judge. In the aforesaid suit the recorded Bhoomiswami late Nawab Mehar Taj Smt. Sajida Sultan was not made party. The suit was decreed by the trial Court.

8. Alongwith the appeal an application under Section 5 and 17 of the Limitation Act read with Section 151 of the C.P.C. was also filed. The appellant pleaded in the application that she is the owner of the suit land. The mother of the appellant late Nawab Mehar Taj Smt. Sajida Sultan was the owner of the disputed land bearing khasra No.15/2 area 2.50 acres. She died on 4th September, 1995. After her death, the appellant got 1/4th share in the suit land. The civil suit was instituted by the respondents No. 1 & 2 with collusion of respondent No.3 to grab the suit land. The respondents No. 1 & 2 obtained judgment and decree without joining heirs of late Nawab Mehar Taj Smt. Sajida Sultan as defendant. The judgment and decree was obtained by the plaintiffs by playing fraud on the Court because the fact that earlier in regard to same land a suit was dismissed by the Additional District Judge on 24.03.2005 was concealed.

9. The appellant came to know about the judgment and decree on 24.04.2014, when she received the copy of the revision petition alongwith the notice from the Board of Revenue, Gwalior. Thereafter, the appellant applied for certified copies of documents on 25.04.2014. The copies were received on 28.07.2014 and, thereafter, the appeal has been filed. Hence, the appeal is within limitation.

10. The trial Court vide impugned order has held that the appeal filed by the appellant is within limitation because the plaintiffs-respondent No. 2 concealed the fact that earlier in regard to same land a civil suit for declaration of title was dismissed. The appellant is the necessary party because she is the legal heir/ daughter of recorded owner Bhoomiswami of the suit land of Nawab Mehar Taj Smt. Sajida Sultan. The appellant came to know about the exparte judgment and decree on 21.04.2014, thereafter, she filed an application for receiving certified copies on 25.04.2014. She received copies on 28.07.2014 and filed appeal on 12.08.2014. Hence, the appeal is within limitation. The Appellate Court admitted the appeal.

11. Learned Senior-counsel appearing on behalf of the petitioner has contended that the impugned order passed by the Appellate Court admitting the appeal without issuing notice to the petitioner on the application of limitation is illegal and against the law. It is further contended by the learned Senior Counsel that Appellate Court had condoned the delay without notice to the petitioner, hence, the order passed by the Appellate Court of admitting appeal and condoning the delay is against the law.

12. Contrary to this the learned counsel appearing on behalf of the respondents No.1, 4, 5, 6 and 7, who are the contesting party, has contended that the order passed by the Appellate Court is in accordance with law. The petitioner played a fraud with the Court and obtained the judgment and decree without adding necessary party in the proceedings. The fact that in regard to same land earlier a civil suit was filed has been concealed by the petitioner-plaintiffs, hence, the judgment and decree passed by the trial Court is nullity. The period of limitation will start from the date of knowledge to the appellant-respondent No.1.

13. In support of his contentions learned counsel has relied on the following judgments; (i) *S.P. Chengalvaraya Naidu (dead) by L.R's Vs. Jagannath (dead) by L.R's. and Ors* reported in (1994) 1 S.C.J. 179, (ii) *Dhananjay Sharma vs. State of Haryana* reported in AIR 1995 S.C. 1795, (iii) *Afzal vs. State of Haryana* reported in 1995 Supp (2) SCC 388, (iv) *Hamza Haji vs. State of Kerala and another* reported in (2006) 7 SCC 416 and (v) *Ram Preeti Yadav Vs. U.P. Board of High School and Intermediate Education & Others* reported in [(2003) Supp. 3 SCR 352].

14. The admitted facts of the case are that plaintiffs Kamar Mohammad Khan and Ashiya Sultan filed a suit, which was registered as Civil Suit No.585-A/2006 for declaration and permanent injunction in regard to a land bearing khasra No.15/2 area 2.35 acres situate at Bhopal. The suit was filed against Mohammad Israr and Mohammad Mansoor Ali Khan Patodi. In the said civil suit Mohammad Mansoor Ali Khan Patodi was exparte. The defendant No.1 Mohammad Israr in his written statement admitted the fact that the plaintiffs are the owner of 2.25 acres of land and he is in possession of 0.25 acre of land. The trial Court observed the fact of her Highness Nawab Mehar Taj Smt. Sajida Sultan.

15. The trial Court after appreciation of evidence passed a decree of declaration declaring that the plaintiffs are the owner and in possession on the suit land area 2.35 decimal bearing khasra No.15/2 situate at Bhopal and further passed a decree of permanent injunction restraining the defendants No.1 & 2 from interfering in the possession of the plaintiffs. In the aforesaid suit, the respondent No.1 was not joined as a party although she is the daughter of Nawab Mehar Taj Smt. Sajida Sultan, who was died on 04.09.1995. Nawab Mehar Taj Smt. Sajida Sultan had one son namely late Mohammad Mansoor Ali Khan Patodi and two daughters namely begum Sabiha Sultan and begum

Saleha Sultan. When the name of Nawab Mehar Taj Smt. Sajida Sultan was recorded as Bhoomiswami against the suit land, in such circumstances, the respondent No.1 being the legal heir of Nawab Mehar Taj Smt. Sajida Sultan was a necessary party.

16. It is also a fact that earlier a civil suit was filed in regard to same suit land for declaration and permanent injunction by Kamar Mohammad Khan and Ashiya Sultan i.e. the same plaintiffs who filed the Civil Suit No.585-A/2006. It was initially registered as Civil Suit No.106-A/2003. Later on it was re-numbered as Civil Suit No.48-A/2004. In the aforesaid suit the plaintiffs pleaded that they are the owner and in possession on the suit land bearing khasra No.15/2 are 2.50 acres situate at Bhopal. The trial Judge A.D.J. granted a decree of permanent injunction, however, dismissed the claim of the plaintiffs for declaration. The trial Judge specifically observed that plaintiffs failed to prove the fact that they are the owner of the suit land in para 9 of the judgment. The trial Judge further observed that the Bhoomiswami of the suit land is Nawab Mehar Taj Smt. Sajida Sultan, she and her legal heirs were not added as a party. There is no documentary evidence to prove that the plaintiffs were in possession on the suit land.

17. From the admitted facts, it is clear that the petitioner and another plaintiff who filed the suit and obtained the judgment and decree dated 28.07.2014 passed in Civil Suit No.585-A/2006 did not disclose the fact that earlier in regard to same land a civil suit was filed and the trial (sic:trial) Court dismissed the claim in regard to declaration. Apart from this the legal heirs of Nawab Mehar Taj Smt. Sajida Sultan, the respondent No.1 who filed the appeal subsequently were not added as party in the aforesaid suit except Mohammad Mansoor Ali Khan Patodi.

18. The Supreme Court in the matter of *S. P. Chengavaraya Naidu (dead) by L.R's. vs. Jagannath (dead) by L.R's. & others* reported in (1994) 1 S.C.J. 179 has held as under in regard to fraud and its effect :

"Fraud-avoids all judicial acts, ecclesiastical or temporal" observed Chief Justice Edward Coke of England about three centuries ago. It is the settled proposition or law that a judgment or decree obtained by playing fraud on the Court is a nullity and non-est in the eyes of law. Such a judgment/decre by the first Court or by the highest court

has to be treated as a nullity by every court, whether superior or inferior. It can be challenged in any Court even in collateral proceedings.

19. The same principle in regard to fraud and its effect in judicial proceedings has further been explained by the Apex Court in the matter of *Hamza Haji vs State of Kerala* and another reported in (2006) 7 SCC 416 the Court has held as under :

10. *It is true, as observed by De Grey, C.J., in R. Vs. Duchess of Kingston that:*

" 'Fraud' is an extrinsic, collateral act, which vitiates the most solemn proceedings of courts of justice. Lord Coke says it avoids all judicial acts ecclesiastical and temporal".

11. *In Kerr on Fraud and Mistake, it is stated that :*

"In applying this rule, it matters not whether the judgment impugned has been pronounced by an inferior or by the highest Court of judicature in the realm, but in all cases alike it is competent for every Court, whether superior or inferior, to treat as a nullity any judgment which can be clearly shown to have been obtained by manifest fraud."

12. *It is also clear as indicated in Kinch Vs. Walcott that it would be in the power of a party to a decree vitiated by fraud to apply directly to the Court which pronounced it to vacate it. According to Kerr,*

"In order to sustain an action to impeach a judgment, actual fraud must be shown; mere constructive fraud is not, at all events after long delay, sufficient..... but such a judgment will not be set aside upon mere proof that the judgment was obtained by perjury." (See the Seventh Edition, Pages 416-417)

13. *In Corpus Juris Secundum, Volume 49, paragraph 265, it is acknowledged that,*

"Courts of record or of general jurisdiction have inherent power to vacate or set aside their own judgments".

In paragraph 269, it is further stated:

"Fraud or collusion in obtaining judgment is a sufficient ground for opening or vacating it, even after the term at which it was rendered, provided the fraud was extrinsic and collateral to the matter tried and not a matter actually or potentially in issue in the action."

It is also stated:

"Fraud practiced on the court is always ground for vacating the judgment, as where the court is deceived or misled as to material circumstances, or its process is abused, resulting in the rendition of a judgment which would not have been given if the whole conduct of the case had been fair".

14. In American Jurisprudence, 2nd Edition, Volume 46, paragraph 825, it is stated:

"Indeed, the connection of fraud with a judgment constitutes one of the chief causes for interference by a court of equity with the operation of a judgment. The power of courts of equity in granting such relief is inherent, and frequent applications for equitable relief against judgments on this ground were made in equity before the practice of awarding new trials was introduced into the courts of common law.

Where fraud is involved, it has been held, in some cases, that a remedy at law by appeal, error, or certiorari does not preclude relief in equity from the judgment. Nor, it has been said, is there any reason why a judgment obtained by fraud cannot be the subject of a direct attack by an action in equity even though the judgment has been satisfied."

15. The law in India is not different. Section 44 of the Evidence Act enables a party otherwise bound by a previous adjudication to show that it was not final or binding because it is vitiated by fraud. The provision therefore gives

jurisdiction and authority to a Court to consider and decide the question whether a prior adjudication is vitiated by fraud. In Paranjpe Vs. Kanade it was held that: (ILR p.148)

"It is always competent to any Court to vacate any judgment or order, if it be proved that such judgment or order was obtained by manifest fraud;"

16. *In Lakshmi Charan Saha Vs. Nur Ali [ILR 38 Calcutta 936], it was held that:*

"[T] he jurisdiction of the Court in trying a suit [questioning the earlier decision as being vitiated by fraud,] was not limited to an investigation merely as to whether the plaintiff was prevented from placing his case properly at the prior trial by the fraud of the defendant. The Court could and must rip up the whole matter for determining whether there had been fraud in the procurement of the decree."

17. *In Manindra Nath Mitra Vs. Hari Mondal the Court explained the elements to be proved before a plea of a prior decision being vitiated by fraud could be upheld. The Court said: (AIR p.127)*

"With respect to the question as to what constitutes fraud for which a decree can be set aside, two propositions appear to be well established. The first is that although it is not permitted to show that the Court (in the former suit) was mistaken, it may be shown that it was misled, in other words, where the Court has been intentionally misled by the fraud of a party and a fraud has been committed upon the Court with the intention to procure its judgment, it will vitiate its judgment. The second is that a decree cannot be set aside merely on the ground that it has been procured by perjured evidence."

18. *The position was reiterated by the same High Court in Esmile- Ud-Din Biswas and Anr. Vs. Shajoran Nessa Bewa & Ors. [132 INDIAN CASES 897].*

" [I]t was held that it must be shown that fraud was practised in relation to the proceedings in the Court and the decree must be shown to have been procured by practising fraud of some sort, upon the Court."

19. In *Nemchand Tantia Vs. Kishinchand Chellaram (India) Ltd.* [63 Calcutta Weekly Notes 740], it was held that:

"A decree can be re-opened by a new action when the court passing it had been misled by fraud, but it cannot be re-opened when the Court is simply mistaken; when the decree was passed by relying on perjured evidence, it cannot be said that the court was misled."

20. It is not necessary to multiply authorities on this question since the matter has come up for consideration before this Court on earlier occasions. In *S.P. Chengalvaraya Naidu (Dead) by LRs. Vs. Jagannath (Dead) by LRs & Ors.* [(1993) Supp. 3 SCR 422], this Court stated that,

"It is the settled proposition of law that a judgment or decree obtained by playing fraud on the court is a nullity and non est in the eyes of law. Such a judgment/decreed by the first court or by the highest court - has to be treated as a nullity by every court, whether superior or inferior. It can be challenged in any court even in collateral proceedings."

The Court went on to observe that the High Court in that case was totally in error when it stated that there was no legal duty cast upon the plaintiff to come to Court with a true case and prove it by true evidence. Their Lordships stated:

"The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often than not, process of the Court is being abused. Property grabbers, tax evaders, Bank loan dodgers, and

other unscrupulous persons from all walks of life find the court process a convenient lever to retain the illegal-gains indefinitely. We have no hesitation to say that a person, whose case is based on falsehood, has no right to approach the Court. He can be summarily thrown out at any stage of the litigation".

21. *In Ram Preeti Yadav Vs. U.P. Board of High School and Intermediate Education & Others [(2003) Supp. 3 SCR 352], this Court after quoting the relevant passage from Lazarus Estates Ltd. Vs. Beasley [(1956) 1 All ER 341] and after referring to S. P. Chengalvaraya Naidu (Dead) by LRs. Vs. Jagannath (Dead) by LRs & Ors. (supra) reiterated that fraud avoids all judicial acts. In State of A.P. & Anr. Vs. T. Suryachandra Rao [(2005) 6 SCC 149], this Court after referring to the earlier decisions held that suppression of a material document could also amount to a fraud on the Court. It also quoted (at SCC p.155, para 16) the observations of Lord Denning in Lazarus Estates Ltd. Vs. Beasley (supra) that : (All ER p.345 C)*

"No judgment of a Court, no order of a minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything."

20. The Supreme Court in the matter of *Narmada Bachao Andolan vs. State of Madhya Pradesh* reported in AIR 2011 SUPREME COURT 1989 further held that a false statement made in the pleadings intentionally to mislead the Court amounts to a criminal contempt. The Court has held as under :

"141. It is a settled proposition of law that a false statement made in the Court or in the pleadings, intentionally to mislead the Court and obtain a favourable order, amounts to criminal contempt, as it tends to impede the administration of justice. It adversely affects the interest of the public in the administration of justice. Every party is under a legal obligation to make truthful statements before the Court, for the reason that causing an obstruction in the due course of justice "undermines and obstructs the very flow of the unsoiled stream of justice, which has to be kept clear and pure, and no one can be permitted to

take liberties with it by soiling its purity". (Vide: *Naraindas v. Government of Madhya Pradesh & others*, AIR 1974 SC 1252:(1974 Cri.LJ 924); *The Advocate General, State of Bihar v. M/s. Madhya Pradesh Khair Industries & another*, AIR 1980 SC 946 : (1980 Cri LJ 684); and *Afzal & another v. State of Haryana & others*, (1996) 7 SCC397): (AIR 1996 SC 2326 : 1996 AIR SCW 824 : 1996 Cri LJ 1679).

22. From the authoritative pronouncement of the Apex Court the principle of law is that if a favourable judgment and decree or order obtained from a Court by concealing important facts amounts to playing fraud with the Court and the judgment and decree can be assailed at any stage. In the present case, the petitioner and another plaintiff deliberately concealed the fact that in regard to same land they filed earlier a civil suit for No.48-A/2004 and in the aforesaid proceedings the trial Judge refused to grant relief of declaration. Necessary party the respondent No.1 was not joined as a party in the suit. Hence, the act of the petitioner and another plaintiff i.e. respondent No.2 amounts to playing fraud with the Court.

23. Article 123 of the Limitation Act prescribes limitation for filing of appeal against the exparte judgment and decree which reads as under :

Description of appeal	Period of limitation	Time from which period begins to run
123. To set aside a decree passed exparte or to rehear an appeal decreed or heard exparte.	Thirty days	The date of the decree or where the summons or notice was not duly served, when the applicant had knowledge of the decree.

The Article prescribes that "limitation runs from the date of knowledge of the decree."

24. The Supreme Court in the matter of *Panna Lal v. Murari Lal (dead)* by his legal representatives reported in AIR 1967 SC 1384 has held as under in regard to knowledge of the decree :

"The decision was followed in Batulan v. S. K. Dwivedi (1954) ILR 33, Pat 1025 at pp.1050-8 and other cases. We

agree that the expression "knowledge of the decree" in art. 164 means knowledge of the particular decree which is sought to be set aside. When the summons was not duly served, limitation under art. 164 does not start running against the defendant because he has received some vague information that some decree has been passed against him. It is a question of fact in each case whether the information conveyed to the defendant is sufficient to impute to him knowledge of the decree within the meaning of art. 164. The test of the sufficiency is not what the information would mean to- a stranger, but what it meant to the defendant in the light of his previous dealings with the plaintiff and the facts and circumstances known to him. If from the information conveyed to him, the defendant has knowledge of the decree sought to be set, aside, time begins to run against him under art. 164. It is not necessary that a copy of the decree should be served on the defendant. It is sufficient that the defendant has knowledge of the material facts concerning the decree, so that he has a clear perception of the injury suffered by him and can take effective steps to set aside the decree.

25. In the present case, the appellant-respondent No.1 pleaded that she received information about passing the judgment and decree by the Civil Court on 21.04.2014 when she received a notice and copy of revision petition from the Board of Revenue, Gwalior. Thereafter, she applied for certified copies of the documents and judgment and decree on 25.04.2014. She received the same on 28.07.2014 and, thereafter, filed the appeal. Hence, the date of knowledge about the judgment and decree to the appellant-respondent No.1 was 21.04.2014. In the impugned judgment and decree appellant was a necessary party. She was not added as a party. Hence, the impugned judgment and decree was not binding on the appellant. The plaintiffs, petitioner and respondent No.1, can file appeal at any time because the judgment and decree is a nullity. In such circumstances, in my opinion, the Appellate Court has not committed any error of law in admitting the appeal for hearing and holding that the appeal is within limitation without issuing notice to the petitioner.

26. I do not find any merit in this revision petition. It is hereby dismissed. Looking to the facts of the case, it would be just and proper to impose cost of

Rs. 10,000/- Hence, the petition is dismissed with cost of Rs.10,000/- payable to the respondents No.1, 4, 5, 6 & 7.

27. C.C. as per rules.

Revision dismissed.

I.L.R. [2016] M.P., 243

CRIMINAL REVISION

Before Mr. Justice B.D. Rath

Cr. Rev. No. 941/2013 (Gwalior) decided on 11 November, 2014

ANIL JAIN

...Applicant

Vs.

SHILPA JAIN

...Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Section 125 - Maintenance - Whether future salary could be ordered to be attached to meet out the maintenance amount - Held - Future salary is not tangible corporeal property available for seizure - Hence cannot be attached for realization of arrear as well as current maintenance. (Paras 16 & 17)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 125 - भरण-पोषण - क्या भरण-पोषण की राशि की पूर्ति करने के लिए भविष्य के वेतन को कुर्क करने का आदेश दिया जा सकता है - अभिनिर्धारित - भविष्य में मिलने वाला वेतन जब्ती के लिए उपलब्ध वास्तविक मूर्त संपत्ति नहीं है - अतः बकाया की वसूली के साथ-साथ वर्तमान भरण-पोषण के लिए कुर्क नहीं किया जा सकता।

R.K. Jain, for the applicant.

Pradeep Katare, for the non-applicant.

ORDER

B.D. RATH, J. :- By invoking the supervisory powers of this Court, petitioner has preferred this petition under Section 397/401 of Code of Criminal Procedure, 1973 (in short 'the Code') seeking the following relief:

“By allowing this petition, the order impugned dated 01-11-2013 passed by Executing Court and the letter dated 30-07-2013 issued by learned JMFC, Ambah District Morena be set aside.”

2. Facts in brief are that respondent/wife has filed an application under

Section 125 of the Code claiming maintenance from petitioner which was registered as MJC NO.95/2009. The aforesaid application filed by the respondent was allowed by the trial Court and petitioner was directed to pay maintenance to the tune of Rs.10,000/- per month from the date of filing of application. Since the order of trial Court was not complied with by the petitioner therefore, respondent has moved an application under Section 128 of the Code for the purpose of recovery of maintenance from the petitioner. On the aforesaid application, trial Court has issued a letter dated 30-07-2013 directing the Branch Manager to deduct Rs.10,000/- p.m. from the salary of petitioner and be credited in the account of respondent without issuing show cause notice to the petitioner.

3. Counsel for the petitioner submitted that the order dated 30-07-2013 passed by learned trial Court ordering to deduct Rs.10,000/- per month under the head of maintenance from the account of petitioner is arbitrary and contrary to law. It is further submitted that since the respondent is living separately from the petitioner without any cause, therefore, she is not entitled for any maintenance. It is also submitted that since the decree of divorce has been passed between the parties, therefore, respondent is not entitled for any maintenance from the petitioner. Thus, the order/letter impugned passed/issued by the learned trial Court is sought to be set aside. It is also submitted that application of the petitioner to recall the letter dated 30/7/2013 was also dismissed vide order dated 1/11/2013 by the Executing Court.

4. Combating the submission of petitioner's counsel, counsel for the respondent submitted that the order dated 23-08-2012 passed by learned trial Court granting maintenance to the respondent has already been put to challenge by the petitioner up to this Court which was dismissed by this Court in M.Cr.C.No.7439/2012. Hence, he prayed for dismissal of petition.

5. Having regard to the arguments advanced by learned counsel for the parties, entire record has been perused.

6. The following incidental questions are arising in this petition to the effects:-

“(i) Whether without affording opportunity of hearing, the impugned order could be passed ?.

(ii) Whether ground of separate living without any sufficient reason by the respondent-wife had to be considered by the

trial court before passing the impugned order?.

(iii) Whether, divorced wife has right to get maintenance ?.

(iv) Whether future salary could be ordered to be attached to meet out the maintenance amount ?.

Question No.(i)

7. To examine the principal controversy involved in the matter, the record of the trial court (MJC No.18/12) has been perused.

8. On perusal of the record it seems that on 21/9/2012 an application under section 128 of Cr.P.C. was preferred for recovery of the awarded amount of maintenance. So, in order to understand the controversy, the provisions of sections 125(3) and 128 of Cr.P.C. are relevant to be considered. Both these provisions are supplementary to each other and show that the order of maintenance can be made enforceable with the help of these two provisions.

9. Firstly, the provisions given in section 125(3) of Cr.P.C. is taken up. Same runs as follows:-

Order for maintenance of wives, children, and parents.-

“Section 125.

(1) xxxx xxxx xxxx

(2) xxxx xxxx xxxx

(3) If any person so ordered **fails without sufficient cause** to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month's *[allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be,]* remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made:

Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made

to the court to levy such amount within a period of one year from the date on which it became due:

Provided further that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.

Explanation.-If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife's refusal to live with him.

10. The opening word employed in section 125 (3) of Cr.P.C. lays down specifically that "if any person so ordered **fails without sufficient cause** to comply with the order, then Magistrate may, for every breach of the order, issue a warrant for levying the amount.

11. On coming to this particular case, a perusal of the original record indicates that show-cause notice was not given to the petitioner before passing the order of attachment of his salary. Therefore, the impugned order is not sustainable in the eyes of law not only because the order impugned was passed in contravention of the provisions of section 125(3) of Cr.P.C. but on the ground that no opportunity of hearing was afforded to the petitioner before taking any stringent action against him. It clearly violates the principles of natural justice. Apart that under provisions of section 128 of Cr.P.C. it was also mentioned that until and unless the Magistrate is not satisfied with non-payment of allowance, he cannot proceed for enforcement of the order of maintenance by issuing attachment warrant, meaning thereby the satisfaction of the Magistrate is mandatory which could be achieved only after following due procedure as established by law. Therefore, on this sole ground, the impugned order cannot be allowed to stand and is liable to be set aside.

Question No.(ii)

12. Admittedly, the order passed in favour of the respondent-wife under section 125 of Cr.P.C. for grant of maintenance was challenged by the petitioner in Cri. Rev. No.168/12 and same was dismissed on 23/8/12 from the court of Additional Sessions Judge, Ambah, district Morena. Thereafter, M.Cri.C.No.7439/12 was preferred and same was again dismissed by this

court vide order dated 13/8/2013 in conformity with the order of maintenance passed in favour of the respondent-wife. Therefore, at the time of recovery proceedings the second question was not germane to be considered.

Question No.III.

13. Before reaching on the conclusion to decide the aforesaid question as to whether a divorced wife can claim maintenance from her husband, the definition of wife has been given under the Explanation of provision under sub-section (1) of section 125 of Cr.P.C.

14. The expression wife includes a woman who has been divorced by, or has obtained a divorce from her husband and has not remarried. Aforesaid provision was enacted in order to provide a quick and summary remedy so that the divorced woman gets sufficient means of livelihood, after the divorce and, therefore, something is provided in advance to contemplate the future needs.

15. Hence, a careful reading of the provisions of the Act would indicate that a divorced woman is entitled to a reasonable and fair amount of maintenance. Same would extend to the whole life of the divorced wife unless she gets married for a second time.

16. Now the fourth question remains whether attachment of future salary could be ordered by the court under the Act.

17. The future salary is not tangible corporeal property available for seizure. Only when the salary become payable and takes shape of tangible corporeal property, it can be attached for realisation of arrear as well as current maintenance according to provisions of section 421(1)a) of Cr.P.C.

18. In this case by the letter dated 30/7/2013 addressed to the Branch Manager of Bank of India Krishi Upaj Mandi, Branch Narsinghgarh Road, Sihore, district Sihore the directions were issued to the concerning Bank to deduct monthly amount of Rs.10,000/- from the salary of the petitioner-Anil Jain to meet out the recovery sum and after deduction the amount be sent to the court. From the language it is clear that attachment order of future salary was passed against the petitioner. Attachment of future salary is not permissible under the law. On this count, the impugned letter dated 30/7/2013 (Annexure-A/1) is also liable to be set aside.

19. Accordingly, the petition is allowed. The impugned letter dated 30/7/

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2013 (Annexure-A/1) stands hereby set aside to the extent that the amount if any deducted so far from the salary of the petitioner pursuant to such letter/impugned directions dated 30/7/2013 by the Bank, same be treated and adjusted from the total arrears of the maintenance amount outstanding against the petitioner. The Executing Court is directed to consider the matter afresh after giving due opportunity of hearing to both the parties and thereafter pass a fresh order in accordance with law. Parties are directed to remain present before the Executing court on 12/1/2015.

20. The record of the case be sent back along with a copy of this order to the trial court for compliance.

Revision allowed.

I.L.R. [2016] M.P., 248

CRIMINAL REVISION

Before Mr. Justice S.K. Palo

Cr. Rev. No. 259/2014 (Gwalior) decided on 13 November, 2014

PUKHRAJ SINGH

Vs.

STATE OF M.P.

Applicant

...Non-applicant

A. **Penal Code (45 of 1860), Section 376, and Criminal Procedure Code, 1973 (2 of 1974), Section 228 - Framing of charge - Rape with two prosecutrix - In FIR, prosecutrix did not allege rape by applicant but it was alleged that he escorted both the prosecutrix to bus stand and assured that he will help them to get marry with other two co-accused persons - Applicant was absconding - In trial against two co-accused, prosecutrix alleged that she was subjected to rape by applicant - Held - It appears that prosecutrix implicated the applicant subsequently with ulterior motive - Charge/prosecution u/s 376 set aside.** (Paras 5 & 16)

क. दण्ड संहिता (1860 का 45), धारा 376 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 228 - आरोप विरचित किया जाना - दो अभियोक्त्रियों के साथ बलात्कार - प्रथम सूचना प्रतिवेदन में, अभियोक्त्री ने आवेदक द्वारा बलात्कार का अभिकथन नहीं किया परंतु यह अभिकथित किया गया कि वह दोनों अभियोक्त्रियों को बस स्टैंड तक ले गया और आश्वासित किया कि वह उन्हें अन्य दोनों सह-अभियुक्तों से शादी करने में सहायता करेगा - आवेदक फरार था - दोनों सह-अभियुक्तों के विरुद्ध विचारण में अभियोक्त्री ने अभिकथित किया है कि

आवेदक ने उसके साथ बलात्कार किया – अभिनिर्धारित – ऐसा प्रतीत होता है कि अभियोक्त्री ने अंतरस्थ हेतु से बाद में आवेदक को आलिप्त किया – धारा 376 के अंतर्गत आरोप/अभियोजन अपास्त।

B. Criminal Procedure Code, 1973 (2 of 1974), Section 482 - Inherent power - Held - To prevent the abuse of process of the Court and to prevent the harassment to citizen of India by illegal prosecution under Section 376 of IPC, it would be imperative obligation to interfere in the impugned order. (Para 18)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – अंतर्निहित शक्ति – अभिनिर्धारित – न्यायालय की प्रक्रिया के दुरुपयोग को रोकने एवं मा.द.सं. की धारा 376 के अंतर्गत अवैध अभियोजन के द्वारा भारत के नागरिक के उत्पीड़न को रोकने के लिये आक्षेपित आदेश में हस्तक्षेप करना अनिवार्य दायित्व होगा।

Cases referred :

1992 Suppl. (1) SCC 335; (2012) 13 SCC 614.

S.K. Shrivastava, for the applicant.

Pramod Pachouri, P.P. for the non-applicant/State.

(Supplied: Paragraph numbers)

ORDER

S.K. PALO, J. :- Heard on the question of admission.

2. Admit.
3. With the consent of both parties, matter is heard finally.
4. This revision under Section 397 read with Section 401 and 482 of Cr.P.C. has been filed with the prayer to set aside the order dated 28.3.2014 passed by the learned ASJ Sironj, District Vidisha in S.T. No. 405/2012.
5. Brief facts just necessary for disposal of the petition is that, Crime No. 211/12 was registered at Police Station, Sironj on 19.6.2012, two the minor prosecutrix' were found absent from their home. Report lodged by their father, Gum Insan No. 13/12 and 14/12 was registered by the Police Sironj. After investigation, it was found that both the prosecutrix were sisters having friendly terms with Ashok Kushwah and Monoj Kushwah. The present applicant Pukhraj Singh is the brother-in-law of the accused, Ashok Kushwah. The minor prosecutrix' were enticed and were eloped with accused Ashok

Kushwah and Monoj Kushwah. The present applicant Pukhraj Singh met them at Chhatra Naka. He was known to the prosecutrix' because he used to visit the house of accused Ashok Kushwah. Both the accused persons Ashok and Monoj asked to go with Pukhraj so that nobody suspects them while leaving the village. The present applicant Pukhraj escorted them to Guna Bus Stand. He has also assured both the prosecutrix that he will get help them marry with Ashok and Manoj. Both accused Ashok and Manoj came to the house of applicant Pukhraj. They committed sexual intercourse with both the prosecutrix'. They were kept for few days applicant's residence. Subsequently, they stayed in a different house. Ashok and prosecutrix No.1 lived as husband and wife and Manoj and prosecutrix No.2 lived as husband and wife.

6. On these statements, Crime No. 211/12 was registered under Sections 376, 363 and 366-A/34 of IPC, Session Trial No. 405/13 was decided by the Additional Sessions Judge, Sironj. Accused Ashok and Manoj vide judgment dated 21.5.2013 were acquitted. In the said case, the present applicant Pukhraj remained absconded. Later, applicant Pukhraj surrendered before the Court and ST No. 405/13 restored to its original number and proceedings initiated. Charges under Sections 376, 363 and 366-A/34 of IPC was explained to the applicant, which he denied.

7. In the trial, the prosecutrix No.1 and No. 2 were examined on 26.3.2014 regarding the charges. In the statement prosecutrix have stated that, when applicant Pukhraj took them to his house at Guna, his wife told them to stay here in that night because it was already 10 O'clock. They stayed in the house of applicant Pukhraj. Prosecutrix No.1 further stated that, the applicant Pukhraj committed sexual intercourse with her in that night and kept her in his house for three months. It is also stated that after three months they had a fight with the wife of the applicant Pukhraj. Therefore, both the prosecutrix fled away from the house of applicant.

8. Prosecutrix No.2 also corroborated the story and stated that the applicant never allowed them to leave the house. They further added that applicant was tried to sale them for Rs. Two Lac.

9. Mother of the prosecutrix' was examined and she has stated that the prosecutrix were escorted on motorcycle to Guna by the applicant.

10. Learned ASJ on the basis of these statements amended the charge vide order dated 28.3.2014 and added Section 376 of IPC against the present

applicant Pukhraj.

11. Applicant has challenged this order on the ground that the order is against the provisions of law, facts and evidence. At no point of time, such allegation were levelled against the applicant by both the prosecutrix. In order to gain some money, the prosecutrix are implicating the applicant by giving false statements. In view of the above circumstances, no person can rely on such statements of the prosecutrix. The prosecutrix' returned to their home and are not living with accused persons Ashok and Manoj. The prosecutrix' are implicating the applicant to gain money which they demanded but was not fulfilled by the applicant. Therefore, the applicant prays to set aside the order in question.

12. On perusal of the records and statements of the prosecutrix', it is found that, the accused Ashok and Manoj were acquitted, because in the statements of the prosecutrix No.1 and No.2 were recorded on 14.5.2013 they did not support the prosecution case and they denied any criminal act having committed by the accused Ashok and Manoj.

13. At the time of enquiry of *Gum Insan*, statement recorded under Section 161 and statement before the Session Court on 14.5.2013, the prosecutrix did not level any allegation of sexual intercourse by the present applicant nor there any allegation of keeping them at his house for three months. They even went to the extent of saying that the prosecutrix left for their Aunt's house at Chhatri Naka, from there they went to Guna and stayed there for two months in a rented house. When they were coming to Bus Stand to board for Sironj, they were caught by the police. Accused Ashok and Manoj did not abused them sexually.

14. Learned PP submitted in his argument that charge has been framed according to the statements of the prosecutrix'. Therefore, there is no illegality or perversity in the impugned order.

15. The Hon'ble Supreme Court in the case of *State of Haryana and Others Vs. Bhajan Lal and others*, reported in 1992 Suppl. (1) SCC 335 has formulated certain guidelines, in which inherent power under Section 482 of Cr.P.C can be exercised to prevent the abuse of process of the Court or otherwise to secure the ends of justice. The Hon'ble Court has held;

This Court in the backdrop of interpretation of various relevant provisions of the Cr.P.C under Chapter XIV and of the

principles of law enunciated by this Court in a series of decisions relating to the exercise of the extra-ordinary power under Article 226 of the Constitution of India or the inherent powers under Section 482, Cr.P.C gave the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of the Court or otherwise to secure the ends of justice. Thus, this Court made it clear that it may not be possible to lay down any precise, clearly defined and sufficiently channelized and inflexible guidelines or rigid formula and to give an exhaustive list to myriad kinds of cases wherein such power should be exercised:

- (1) where the allegations made in the First Information Report of the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.
- (2) Where the allegations in the First Information Report or other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156 (1) of the Code except under an order of a Magistrate within the purview of Section 155 (2) of the Code.
- (3) Where the controverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.
- (4) Where the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a magistrate as contemplated under Section 155 (2) of the Code.
- (5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.
- (6) Where there is an express legal bar engrafted in any of the

provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specified provisions in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with malafide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.

16. Keeping in mind the above, the petitioner has not been alleged for the offence under Section 376 and subsequently after certain developments, he has been seems to be implicated for the offence under Section 376 of IPC with some ulterior motive. It is apparent on the face of the record that the earlier prosecution under Section 376 of IPC was against accused Ashok and Manoj. Thus, proceeding if continued would result into wasting of valuable time of the Court, it will cause hardship to the petitioner.

17. In view of the above, this is a fit case to invoke the powers under Section 482 of Cr.P.C. This view is fortified in the judgment rendered by the Hon'ble Supreme Court in *Satish Mehra VS. State (NCT of Delhi) and another* (2012) 13 SCC 614, in which the Hon'ble Supreme Court has held as under:

A. Criminal Procedure Code, 1973 – S. 482 – Inherent power of High Court – Power to quash proceedings specially after framing of charges – Scope and nature of – Reiterated – Held, power to quash proceedings after charges were framed is wider as evidence adduced while submitting charge-sheet can be looked into for determining disclosure of offence against accused – Where allegations do not disclose prima facie case and prosecution of accused would result in abuse of process then proceedings can be quashed either at early stage or at later stage – This extraordinary power available to High Court needs to be exercised carefully and sparingly – It cannot be used for quashing legitimate prosecution – Criminal Procedure Code, 1973, Ss. 161, 165, 173, 227 and 239.

18. Therefore, to prevent the abuse of process of the Court, and to prevent the harassment to citizen of India by illegal prosecution under Section 376 of IPC, it would be imperative, obligation to interfere in the impugned order. Therefore, by allowing this petition invoking power under Section 482 of Cr.P.C, order dated 28.3.2014 passed by the learned ASJ, Sironj in S.T. 405/2012 is set aside.

Revision allowed.

I.L.R. [2016] M.P., 254

CRIMINAL REVISION

Before Mr. Justice B.D. Rathi

Cr. Rev. No. 879/2013 (Gwalior) decided on 18 November, 2014

OMPRAKASH

...Applicant

Vs.

STATE OF M.P. & anr.

...Non-applicants

Criminal Procedure Code, 1973 (2 of 1974), Section 319 - Power to proceed against other persons - During investigation it was found that applicant was not present on spot - Material contradictions in the evidence of witnesses - Addition of additional accused warranted only when there is reasonable prospect of case against such accused ending in their conviction - Order under this Section cannot be passed only because first informant or one of witnesses seeks to implicate other persons.
(Paras 3 & 9)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 319 - अन्य व्यक्तियों के विरुद्ध कार्यवाही करने की शक्ति - अन्वेषण के दौरान यह पाया गया कि आवेदक घटनास्थल पर उपस्थित नहीं था - साक्षियों के साक्ष्य में तात्त्विक विरोधाभास है - अतिरिक्त अभियुक्त को जोड़ना केवल तभी आवश्यक है जब ऐसे अभियुक्त के विरुद्ध प्रकरण की युक्तियुक्त संभावना है जो उनकी दोषसिद्धि में समाप्त हो - इस धारा के अंतर्गत आदेश केवल इसलिए पारित नहीं किया जा सकता कि प्रथम सूचनाकर्ता अथवा साक्षियों में से कोई एक अन्य व्यक्तियों को आलिप्त करना चाहता है।

Cases referred :

AIR 2007 SC 2786, (2007) 2 SCC 412, (2013) 3 SCC (Cri) 920, (2006) 2 SCC (Cri) 324, 2004 SCC (Cri) 2093, 2014 (2) MPLJ (Cri) 68.

R.K. Sharma, for the applicant.

Nutan Saxena, P.P. for the non-applicant No. 1.

V.D. Sharma, for the non-applicant No. 2.

ORDER

B.D. RATHI, J. :- By invoking the supervisory powers of this Court, petitioner has preferred this petition under Section 397/401 of Code of Criminal Procedure, 1973 (in short 'the Code') being aggrieved by the order dated 05-09-2013 passed by learned Second Additional Sessions Judge, Jaura District Morena in S.T.No.171/2011 whereby the application filed by the petitioner/complainant under Section 319 of the Code was dismissed. The instant petition has been filed by the petitioner seeking the following relief:

“By allowing this petition, impugned order dated 05-09-2013 passed by learned Second Additional Sessions Judge, Jaura District Morena in S.T.No.171/2011 be quashed and trial Court be directed to implead respondent No.2 -Rakesh Sharma as an accused person in the aforesaid S.T.”

2. In brief, facts of the case are that incident has occurred on 06-11-2010 and Dehati Nalish was recorded on the spot to the effect that since in the election campaign of Gram Panchayat the petitioner/complainant -Omprakash has supported the opposite candidate Banwari, therefore, there was enmity between Rakesh Sharma, Ravindra, Akhilesh, Munshi and complainant - Omprakash. On 06-11-2010 at about 2:15 pm quarrel took place between Arvind (brother of complainant) and Rakesh Sharma, Ravindra, Akhilesh and Munshi. When Arvind was coming to his house, he was chased by the aforesaid accused persons, Ravindra and Rakesh Sharma both were armed with pistol, when they reached at the house of complainant, they all started hurling the abuses. On objections, one fire was made by Ravindra at the stomach of complainant and he fell down. Crime No.162/2010 was registered at Police Station Bagchini against Rakesh Sharma, Ravindra, Akhilesh and Munshi. Investigation was made and on completion of investigation charge-sheet was filed only against Ravindra, Akhilesh and Munshi. No case against respondent No.2 -Rakesh Sharma was found by the Investigating Officer. He was not chargesheeted on the ground that as per the evidence collected during the investigation, Rakesh Sharma -respondent No.2 was not present on the spot and in the FIR, allegations were levelled against him because of enmity of Panchayat election.

3. On committal, S.T.No.171/2011 was registered for the offence punishable under Sections 307/34 of IPC. Before the trial Court evidence of Omprakash (PW-1) and Arvind Sharma (PW-2) was recorded. Thereafter, an application under Section 319 of the Code was preferred by the complainant in the month of April, 2013 which was dismissed by the trial Court vide impugned order on the ground as discussed in para 14 that because of material contradictions and omissions in the evidence of Omprakash (PW-1) and Arvind Sharma (PW-2), respondent No.2 -Rakesh Sharma cannot be convicted. Second ground has been discussed by the trial Court in para 20 of its impugned order that as per investigating agency at the time of commission of offence, respondent No.2 was present at his house situated at Morena and he was not present on the spot at village Kumheri because as per mobile details, his location was at Nainagarh, Morena and this fact was also corroborated from the statements of prosecution witnesses.

4. Counsel for the petitioner submitted that in the named FIR allegations were made against respondent No.2 and as per the statements of Omprakash (PW-1), Arvind Sharma (PW-2) and other witnesses, respondent No.2 was present on the spot and on his instigation, fire was made by Ravindra. With malafide intention, charge-sheet has not been filed by the prosecution against respondent No.2 in order to save him. It is further submitted that at this stage, plea of alibi of respondent No.2 cannot be considered. It is also submitted by Shri R.K. Sharma that statements of witnesses recorded under Section 161 of the Code by police to prove the fact that respondent No.2 was not present on the spot cannot be taken into consideration in view of proviso to subsection (1) of Section 162 of the Code. In support of his contention he has relied over the judgment of Apex Court in the matter of *Rajindra Singh Vs. State of U.P. & Anr.* AIR 2007 SC 2786 and *Y. Saraba Reddy Vs. Puthur Rami Reddy and another* (2007) 2 SCC.

5. Combating the submission of petitioner's counsel, counsel for respondent No.2 submitted that there is material contradictions and omissions between the evidence of Omprakash (PW-1) and Arvind Sharma (PW-2). Apart that, it was the conclusion of Investigating Officer that respondent No.2 was not present on the spot. The Investigating Officer -Dy. Superintendent of Police had prepared a detailed report dated 22-11-2010 and sent to the Superintendent of Police, Morena whereby it was found that because of election inimical relationship, respondent No.2 has been falsely implicated in this case while he was not present on the spot. Call details of mobile No.94254-19108

and tower location shows that at the time of commission of offence, respondent No.2 was present at his house situated at Jiwajiganj, Morena. From his mobile phone respondent No.2 has called and received the calls from Ravindra Sharma and Akhilesh Sharma and their mobile numbers were also mentioned in the report. This fact of absence of respondent No.2 at the spot has been duly supported from the statements given by Kamlesh Kumar Bansal, Sanjay Parashar, Dataram, Pramod Kumar, Ramkrishna and Deepak and recorded under Section 161 of the Code and are part and parcel of the charge-sheet. Further, it is submitted that the plea of alibi was not raised by respondent No.2, it was the conclusion of Investigating Officer, therefore, the judgments of Apex Court cited by petitioner's counsel are not applicable.

6. Counsel for respondent No.2 further submitted that if the opinion and conclusion of Investigating Officer is not taken into consideration then the sacredness of conducting fair investigation will be defeated. It is also submitted that the statements recorded under Section 161 of the Code can be taken into consideration for framing the charges and only because of that, charges are always framed also on the basis of such statements. Apart that this was not the only reason to prove absence of respondent No.2 on spot but the fact of absence had come before the Investigating Officer on collection of scientific evidence i.e. mobile and tower location of cell phone of respondent No.2 which is admissible under Sections 45-A, 65-A&B and 85-B of the Evidence Act, 1872. It is also submitted that only general omnibus allegations were made against respondent No.2 in FIR and in police statement by complainant and his brother in regard to instigation made by respondent No.2. On such premises, respondent No.2 cannot be convicted. In order to strengthen his contention, counsel for respondent No.2 placed reliance on the judgment of Apex Court in the matter of *Prashant Bharti Vs. State of NCT of Delhi*, (2013) 3 SCC (Cri) 920, *Kavuluri Vivekananda Reddy and another Vs. State of A.P. And Another*, (2006) 2 SCC (Cri) 324 and *Krishnappa Vs. State of Karnataka*, 2004 SCC (Cri) 2093. Further reliance has been placed on the judgment of this Court in the matter of *Virendra Singh Vs. State of M.P. and another* 2014 (2) MPLJ (Cri.) 68.

7. Having regard to the arguments advanced by learned counsel for the parties, entire record has been perused.

8. On perusal of record, it seems that in Dehati Nalish name of respondent No.2 has been mentioned and allegation was also made that at his instigation

offence was committed by another co-accused Ravindra. Crime was registered and during the course of investigation, it was found by the Investigating Officer that respondent No.2 was not present on the spot. The report dated 22-11-2010 addressed by Dy. Superintendent of Police to Superintendent of Police, Morena shows that there was inimical relationship between respondent No.2 and complainant and after taking into consideration the call records of mobile of respondent No.2 and tower location at the time of commission of offence, it was found that respondent No.2 was not present on the spot but in fact he was present at his house situated at Morena far away from the spot. This fact find concurrence from the statements of witnesses, namely, Kamlesh Kumar Bansal, Sanjay Parashar, Dataram, Pramod Kumar, Ramkrishna and Deepak. Apart that, from perusal of evidence of Omprakash (PW-1) and Arvind Sharma (PW-2) it seems that there is material contradictions and omissions between the evidence of these witnesses as Omprakash (PW-1) has deposed that at the relevant time, respondent No.2 armed with revolver was present on the spot while Arvind Sharma (PW-2) did not say that respondent No.2 was armed with any firearm. Inimical relationship on the basis of election rivalry was admitted by Omprakash (PW-1) in para 3 of his evidence.

9. It is settled law that addition of additional accused warranted only when there is reasonable prospect of case against such accused ending in their conviction. It is also settled law that order under Section 319 of Cr.P.C. cannot be passed only because first informant or one of witnesses seeks to implicate other persons. The evidence adduced against such persons must be substantive evidence in order to summon him for trial, there should be a good chance for his conviction.

10. It is imperative of note that, the case in hand is not a case where plea of alibi was taken by respondent No.2 but it was the conclusion of Investigating Officer based on the evidence collected during the course of investigation, that respondent No.2 was not present on the spot. If the entire evidence in relation to absence of respondent No.2 on spot, statements and evidence of other witnesses named above and material contradictions between the evidence of Omprakash (PW-1) and Arvind Sharma (PW-2). Omprakash (PW-1) and Arvind Sharma (PW-2) have not uttered single word before the Court that wrong statements were given to police by the other prosecution witnesses in regard to presence of respondent No.2 at his house situated at Morena, far away from the spot.

11. If the entire evidence collected by prosecution during the course of

investigation and evidence recorded by the trial Court is considered then because of material contradictions and omissions, because of general omnibus allegation, also because respondent No.2 was not present on the spot well supported from the statements of prosecution witnesses and scientific evidence, respondent No.2 cannot be convicted. Therefore, in the considered view of this Court, impugned order passed by the trial Court is well merited and no interference is warranted.

12. For the abovementioned cumulative reasons, the petition filed by the petitioner has no merit and is hereby dismissed being bereft of merits.

Copy of this order be sent to the trial Court for information and compliance.

Revision dismissed.

**I.L.R. [2016] M.P., 259
CRIMINAL REVISION**

Before Mr. Justice Sushil Kumar Gupta

Cr. Rev. No. 758/2014 (Gwalior) decided on 12 December, 2014

DEVENDRA SINGH & ors.

...Applicants

Vs.

STATE OF M.P.

...Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Sections 228 & 397 - Framing of charges - Held, the material and quality of evidence cannot be gone into - Revisional Court has limitations which don't empower to intervene at an interlocutory stage - All that has to be looked into at the time of framing of charge, is existence of prima facie case. (Paras 7 & 8)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएं 228 व 397 - आरोप विरचित किये जाना - अभिनिर्धारित, साक्ष्य की सामग्री एवं गुणवत्ता पर विचार नहीं किया जा सकता - पुनरीक्षण न्यायालय की सीमाएं हैं जो कि अंतर्वर्ती प्रक्रम में हस्तक्षेप करने के लिए सशक्त नहीं करती - आरोप विरचित करते समय जो कुछ भी देखा जाना चाहिए वह यह है कि प्रथम दृष्ट्या प्रकरण विद्यमान है।

Cases referred :

2002 (2) MPLJ 322, (2000) 1 SCC 138, (1996) 4 SCC 659.

Pradeep Katare, for the applicants.

Prabal Solanki, P.P. for the non-applicant/State.

ORDER

S.K. GUPTA, J. :- By this Criminal Revision under Section 397 read with 401 of Cr.P.C., petitioners have challenged the order dated 12.05.2014 passed by learned Second Additional Sessions Judge, Gohad District Bhind in S.T.No.90/2014 whereby the charges for the offence punishable under Sections 498-A, 304-B of IPC and Section 4 of Dowry Prohibition Act were framed against the petitioners.

2. The case of the prosecution is that, deceased-Radha got married with Sahab Singh in the year 2012. On dated 31.10.2013 her father Fulzari Singh received information on mobile by Betal Singh that his daughter- Radha has died in the night. On this information Fulzari Singh informed to the police. After registration of Merg and enquiry, it was found that husband-Sahab Singh, mother-in-law (Munni Devi), brother-in-law (Devendra and Prem Singh) and sister-in-law (Kiran and Baby) were harassing the deceased-Radha in connection with demand of four-wheeler and Rs.2,00,000/- in cash and used to beat her.

3. After completion of the enquiry, FIR under Section 498-A, 304-B of IPC and Section 4 of Dowry Prohibition Act against the petitioners as well as co-accused has been registered. After investigation, the police submitted the charge-sheet against the petitioners and other co-accused. Learned Trial Court framed the charges under Sections 498-A, 304-B of IPC and Section 4 of Dowry Prohibition Act.

4. Learned counsel for the petitioners submits that ingredient of Section 304-B of IPC is not made out. There is no evidence against the petitioners that they were harassing the deceased for demand of dowry soon before her death. It is submitted that there is no specific evidence about demand of dowry against the petitioners. It is further submitted that there is no iota of evidence present on record to implicate the petitioners. He also submitted that learned Court below has not considered the ingredients of Section 304-B of IPC, therefore, the offence under Section 304-B of IPC is not made out.

5. Per contra, learned Public Prosecutor for the respondent/State has fully supported the impugned order of Lower Court and submitted that the deceased-Radha died within 1 ½ years of her marriage. He further submitted that she died in the house of the petitioners and other coaccused and there is *prima facie* evidence against the petitioners.

6. Having heard the learned counsel for the parties and after perusal of the evidence available on record and facts and circumstances of the case and from the statement of Fulzari Singh, it appears that there is *prima facie* evidence against the petitioners for harassing the deceased for demand of dowry.

7. In such premises, order of framing of charge is based on sound appreciation of material available on record and cogent reasons. No infirmity can be found with the impugned order of the Trial Court for framing the aforesaid charge. The revision is premature and it would not be proper to stifle the prosecution at this stage.

8. Moreover, it is trite to state that at the time of framing of charge the material and quality of evidence cannot be gone into. This Court is well aware about the limitation of the Court while exercising the revisional jurisdiction, which does not empower to intervene at an interlocutory stage. Moreover, all that has to be looked into at the time of framing of the charge is that whether there was existence of *prima facie* case. So also it would be profitable to rely on *State of M.P. Vs. S.B. Johari and others* reported in 2002 (2) MPLJ 322, whereby the Court held thus:

It is settled law that at the stage of framing the charge, the Court has to *prima facie* consider whether there is sufficient ground for proceeding against the accused. The Court is not required to appreciate the evidence and arrive at the conclusion that the materials produced are sufficient or not for convicting the accused. If the Court is satisfied that a *prima facie* case is made out for proceeding further, then a charge has to be framed.

Umar Abdul Sakoor Sorathia Vs. Intelligence Officer, Narcotic Control Bureau reported in (2000) 1 SCC 138 whereby the Court held thus:

It is well settled that at the stage of framing charge the Court is not expected to go deep into the probative value of the materials on record. If on the basis of materials on record that Court could come to the conclusion that the accused would have committed the offence the Court is obliged to frame the charge and proceed to the trial.

State of Maharashtra and others Vs. Som Nath Thapa and others reported in (1996) 4 SCC 659 whereby the Court held thus:

The aforesaid shows that if on the basis of materials on record, a Court could come to the conclusion that commission of the offence is probable consequence, a case for framing of charge exists. To put it differently, if the Court were to think that the accused might have committed the offence it can frame the charge, though for conviction the conclusion is required to be that the accused has committed the offence. It is apparent that at the stage of framing of a charge, probative value of the materials on record cannot be gone into; the materials brought on record by the prosecution has to be accepted as true at that stage.

9. Therefore, no infirmity, irregularity or illegality is found in the impugned order passed by learned Additional Sessions Judge.

10. Accordingly, this revision petition is devoid of merits and hereby dismissed at this stage. It is made clear that nothing observed herein above shall prejudice the case of the petitioners/accused persons at the trial.

Revision dismissed.

I.L.R. [2016] M.P., 262

CRIMINAL REVISION

Before Mr. Justice Alok Verma

Cr. Rev. No. 707/2012 (Indore) decided on 18 December, 2014

SADHNA KOTHARI (SMT.)

...Applicant

Vs.

SHRI ABHAY KUMAR DALAL & ors.

...Non-applicants

(Alongwith M.Cr.C. No. 2145/2007)

A. Criminal Procedure Code, 1973 (2 of 1974), Section 408 and Penal Code (45 of 1860), Section 406 - Trial Court held that Court at Ujjain has no jurisdiction to entertain complaint for offence u/s 406 of IPC and directed to transfer the case to the Court of JMFC, Khachrod - Order attained finality - Application under Section 408 of Cr.P.C. dismissed by Sessions Judge on the ground that parallel Court has already passed the transfer order, and it has no power to take different view - No irregularity by revisional Court - Revision dismissed. (Para 10)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 408 एवं दण्ड संहिता (1860 का 45), धारा 406 – विचारण न्यायालय ने अभिनिर्धारित किया कि उज्जैन के न्यायालय को भा.द.सं. की धारा 406 के अंतर्गत अपराध की शिकायत ग्रहण करने की कोई अधिकारिता नहीं और न्यायिक दंडाधिकारी प्रथम श्रेणी, खाचरौद के न्यायालय को प्रकरण अंतरित करने के लिये निदेशित किया – आदेश ने अंतिमता प्राप्त की – द.प्र.सं. की धारा 408 के अंतर्गत आवेदन को सत्र न्यायाधीश द्वारा इस आधार पर खारिज किया गया कि समानांतर न्यायालय ने पहले ही अंतरण आदेश पारित किया है और भिन्न दृष्टिकोण लेने की शक्ति नहीं – पुनरीक्षण न्यायालय द्वारा कोई अनियमितता नहीं – पुनरीक्षण खारिज।

B. Criminal Procedure Code, 1973 (2 of 1974), Section 482 - Inherent power - Quashment of complaint - Complaint filed by divorced wife against husband for misappropriation of "Stridhan" - Whether any property gifted during marriage is still in possession of husband and he is not returning the same while having no right, is a matter of evidence - Application has no force - Dismissed. (Para 10)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – अंतर्निहित शक्ति – शिकायत अभिखंडित की जाना – विच्छिन्न विवाह पत्नी द्वारा पति के विरुद्ध "स्त्रीधन" के दुर्विनियोजन की शिकायत प्रस्तुत की गई – क्या विवाह के दौरान दान की गई कोई संपत्ति अभी भी पति के कब्जे में है और कोई अधिकार न होते हुये उसे नहीं लौटा रहा है, साक्ष्य का मामला है – आवेदन में कोई बल नहीं – खारिज।

Umesh Sharma, for the applicant in Cr.R. No. 707/2012.

M.A. Mansoori, for the applicant in M.Cr.C. No. 2145/2007.

M.A. Mansoori, for the non-applicant in Cr.R. No. 707/2012.

Umesh Sharma, for the non-applicant in M.Cr.C. No. 2145/2007.

Mamta Shandilya, P.L. for the non-applicant/State.

ORDER

ALOK VERMA, J. :- This common order shall govern disposal of Criminal Revision No.707/2012 and M.Cr.C. No.2145/2007.

2. The common facts relevant for disposal of both the petitions are that the applicant in Cr.R. No.707/2012, Smt. Sadhna Kothari was married to Shri Abhay Kumar Dalal way back in the year 10.02.2000. At the time of marriage, some movable property like cash, color T.V., Godrej Almira, Dinner Set, Gold Jewellery, Garments and other household goods were given to the applicant Sadhna Kothari by her father. It was alleged that on her first night

itself, the applicant refused to live with the respondent Abhay Dalal as his wife stating to him that she was already married to another person at Mahidpur, Ujjain and she would not allow him to have relationship with her. After two three days of her marriage, she left her matrimonial house and came back to her parental house.

3. Subsequently, divorce petition was filed, which was allowed by the Sessions Court at Ujjain and in First Appeal, the High Court confirmed the decree of divorce passed in favour of the respondent. After the divorce attained finality, the applicant Sadhna Kothari filed a criminal complaint against the respondent Abhay Kumar Dalal under section 406 of IPC claiming that her *streedhan*, which was given to her during marriage by her father, was misappropriated by the respondent. The respondent filed revision before the Court of Sessions at Ujjain. The revision was made over to learned Additional Sessions Judge, who used to hold Camp Court at Mahidpur. Learned Additional Sessions Judge while deciding the revision observed that, the jurisdiction to decide the matter was with the Court at Khachrod where, the respondent/husband Abhay Kumar Dalal was living and where, the property was said to have been misappropriated and accordingly, he directed the learned CJM at Ujjain to transfer the criminal complaint from the Court of JMFC at Mahidpur to the Court of JMFC at Khachrod.

4. Against this order, the present applicant filed petition under section 407 of Cr.P.C. The High Court observed that in such case firstly, an application should be filed before the Sessions Court under section 408 of Cr.P.C. and with that observation, the application was disposed of.

5. In compliance of the said observation, the application was filed before the learned Sessions Judge, Ujjain, who passed the impugned order and dismissed the application for transfer of the case from Khachrod to Mahidpur. In this factual background, Criminal Revision No.707/2012 is filed against the order passed by learned Sessions Judge in Miscellaneous Criminal Case No.13/2012 dated 04.05.2014 by which, the learned Sessions Judge dismissed the application filed under section 408 of Cr.P.C. and refused to transfer the case from Khachrod to Mahidpur. M.Cr.C. No.2145/2007 is filed by the husband Abhay Kumar Dalal under section 482 of Cr.P.C. for quashment of criminal complaint filed against him under section 406 of IPC.

6. Considering first, Criminal Revision No.707/2012, learned Sessions Judge dismissed the application under section 408 of Cr.P.C. inter alia on the

ground that Criminal Revision No.213/2009 by his order dated 24.06.2010, learned Additional Sessions Judge observed that Mahidpur Court had no jurisdiction to try the case and, therefore, it is directed that the case be transferred from the Court at Mahidpur to the Court at Khachrod. Learned Sessions Judge observed that it was parallel Court having equal jurisdiction and which attained finality and, therefore, he has no power to take a different view. However, he also observed that both the Courts have parallel jurisdiction.

7. Next, he observed that the ground that wife apprehends danger to her life, she can seek police protection and thirdly, in respect of distance of 60 km between two places, the Court observed that as, she used to appear at Khachrod Court where, her petition for divorce was pending and, therefore, there is no reason to hold that the distance of 60 km would be a problem for her to travel to pursue the complaint case at Khachrod.

8. Before proceeding to examine the order on merit, it may be observed that this Court has parallel jurisdiction under section 407 of Cr.P.C., therefore, the present applicant could have filed the application under section 407 of Cr.P.C. before this Court. However, he chose to file revision before this Court under which, power of this Court to interfere, is limited and only it is to be seen whether any irregularity or illegality is committed by the lower Court or there is any miscarriage of justice.

9. Examining the impugned order with this view of the matter, I find that while holding that he had no power to interfere because, parallel Court is already directed the case to be transferred from Mahidpur to Khachrod has no irregularity and in revision this Court can also not interfere in the matter. So far as the other two grounds are concerned, they are purely based on the apprehension of the applicant wife and the observation of the learned Sessions Judge cannot be termed as unreasonable or improper.

10. In this view of the matter, the revision holds no force and liable to be dismissed and is accordingly, dismissed.

11. Coming to the application filed under section 482 of Cr.P.C.. It may be observed that under section 482 of Cr.P.C. for quashment of any criminal proceeding, it is to be seen whether prima facie, there appears to be a commission of offence is alleged in the proceedings. In the present case, it is alleged that husband/respondent misappropriated the property given to the

applicant by her father. Whether any property was gifted during the marriage or same was still in possession of the respondent, who is not returning the same while having no right to keep the property is to be decided by the Court after recording the evidence.

12. At this stage, it cannot be said that the complaint was filed on the false and frivolous grounds. In this view of the matter, the application has no force and liable to be dismissed and is accordingly, dismissed.

13. With the aforesaid observations, Criminal Revision No.707/2012 and M.Cr.C. No.2145/2007 stand disposed of.

C.c. as per rules.

Revision dismissed.

I.L.R. [2016] M.P., 266

CRIMINAL REVISION

Before Mr. Justice C.V. Sirpurkar

Cr.Rev. No. 562/2009 (Jabalpur) decided on 5 August, 2015

ABHILASHA

...Applicant

Vs.

ASHOK DONGRE & ors.

...Non-applicants

A. *Criminal Procedure Code, 1973 (2 of 1974), Section 397 & 401 and Penal Code (45 of 1860), Section 498A r/w 34 - Marriage solemnized on 17/05/2002 - No cruelty in relation to demand of dowry committed in short duration of two months - Held - No cruelty of serious nature alleged and there is no manifest error of law - Revision against acquittal dismissed. (Paras 13 & 14)*

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 397 व 401 एवं दण्ड संहिता (1860 का 45), धारा 498ए सहयुक्ति 34 - विवाह 17/05/2002 को संपन्न हुआ - दो महीने की संक्षिप्त अवधि में दहेज की मांग के संबंध में कोई क्रूरता कारित नहीं की गई - अभिनिर्धारित - गंभीर प्रकृति की कोई क्रूरता अभिकथित नहीं तथा विधि की कोई प्रकट त्रुटि नहीं - दोषमुक्ति के विरुद्ध पुनरीक्षण खारिज।

B. *Criminal Procedure Code, 1973 (2 of 1974), Section 397 & 401 - Revision - When High Court may exercise and may not exercise power of revision - Circumstances explained. (Paras 10 to 12)*

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 397 व 401 – पुनरीक्षण – उच्च न्यायालय कब पुनरीक्षण की शक्ति का प्रयोग कर सकता है और कब नहीं कर सकता – परिस्थितियां स्पष्ट की गईं।

C. Interpretation of statutes - Acquittal - Revision - By private party - No State appeal - In revision by private parties, order of acquittal can be set aside - Order of acquittal cannot be converted into order of conviction - High Court at the most can direct for retrial - However, this jurisdiction to be exercised by the High Court in exceptional cases. (Para 9)

ग. कानूनों का निर्वचन – दोषमुक्ति – पुनरीक्षण – प्राइवेट पक्षकार द्वारा – राज्य की कोई अपील नहीं – प्राइवेट पक्षकारों द्वारा पुनरीक्षण में, दोषमुक्ति का आदेश अपास्त किया जा सकता है – दोषमुक्ति के आदेश को दोषसिद्धि के आदेश में परिवर्तित नहीं किया जा सकता – उच्च न्यायालय अधिक से अधिक पुनः विचारण के लिये निदेश दे सकता है – किंतु, उच्च न्यायालय द्वारा इस अधिकारिता का प्रयोग आपवादिक प्रकरणों में किया जाना चाहिये।

Cases referred :

(1951) 1 SCR 284, (1951) SCR 676, (1963) 3 SCR 412, (1968) 2 SCR 287, (1992) 4 SCC 305, (2005) 1 SCC 115, AIR 2008 Supreme Court 1165.

A.D. Mishra, for the applicant.

Pranay Gupta, for the non-applicant Nos. 1 to 3.

Shaheen Fatima, G.A. for the non-applicant No. 4/State.

ORDER

C.V. SIRPURKAR, J. :- This criminal revision is directed against judgment dated 31.12.2008 passed by Judicial Magistrate First Class, Katangi, District Balaghat, in Criminal Case No. 336 of 2008 whereby, accused persons/respondents Basant Kumar Dongre, Ashok Dongre and Savita Dongre were acquitted of the charge under Section 498A read with Section 34 of the I.P.C.

2. The prosecution case before the learned Trial Court was as follows: The revisionist/first informant Abhilasha had married respondent/accused no. 3 Basant Kumar on 17.5.2002 by Hindu rites. At the time of her marriage, her parents and brothers had given her Suzuki Motorcycle, Colour T.V., Fridge, Washing Machine, Almirah, Sofa Set, Dining Table, Diwan, Gold Chain, two Gold Rings and other ornaments and utensils. In addition thereto, she was

also given Rs. 8,000/- in cash that was received by the revisionist in gift from her relatives and acquaintances. After marriage, the petitioner stayed with her husband in the house of his brother in law Ashok and his wife Savita at Balaghat. They used to harass her complaining that they wanted Hero Honda Splendor Motorcycle in dowry, whereas her parents had only given Suzuki Motorcycle. They sometimes demanded Rs. 30,000/- and other times 50,000/- by way of dowry saying that her parents had given no cash. Ashok and his wife Savita also use to say that they had incurred expenditure on the adjudication and marriage of her husband Basant; therefore, they need to be compensated by her parents. Ashok and Savita used to instigate Basant to beat her. As a result, her husband Basant used to beat, threaten her that he would see her after reaching Tendukheda, where he was posted as teacher.

3. It was also case of the prosecution that Basant Kumar took her to Tendukheda on 30.6.2002. However, Ashok and Savita only gave her Fridge, Colour T.V, Washing Machine, and some other articles and retained rest of the item received in the marriage. They asked her to bring remaining items from her parents, as second time. Basant Kumar started to harass her from 2.7.2002. onwards, demanding Hero Honda Splendor Motorcycle. He used beat her and forcibly poured liquor in her mouth and threatened to kill her. She was not given enough food. Basant Kumar used to block the telephone, so that she would not be able to speak to her parents and she was also not allowed to speak to her neighbours. On one day, respondent Basant Kumar warned her that he would sort her out after returning from school. Her neighbours advised her that it was dangerous for her to stay with him; therefore, she took her cloths and with the help of her neighbours fled to her maternal uncles's place at Seoni; wherefrom, her parents and brothers took her to her maternal home. Subsequently on 19.7.2002, she lodged a written report with Superintendent of Police of Balaghat. On the basis of aforesaid written report, a crime under Section 498-A of the I.P.C. was registered.

4. After trial, learned Trial Court acquitted all three accused persons namely Basant, Ashok and Savita of the charge under Section 498-A read with section 34 of the I.P.C., extending benefit of doubt.

5. Learned Trial Court *interalia* recorded following reasons for acquittal

(a) That the first information report lodged on the basis of written report (Ex.-P1) has not been proved by examining Sub-Inspector N.S. Kumar, who had recorded the same;

(b) that Petitioner Abhilasha had admitted in her statement that she had not stated in her written report (Ex.P-1) that accused persons namely Ashok and Savita used to tell her that they had incurred expenditure on her husband's education; therefore, they should be compensated;

(c) that she also admitted in her statement that she did not write in the report that Ashok and Savita used to demand Rs. 30,000/- or Rs. 50,000/- and used to instigate her husband Basant Kumar for demanding dowry and for beating her; therefore statement of petitioner Abhilasha cannot be relied upon in this regard.

(d) that Puran Lal (PW-2), father of the petitioner has admitted that it was not settled before the marriage as to what items shall be given in dowry;

(e) that he also admitted that none of the accused persons had demanded any dowry in his presence. His knowledge in this regard is based upon information received from petitioner Abhilasha; therefore, the statement of Puran Lal that Suzuki Motorcycle was given to Basant Kumar on demand from him is falsified.

(f) that Rajesh Kumar (PW-3), brother of petitioner Abhilasha has stated that she never had any conversation with Abhilasha regarding harassment for dowry;

(g) that Punaram (PW-5), is said to have gone to Ashok's house with Kishore, brother of Abhilasha on 10.2.2002. He has stated in the Court that in his presence no physical assault, altercation or abuse took place. He further stated that they had returned without taking Abhilasha with them whereas he had stated to the police that after altercation, they had taken Abhilasha back to her maternal home thus, the statement of witness Punaram can also not be believed;

(h) that on the basis of aforesaid considerations, the statement of petitioner Abhilasha and other prosecution witnesses are not worthy of credit.

6. The impugned judgment of acquittal has been mainly assailed on behalf of the petitioner/first informant Abhilasha on the grounds that though first information report recorded by Sub-Inspector N.S. Kumre has not been proved; yet, the written report (Exhibit P-1) sent by the petitioner Abhilasha to the Superintendent of Police, was duly proved. It is on the basis of this written report that the first information report was recorded. As such, failure

to prove the first information report in the case did not have any bearing on the case of the prosecution. It has further been contended that the approach of learned trial Court in appraisal of evidence was not balanced. It accorded undue weightage to minor discrepancies occurring in the statements of prosecution witnesses and did not consider them worthy of credit on flimsy grounds. It has also been argued that learned trial Court failed to take attendant circumstances into consideration and mis-appreciated the evidence, resulting in acquittal of accused persons on unsubstantial grounds; therefore, it has been prayed that the judgment of acquittal be set aside.

7. Learned counsel for the respondent Nos. 1 to 3 on the other hand had supported the impugned judgment.

8. Before advertng to the findings recorded by learned trial Court in the case at hand, it would be apposite to refer to the position of law in this regard. On consideration of the authoritative pronouncement made by the Apex Court in the cases of *D. Stephens Vs. Nosibolla*, (1951) 1 SCR 284, *Logendranath Jha And Others Vs. Polai Lal Biswas*, (1951) SCR 676, *K. Chinawamy Reddy Vs. State of Andhra Pradesh*, (1963) 3 SCR 412, *Mahendra Pratap Vs. Sanju Singh And Another* (1968) 2 SCR 287, *Janta Dal Vs. H.S. Choudhary*, (1992) 4 SCC 305, *Satyajeet Banerjee Vs. State of West Bengal*, (2005) 1 SCC 115 and *Johar Vs. Mangal Prasad*, AIR 2008 Supreme Court 1165 following principles with regard to scope and ambit of powers of the High Court while adjudicating a criminal revision preferred by aggrieved person against a judgment of acquittal, may be culled out.

9. It is true that it is open to a High Court in revision to set aside an order of acquittal even at the instance of private parties, though the State may not have thought fit to appeal; but this jurisdiction should be exercised by the High Court only in exceptional cases. The High Court while exercising its revisional jurisdiction under Sections 397 and 401 of the Code of Criminal Procedure, exercises a limited power. Its jurisdiction to entertain a revision application, although is not barred but is severally restricted, particularly when it arises from a judgment of acquittal. Nothing in section 401 is deemed to authorize a High Court to convert a finding of acquittal into one of conviction. So the High Court, at best, can set aside the judgment of acquittal and order a retrial. Sub-section (3) of S. 401 forbids a High Court from converting a finding of acquittal into one of conviction and that makes it all the more incumbent on the High Court to see that it does not convert the finding of

acquittal into one of conviction by the indirect method of ordering retrial, when it cannot itself directly convert a finding of acquittal into a finding of conviction. This places limitations on the power of the High Court to set aside a finding of acquittal in revision. The High Court has to be alive to the fact that by ordering a retrial, the dice is heavily loaded against the accused because however much the High Court may caution the Subordinate Court, it is always difficult to re-weigh the evidence ignoring the opinion of the High Court. Thus, it is only in exceptional cases that this power should be exercised.

10. The High Court may exercise powers in exceptional cases:

(1) where the interests of public justice requires interference for the correction of a manifest illegality for the prevention of gross miscarriage of justice;

(2) where there is some glaring defect in the procedure, like want of jurisdiction or there is a manifest error on a point of law and consequently there has been a flagrant miscarriage of justice.

(3) to correct miscarriage of justice arising from misconception of law, irregularity of procedure, neglect of proper precaution or apparent harshness of treatment

(4) where the Court had shut out some material evidence which was admissible or any relevant evidence has been overlooked or where the Court attempted to take into account evidence which was not admissible, leading to gross and flagrant miscarriage of justice.

11. The High Court may not exercise the power:

(1) where it is required to enter into merits of the matter by analyzing the depositions of witnesses examined on behalf of the prosecution and re-appreciate the whole evidence for substituting one possible view by another;

(2) by merely characterizing the judgment of the trial court as "perverse" and "lacking in perspective, without assigning reasons therefor;

(3) simply because the lower court has taken a wrong view of the law without causing flagrant miscarriage of justice;

(4) where the Court below has misappreciated the evidence on record without making the judgment perverse; or

(5) to upset pure findings of fact based on the trial Court's appreciation of the evidence in the case.

12. The aforesaid list of circumstances where the High Court may or may not exercise revisional jurisdiction at the instance of the aggrieved person in respect of finding of acquittal, is enumerative and not exhaustive.

13. In the instant case, the offences is said to have been committed in the short duration of two months between 17.05.2002 and 19.07.2002. The judgment of acquittal was passed on 31.12.2008. No cruelty of serious nature has been alleged.

14. Applying aforesaid principles to the case at hand, we find that learned counsel for the petitioner has not been able to point out any manifest error of law on the part of learned trial Judge leading to miscarriage of justice. It cannot be said that any relevant evidence has not been considered and irrelevant material has been taken into consideration. Learned trial Court has analyzed the evidence of all prosecution witnesses and has recorded reasons for not placing reliance upon them. In the revisional jurisdiction against acquittal, the High Court is not supposed to enter into the merits of the matter and re-appreciate the whole evidence and substitute one possible view for another. The findings recorded by learned trial Court cannot be said to be perverse. This is not a one of those exceptional cases where interest of public justice requires interference in finding of acquittal for correction of a manifest illegality or for prevention of a gross miscarriage of justice.

15. Even if we assume for the sake of arguments that learned trial Court had mis-appreciated the evidence on record, the High Court in the exercise of revisional jurisdiction cannot reverse pure findings of fact on which the acquittal was based. The High Court has to be conscious of the fact if finding of acquittal is set aside and retrial is ordered, it would be difficult for the trial Court to re-appreciate the evidence ignoring the opinion of the High Court.

16. In aforesaid view of the matter, no case is made out for interfering with the judgment of acquittal.

17. Consequently, this revision against acquittal filed on behalf of aggrieved person, is dismissed.

Revision dismissed.

I.L.R. [2016] M.P., 273

MISCELLANEOUS CRIMINAL CASE**Before Mr. Justice Sushil Kumar Gupta**

M.Cr.C. No. 1508/2014 (Gwalior) decided on 4 December, 2014

ASHISH

...Applicant

Vs.

STATE OF M.P. & anr.

...Non-applicants

Criminal Procedure Code, 1973 (2 of 1974), Section 300 - Double jeopardy - Respondent had lodged FIR against applicant and his parents u/s 498-A of IPC and they were acquitted - Second FIR lodged again on similar allegations - No man shall be put in jeopardy twice for one and same offence - Applicant cannot be prosecuted for same offence - Charge sheet quashed. (Paras 3, 10 to 12).

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 300 - दोहरा संकट - प्रत्यर्थी ने भारतीय दंड संहिता की धारा 498-ए के अंतर्गत आवेदक एवं उसके माता-पिता के विरुद्ध प्रथम सूचना प्रतिवेदन दर्ज किया था और उन्हें दोषमुक्त किया गया था - समान अभिकथनों पर पुनः दूसरा प्रथम सूचना प्रतिवेदन दर्ज किया - किसी व्यक्ति को एक एवं समान अपराध के लिये दो बार दंडित नहीं किया जा सकता - समान अपराध के लिये आवेदक को अभियोजित नहीं किया जा सकता - आरोप पत्र अभिखंडित।

Cases referred :

1999 (1) J LJ 388, (2011) 1 SCC (Cri) 882.

A.R. Shivhare, for the applicant.

R.S. Sharma, P.L. for the non-applicant no.1/State.

Vinod Pathak, for the non-applicant no. 2.

ORDER

SUSHIL KUMAR GUPTA, J. :- Petitioner has filed this petition under Section 482 of Cr.P.C. for invoking the inherent powers of this Court for quashing the FIR and further proceedings of Criminal Case No.15963/2013 pending in the Court of JMFC, Gwalior, in connection with Crime No.581/2013 registered under Sections 498-A, 506/34 of IPC at police Station, Kampoo, Distt. Gwalior.

2. The brief facts of the case are that on 8.11.13 the complainant/

respondent No.2 has lodged a report against the petitioner and his family members at police Station, Kampoo, Distt. Gwalior, alleging that her marriage got solemnized with the petitioner on 19.2.2007 in which her father gave jewellery and other items total worth Rs. three lacs and one motorcycle in dowry. It is further alleged that petitioner and her parents used to demand Rs.80,000/- more and five Beegha of land and also used to harass her physically and mentally on account of not fulfilling the demand of dowry. It is further alleged that petitioner and his family members beat her on 3.11.13, 5.11.13 and 7.11.13. Thereafter, she lodged the report on 8.11.13. On this report, the police registered the offence under Sections 498-A, 506/34 of IPC at Crime No.581/13 against the petitioner, his parents, brother and sister and after completion of the investigation submitted the charge-sheet against them and the case is pending before the learned trial Court.

3. Learned counsel for the petitioner submitted that complainant/respondent No.2 lodged a false report against the petitioner mentioning wrong facts and suppressing the original facts. He further submitted that earlier also complainant/respondent No.2 had lodged an FIR (Annexure A/2) against petitioner and his parents which was registered under Section 498-A, 506 read with Section 34 of IPC and Section 4 of the Dowry Prohibition Act at Crime No.33/12 at police Station, Mahila Thana Padav, Distt. Gwalior. In that case, police Station Mahila Thana Padav submitted the charge-sheet against petitioner and their parents before the trial Court. The learned trial Court, after trial, acquitted all the accused persons including the petitioner vide judgment dated 31.12.12 passed in Criminal Case No.4125/12. It is also submitted that complainant/respondent No.2 has suppressed these facts of the earlier FIR in the present report. It is also submitted that petitioner had filed a suit under Section 13 of the Hindu Marriage Act on 21.5.2010 against respondent No.2 which is still pending in the Family Court as Case No.30-A/2010 HMA and after filing of that petition respondent No.2 has lodged this false report against the petitioner and his family members. It is also submitted that allegations in both the FIRs are same and as per Section 300 of Cr.P.C. no person can be prosecuted more than once for the same offence and the law does not permit further prosecution of the accused on the same facts. In support of the submissions, learned counsel placed reliance on the decision of *Rafiq Khan and another v. Smt. Jamila Bee and another*, 1999 (1) JLJ 388. In view of the aforesaid, learned counsel prays for quashing of the FIR as well as further proceedings of Criminal Case No.15963/13 pending

in Court of JMFC, Gwalior.

4. Per contra, learned counsel for complainant/respondent No.2 submitted that facts of both the FIRs are different. He has also submitted that FIR (Annexure A/1) was lodged before the appearance of respondent No.2/complainant before the Family Court in the proceedings under Section 13 of the Hindu Marriage Act. He also submitted that petitioner and his parents were acquitted by the JMFC on 31.12.12 only on the ground that complainant/respondent No.2 & her father did not depose against the accused and prays for dismissal of the petition.

5. Learned counsel for respondent No.1/State also controverted the submissions made on behalf of the petitioner and prays for dismissal of the petition.

6. The only question arises for consideration in this petition is as to whether the petitioner can be prosecuted on the basis of FIR (Annexure A/1) lodged by respondent No.2/complainant while he was acquitted in criminal Case No.4125/12 vide judgment dated 31.12.12 arising out of FIR (Annexure A/2) lodged on the same allegation.

7. It is not disputed that complainant/respondent No.2 has lodged the FIR (Annexure A/2) on dated 15.4.12 against the petitioner as well as his parents which was registered under Section 498-A, 506/34 of IPC. It is also not in dispute that on the basis of this FIR, charge-sheet was submitted before the JMFC and after trial petitioner and his parents were acquitted of the charges under Section 498-A and 506/34 of IPC. It is also not in dispute that petitioner has filed a petition under Section 13 of the Hindu Marriage Act before the Principal Judge, Family Court, Gwalior, on dated 21.5.10 and alleged FIR (Annexure A/1) has been lodged by respondent No.2/complainant on dated 8.11.13 under Sections 498-A and 506/34 of IPC.

8. After perusal of both the FIRs, it appears that allegations of demand of Rs.80,000/- and five Beegha of land and harassment due to not fulfilling the demand are present in both the FIRs. It is also apparent from the judgment dated 31.12.12 that petitioner and his parents were acquitted of the charges under Section 498-A and 506/34 of IPC and the said order of acquittal became final.

9. In the case of *Kolla Veera Raghav Rao v. Gorantla Venkateswara Rao and another*, (2011) 1 SCC (Cri) 882, the Apex Court has observed

and explained the scope of Article 20(2) of the Constitution of India and Section 300(1) of Cr.P.C. in para 4 and 5 as under:-

4. It may be noticed that there is a difference between the language used in Article 20(2) of the Constitution of India and Section 300(1) Cr.P.C. Article 20(2) states:

“20.(2) No person shall be prosecuted and punished for the same offence more than once.”

On the other hand, Section 300(1) Cr.P.C. states:

“300. Person once convicted or acquitted not to be tried for same offence.- (1) A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under sub-section (1) of section 221, or for which he might have been convicted under sub-section (2) thereof”

5. Thus, it can be seen that Section 300(1) Cr.P.C. is wider than Article 20(2) of the Constitution. While Article 20(2) of the Constitution only states that “no person shall be prosecuted and punished for the same offence more than once”, Section 300(1) Cr.P.C. states that no one can be tried and convicted for the same offence or even for a different offence but on the same facts.”

10. Thus, Article 20(2) of the Constitution of India provides that no person shall be prosecuted and punished for the same offence more than once. The rule against double jeopardy is stated in the maxim “Nemo Debet Bis Vexari Pro Una Et Eadem Causa”. It is significant basic rule of criminal law that no man shall be put in jeopardy twice for one and the same offence. The rule provides foundation for the pleas of “autrefois acquite” and “autrefois convict”. The manifestation of this rule is to be found contained in Section 300 of Cr.P.C.

11. In view of the facts and circumstances of the case in hand and the law

applicable, in my considered opinion when the petitioner in a case instituted on an FIR (annexure A/2) has been tried for the offence under Section 498-A and 506/34 of IPC and acquitted in Criminal Case No.4125/12 vide judgment dated 31.12.12 and the said order of acquittal became final and still remained in force, in such state of affairs on the same set of facts the petitioner cannot be prosecuted for the same offence in view of Section 300(1) of Cr.P.C.

12. Consequently, this petition deserves to be allowed and is allowed accordingly and the FIR and further proceedings of Criminal Case No.15963/2013 pending in the Court of JMFC, Gwalior, in connection with Crime No.581/2013 registered under Sections 498-A, 506/34 of IPC at police Station, Kampoo, Distt. Gwalior, are hereby quashed so far as it relates to the petitioner.

Application allowed.

I.L.R. [2016] M.P., 277

MISCELLANEOUS CRIMINAL CASE.

Before Mr. Justice Sushil Kumar Gupta

M.Cr.C. No. 4388/2014 (Gwalior) decided on 15 December, 2014

SOHANLAL SINGHAL & anr.

...Applicants

Vs.

SUNIL JAIN

...Non-applicant

Negotiable Instruments Act (26 of 1881), Section 138 and Evidence Act (1 of 1872), Section 45 - Hand writing expert - Age of writing of the cheque as well as signature of the accused are in dispute - Trial Court will call the handwriting expert for examination of the disputed cheque - Order of trial Court liable to be set aside. (Paras 12 and 13)

परक्राम्य लिखत अधिनियम (1881 का 26), धारा 138 एवं साक्ष्य अधिनियम (1872 का 1), धारा 45 - हस्तलिपि विशेषज्ञ - चैक लिखे जाने का समय और साथ ही अभियुक्त के हस्ताक्षर विवादित हैं - विवादित चैक के परीक्षण हेतु विचारण न्यायालय हस्तलिपि विशेषज्ञ को बुलायेगा - विचारण न्यायालय का आदेश अपास्त किये जाने योग्य।

Cases referred :

2012 (II) MPWN 13, 2009 Legal Eagle (M) 47, 2012 Legal Eagle (MP) 222, AIR 1971 SC 1093, AIR (2003) P & H 344, 2008 AIR SCW 3349.

Suresh Agarwal, for the applicants.

A. V. Bhardwaj, for the non-applicant.

ORDER

SUSHIL KUMAR GUPTA, J. :- This petition has been filed under Section 482 of the Code of Criminal Procedure, 1973 [in short the "Code"] by the petitioners being aggrieved by the order dated 06.05.2014 passed by Judicial Magistrate First Class, Gwalior in Criminal Complaint No.5739/2013 whereby the application under Section 45 of Evidence Act, 1872 [for brevity Act 1872] sending the disputed cheque for examination by the handwriting expert was dismissed.

2. Brief facts of the case are that respondent filed a private complaint under Section 138 of Negotiable Instruments Act, 1881 [in short the Act 1881] wherein it was alleged that accused received Rs.5,00,000/- from the respondent/complainant and for paying the same issued a cheque No.000097 of Allahabad Bank dated 11.03.2013 in favour of the complainant. It was further alleged that cheque was presented in the bank by the complainant and the same was dishonored with the endorsement opening balance insufficient, hence, issued a legal notice, thereafter, private complaint has been filed before the competent Court. During the pendency of the complaint, petitioners/accused filed an application under Section 45 of Act 1872 and the same was dismissed vide order dated 26.09.2013 on the ground that the accused can take this steps at the stage of defence. It is further submitted that evidence was produced by the respondent/complainant before the Court and the same was cross examined by the counsel of the petitioners and it was admitted by the complainant that he has not completed any formalities with regard to the transaction. Complainant closed evidence and Court recorded examination of the petitioner under Section 313 of the code and fixed the case for defence.

3. At the stage of defence, petitioners filed an application under Section 45 of Act 1872 for sending the disputed cheque for examination by the handwriting expert. Respondent did not file any reply and after hearing of the parties, learned Magistrate dismissed the same vide order dated 06.05.2014.

4. Learned counsel submitted that impugned order passed by learned Magistrate is wholly illegal, arbitrary hence deserves to be set aside. It is further submitted that learned Trial Court committed an error in not considering the order passed by this Court in the cases of *Abhishek Vs. Ramesh* reported

in 2012 (II) MPWN 13, *Mukesh Goyal Vs. Yasin Patel* reported in 2009 Legal Eagle (M) 47 and *Ram Singh Damor Vs. Sunil Kumar* reported in 2012 Legal Eagle (MP) 222 wherein it was held that the age of writing on the disputed cheque is material for determination of the right of the petitioners/accused and they are entitled to get the cheque examination by handwriting expert and ascertained the age of both writing. It is further submitted that learned Trial court committed an error while passing the impugned order ignored the observation made in the order dated 26.09.2013 in which the Court observed that the stage is not proper and application can be filed at the stage of defence, hence, now the application is dismissed which is clearly violation of the natural justice. On these ground learned counsel for the petitioners prays for set aside the order dated 06.05.2014 by allowing the application under Section 45 of Evidence Act.

5. On the other hand learned counsel for the respondent vehemently opposed the argument advanced by learned counsel for the petitioners contended that the learned Trial Court exercised his jurisdiction judiciously as the application filed by the petitioners with the intention to protract the trial. He also submitted that petitioners have admitted their signature on the cheque therefore, no need to send the disputed cheque for examination of handwriting expert. He also submitted that impugned order passed by learned Trial Court is well merited and no interference is called for.

6. Upon perusal of the order dated 26.09.2013, it appears that earlier application under Section 45 of Act 1872 was dismissed by learned Trial Court on the ground that matter is at initial stage and in view of the settled principal (sic:principle) of the Apex Court, accused can plead and submit their defence at the stage of defence. At present the case is listed for recording the plea of the petitioners. Thereafter, in compliance of the said order, petitioners have filed this application under Section 45 of Act 1872 after completion of the complainant evidence and recording his examination under Section 313 of the Code at the defence stage.

7. Learned counsel for the petitioners submitted that learned Trial Court committed an error in not considering the judgment of this Court in the case of *Abhishek Vs. Ramesh* reported in 2012 (II) MPWN 13, *Mukesh Goyal Vs. Yasin Patel* reported in 2009 Legal Eagle (M) 47 and *Ram Singh Damor Vs. Sunil Kumar* reported in 2012 Legal Eagle (MP) 222.

8. Learned counsel for the respondent submitted that when the disputed

signature has been admitted by the petitioners/accused they better know the date of signing of cheque, therefore, no need of sending the disputed document for examination of hand writing expert he placed reliance on M.Cr.C.No.8139/2013 passed on 28.11.2013.

9. Learned Trial Court has also placed reliance on the judgment of the Apex Court *Union of India Vs. Jyoti Prakash Mitter* reported in AIR 1971 SC 1093 and judgment of Punjab and Harayan *Yash Pal Vs. Kartar Singh* reported in AIR (2003) 344.

10. To appreciate the reasonings recorded by the Trial Court in the impugned order Section 45 of Act 1872 reads as under :-

When the Court has to form an opinion upon a point of foreign law or of science or art, or as to identity of handwriting (or finger impressions) the opinions upon that point of persons specially skilled in such foreign law, science or art, (or in questions as to identity of handwriting) (or finger impressions) are relevant facts. Such persons are called experts.

Section 243 of the Code reads as under :-

1. The accused shall then be called upon to enter upon his defence and produce his evidence; and if the accused puts in any written statement, the Magistrate shall file it with the record.
2. If the accused, after he has entered upon his defence, applies to the Magistrate to issue any process for compelling the attendance of any witness for the purpose of examination or cross-examination, or the production of any document or other thing, the Magistrate shall issue such process unless he considers 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 and such ground shall be recorded by him in writing:

Provided that, when the accused has cross examined

or had the opportunity of cross examining any witness before entering on his defence, the attendance of such witness shall not be compelled under this section, unless the Magistrate is satisfied that it is necessary for the ends of justice.

3. The Magistrate may, before summoning any witness on an application under sub-section (2), require that the reasonable incurred by the witness in attending for the purposes of the trial be deposited in Court.

Section 243 (2) is clear that a Magistrate holding an inquiry under the Cr.P.C. in respect of an offence triable by him does not exceed his powers under Section 243(2) if, in the interest of justice, he directs to send the document for enabling the same to be compared by a hand-writing expert because even in adopting this course, the purpose is to enable the Magistrate to compare the disputed signature or writing with the admitted writing or signature of the accused and to reach his own conclusion with the assistance of the expert. The appellant is entitled to rebut the case of the respondent and if the document viz. the cheque on which the respondent has relied upon for initiating criminal proceedings against the appellant would furnish good material for rebutting that case, the Magistrate having declined to send the document for the examination and opinion of the hand-writing expert has deprived the appellant of an opportunity of rebutting it. The appellant cannot be convicted without an opportunity being given to her to present her evidence and if it is denied to her, there is no fair trial. 'Fair trial' includes fair and proper opportunities allowed by law to prove her innocence. Adducing evidence in support of the defence is a valuable right. Denial of that right means denial of fair trial. It is essential that rules of

procedure designed to ensure justice should be scrupulously followed, and courts should be jealous in seeing that there is no breach of them.

11. So far as the decision of the Hon'ble Apex Court in the case of *Union of India* (supra) and Punjab and Harayana in *Yashpal* (supra) here it is pertinent to mention that in latest decision of Hon'ble Apex Court in *T. Nagappa Vs. Muralidhar* reported in 2008 AIR SCW 3349 wherein the same circumstances wherein the age of writing of the cheque as well as signature of the accused are in dispute, the Hon'ble Apex Court allowed the appeal and directed examination of the cheque by some handwriting expert so that the age of both the writings can be ascertained and held here as under :-

"The learned trial Judge as also the High Court rejected the contention of the appellant only having regard to the provisions of Section 20 of the Negotiable Instruments Act. The very fact that by reason thereof, only a prima facie right had been conferred upon the holder of the negotiable instrument and the same being subject to the conditions as noticed hereinbefore, we are of the opinion that the application filed by the appellant was bona fide.

The issue now almost stands concluded by a decision of this Court in *Kalyani Baskar (Mrs.) Vs. M.S.Sampoornam (Mrs.)*, reported in (2007) 2 SCC 258- 2007(1) ANJ (SC) 308, wherein it was held :-

"12. Section 243(2) is clear that a Magistrate holding an inquiry under Cr.P.C. in respect of an offence triable by him does not exceed his powers under Section 243(2) if, in the interest of justice, he directs to send the document for enabling the same to be compared by a handwriting expert to compare the disputed signature or writing with the admitted writing or signature of the accused and to reach his own conclusion with the assistance of the expert. The appellant is entitled to rebut the case of the respondent and if the document viz. the cheque on which the respondent has relied upon for initiating criminal proceedings against the appellant would furnish good material for rebutting that case, the Magistrate having declined to send the document for the examination and opinion of the handwriting expert has

deprived the appellant an opportunity of rebutting it. The appellant cannot be convicted without an opportunity being given to her to present her evidence and if it is denied to her, there is no fair trial. "Fair trial" includes fair and proper opportunities allowed by law to prove her innocence. Adducing evidence in support of the defense is a valuable right. Denial of that right means denial of fair trial. It is essential that rules of procedure designed to ensure justice should be scrupulously followed, and the Courts should be jealous in seeing that there is no breach of them."

However, it is not necessary to have any expert opinion on the question other than the following :

"Whether the writings appearing in the said cheque on the front page is written on the same day and time the said cheque was signed as "T.Nagappa" on the front page as well as on the reverse, or in other words, whether the age of the writing on Ex.P/2 on the front page is the same as that of the signature "T.Nagappa" appearing on the front as well as on the reverse of the cheque Ex.P/ 2 ?"

12. On the basis of aforesaid law laid down by the Hon'ble Apex Court the facts of the present case also appears to be same wherein the petitioner/accused are taking defence that the cheque has not been filled by his handwriting and operative part of the cheque was filled by using different pens. Therefore, it would be beneficial evidence in favour of the petitioners/accused to ascertain the age of both the writing, signature of the petitioners as well as other remaining writing of the cheque and by rejecting the aforesaid application for examination by some hand writing expert petitioners/accused have deprived his valuable right for fair trial and right to rebut complainant's case.

13. Resultantly, in view of the above, the petition is allowed. The impugned order passed by the Trial court is set aside and it is directed that the Trial Court will call the handwriting expert for examination of the disputed cheque. After obtaining report and recording of the statement of the handwriting expert the Trial court will proceed with the trial according to law. The costs of the hand writing expert will be borne by the petitioners/accused.

14. With the aforesaid directions, this petition is disposed of.

Application allowed.

I.L.R. [2016] M.P., 284

MISCELLANEOUS CRIMINAL CASE*Before Mr. Justice Alok Verma*

M.Cr.C. No. 5169/2014 (Indore) decided on 16 December, 2014

MANISH

...Applicant

Vs.

K.G. SHARMA

...Non-applicant

(Alongwith M.Cr.C.No. 5166/2014)

Negotiable Instruments Act (26 of 1881), Section 138 - Cheques were signed by 'A' for and on behalf of Aman Jeweler as proprietor of the concern - In the legal notice also, he was described as proprietor of the concern - In complaint filed u/s 200 of Cr.P.C., present applicant also added - No prima-facie evidence available to infer that Aman Jeweler is a partnership firm and present applicant is a partner - Applicant has no liability for dishonor of cheques - Therefore, applicant discharged from charge.

(Paras 10 & 12)

परक्राम्य लिखत अधिनियम (1881 का 26), धारा 138 - प्रतिष्ठान के स्वत्वधारी के रूप में 'ए' ने अमन ज्वेलर के लिये एवं उसकी ओर से चैक हस्ताक्षरित किये - कानूनी नोटिस में भी, वह प्रतिष्ठान के स्वत्वधारी के रूप में वर्णित था - दंड प्रक्रिया संहिता की धारा 200 के अंतर्गत, प्रस्तुत शिकायत में वर्तमान आवेदक को भी जोड़ा गया - यह निष्कर्ष निकालने के लिये, प्रथम दृष्ट्या साक्ष्य उपलब्ध नहीं है कि अमन ज्वेलर एक भागीदारी फर्म है एवं वर्तमान आवेदक एक भागीदार है - चैक के अनादरण के लिये आवेदक का कोई दायित्व नहीं - अतः, आवेदक को आरोपमुक्त किया गया।

Case referred :

2004 (4) MPLJ 1.

Pushyamitra Bhargava, for the applicants.*V.P. Khare*, for the non-applicants.**ORDER**

ALOK VERMA, J. :- This common order shall govern the disposal of MCRC nos. 5169/2014 and 5166/2014.

2. These applications under section 482 of Cr.P.C are filed for quashment of proceedings arising out of complaint case nos. 29218/2010 and 17960/2010 pending before the learned JMFC, Indore and also for setting aside of the

order passed by learned 3rd Additional Sessions Judge, Indore in Criminal Revision nos. 118/2014 and 117/2014 respectively dated 27/01/2014.

3. The facts relevant for disposal of these applications are that the respondent filed a complaint under section 138 of Negotiable Instruments Act against the present applicant as well as his brother Aman Verma for dishonor of three cheques allegedly issued by partnership firm, of which, it was alleged that the present applicant as well as his brother Aman Verma were the partners. According to the averments made in the complaint, three cheques were issued totaling (sic: totalling) Rs. 7,50,000/-.

4. These applications involve a short question, whether present applicant Manish Verma can be made an accused in the complaint, when the cheques were signed by his brother Aman Verma on behalf of Aman Jeweler as proprietor of the concern.

5. According to the present applicant, Aman Jeweler is the sole proprietorship concern and his brother Aman Verma is the sole proprietor of the concern. The cheques under dispute were signed on behalf of sole proprietorship Aman Jeweler, of which, his brother is the sole proprietor.

6. An application was filed by the present applicant before the learned Magistrate stating therein, that Aman Jeweler is not a partnership firm, but the sole proprietorship concern, and as such, he is not liable for rights and liabilities of the concern. His brother is the sole proprietor of the concern. As such, he signed the cheques. The learned Magistrate dismissed his application placing reliance on the judgment of Hon'ble Apex Court delivered in the case of *Adalat Prasad Vs. Rupalal Jindal* reported in 2004(4) MPLJ 1 on the ground that after issuing summons, it was not under the power of Magistrate to recall his own order and discharge the present accused. The present applicant then filed a revision against this order. The learned Revisional Court also took the same view and dismissed the revision. Against which, the present applications are filed.

7. Under these background, the moot question for consideration in this case is that, whether the present applicant is liable for dishonor of cheques issued and signed by his brother Aman Verma for and on behalf of Aman Jeweler, which according to the present applicant, is the sole proprietorship concern.

8. So far as the principle laid down by Hon'ble Apex Court in the case of *Adalat Prasad* (supra) is concerned, it is true that Magistrate cannot recall his own order and only after taking evidence, the person against whom,

summons were issued, can be discharged. However, these applications are filed under section 482 of Cr.P.C and limitation is not applicable on this Court. In this view of the matter, it is to be seen, whether Aman Jeweler was the sole proprietorship concern or it was partnership firm.

9. - Learned counsel for the applicant argues that in the legal notice issued on 11/06/2010, only name of brother of the present applicant Aman Verma was mentioned. Notice was given to the proprietor of Aman Jeweler and name of the present applicant nowhere appears. However, in the complaint, the concern Aman Jeweler was described as accused and the name of the present applicant was also added. He argues that being sole proprietorship concern, the present applicant is not liable in any way for the transactions that were undertaken by his brother Aman Verma

10. I have gone through the documents filed by the present applicant. Copies of the cheques, which are subject matter of these complaint, clearly show that the cheques were signed by Aman Verma for and on behalf of Aman Jeweler as proprietor of the concern. In the legal notice also, he was described as proprietor of the concern. Subsequent to this, in the complaint filed under section 200 of Cr.P.C, name of the present applicant was added. If it was the case of the complainant that Aman Jeweler is the proprietorship firm, then it was his duty to obtain certificate of the firm issued by the Registrar, Firms and Societies during registration of the firm and also copy of the partnership deed, but it has not been done by the respondent and as such, there is no *prima facie* evidence available to infer that Aman Jeweler is a partnership firm and the present applicant is a partner.

11. In this view of the matter, it is apparent that the present applicant has no liability for dishonor of the cheques, which were subject matter of the complaint and accordingly, the applications deserve to be allowed.

12. Accordingly, these applications are allowed. It is directed that the name of the present applicant be deleted from the complaint case nos. 29218/2010 and 17960/2010 pending before the learned JMFC, Indore filed by the respondent. He is discharged from the charge under section 138 of Negotiable Instruments Act.

13. With the aforesaid observations and directions, present applications stand disposed of.

C.c as per rules.

Application allowed:

I.L.R. [2016] M.P., 287

MISCELLANEOUS CRIMINAL CASE*Before Mr. Justice N.K. Gupta*

M.Cr.C. No. 9311/2012 (Jabalpur) decided on 1 May, 2015

SUKHVATI BAI (SMT.)

...Applicant

Vs.

MANPHOOL NARVARIYA

...Non-applicant

A. Criminal Procedure Code, 1973 (2 of 1974), Section 125 - Maintenance - Second wife - If the respondent/husband has done a cheating with the applicant/wife by not informing about the first marriage then still he is liable to pay maintenance to the applicant/wife - Application allowed. (Para 16)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 125 - भरण-पोषण - दूसरी पत्नी - प्रत्यर्थी/पति ने यदि प्रथम विवाह के बारे में जानकारी न देकर आवेदिका/पत्नी के साथ छल किया है, तब भी वह आवेदिका/पत्नी को भरण-पोषण का भुगतान करने के लिये उत्तरदायी है - आवेदन मंजूर।

B. Evidence Act (1 of 1872), Section 114 - Presumption - Applicant resided with the respondent for 15 years as a wife - It shall be presumed that the applicant was the wife of the respondent. (Para 7)

ख. साक्ष्य अधिनियम (1872 का 1), धारा 114 - उपधारणा - आवेदिका 15 वर्षों तक प्रत्यर्थी के साथ पत्नी के रूप में निवासरत रही - यह उपधारणा की जायेगी कि आवेदिका, प्रत्यर्थी की पत्नी थी।

C. Evidence Act (1 of 1872), Section 103 - Burden of proof - Where it is a admitted fact that the applicant resided with the respondent for 15 years as a wife, it shall be presumed that pleadings and statements of the applicant are acceptable and the marriage of the applicant took place with the respondent by following the various rituals and procedure as prescribed in the Hindu Marriage Act. (Para 8)

ग. साक्ष्य अधिनियम (1872 का 1), धारा 103 - सबूत का भार - जहां यह स्वीकृत तथ्य है कि आवेदिका 15 वर्षों तक प्रत्यर्थी के साथ पत्नी के रूप में निवासरत रही, यह उपधारणा की जायेगी कि आवेदिका के अभिवचन एवं कथन स्वीकार करने योग्य है तथा प्रत्यर्थी के साथ आवेदिका का विवाह विभिन्न रीति रिवाजों एवं प्रक्रिया जैसा कि हिंदू विवाह अधिनियम में विहित है का पालन करते हुए हुआ है।

Cases referred :

2014 (2) MPHT 499 (SC), ILR (2008) MP 981, 2005 (2) MPHT 382, 1991 (2) SCC 375.

N.K. Jain, for the applicant.

Rajendra Raghuvanshi, for the non-applicant.

ORDER

N.K. GUPTA, J. :- That, vide order dated 14.2.2012 the JMFC, Hoshangabad in M.J.C No.226 of 2010 granted a maintenance of Rs.6000/- per month to the applicant from the date of order. In Criminal Revision No.28 of 2012 the Sessions Judge, Hoshangabad vide order dated 22.5.2012 reversed the order passed by the JMFC and dismissed the application under Section 125 of the Cr.P.C filed by the applicant. Being aggrieved with the order passed by the Sessions Judge the applicant has preferred the present petition under Section 482 of the Cr.P.C.

2. Facts of the case in short are that the applicant had preferred an application under Section 125 of the Cr.P.C before the trial Court that marriage of the applicant and respondent took place on 17.11.1995. The respondent after consuming liquor was habitually doing cruelty upon the applicant. Ultimately on 3.11.2010, he ousted the applicant from his house and she was forced to leave her clothes and ornaments at the house of the respondent and thereafter she resided with her younger sister. She pleaded about the source of income of the respondent and claimed a sum of Rs.10,000/- per month as maintenance.

3. The respondent in his reply accepted the marriage but, denied that it was done according to the rituals of Hindu law. Only an affidavit was executed and therefore, marriage was not solemnized validly. The applicant was already married with one Gopal and it was informed to the respondent that a divorce of the applicant took place with her husband and after some time husband of the applicant had already expired but, after two years of marriage with the respondent, the respondent was informed that the previous husband of the applicant was alive. Since the applicant was not blessed with a child and therefore, she was quarreling with the respondent and ultimately she left the house of the respondent. He denied about his income and therefore, it was prayed that the application under section 125 of the Cr.P.C be dismissed.

4. The JMFC after considering the evidence adduced by the parties found that the applicant was not married with Gopal and allegation made by the respondent to that effect was not correct. The respondent has accepted that being her husband, he was responsible to maintain the applicant. The trial Court found that he was competent to give a sum of Rs.6000/- per month and therefore, such maintenance was granted from the date of order.

5. In revision the revisionary Court found that the respondent was already married with one Hiriya Bai and therefore, marriage of the applicant and the respondent was invalid. Similarly, the applicant did not obtain divorce from her previous husband Gopal and therefore, the applicant was residing with the respondent without any valid marriage and therefore, she was not entitled to get the maintenance. Consequently, the revisions was allowed and maintenance application of the applicant was dismissed.

6. I have heard the learned counsel for the parties at length.

7. In the present matter, there are so many points relating to marriage of the parties and validity of that marriage. The respondent has accepted in his reply that marriage of the applicant took place with him but, rituals were not followed and it was accepted on the basis of affidavits and therefore, it was not a valid marriage in the eye of law. However, it would be apparent that the respondent admitted the fact that marriage of the applicant took place with the respondent and they lived as husband and wife. In this connection, the learned counsel for the applicant has invited the attention of this Court to the judgments passed by the Apex Court in the case of "*Badshah Vs. Sou. Urmila Badshah Godse and another*" (2014(2) M.P.H.T. 499(SC)) and "*Tulsa and others Vs. Durghatiya and others*" (I.L.R (2008) M.P. 981). In the case of *Tulsa* (supra) the Apex Court has held as under :-

"11. "In *Mohabhat Ali V. Md. Ibrahim Khan* (AIR 1929 PC 135) their Lordship (sic: Lordship) of the Privy Council once again laid down that :

"The law presumes in favour of marriage and against concubinage when a man and woman have cohabited continuously for number of years"

12. It was held that such a presumption could be drawn under Section 114 of the Evidence Act.

13. Where the partners lived together for long spell as husband and wife there could be presumption in favour of wedlock. The presumption was rebuttal, but a heavy burden lies on the person who seeks to deprive the relationship of legal origin to prove that no marriage took place. Law leans in favour of legitimacy and frowns upon Bastardy (See: *Badri Prasad Vs. Dy. Director of Consolidation and others*) (AIR 1978 SC 1557).

14. This Court in *Gokal Chand V. Parvin Kumari* (AIR 1952 SC 231) observed that continuous co-habitation of woman as husband and wife and their treatment as such for a number of years may raise the presumption of marriage, but the presumption which may be drawn from long co-habitation is rebuttal and if there are circumstances which weaken and destroy that presumption, the Court cannot ignore them."

In the present case, the applicant resided with the respondent for 15 years as a wife and therefore, in the light of the aforesaid judgment of the Apex Court, it shall be presumed that the applicant was the wife of the respondent. Hence it was for the respondent to rebut the presumption.

8. Similarly, according to the provisions of Section 103 of the Evidence Act if any of the party pleads a particular fact then it is its duty to prove it. Provisions of Section 103 of the Evidence Act is reproduced as under :-

"S.103. Burden of proof as to particular fact. - The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person"

In this case the respondent has pleaded that marriage of the applicant and the respondent took place by execution of affidavits and therefore, it was for the respondent to prove that marriage was performed in such a manner which was not an appropriate procedure to make a valid marriage. To prove such a fact it was for the respondent to file those affidavits by which the marriage was alleged to be performed but, except for giving his oral evidence the respondent did not furnish any documentary evidence to that effect and a fact which was specifically pleaded by the respondent could not be proved by

him. Hence, on his admission that his marriage took place with the applicant and in the light of the judgment passed by the Apex Court in the case of *Tulsa* (supra) where it is a admitted fact that the applicant resided with the respondent for 15 years as a wife, it shall be presumed that pleadings and statements of the applicant are acceptable and the marriage of the applicant took place with the respondent by following the various rituals and procedure as prescribed in the Hindu Marriage Act.

9. The respondent took a plea that the applicant was already married with one Gopal and without taking any divorce from that Gopal the applicant started residing with the respondent. In this context Sukhvati Bai (PW1) has denied that her marriage ever took place with Gopal. In the cross examination of Sukhvati Bai such a suggestion was not given by the learned counsel for the respondent to show that the applicant was married with one Gopal and no divorce took place. According to Section 103 of the Evidence Act a specific pleading was done by the respondent but, it is surprising that after receiving the notice Ex.P/4 the respondent did not send any reply to the notice with such objection. According to the provision of Section 103 of the Evidence Act, it was the duty of the respondent to prove that the first marriage of the applicant took place with one Gopal and best evidence could be placed by the respondent before the Court that Gopal could be brought before the Court with the claim that the applicant was his wife. Manphool (DW1) has stated that he has filed the electoral roll of Polling Centre, Nagar Paradhe as Ex.D/3 in which it was mentioned that at serial no.327 one entry was made that Gopal s/o Manphool r/o House No.69 was listed in that electoral roll and at serial no.328 in the same house one Shukvati was listed. However, the respondent could not connect with document Ex.D/3 that it was relating to the applicant. It was for the respondent to establish that the applicant resided on a particular address given in electoral roll specifically in House No.69. Name of the applicant is not exactly re-produced in the document Ex.D/3. A person who is shown in the electoral roll Ex.D/3 has a name Shukvati. It is slightly different from the name of the applicant and therefore, it was necessary for the respondent to prove that the document Ex.D/3 was the document related to the applicant. Secondly, if name of a woman is given as a wife of someone in the electoral roll then it is not necessary that a woman was a wedded wife of the person for whom the electoral roll indicates that she is wife of that person. Electoral roll is prepared only by information given by the person residing in the house and therefore, by collecting such information if a electoral roll is

prepared then on the basis of electoral roll it cannot be concluded that alleged Shukvati was wedded wife of Gopal s/o Manphool.

10. According to the document Ex.D/3 alleged Shukvati was aged 21 years in the year 1998 and therefore, in the year 2011 she should be 43 years old whereas, Sukhvati (PW1) has stated her age to be 30 years in her statement. If it may be presumed that Sukhvati Bai could not tell her actual age and she was 35 years old at the time of her statement then still age of alleged Shukvati as mentioned in the document Ex.D/3 does not match with the age of the applicant.

11. Under these circumstances, when the respondent did not give any reply to the notice given by the applicant no suggestion was given in the cross examination of the applicant Sukhvati (PW1), alleged Gopal could not be produced before the Court and also, no other witness was produced before the Court that marriage of the applicant took place with Gopal or she resided with Gopal at a particular place in a particular house shown in the document Ex.D/3. The testimony of the respondent Manphool cannot be accepted. The respondent could not prove his pleading relating to the fact that the applicant was already married with Gopal and without getting a divorce from that Gopal the applicant entered into a marriage with the respondent. The revisionary Court has committed an error of law in finding that the applicant was already married with Gopal and no divorce took place between them.

12. The respondent took a plea that he was married with one Hiriya Bai and thereafter, the applicant resided with him as a wife for 15 years but, after her ouster he again started to reside with Hiriya Bai. In support of these objections document Exs.D/1 and D/2 are filed and Hiriya Bai (DW2) was also examined. In this context the learned counsel for the applicant has placed his reliance upon the judgment of *Badshah* (supra) in which it is held that a Hindu having his first wife living but, suppressing that fact duping respondent/ woman by getting her to marry him then he cannot be permitted to deny the benefit of maintenance to the respondent taking advantage of his own wrong. In this judgment the Apex Court has dealt with the development of "Social Context Adjudication" and "Social Justice". Hence in the light of the judgment passed by the Apex Court in the case of *Badshah* (supra) if the respondent had hidden a fact of his previous marriage with Hiriya Bai then no effect would be caused if maintenance application of the applicant is granted. However, the position of evidence is to be examined before deciding that point.

13. It is an admitted fact that the applicant resided with the respondent for 15 years from November 1995. The respondent has filed the copy of electoral rolls of the year 1988 as Exs.D/1 and D/2 in which one Hiriyabai was shown to be residing with the respondent as wife. In this context if the statement of present Hiriyabai (DW2) is examined then Hiriyabai claims that her marriage with the respondent took place 40 years ago and thereafter, she was continuously residing with the respondent. However, she did not claim that she resided with the respondent in presence of the applicant Sukhvati Bai. When she was asked such a question then she replied that after her marriage her mental condition was disturbed and therefore, she was taken by her parents etc. to her parents house. Again she claimed that she remained for two years in her parents house and thereafter, she came back but, admittedly, the applicant resided with the respondent for 15 years and it is strange that Hiriyabai does not know Sukhvati Bai and Sukhvati Bai does not know Hiriyabai. If Hiriyabai was wife of the respondent and she was residing with the respondent in the year 1988 or 1991 then as to why she did not reside with the respondent in those 15 years when Sukhvati Bai resided with the respondent. This question was not answered by Manphool (DW1).

14. The Sessions Judge has relied upon the judgment passed by the Apex Court in the case of "*Savita Ben Somabai Bhatia Vs. State of Gujarat and others*" (2005 (2) M.P.H.T. 382) and "*Vimala Vs. Veeraswamy*" (1991 (2) SCC 375) in which it was held that a woman whose marriage did not take place validly then she is not entitled to get any maintenance from such alleged husband. However, the revisionary Court has committed a mistake in taking guidance from the aforesaid judgment. In this connection a portion of para 3 of the judgment passed by the Apex Court in the case of *Vimala* (supra) may be referred as under :-

"When an attempt is made by the husband to negative the claim of the neglected wife depicting her as a kept-mistress on the specious plea that he was already married, the court would insist on strict proof of the earlier marriage."

Hence it was for the respondent to plead and prove about his first marriage. I have gone through the reply submitted by the respondent before the trial Court and it is surprising that the respondent did not take the plea that he was already married with Hiriyabai. It is also shocking that when Manphool (DW1) and Hiriyabai (DW2) were examined the learned counsel for the respondent

did not amend the reply filed by the respondent and did not add such a plea in the reply and therefore, the revisionary Court has committed an error that without looking to the pleadings it took a decision on the basis of arguments advanced by the learned counsel for the respondent. It is settled view of the Apex Court that the procedure which is to be adopted for considering a maintenance application under Section 125 of the Cr.P.C is not a purely criminal procedure. Such a procedure that is a quasi civil procedure and therefore, as held by the Hon'ble the Apex Court in the case of *Vimala* (supra) it was for the respondent to "plead" and prove his objection. It is the settled principle of Civil Procedure Code that a fact which is not pleaded cannot be proved and if any proof is given then such proof shall be discarded. At this stage, I do not want to quote various orders of this Court in which it was held regularly that if there is a variance between pleading and proof then such portion of proof which is laid without any pleading shall not be read into the evidence.

15. However, though pleading is not done by the respondent if his proof is perused then Manphool and Hiriya Bai did not examine any independent witness to show that a valid marriage took place amongst them prior to the year 1988. By filing of electoral rolls the factum of marriage is not proved. As discussed above electoral roll could be prepared by the information given by the concerned person whose name is incorporated in that roll and therefore, in the year 1988 if Hiriya Bai was residing with Manphool and she had alleged before the officer preparing that electoral roll that she was wife of Manphool then her name could be shown as wife of Manphool in that electoral roll but, that electoral roll is not a sufficient document to prove the marriage of Hiriya Bai with the respondent. If she was wedded wife of the respondent then what was the reason as to why she did not reside with the respondent for 15 years from November 1995 to the year 2010 when the applicant was residing with the respondent. If her mental condition was not good then according to Hiriya Bai herself she remained for two years at her parents house and thereafter, she resided with the respondent but, it is an admitted fact that when the applicant Sukhvati Bai resided with the respondent for 15 years Hiriya Bai was not there in the life of the respondent. Hence it was for Hiriya Bai to show that as to why she left the respondent for more than 15 years and the reason behind such a conduct. If she was ousted by the respondent then whether she had taken any step for redressal. The conduct of the witness Hiriya Bai that she did not reside with the respondent for 15 years continuously when the applicant Sukhvati Bai resided with the respondent indicates that Hiriya Bai was not the wedded

wife of the respondent otherwise, she would have tried to come back to her husband's house or she would have initiated any proceeding under Section 125 of the Cr.P.C or Section 498-A of I.P.C against the respondent in that period of 15 years but, no such proceeding has been initiated by Hiriyabai according to herself. Hence conduct of Hiriyabai defeats the entry of electoral roll Exs. D/1 and D/2 that she was the wedded wife of the respondent.

16. When the respondent had tried to adduce an evidence that he was already married with Hiriyabai and therefore, as marriage took place with the applicant was invalid then it was for him to prove the factum of marriage of himself with Hiriyabai. Unfortunately, the respondent could not prove that his marriage took place with Hiriyabai. No witness has been examined who, attended such a marriage. No reason could be shown by the respondent Manphool himself as to why his first wife Hiriyabai did not reside with him for 15 years when he resided with the applicant Sukhvati Bai. Hence by filing the copy of two electoral rolls and examining Hiriyabai, evidence given by Manphool cannot be accepted that he was married with Hiriyabai prior to his marriage with the applicant. The revisionary Court has drawn a conclusion of such marriage without any basis, especially when the respondent did not plead such a objection in his reply to the maintenance application under Section 125 of the Cr.P.C. Hence, in the light of the judgment passed by the Apex Court in the case of *Vimala* (supra) the respondent neither could plead his objection relating to validity of marriage of the applicant due to first marriage of the respondent with Hiriyabai nor he could prove such a fact. Possibility cannot be ruled out that in the year 1988 or 1991 Hiriyabai would have resided with the respondent but by only that fact her marriage cannot be presumed with the respondent to be a valid marriage. Also in the light of the judgment passed by the Apex Court in the case of *Badshah* (supra) if the respondent has done a cheating with the applicant that he did not inform about the first marriage then still he is liable to pay maintenance to the applicant.

17. So far as the right of the applicant is concerned as to whether she is entitled to get maintenance without living with the respondent is concerned, the trial Court has rightly held that the testimony of the applicant Sukhvati (PW1) is acceptable. The respondent did not try to bring her back. On the contrary he kept another woman Hiriyabai with him. Now Hiriyabai was residing with the respondent therefore, this is the second ground for the applicant for her denial to reside with the respondent in the same house in the presence of Hiriyabai. Looking to the conduct of the respondent the allegation made by

the applicant that she was ousted by the respondent from his house appears to be correct and therefore, the applicant Sukhvati Bai is entitled to get a maintenance without residing with the respondent.

18. So far as the quantum is concerned, the respondent has tried to prove that he is an old man and therefore, he cannot do anything. However, it is proved by the applicant that the respondent has various pieces of land duly cultivated by the labours and he has a house in which many tenants are residing on rent and he is getting rent from those tenants and therefore, he has sufficient income so that he can provide the maintenance. However, if total income of the respondent as proved by the applicant and admitted by the respondent is considered and also the requirement of the applicant is assessed then the maintenance granted to the applicant appears to be slightly higher. A sum of Rs.5000/- per month would be the appropriate maintenance which can be granted to the applicant.

19. On the basis of the aforesaid discussion, the present petition filed by the applicant appears to be acceptable and it is partly accepted. The order passed by the revisionary Court is hereby set aside and the order passed by the trial Court is modified that the applicant is entitled to get a maintenance of Rs.5000/- per month from the respondent from the date of order passed by the trial Court.

20. A copy of the order be sent to the Courts below along with their records for information and future compliance.

Application partly allowed.

I.L.R. [2016] M.P., 296

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice Rajendra Mahajan

M.Cr.C. No. 12470/2009 (Jabalpur) decided on 16 September, 2015

RAJENDRA KUMAR JAIN

...Applicant

Vs.

SHRIRAM AGRAWAL

...Non-applicant

A. Criminal Procedure Code, 1973 (2 of 1974), Section 256
- Non-appearance of complainant - Powers are discretionary to be exercised judiciously, fairly and for advancement of criminal justice and not for its impairment.
(Para 5)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 256 – परिवादी का उपस्थित न होना – शक्तियाँ वैवेकिक हैं जिसका प्रयोग न्यायोचित रूप से, निष्पक्ष रूप से तथा आपराधिक न्याय की उन्नति के लिये किया जाना चाहिये और न कि उसकी हानि के लिए।

B. Criminal Procedure Code, 1973 (2 of 1974), Section 256 - Non-appearance of complainant - Circumstances for exercise of power - Appearance of complainant or his counsel on previous dates of hearing - Interested in early disposal of the case - Case should not be dismissed for singular default of appearance. (Para 5)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 256 – परिवादी का उपस्थित न होना – शक्ति के प्रयोग हेतु परिस्थितियाँ – सुनवाई की पूर्वतर तिथियों पर परिवादी या उसके अधिवक्ता की उपस्थिति – प्रकरण के शीघ्र निपटारे के इच्छुक – उपस्थिति के एकमात्र व्यतिक्रम पर प्रकरण को खारिज नहीं किया जाना चाहिए।

C. Criminal Procedure Code, 1973 (2 of 1974), Section 256 - Complaint dismissed in default of appearance - Magistrate should mention the reason that why he has no option but to dismiss the complaint. (Para 5)

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 256 – उपस्थिति के व्यतिक्रम में परिवाद खारिज – मजिस्ट्रेट को कारण उल्लिखित करना चाहिए कि क्यों उसके पास परिवाद खारिज करने के सिवाय कोई विकल्प नहीं।

Case referred :

ILR (2010) MP 2346.

Sushma Pandey, for the applicant.

None for the non-applicant despite duly served.

O R D E R

RAJENDRA MAHAJAN, J. :- The applicant has knocked the door of this Court by filing this petition under Section 482 of the Criminal Procedure Code, 1973 (for short 'the Code') for restoration of the Private Criminal Complaint Case No. 2001/2002 *Rajendra Kumar Jain Vs. Shriram Agrawal* (for short the 'case') on the file of Chief Judicial Magistrate Satna.

2. The intrinsic facts for adjudication of this petition are given below:-

2.1 The non-applicant/accused was being prosecuted in the case under Section 138 of the Negotiable Instrument Act, 1881 (for short the 'Act') in the Court of Chief Judicial Magistrate Satna (for short the 'Court') upon the applicant's complaint. On 25.03.2006, the case was fixed for his cross-examination. On that day, neither he nor his counsel was present even in the second round of calling-out after the recess. Consequently, the learned Trial Judge dismissed the case in their absence. Thereupon, he filed an application for the restoration of the case in the Court, stating that prior to the date of dismissal of the case i.e. 25.03.2006 it was posted on 09.03.2006 for his evidence. On that day, his senior counsel Shri R.K. Verma was not present as he had gone to Katni for family obligations. On that day, he was present with his junior counsel Shri Rudra Datt Gautam in the Court. Upon his prayer, the Court adjourned the case on the ground of non-availability of his senior counsel. On that day, his signature was obtained on the order-sheet of the case stating him that after the appearance of the counsel for the non-applicant, the next date of hearing will be given. When counsel Shri Rudra Datt Gautam sought the next date in his absence, he was told that the case is set down for 25.04.2006. Thereupon, he entered the next date of hearing of the case as 25.04.2006 against the date of 09.03.2006 in his advocate diary and informed him that date. On 29.03.06, senior counsel Shri R.K. Verma appeared in the Court in some other matter. He came to know that the case had been dismissed for non-appearance on 25.03.2006. Upon his instructions, he applied for the certified copy of the order-sheet dated 25.03.2006 and which he received on 12.04.2006. Thereafter, he filed the restoration application dated 18.04.2006 for taking the case on file mentioning the aforesaid background facts for his non-appearance and that of his counsel on 25.03.2006.

2.2 Vide the order dated 27.07.09, the learned Trial Judge dismissed his restoration application, holding that he does not have inherent power to restore the case in view of the law laid down in the cases of *Bindeshwari Prasad Singh Vs. Kali*

Singh (AIR 1977 SC 2432) and *Major Genl. A.S. Gauraya and another Vs. S.N. Thakur and another* (AIR 1986 SC 1440). It is worthy to note the ratio of these cases is that when a complaint case is dismissed by the Magistrate for non-appearance of the complainant or his counsel and the accused is acquitted, then the Magistrate cannot exercise any inherent power to restore the case in the absence of any specific provisions in the Criminal Procedure Code. However, a second complaint case is permissible in law if it could be brought within the limitation.

2.3 Aggrieved by the aforesaid order, the applicant has filed Criminal Revision No.96/2008 *Rajendra Kumar Jain Vs. Shriram Agrawal*, which was dismissed by the 6th Additional Sessions Judge Satna by an order dated 26.07.2009 upholding the view taken by the learned Trial Judge for restoration of the case in view of the law laid down in the aforesaid authorities.

2.4 Hence, this petition.

3. Learned counsel for the applicant has submitted that on each and every date of hearing of the case either the applicant or his counsel or both remained present prior to the dismissal of the case. However, on 25.03.2006, neither the applicant nor his counsel was present because of wrong noting of the next date of hearing 25.04.06 instead of 25.03.06. It is further submitted by her that looking to the regular appearance of the applicant and his counsel on all dates of hearings before the dismissal of the case and a single default of theirs on 25.03.06, the learned Trial Judge ought to have adjourned the case instead of dismissing it. Under the circumstances, the action taken by the learned Trial Judge was more harsh, strict and unjust. Therefore, this Court ought to exercise its inherent power under Section 482 of the Code for restoration of the case in order to prevent the miscarriage of justice suffered by the applicant. In support of the submissions, the learned counsel has relied upon a decision rendered in the case of *Vijay Singh Vs. Surendra Singh* I.L.R. (2010) M.P. 2346.

4. I have considered the submissions and perused the material on record.
5. Undisputedly, the trial of an offence punishable under Section 138 of

the N.I. Act is held as per the provisions of Chapter-XX of the Code. In this case, Section 256 of the Code is relevant, which provides for as to how the Magistrate would proceed on non-appearance of the complainant or his death during the trial. The Section is reproduced below with an objective to understand its provisions in right perspective:-

Section 256 Non-appearance or death of complainant

(1) If the summons has been issued on complaint, and on the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the accused, unless for some reason he thinks it proper to adjourn the hearing of the case to some other day:

Provided that where the complainant is represented by a pleader or by the officer conducting the prosecution or where the Magistrate is of opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with his attendance and proceed with the case.

(2) The provisions of sub-section (1) shall, so far as may be, apply also to cases where the non-appearance of the complainant is due to his death.

Upon the plain reading of the language of the Section, it is manifest that the power under Section 256 of the Code is discretionary in nature. Therefore, it cannot be stated as a rule of thumb that in each and every case where a complainant is absent, the complaint is necessarily dismissed and accused be acquitted mechanically. Hence, the requirement of this Section is that the Magistrate ought to exercise his discretion judiciously and fairly for the advancement of cause of administration of criminal justice and not for impairing it. Now, the question arises as to how the Magistrate should exercise his discretion. No doubt, this discretion depends upon the facts and circumstances of a given case and in this regard no arithmetical formula can be laid down. In a given case, by and large, if the complainant or his counsel or both appear regularly on the date of hearings and, if they are interested in early disposal of the case, then the case ought not to be dismissed for singular default of appearance on the part of the complainant and his counsel or both.

In such a situation the case should be adjourned for further date giving the reason thereof in brief. To ascertain these facts, proceedings of previous date of hearings may come in handy. If in a particular case, the Magistrate decides to dismiss the complaint on account of non-appearance of the complainant and his counsel, then he should, in brief, mention the reasons as to why he has no option but to dismiss the complaint. On the touch stone of the aforesaid criteria, this Court will examine whether the learned Trial Judge was justified in dismissing the applicant's complaint. By perusal of the order-sheet dated 25.03.06, the date of dismissal of the complaint, this Court finds that the learned Trial Judge had dismissed the complaint on account of non-appearance of the complainant and his counsel without taking into account whether the complainant and his counsel were regular in attending the case before and whether they are interested in the prosecution of it. Hence, the order of dismissal of the complaint is bad in law and the applicant has to suffer the miscarriage of justice. It is worth mentioning here that this Court has already held in case of *Vijay Singh* (supra) that for single default in appearance either of the complainant or his counsel or both, the Magistrate should not dismiss the complaint on the other hand, he should adjourn the case for further hearing.

6. However, the learned Magistrate and the learned Judge of Revisional Court have not committed any error by passing the orders dated 25.03.2008 and 26.07.2009 in view of the law laid down in the cases of *Vindeshwari Prasad Singh and Major Genl. A.S. Gauraya and another* (supra).

7. In the instant case, the applicant has properly explained the non-appearance of him and his counsel on 25.03.2006 and in support of the averments made in the petition, he has filed his affidavit. Hence, the case is deserved to be restored taking into account facts-situation of it.

8. In the aforesaid premises, this Court is of the view that it is a proper case for invocation of the extra-ordinary power vested in it by virtue of Section 482 of the Code to prevent the miscarriage of justice and to advance the cause of administration of criminal justice. Therefore, the learned trial Court is ordered to restore the case on its original number and to decide it in accordance with law expeditiously as the case is pending circa 2002.

9. A copy of this order be sent to the concerned trial Court without delay.

10. Accordingly, this petition is finally disposed of.

C.C. as per rules.

Application disposed of.

I.L.R. [2016] M.P., 302
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice J.K. Maheshwari

M.Cr.C.No. 14047/2013 (Jabalpur) decided on 16 September, 2015

RAVI KUMAR BAJPAI & anr.

...Applicants

Vs.

SMT. RENU AWASTHI BAJPAI

...Non-applicant

A. *Protection of Women from Domestic Violence Act (43 of 2005), Section 12 (Proviso)* - Whether it is obligatory to call for domestic violence report from Protection Officer or Service Provider at the time of issuance of notice, if it is not available or if report is available, then is it mandatory to consider it - Held - It is not obligatory for a Magistrate to call for or avail the report at the stage of taking cognizance and if report is available, then its consideration is obligatory even at the stage of issuance of notice or at the time of passing final order, as the case may be, affording opportunity to the other side - Application dismissed. (Paras 5, 6, 8 to 10, 12 to 14 & 16)

क. घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम (2005 का 43), धारा 12 (परंतुक) - क्या नोटिस जारी करते समय सुरक्षा अधिकारी या सेवा प्रदाता से घरेलू हिंसा प्रतिवेदन, यदि वह उपलब्ध न हो तब उसकी मांग करना बाध्यकारी है, या यदि प्रतिवेदन उपलब्ध है तब क्या इस पर विचार किया जाना आज्ञापक है - अभिनिर्धारित - संज्ञान लेने के प्रक्रम पर प्रतिवेदन की मांग करना या प्रतिवेदन प्राप्त करना मजिस्ट्रेट के लिये बाध्यकारी नहीं है और यदि प्रतिवेदन उपलब्ध है तब नोटिस जारी करने के प्रक्रम पर या अंतिम आदेश पारित करते समय भी जैसी कि स्थिति हो, अन्य पक्षकार को अवसर प्रदान करते हुये उसका विचारण किया जाना बाध्यकारी है - आवेदन खारिज।

B. *Criminal Procedure Code, 1973 (2 of 1974), Section 200 and Protection of Women from Domestic Violence Act (43 of 2005), Section 28(2) - Preliminary examination* - Domestic violence case - There is no requirement to record preliminary examination of the aggrieved person on filing the complaint and prior to taking the cognizance. (Para 10)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 200 एवं घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम (2005 का 43), धारा 28(2) - प्रारंभिक

परीक्षण – घरेलू हिंसा प्रकरण – परिवाद प्रस्तुत करने पर तथा संज्ञान लेने से पूर्व व्यथित व्यक्ति के प्रारंभिक परीक्षण को अभिलिखित किया जाना अपेक्षित नहीं ।

C. Interpretation of statutes - 2008 Cr.L.J. 264 (Ajay Kant Sharma & ors. vs. Smt. Alka Sharma) - Case law incorporating meaning "any order" means 'final order' is held per incuriam and case law of 2010 (1) MPHT 133 (Tehmina Qureshi vs. Shazia Qureshi) is also held per incuriam. (Paras 12 & 16)

ग. कानूनों का निर्वचन – 2008 क्रि.लॉ.जरनल 264 (अजय कान्त शर्मा और अन्य वि. श्रीमती अलका शर्मा) – निर्णय विधि जिसमें "कोई आदेश" का अर्थ "अंतिम आदेश" के अर्थ में समाविष्ट किया गया है, उसे अनवधानता के कारण होना अभिनिर्धारित किया गया है तथा निर्णय विधि 2010 (1) एम.पी.एच.टी. 133 (तहमीना कुरैशी वि. शाजिया कुरैशी) को भी अनवधानता के कारण होना अभिनिर्धारित किया गया ।

D. Words and phrases - Protection of Women from Domestic Violence Act (43 of 2005), Section 12(1) - Words 'Proviso', 'any order' and 'before passing any order' explained. (Paras 8 to 12)

घ. शब्द और वाक्यांश – घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम (2005 का 43), धारा 12(1) – शब्द 'परंतुक', 'कोई आदेश' एवं 'कोई आदेश पारित करने से पूर्व' स्पष्ट किया गया ।

Cases referred :

2012 (4) MPHT 169, 2008 Cri.L.J. 264, 2010 (1) MPHT 133, 2011 Cri.L.J. 1687, AIR 2010 SC 2239, 1982 (2) AER 737, AIR 1955 Calcutta 225, 2011 SCC OnLine Gau 249, CRL M.C. 3083/2011 and CRL M.A. 10914/2011 decided on 17.5.2012 (Delhi High Court), AIR 1991 SC 1406, (1976) 1 SCC 128, AIR 2004 SC 3946.

D.K. Mishra, for the applicants.

Shobhitaditya, for the non-applicant.

ORDER

J.K. MAHESHWARI, J. :- Invoking the jurisdiction under Section 482 of the Code of Criminal Procedure challenging the illegal and arbitrary action of the respondent of instituting a false and frivolous case M.J.C. No.59/2010 filed before Judicial Magistrate First Class, Hoshangabad under the Protection of Women from Domestic Violence Act, 2005 (in short be called as 'Domestic

Violence Act'), petitioners have filed this petition seeking quashment of the same.

2. Petitioner no.1 is the husband and petitioner no.2 is the father-in-law of the complainant/respondent. It is said that the marriage of the petitioner no.1 and respondent was solemnized on 22.2.2008 at Hoshangabad. After marriage, as alleged respondent was subjected to demand of dowry, cruelty and harassment, however, a complaint under Section 12 of the Domestic Violence Act was filed on 14.9.2009 in the Court of Judicial Magistrate First Class, Hoshangabad whereupon notices were issued to the petitioners. On receiving the notice, a preliminary objection was filed by the petitioners which was rejected, thereafter reply has also been filed denying the allegations made in the complaint, and now, the case is at the stage of recording the evidence. In the meantime, present petition has been filed seeking quashment of the private complaint.

3. Learned counsel for the petitioners has put forth solitary contention seeking quashment of the private complaint, placing reliance on the judgment of this Court in the case of *Shri Rama Singh vs. Smt. Maya Singh and others* reported in 2012(4) MPHT 169 and submits that taking cognizance by the Magistrate and to call upon the petitioners without asking and taking into consideration the report of the Protection Officer is in violation of the proviso to Section 12 of the Domestic Violence Act. It is contended that the proviso to Section 12 is mandatory as held in the said judgment therefore, without having a report of the Protection Officer, passing an order by the Magistrate to summon the petitioners is not in conformity to law, therefore, the proceedings may be quashed.

4. Learned counsel representing respondent referring to Section 23 submits that the Magistrate under the Domestic Violence Act conferred with the power to grant interim and *ex parte* order. However, the connotation "before passing any order on such application the magistrate shall consider domestic incidence report received by him" would not include an order of taking cognizance or summoning the petitioners and infact the report may be considered at the time of passing the final order. In support of his contention, reliance has been placed on a judgment of this Court in the case of *Ajay Kant Sharma and others Versus Smt. Alka Sharma* reported in 2008 Cri.L.J 264. It is also urged that as per Section 28(2), the Court may lay down its own procedure for disposal of the application under Section 12 or under sub-

section (2) of Section 23, therefore, it do not preclude the magistrate in exercising the power to take cognizance on having prima facie satisfied on the basis of material brought before him to summon the respondent, without the report of the Protection Officer or Service Provider. In such circumstances, the order passed by the Magistrate taking cognizance is in accordance with law and this petition seeking quashment in exercise of the powers under Section 482 of the Cr.P.C. may be dismissed.

5. After hearing learned counsel appearing on behalf of both the parties, on the point in issue as advanced, this Court has earlier considered the scope of Section 12 of Domestic Violence Act and its proviso. Firstly in the case of *Ajay Kant Sharma* (supra), learned Single Judge in Para-3 after referring Section 12 has observed as under :-

"On perusal of the aforementioned proviso appended to the provision, it appears that before passing any order on the application, it is obligatory on a Magistrate to take into consideration any report received by him from the Protection Officer or the service provider. Neither it is obligatory for a Magistrate to call such report nor it is necessary that before issuance of notice to the petitioners it was obligatory for a Magistrate to consider the report. The words before passing any order provide that any final order on the application and not merely issuance of notice to the respondent/the petitioners herein. The words any report also mention that a report, if any, received by a Magistrate shall be considered. Thus, at this stage if the report has not been called or has not been considered, it cannot be a ground for quashing the proceeding."

Secondly, in the case of *Shri Rama Singh* (supra) wherein this Court has considered the judgments of *Ajay Kant* (supra) and also *Tehmina Qureshi vs. Shazia Qureshi* reported in 2010(1) MPHT 133. In the context of joining other family members as a party in complaint, the Court observed that in the wake of pronouncement of the Supreme Court judgment in the case of *Sou. Sandhya Manoj Wankhade vs. Manoj Bhimrao Wankhade and others* reported in 2011 Cri.L.J. 1687 the view taken by this Court in the case of *Ajay Kant Sharma* (supra) and *Tehmina Qureshi* (supra) do not describe the correct proposition of law, however, in this respect, for all practical purposes those two judgments are held as *per incuriam*. In the judgment of

Shri Rama Singh (supra), the judgment of *Ajay Kant Sharma* (supra) has also been considered in the context of proviso to Section 12(1) of Domestic Violence Act. On the said issue the Coordinate Single Bench has referred the proviso and in para-11 observed as thus :-

"The proviso ordinarily carves out an exception from the general rule enacted in the main provision. It is also well settled that the word 'any' would mean one or more out of several and includes all (See : *Raj Kumar Shivhare vs. Assistant Director, Directorate of Enforcement*, AIR 2010 SC 2239). In this view of the matter, even any interlocutory order directing issuance of notice would not be excluded from the rigour of the proviso. Accordingly, learned Magistrate ought to have passed a reasoned order holding that *prima facie* a case existed for asking the petitioners as to why the reliefs, as claimed in the application, should not be granted."

In view of the said two pronouncements, it is apparent that in the case of *Ajay Kant Sharma* (supra), the Court observed that it is not obligatory for a Magistrate to call for the report from the Protection Officer or Service Provider, and also not necessary to consider the said report before issuance of notice. The word "any order" has been interpreted that it denotes the final order and not of an order of issuance of notice. While the Co-ordinate Bench in the other case of *Shri Rama Singh* (supra) interpreting the word "any order", observed that "any order" would mean one or more out of several and includes all, however, said that the interlocutory order would not be excluded from the rigour of proviso. It is to be noted here that in the subsequent judgment it has not been considered that is it obligatory on the Magistrate to call for a report of Protection Officer or Service Provider at the time of issuance of notice and also not considered the scope of the proviso which in-fact is contextual rather than compulsive, however, it is obligatory to this Court to explain the said legal issues.

6. In view of the foregoing, the precise questions in the case called upon to answer is to whether the report of the Protection Officer or the Service Provider, if not available is obligatory to call at the time of issuance of notice on the application under Section 12 of the Domestic Violence Act, or its consideration is mandatory on availability of such report?

7. After hearing, to advert the said issue relevant provisions of the Act

are necessarily required to be referred viz. 2(a) Aggrieved Person; means any woman having relationship with the respondent alleges to have subjected to any act of domestic violence by them; 2(e) Domestic Incident report; means the report submitted by the complainant in the prescribed format regarding domestic violence, whereupon the Judicial Magistrate First Class defined in Section 2(i) in exercise of the jurisdiction under Code of Criminal Procedure, of the area wherein the aggrieved person resides or the incident of the domestic violence took place, may take cognizance and may pass orders as specified under Sections 18, 19, 21, 22 or under Section 23. The Protection Officers may be appointed as per Section 8 of the Act by the State Government issuing notification for the area or areas to discharge the duties and functions as specified under Section 9, for assisting the Magistrate in discharge of his function under the Act to make a domestic incident report and to make application in the form so prescribed ensuring the aggrieved person to provide the legal aid, medical facility, shelter home and other monetary benefits as contemplated under the Act. The working of the Protection Officer shall be under the control and supervision of the Magistrate and to perform the duties imposed on him by the Magistrate and by the Government under the Act. Similarly, under Section 10 on having registration by the Society as a Service Provider, may submit a report in a prescribed form to a Magistrate or to the Protection Officer and to provide the medical facility and also shelter. The Service Provider is having protection under sub-section (3) of Section 10 if they have acted in good faith and in discharge of the duties conferred under the Act.

8. Chapter IV of the Domestic Violence Act specifies the Procedure for Obtaining Orders Of Reliefs. Under Section 12 of the Act, an application is required to be filed before Magistrate. To understand the literal meaning and purpose for resolving the controversy involved in the present case, the provision of Section 12 is relevant, therefore, it is quoted hereinbelow :-

"Section 12. Application to Magistrate.—

(1) An aggrieved person or a Protection Officer or any other person on behalf of the aggrieved person may present an application to the Magistrate seeking one or more reliefs under this Act:

Provided that before passing any order on such application, the Magistrate shall take into consideration any domestic incident report received by him from the Protection Officer or

the service provider."

(2) The relief sought for under sub-section (1) may include a relief for issuance of an order for payment of compensation or damages without prejudice to the right of such person to institute a suit for compensation or damages for the injuries caused by the acts of domestic violence committed by the respondent:

Provided that where a decree for any amount as compensation or damages has been passed by any court in favour of the aggrieved person, the amount, if any, paid or payable in pursuance of the order made by the Magistrate under this Act shall be set off against the amount payable under such decree and the decree shall, notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908), or any other law for the time being in force, be executable for the balance amount, if any, left after such set off.

(3) Every application under sub-section (1) shall be in such form and contain such particulars as may be prescribed or as nearly as possible thereto.

(4) The Magistrate shall fix the first date of hearing, which shall not ordinarily be beyond three days from the date of receipt of the application by the court.

(5) The Magistrate shall endeavour to dispose of every application made under sub-section (1) within a period of sixty days from the date of its first hearing.

This section enshrines that either the aggrieved person himself/herself or Protection Officer or any other person on behalf of the aggrieved person may present a complaint to the Magistrate seeking one or more reliefs as specified under the Act, including order for payment of compensation or damages without prejudice to the rights of such person to institute a suit for compensation or damages for the injuries sustained in the act of domestic violence committed by the respondent. While passing any order on such application under Sub-clause (1), the Magistrate shall take into consideration any domestic incident report, received by him from the Protection Officer or the service provider. The amount paid or payable to the aggrieved person by an order of the Magistrate under the Act shall be set off against the amount of

degree of compensation or damages passed by any Court in favour of the aggrieved person. Sub-clause (3) provides the particulars to be furnished in the application, as far as possible in the format laid down by the Central Government under rules. Sub-clauses (4) and (5) provide that the Magistrate shall fix the first date of hearing of the application ordinarily within three days of its receipt and shall take endeavour to dispose of the application within sixty days of the first hearing.

9. In view of the aforesaid, it is apparent that as per main body of Section 12(1), the application may be presented before the Magistrate seeking one or more reliefs. As per the language of its proviso, upon filing an application, the Magistrate before passing any order, take into consideration any domestic incident report received by him from the Protection Officer or the Service Provider. It is to be noted here that main Section 12 contemplates filing of the application by complainant or in his/her behalf and its proviso denotes the act of Court to consider the report if available while passing any order on such application. The proviso starts with "before passing any order on such application" indicates primary adjudication before "any order". As per the judgment of Hon'ble the Supreme Court in the case of *Raj Kumar Shivhare vs. Assistant Director, Directorate of Enforcement & Another* reported in AIR 2010 SC 2239, the word "any order" has been interpreted in the context of Foreign Exchange Management Act wherein an appeal was provided to the High Court against "any decision or order" of the Tribunal. The Apex Court referring the dictionary meaning and also considering the judgment of *Ellerine Bros (Pty) Ltd. and another vs. Klinger*, reported in 1982(2) AER 737 and the judgment of *Satyanarain Biswanath vs. Harakchand Rupchand* reported in AIR 1955 Calcutta 225 and taking note of the use of the said word "any" held that the meaning of the word "any" is one or more out of several and includes all. Thus, in view of the judgment of Hon'ble the Supreme Court, and looking to the use of the word "before" passing "any order" the judgment of this Court in the case of *Ajay Kant Sharma* (supra) holding that passing any order would mean any final order on the application and not merely issuance of notice to the respondent, is rightly held *per incuriam* by other Coordinate Bench in the case of *Shri Rama Singh* (supra). In this context, the judgment of Gauhati High Court in the case of *Md. Basit vs. State Assam and others* reported in 2011 SCC OnLine Gau 249 having persuasive force, is relevant wherein the Court has considered the judgment of *Ajay Kant Sharma* (supra) and expressed disagreement to the meaning of

word "any order" means any final order. The judgment of the Gauhati High Court has further been considered by the Delhi High Court in CRL.M.C. 3083/2011 and CRL.M.A 10914/2011 in the case of *Shambhu Prasad Singh vs. Manjari* decided on 17.5.2012, and has approved the view taken by Gauhati High Court. Thus, concluded that the word "before passing any order" used in the proviso of Section 12 would include the order of initiation of the proceedings or summoning of the accuseds (sic:accused).

10. The aforesaid analogy finds support from the other provisions of Chapter IV whereby as per Section 13 on filing of application, a notice of the date of hearing fixed by the Magistrate may be served through the Protection Officer by a mode as prescribed. However, on taking cognizance by a Magistrate, the notice of the application is required to be served on the respondent and upon service, the Magistrate shall hold a counselling at any stage of the proceedings. As per Section 18 after giving opportunity to the aggrieved person or to the respondent, of being heard and on having *prima facie* satisfied that domestic violence has taken place or is likely to take place, may pass protection order granting reliefs as specified therein. Similarly, as per Section 19 while disposing of an application under sub-section (1) of Section 12, the order of residence may be passed in favour of aggrieved person to grant relief to such persons. The Magistrate may grant the monetary reliefs as per Section 20 and also grant temporary custody of any child or children as per Section 21, and vide Section 22 compensation and damages for the injuries to the aggrieved person may also be granted. As per Section 23(1) Magistrate is conferred with a power to pass any interim order as he deems fit. As per Section 23(2) the powers to pass *ex parte* order on going through the contents of the application having *prima facie* disclosed the offence, to pass any order under Sections 18, 19, 20, 21 and 22. Section 28 specifies what procedure ought to be followed, however, as per sub-section (1), the proceedings of Section 12, 18, 19, 20, 21 and 23 and of Section 31 shall be governed by the provisions of Code of Criminal Procedure, 1973 but as per sub-section (2) of Section 28 it is clear that sub-section (1) shall not prevent the Court from laying down own procedure for disposal of the application under Section 12 or under sub-section (2) of Section 23. Here it is relevant to observe that Section 12 only contemplates that who can file a complaint and what reliefs can be sought for. If these pre-conditions are satisfied, the Magistrate may take cognizance on the complaint, if on fact *prima facie* case is made out to summon the respondent. Looking to the relaxation specified

under sub-section (2) of Section 28 unlike Section 200 of Cr.P.C., there is no requirement to record preliminary statement of the aggrieved person on filing the complaint and prior to taking the cognizance thereon. The proviso to Section 12(1) mandates to Magistrate to take into consideration any domestic incident report received by him either from a Protection Officer or from Service Provider. Thus, the rider specified in the proviso of Section 12(1) is for consideration of the report received of domestic incident either of the Protection Officer or of Service Provider. This proviso do not contemplate that before passing "any order" the Magistrate is bound to call for the report from Protection Officer or Service Provider. It also do not qualify that Magistrate can take cognizance only when the report is received and considered. Thus, generous meaning of proviso in common parlance is that on receipt of the report of the Protection Officer or Service Provider before passing any order, it be considered by the Magistrate but it is not obligatory on the Magistrate to call for such report, prior to passing any order. Otherwise in Section 23, the power to pass *ex parte* orders would not have been conferred to the Magistrate. Such expression of the proviso as discussed hereinabove finds support from the judgment of *Md. Basit* (supra) of Gauhati High Court and also of Delhi High Court in the case of *Shambhu Prasad Singh* (supra) coupled with sub-section (1) and (2) of Section 28 of the Act. In other words looking to the aims and object of the Domestic Violence Act and for the purpose to which it was enacted, the intention of the legislature was to provide immediate relief to aggrieved persons by indulgence of the Court. Therefore, under the proviso even without having a report of the Protection Officer looking to the facts of the case and material available on record, Magistrate may take cognizance looking to the allegations and such proviso do not put any embargo to not to take any cognizance without such report.

11. The Central Government in exercise of the power of Section 37 of the Domestic Violence Act framed the rules, which are knowns (sic:known) as Protection of Women From Domestic Violence Rules, 2006. Rule 4 indicates that any person having reasons to believe regarding an incident of domestic violence may furnish the information to the Protection Officer which shall be acknowledged by him and upon a complaint of the domestic violence, the report be prepared by him in Form-I and be submitted before the Magistrate supplying a copy thereof to the Police Officer of the local jurisdiction. Rule 6 makes it clear that every application of the aggrieved person under Section

12 shall be in Form-II or as nearly as possible thereto specifying the reliefs claimed thereunder. The aggrieved person may seek assistance of the Protection Officer in preparing the application under sub-rule (1) and forward the same to the concerned Magistrate. However, Rule 6(2) makes it clear that on filing an application by aggrieved person, the assistance may be provided by the Protection Officer. On plain reading of Section 12 and the rules, it is clear that to pass an appropriate order upon the application filed by (the aggrieved person) i.e. the victim of domestic violence, is to consider the report of Protection Officer if received by Magistrate. In another category, if on receiving an information by the Protection Officer, a complaint is made by him then he shall submit his report regarding the domestic incident came to his knowledge. In the said case, the report would be available, however, it is obligatory on the Court to consider the same prior to taking the cognizance. Thus, if the legislative intent was that to call for a report from Protection Officer as a precondition by the Magistrate to act upon a complaint of aggrieved person then it would have been expressed that intention emphasizing by the words in the main section. In the said context, the judgment of Hon'ble Supreme Court in the case of *A.N. Sehgal and others vs. Raje Ram Sheoram and others* reported in AIR 1991 SC 1406 is relevant. Hon'ble Apex Court has said that -

"It is cardinal rule of interpretation that a proviso to a particular provision of a statute only embraces the field which is covered by the main provision. It carves out an exception to the main provision to which it has been enacted by the proviso and to no other. The proper function of a proviso is to except and deal with a case which would otherwise fall within the general language of the main enactment, and its effect is to confine to that case. Where the language of the main enactment is explicit and unambiguous, the proviso can have no repercussion on the interpretation of the main enactment, so as to exclude from it, by implication what clearly falls within its express terms.

The scope of the proviso, therefore, is to carve out an exception to the main enactment and it excludes something which otherwise would have been within the rule. It has to operate in the same field and if the language of the main enactment is clear, the proviso cannot be torn apart from the main enactment nor can it be used to nullify by implication what the enactment clearly says nor set at naught the real object of the main

enactment, unless the words of the proviso are such that it is its necessary effect."

In the case of *Dwarka Prasad vs. Dwarka Das Saraf* reported in (1976) 1 SCC 128 Justice V.R. Krishna Iyer speaking for the Bench explained on the point of interpretation of the statute, internal aids, proviso and scope thereof. The Court held that -

"Though many functions have been assigned for provisos one has to be selective having regard to the text and context of the statute.

If, on fair construction, the principal provision is clear, a proviso cannot expand or limit it. Sometime, a proviso is engrafted by an apprehensive draftsman to remove possible doubts, to make matters plain, to light up ambiguous edges, then it ought to be read to such extent.

A proviso must be limited to the subject-matter of the enacting clause. It is a settled rule of construction that a proviso must *prima facie* be read and considered in relation to the principal matter to which it is a proviso. It is not a separate or independent enactment. Words are dependent on the principal enacting words, to which they are tacked as a proviso. They cannot be read as divorced from their context.

A proviso ordinarily is but a proviso, although the golden rule is to read the whole section, inclusive of the proviso, in such manner that they mutually throw light on each other and result in a harmonious construction."

In *Maulavi Hussein Haji Abraham Umarji vs. State of Gujarat* reported in AIR 2004 SC 3946, the Apex Court explained that how the proviso ought to be considered with an enactment. The Court said -

"The normal function of a proviso is to except something out of the enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment. When one finds to a proviso to a section the natural presumption is that but for the proviso, the enacting part of the section would have included the subject-matter of the

proviso. The proper function of a proviso is to except and to deal with a case which would otherwise fall within the general language of the main enactment and its effect is confined to that case. Thus, as a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment and ordinarily, a proviso is not interpreted as stating a general rule."

12. In view of the foregoing discussion, the ambiguity arose by the judgment of "*Ajay Kant Sharma*", "*Tehmina Qureshi*" and "*Shri Rama Singh*" (supra) is hereby explained that the judgment of *Ajay Kant Sharma* (supra) incorporating the meaning of "any order" which means final order is held to be *per incuriam* in the light of the judgment of Apex Court in the case of *Raj Kumar Shivhare* (supra) and to such extent the judgment of *Shri Rama Singh* (supra) is held to be good. Simultaneously the finding recorded that it is not necessary to the Magistrate to consider the report of the Protection Officer or Service Provider before issuance of the notice is also not held to be good. But the findings in the said case holding that it is not obligatory for a Magistrate to call for the report at the stage of taking cognizance may be held to be good and in consonance to the spirit of the Act. In-fact, if the report of the Protection Officer or Service Provider is available then its consideration is obligatory even at the stage of issuance of notice or at the time of passing final order as the case may be, affording opportunity to other side. It may be explained by example that under Section 12 on behalf of the aggrieved person if any application is filed by the Protection Officer or Service Provider attaching a report then it is obligatory on the Magistrate to consider the same at the time of issuance of summons but in case the complaint is filed by the complainant without having report then Magistrate is not bound to call for or await the report of the Protection Officer, and defer the proceeding awaiting the report before passing an order taking cognizance. Simultaneously, it is to be further held that in *Tehmina Qureshi* (supra) relying upon the judgment of *Ajay Kant Sharma* (supra) the interpretation of Section 2(q) made by this Court is against the judgment of Hon'ble Apex Court in the case of *Sandhya Manoj Wankhade* (supra). In view of the discussion made hereinabove the judgment of *Ajay Kant Sharma* (supra) is held to be *per incuriam*, except on the point that calling of the report from the Protection Officer at the stage of taking cognizance is not obligatory.

13. In addition to the aforesaid observations, the judgment of *Shri Rama*

Singh (supra) in para-11 is also required to be explained, wherein while interpreting the word "any order", the Court observed that it would mean one or more out of several and includes all, but later observed that even an interlocutory order "asking issuance of notice would not preclude from the rigour of proviso", meaning thereby to pass an interlocutory order of summoning the accused, the consideration of the report is obligatory. But looking to the above discussion, it is explained that in case of non-availability of the report on a complaint filed by the aggrieved person, if the Magistrate is prima facie satisfied on the material brought before him, cognizance may be taken without awaiting report and the said complaint shall not be dismissed on the ground that the report of the Protection Officer has not considered at the time of taking cognizance.

14. In consequence to the above discussion and on plain reading of Section 12 of the Domestic Violence Act, as a whole the complaint can be presented by an aggrieved person, Protection Officer or Service Provider before the Magistrate seeking one or more reliefs as specified under Sections 18, 19, 20, 21, 22, 23 and 31. Upon filing of such an application, the procedure enumerated in Code of Criminal Procedure, 1973 be followed and the Court is not prevented from laying down its own procedure for disposal of an application under Section 12 or sub-section (2) of Section 23. On plain reading of proviso attached to Section 12(1), it is clear that "before" passing "any order" on such application under sub-section (1) of Section 12, if the report of Protection Officer is available, the Magistrate shall take into consideration. Thus, word used "the Magistrate shall take into consideration" is only with respect to a report if it is available and not to call for it at the time of taking cognizance. However, the obligation of a Magistrate is only to the extent to consider the report if available with a view to affording an opportunity to other side. Thus, the question as framed in Paragraph 6 of the order is answered in view of the discussion made hereinabove.

15. In the said context, the argument advanced by the learned counsel for the petitioners to quash the complaint filed by the respondent on account of taking cognizance by the Magistrate without having a report of the Protection Officer is devoid of any merit, hence repelled. In the present case the evidence is being recorded, however, the Magistrate is duty bound to decide the complaint filed by the aggrieved person as early as possible within a period of two months from the date of production of certified copy of this order.

16. Accordingly, the petition filed by the petitioners seeking quashment of the proceedings is devoid of any merit, hence dismissed. The judgment of *Tehmina Qureshi* (supra) is held *per incuriam*. The judgment of *Ajay Kant Sharma* (supra) is also held *per incuriam* to the extent indicated hereinabove. Simultaneously, the judgment of *Shri Rama Singh* (supra) is also explained. In the facts of the case, petitioners shall bear the expense of the respondent which is quantified Rs.5000/-.

Application dismissed.

I.L.R. [2016] M.P., 316

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice Sheel Nagu

M.Cr.C. No. 7642/2015 (Gwalior) decided on 18 September, 2015

NADIMUDDIN

...Applicant

Vs.

STATE OF M.P.

...Non-applicant

Penal Code (45 of 1860), Sections 337, 279 & 304-A, Criminal Procedure Code, 1973 (2 of 1974), Sections 300 & 482 and Constitution - Article 20(2) - Double jeopardy - Earlier petitioner was tried and convicted for the offence punishable under Section 337 and 279 of the IPC - Subsequently tried for offence under Section 304-A of the IPC - If a person has been tried and convicted for less graver offence arising out of one particular incidence, then he can very well to be tried for a graver offence which may also arise out of the same incidence - Constitutional protection under Article 20(2) is against the offence and not against the act/incidence - Section 304A IPC gets attracted when, the death takes place due to rash and negligence act, whereas when mere hurt takes place, Section 337 of IPC can be invoked - Whereas Section 279 of IPC gets attracted merely by driving a vehicle on public way in a rash and negligent manner which endangers human life, which may or may not cause an injury to anyone - The applicant can very well be prosecuted for a graver offence despite having been earlier prosecuted and punished for a lesser offence - Application dismissed. (Paras 4, 12, 13.3 & 15)

दण्ड संहिता (1860 का 45), धाराएं 337, 279 व 304-ए, दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएं 300 व 482 एवं संविधान - अनुच्छेद 20(2) - दोहरा संकट - पूर्व में याची को भा.दं.सं. की धारा 337 व 279 के अंतर्गत दण्डनीय

अपराध के लिए विचारित एवं दोषसिद्ध किया गया – तदनंतर उसे भा.द.सं. की धारा 304-ए के अंतर्गत अपराध के लिए विचारित किया गया – यदि किसी विशेष घटना से उत्पन्न हुए कम गंभीर अपराध के लिए किसी व्यक्ति को विचारित एवं दोषसिद्ध किया गया है तो उसे किसी अधिक गंभीर अपराध के लिए भी मली मांति विचारित किया जा सकता है जो उसी घटना से उत्पन्न हुआ हो – अनुच्छेद 20(2) के अंतर्गत संवैधानिक सुरक्षा अपराध के विरुद्ध है और न कि कृत्य/घटना के विरुद्ध – भा.द.सं. की धारा 304-ए तब आकर्षित होती है जब मृत्यु उतावलेपन एवं लापरवाही के कारण कारित होती हो, जबकि जब मात्र उपहति कारित होती है तो भा.द.सं. की धारा 337 का अवलंब लिया जा सकता है – जबकि भा.द.सं. की धारा 279 केवल उतावलेपन और लापरवाहीपूर्वक आम रास्ते में वाहन चलाने पर आकर्षित होती है जिससे मानव जीवन को खतरा हो, जिससे किसी को कोई उपहति कारित हो या न हो – किसी कम गंभीर अपराध के लिये पूर्व में अभियोजित एवं दंडित होने के बावजूद भी किसी अधिक गंभीर अपराध के लिए आवेदक को अभियोजित किया जा सकता – आवेदन खारिज।

Case referred :

AIR 1953 SC 325.

Raghvendra Singh Tomar, for the applicant.

R.B.S. Tomar, G.A. for the non-applicant/State.

J U D G M E N T

SHEEL NAGU, J. :- The inherent powers of this Court are invoked u/S 482 Cr.P.C. for quashing of the interlocutory order dated 19.12.2013 passed in Criminal Case No. 2730/2012 by learned J.M.F.C., Morena.

2. Learned counsel for the rival parties are heard on the question of admission.

3. Legal question involved herein is whether the protection under Article 20(2) of Constitution of India and Section 300 Cr.P.C. against 'double jeopardy' is relateable to the one particular offence or to all the offences which arise out of the same act/incident.

4. Facts of the case are that the prosecution launched against the petitioner as regards offences punishable u/S 337 and 279 of IPC culminated into passing of an order dated 15.12.2012 by the Judicial Magistrate, I Class, Morena in case no. 2730/2012, whereby after recording of statement of admission of guilt, the petitioner was convicted for the said offences by imposing fine of Rs.1,800/- with default stipulation. Admittedly the fine is deposited

5. In this background, it is submitted that once the incident giving rise to prosecution u/S 279 and Section 337 of IPC culminated into conviction, the impugned order dated 19.12.2013 directing reopening of the same Criminal Case.No: 2730/12 now alleging a graver offence punishable u/S 304-A of IPC cannot stand the test of law, especially on the anvil of the doctrine of double jeopardy enshrined in Article 20(2) of Constitution of India.

6. Similarly, Section 300 of the Cr.P.C., which is a manifestation of the above said fundamental right under Article 20(2) of the Constitution provides similar protection. For convenience and ready reference, Article 20(2) & Section 300 of Cr.P.C. are reproduced below:

Article 20 – Protection in respect of conviction for offences –

(1) No person shall be convicted of any offence except for violation of the law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

(2) No person shall be prosecuted and punished for the same offence more than once.

(3) No person accused of any offence shall be compelled to be a witness against himself.

Section 300 – Person once convicted or acquitted not to be tried for same offence.

(1) A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under sub- section (1) of section 221, or for which he might have been convicted under sub- section (2) thereof.

(2) A person acquitted or convicted of any offence may be afterwards tried, with the consent of the State Government, for any distinct offence for which a separate charge might have

been made against him at the former trial under sub-section (1) of section 220.

(3) A person convicted of any offence constituted by any act causing consequences which, together with such act, constituted a different offence from that of which he was convicted, may be afterwards tried for such last- mentioned offence, if the consequences had not happened, or were not known to the Court to have happened, at the time when he was convicted.

(4) A person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction, be subsequently charged with, and tried for, any other offence constituted by the same acts which he may have committed if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged.

(5) A person discharged under section 258 shall not be tried again for the same offence except with the consent of the Court by which he was discharged or of any other Court to which the first- mentioned Court is subordinate.

(6) Nothing in this section shall affect the provisions of section 26 of the General Clauses Act, 1897, (10 of 1897) or of section 188 of this Code.

7. Section 300 of Cr.P.C is more elaborate and explanatory than Article 20 (2) of Constitution of India. Sub Sections (2) and (3) of Section 300 of Cr.P.C. empowers the State to frame charge and prosecute a person for a different offence notwithstanding the same person having been tried and convicted of a different offence arising out of the same incident/act/transaction.

8. The concept of double jeopardy raised as a ground of challenge herein is enshrined under Article 20(2) of the Constitution of India which is reproduced (supra).

9. From a bare perusal of the above said fundamental right enshrined in Part III of the Constitution, it is vivid that the Constitutional protection against repeat prosecution and punishment is in regard to the same offence.

10. The said constitutional protection cannot be stretched to the extent of

including protection against prosecution and punishment for a different offence, which also arises out of the same incident.

11. The above said proposition is bolstered by the decision of Apex Court in case of *Maqbool Hussain v. State of Bombay* reported in AIR 1953 SC 325.

The law in this regard is well settled in view of several Constitution Bench decisions of the Apex Court which continue to hold the field till today. The relevant extracts of the decisions are reproduced below to elaborate the settled legal position.

Maqbool Hussain v. State of Bombay, AIR 1953 SC 325,

"7. The fundamental right which is guaranteed in Article 20(2) enunciates the principle of "autrefois convict" or "double jeopardy". The roots of that principle are to be found in the well-established rule of the common law of England "that where a person has been convicted of an offence by a court of competent jurisdiction the conviction is a bar to all further criminal proceedings for the same offence". (Per Charles, J. in *Reg v. Miles*, 24 QBD 423). To the same effect is the ancient maxim "Nemo Bis Debet Puniri pro Uno Delicto", that is to say that no one ought to be twice punished for one offence or as it is sometimes written "Pro Eadem Causa", that is, for the same cause.

8. This is the principle on which the party pursued has available to him the plea of "autrefois convict" or "autrefois acquit". "The plea of 'autrefois convict' or 'autrefois acquit' avers that the defendant has been previously convicted or acquitted on a charge for the same offence as that in respect of which he is arraigned.... The question for the jury on the issue is whether the defendant has previously been in jeopardy in respect of the charge on which he is arraigned, for the rule of law is that a person must not be put in peril twice for the same offence. The test is whether the former offence and the offence now charged have the same ingredients in the sense that the facts constituting the one are sufficient to justify a

conviction of the other, not that the facts relied on by the Crown are the same in the two trials. A plea of 'autrefois acquit' is not proved unless it is shown that the verdict of acquittal of the previous charge necessarily involves an acquittal of the latter." (Vide Halsbury's Laws of England, Hailsham Edition, Vol. 9, pp. 152 and 153, para 212).

9. This principle found recognition in Section 26 of the General Clauses Act, 1897,—

"Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments but shall not be liable to be punished twice for the same offence,"

and also in Section 403(1) of the Criminal Procedure Code, 1898,—

"A person who has been tried by a court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under Section 236, or for which he might have been convicted under Section 237." ...

11. These were the materials which formed the background of the guarantee of fundamental right given in Article 20(2). It incorporated within its scope the plea of "autrefois convict" as known to the British jurisprudence or the plea of double jeopardy as known to the American Constitution but circumscribed it by providing that there should be not only a prosecution but also a punishment in the first instance in order to operate as a bar to a second prosecution and punishment for the same offence. ..."

S.A. Venkataraman v. Union of India, AIR 1954 SC 375,

"4. ... The roots of the principle, which this clause enacts,

are to be found in the well-established rule of English law which finds expression in the maxim *Nemo debet bis vexari* — a man must not be put twice in peril for the same offence. If a man is indicted again for the same offence in an English court, he can plead, as a complete defence, his former acquittal or conviction, or as it is technically expressed, take the plea of *autrefois acquit* or *autrefois convict*. The corresponding provision in the Federal Constitution of the U.S.A. is contained in the Fifth Amendment, which provides *inter alia*: "Nor shall any person be subjected for the same offence to be put twice in jeopardy of life and limb." This principle has been recognized and adopted by the Indian Legislature and is embodied in the provisions of Section 26 of the General Clauses Act and Section 403 of the Criminal Procedure Code.

5. Although these were the materials which formed the background of the guarantee of the fundamental right given in Article 20(2) of the Constitution, the ambit and contents of the guarantee, as this court pointed out in the case referred to above, are much narrower than those of the common law rule in England or the doctrine of "Double Jeopardy" in the American Constitution. Article 20(2) of our Constitution, it is to be noted, does not contain the principle of *autrefois acquit* at all. It seems that our Constitution-makers did not think it necessary to raise one part of the common law rule to the level of a fundamental right and thus make it immune from legislative interference. This has been left to be regulated by the general law of the land. In order to enable a citizen to invoke the protection of clause (2) of Article 20 of the Constitution, there must have been both prosecution and punishment in respect of the same offence. The words "prosecuted and punished" are to be taken not distributively so as to mean prosecuted or punished. Both the factors must co-exist in order that the operation of the clause may be attracted. ...

15. It may be pointed out that the words "prosecution"

and "punishment" have no fixed connotation and they are susceptible of both a wider and a narrower meaning; but in Article 20(2) both these words have been used with reference to an "offence" and the word "offence" has to be taken in the sense in which it is used in the General Clauses Act as meaning "an act or omission made punishable by any law for the time being in force". It follows that the prosecution must be in reference to the law which creates the offence and the punishment must also be in accordance with what that law prescribes. ... "

State of Bombay v. S.L. Apte, AIR 1961 SC 578;

"12. We shall first take up for consideration Article 20(2) of the Constitution ...

13. To operate as a bar the second prosecution and the consequential punishment thereunder, must be for "the same offence". The crucial requirement therefore for attracting the Article is that the offences are the same i.e. they should be identical. If, however, the two offences are distinct, then notwithstanding that the allegations of facts in the two complaints might be substantially similar, the benefit of the ban cannot be invoked. It is, therefore, necessary to analyse and compare not the allegations in the two complaints but the ingredients of the two offences and see whether their identity is made out. ... "

State of Bihar v. Murad Ali Khan, (1988) 4 SCC 655,

"26. Broadly speaking, a protection against a second or multiple punishment for the same offence, technical complexities aside, includes a protection against re-prosecution after acquittal, a protection against re-prosecution after conviction and a protection against double or multiple punishment for the same offence. These protections have since received constitutional guarantee under Article 20(2). But difficulties arise in the application of the principle in the context of what is meant by "same offence".

27. The expression "the same offence", "substantially the same offence" "in effect the same offence" or "practically the same", have not done much to lessen the difficulty in applying the tests to identify the legal common denominators of "same offence". Friedland in *Double Jeopardy* (Oxford 1969) says at p. 108:

"The trouble with this approach is that it is vague and hazy and conceals the thought processes of the court. Such an inexact test must depend upon the individual impressions of the judges and can give little guidance for future decisions. A more serious consequence is the fact that a decision in one case that two offences are 'substantially the same' may compel the same result in another case involving the same two offences where the circumstances may be such that a second prosecution should be permissible...."

28. In order that the prohibition is attracted the same act must constitute an offence under more than one Act. If there are two distinct and separate offences with different ingredients under two different enactments, a double punishment is not barred. ..."

State v. Nalini, (1999) 5 SCC 253,

"236. The well-known maxim "nemo debet bis vexari pro eadem causa" (no person should be twice vexed for the same offence) embodies the well-established common law rule that no one should be put to peril twice for the same offence. The principle which is sought to be incorporated into Section 300 of the Criminal Procedure Code is that no man should be vexed with more than one trial for offences arising out of identical acts committed by him. When an offence has already been the subject of judicial adjudication, whether it ended in acquittal or conviction, it is negation of criminal justice to allow repetition of the adjudication in a separate trial on the same set of facts.

237. Though Article 20(2) of the Constitution of India

embodies a protection against a second trial after a conviction of the same offence, the ambit of the clause is narrower than the protection afforded by Section 300 of the Criminal Procedure Code. It was held by this Court in Manipur Admn. v. Thokchom Bira Singh (AIR 1965 SC 87) that "if there is no punishment for the offence as a result of the prosecution, Article 20(2) has no application". While the clause embodies the principle of autrefois convict Section 300 of the Criminal Procedure Code combines both autrefois convict and autrefois acquit. ... "

Monica Bedi v. State of A.P., (2011) 1 SCC 284,

"22. Article 20(2) embodies a protection against a second trial and conviction for the same offence. The fundamental right guaranteed is the manifestation of a long struggle by the mankind for human rights. A similar guarantee is to be found in almost all civilised societies governed by rule of law. The well-known maxim nemo debet bis vexari pro una et eadem causa embodies the well-established common law rule that no one should be put on peril twice for the same offence. Blackstone referred to this universal maxim of the common law of England that no man is to be brought into jeopardy of his life more than once for the same offence.

23. The fundamental right guaranteed under Article 20(2) has its roots in common law maxim nemo debet bis vexari — a man shall not be brought into danger for one and the same offence more than once. If a person is charged again for the same offence, he can plead, as a complete defence, his former conviction, or as it is technically expressed, take the plea of autrefois convict. This in essence is the common law principle. The corresponding provision in the American Constitution is enshrined in that part of the Fifth Amendment which declares that no person shall be subject for the same offence to be twice put in jeopardy of life or limb. The principle has been recognised in the existing law in India and is enacted in Section 26 of the General Clauses

Act, 1897 and Section 300 of the Criminal Procedure Code, 1973. This was the inspiration and background for incorporating sub-clause (2) into Article 20 of the Constitution. But the ambit and content of the guaranteed fundamental right are much narrower than those of the common law in England or the doctrine of "double jeopardy" in the American Constitution. ...

26 . What is the meaning of the expression used in Article 20(2) "for the same offence"? What is prohibited under Article 20(2) is that the second prosecution and conviction must be for the same offence. If the offences are distinct, there is no question of the rule as to double jeopardy being applicable.

xxxxxx

29 . It is thus clear that the same facts may give rise to different prosecutions and punishment and in such an event the protection afforded by Article 20(2) is not available. It is settled law that a person can be prosecuted and punished more than once even on substantially same facts provided the ingredients of both the offences are totally different and they did not form the same offence. ..."

Sangeetaben Mahendrabhai Patel v. State of Gujarat, (2012) 7 SCC 621,

"33. ... the law is well settled that in order to attract the provisions of Article 20(2) of the Constitution i.e. doctrine of autrefois acquit or Section 300 CrPC or Section 71 IPC or Section 26 of the General Clauses Act, the ingredients of the offences in the earlier case as well as in the latter case must be the same and not different. The test to ascertain whether the two offences are the same is not the identity of the allegations but the identity of the ingredients of the offence. Motive for committing the offence cannot be termed as the ingredients of offences to determine the issue. The plea of autrefois acquit is not proved unless it is shown that the judgment of acquittal in the previous charge

necessarily involves an acquittal of the latter charge. ...”

State (NCT of Delhi) v. Sanjay, (2014) 9 SCC 772,

“52. It is well-known principle that the rule against double jeopardy is based on a maxim *nemo debet bis vexari pro una et eadem causa*, which means no man shall be put in jeopardy twice for one and the same offence. Article 20 of the Constitution provides that no person shall be prosecuted or punished for the offence more than once. However, it is also settled that a subsequent trial or a prosecution and punishment has no bar if the ingredients of the two offences are distinct.”

(emphasis supplied)

[Also see *Corpn. of Calcutta v. Mulchand Agarwala*, AIR 1956 SC 110; *State of M.P. v. Veereshwar Rao Agnihotri*, AIR 1957 SC 592; *Thomas Dana v. State of Punjab*, AIR 1959 SC 375; *State v. Navjot Sandhu*, (2005) 11 SCC 600; *Jitendra Panchal v. Narcotics Control Bureau*, (2009) 3 SCC 57; *Union of India v. Purushottam*, (2015) 3 SCC 779]

12. One single incident may give rise to various offences differently defined and punishable in the Indian Penal Code. If a person has been tried and convicted for a less grave offence arising out of one particular incident, then he can very well be tried for a graver offence which may also arise out of the same incident. The Constitutional protection under Article 20(2) is against an offence and not against act/incident.

13. At this juncture, it is relevant to mention the differences between the offence punishable u/S 279 read with Section 337 of IPC and the offence punishable u/S 304 A of IPC for which the present impugned prosecution has been initiated. Section 304A of IPC relates to Chapter XVI of the IPC relating to offences affecting the human body. For convenience and ready reference, Section 304A of IPC is reproduced herein below:

Section 304A – Causing death by negligence. *Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall*

be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

13.1. A bare perusal of the above said Section 304A IPC makes it clear that when death occurs due to rash and negligent act, it amounts to culpable homicide.

13.2. Whereas the earlier offence u/S 279 and 337 of IPC for which the petitioner has already been convicted, relates to Chapter XIV of IPC, which pertains to offence affecting public health, safety, decency and morals. Similarly Section 337 IPC though relates to the same Chapter XVI to which Section 304A IPC belongs, but the said Section 337 IPC arises when only hurt is caused due to an act which endangers life or personal safety of others.

13.3. Thus, a marked difference exists between Section 304A IPC on the one hand and Section 279 and Section 337 IPC on the other hand. Section 304A IPC gets attracted when, death takes place due to rash and negligent act, whereas when mere hurt takes place, Section 337 of IPC can be invoked. Whereas Section 279 IPC gets attracted merely by driving a vehicle on public way in a rash and negligent manner which endangers human life, which may or may not cause an injury to anyone.

13.4. Consequently, Section 279 and 337 IPC on the one hand and Section 304A IPC on the other are distinct in their basic constitution, basic ingredients, definitions and the punishments they attract. Thus, the distinction between the two classes of offence is so vividly pronounced that even if they arise out of one single transaction or act, they can attract separate and distinct prosecution and punishment.

14. Coming to the type of cases for which the petitioner had been earlier convicted and the graver offence for which impugned prosecution is taking place, it is seen that initial prosecution is related to offences punishable u/S 337 and 279 of IPC. Section 279 of IPC relates to endangering human life by rash and negligent driving on public way and invites maximum punishment of six months of imprisonment or with fine which may extend to Rs.1,000/- or with both. Whereas Section 337 of IPC relates to causing hurt to any person by doing rash and negligent act as to endanger human life or personal safety of others. This offence attracts maximum punishment of six months and or fine to the extent of Rs. 500/-.

15. It is thus evident that the applicant can very well be prosecuted for a graver offence punishable u/S 304A of IPC, despite having been earlier prosecuted and punished for a lesser offence punishable u/S 337 read with Section 279 of IPC, notwithstanding the said graver offence arising out of the same incident/act which gave rise to the less grave offence for which prosecution and conviction stands concluded.

16. In view of the above, no case for interference is made out as the sole ground of double jeopardy raised by the petitioner to assail the impugned order dated 15.12.2012 by the Judicial Magistrate, I Class, Morena in case no. 2730/2012 is not tenable.

17. Consequently, the M.Cr.C. deserves to be and is therefore rejected with *no cost*.

Application dismissed.

I.L.R. [2016] M.P., 329

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice Mool Chand Garg

M.Cr.C. No. 13810/2014 (Jabalpur) decided on 19 October, 2015

RASMEET SINGH MALHOTRA

...Applicant

Vs.

STATE OF M.P. & ors.

...Non-applicants

Criminal Procedure Code, 1973 (2 of 1974), Section 482, Essential Commodities Act (10 of 1955), Section 3/7 and Kerosene (Restriction on use and Fixation of Ceiling Price) Order, 1993, Sub-clause 3(2) - Quashing of FIR - No evidence available on record which may show that the petitioner was in any way connected with the tanker found stationed in his premises though truck was stationed without his sanction and authority and at the instance of owner of the tanker containing kerosene for whose benefit, the kerosene was transported - It cannot be said that the petitioner is guilty of any crime - FIR liable to be quashed and the petitioner is discharged - Application allowed. (Paras 8 & 9)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482, आवश्यक वस्तु अधिनियम (1955 का 10), धारा 3/7 एवं केरोसिन (उपयोग पर निर्बंधन और अधिकतम कीमत का निर्धारण) आदेश, 1993, उपखंड 3(2) - प्रथम सूचना प्रतिवेदन अमिखंडित किया जाना - अभिलेख पर कोई साक्ष्य उपलब्ध नहीं जो यह दर्शा सके

कि याची उसके परिसर में खड़े पाये गये टैंकर से किसी प्रकार संबद्ध है यद्यपि ट्रक उसकी मंजूरी या प्राधिकार के बिना और केरोसिन युक्त टैंकर के स्वामी जिसके लाभ हेतु केरोसिन का परिवहन किया गया, के कहने पर खड़ा किया गया था – यह नहीं कहा जा सकता कि याची किसी अपराध का दोषी है – प्रथम सूचना प्रतिवेदन अभिखंडित किये जाने योग्य और याची को आरोपमुक्त किया गया – आवेदन मंजूर।

D.K. Dixit, for the applicant.

D.K. Bohrey, G.A. for the non-applicant/State.

ORDER

MOOL CHAND GARG, J. :- The petitioner has filed this petition for quashing of proceedings initiated against him in Criminal Case No. 1225/2008 pending before the Court of Judicial Magistrate First Class, Piparia, Hoshangabad whereby he has been prosecuted under Section 3/7 of the Essential Commodities Act for having violated the provisions of the Kerosene (Restriction on Use and Fixation of Ceiling Price) Order, 1993.

2. A complaint was filed against the petitioner on the basis of the report made by Shri Ashok Kumar Rajvaidya, Junior Supply Officer, Piparia alleging, that a tanker containing 20000 litres of kerosene meant for below poverty line people was found stationed within the premises belonging to the petitioner. Even though nothing unusual was found from the aforesaid tanker and the entire kerosene was found to be intact. It was also found that the kerosene was sent from Itarsi for the benefit of Indian Traders, Piparia which in fact was also duly verified, the petitioner was still asked to face the trial under Section 3/7 of the Essential Commodities Act as stated above.

3. The petitioner submits that there is no strength in the case of the prosecution and in fact, the entire proceedings are required to be quashed by exercising power of this Court under Section 482 of the Cr.P.C. Briefly it is the case of the petitioner that :-

(i) He is resident of Piparia, District Hoshangabad. According to the petitioner, he is resident of Piparia and owns 2 acres of plot wherein residential accommodation, Alka Talkies, garage and kerosene tankers and dispensing units are situated. A lot of land owned by the petitioner is lying vacant and is being used by the general public. It is alleged that on 15.3.2008 in the evening, a tanker carrying 20 KL of kerosene

was found stationed in the vacant land of the petitioner and at that time, he was not at home. The police came at the spot and searched the tanker. The aforesaid tanker stationed therein was carrying kerosene which was transported by one Manjusha Chouhan from Itarsi for the benefit of Indian Traders at Parasia whose proprietor is Sharad Rao Chouhan, the husband of Manjusha Chouhan.

(ii) At that time when the police party searched the tanker and had opened the upper lids, they did not find anything unusual and left the spot. Later on Junior Supply Officer namely Ashok Kumar Rajvaidya came on the spot and enquired about the matter and recorded the statements of cleaner and driver/respondent No.3 and reported the matter to the Collector, Hoshangabad alleging that the said kerosene was to be supplied to the applicant and it was found stationed on his plot without any knowledge of the petitioner. Even though such statements were made by the driver and cleaner, in fact they had informed that the kerosene tanker came from Itarsi and was meant for M/s Indian Traders belonging to Shri Sharad Rao Chouhan and had nothing to do with the petitioner, except that the tanker was parked at the plot belonging to the petitioner but without his authority.

(iii) The Collector issued a notice to the petitioner, respondent No.3, Smt.Manjusha Chouhan and also to Sharad Rao Chouhan. A reply was submitted by the petitioner stating therein that Sharad Rao Chouhan who was supposed to receive the kerosene and was dealer of kerosene and proprietor of Indian Traders had requested the petitioner to send two bags of Tuar Dal in which the petitioner was dealing and it was for that reason that the tanker was stationed on the land of the petitioner of course without his knowledge. This stand of Smt. Manjusha Chouhan and Sharad Rao Chouhan again confirms the stand of the petitioner that the kerosene in the tanker was not meant, utilised or sold to the petitioner.

(iv) It is stated the even though the notice was issued to Sharad Rao Chouhan, Smt.Manjusha Chouhan and driver

Narendra Deshmukh but ultimately the action has been taken against the petitioner while no action has been taken against Smt.Manjusha Chouhan and Shri Sharad Rao Chouhan.

The notices issued to Sharad Rao Chouhan, Smt.Manjusha Chouhan and driver Narendra Déshmukh by the Collector are enclosed with this petition as Annexure A/5 to A/7. One such notice sent to Sharad Rao Chouhan, Proprietor of Indian Traders reads as under:-

कार्यालय कलेक्टर (खाद्य) होशंगाबाद

कारण बताओ सूचना पत्र

क्रमांक/376/खाद्य/08

होशंगाबाद

दिनांक

20/3/2008

प्रति,

श्री शरद राव चौहान आ. श्री जयसिंह राव चौहान
प्रो.मेसर्स इंडियन ट्रेडर्स थोक केरोसीन डीलर
अनुज्ञप्ति क्र.3/सी/1980 रेस्ट हाउस के सामने
परासिया जिला छिंदवाड़ा

1. एतद् द्वारा सूचना के आधार पर आपको सूचित किया जाता है कि दिनांक 15/3/2008 को राजस्व, खाद्य एवं पुलिस विभाग के संयुक्त दल द्वारा आकस्मिक रूप से जांच के दौरान निम्न अनियमितताएँ पाई गई।

2. जांच के दौरान टेंकर क्रमांक एम.पी. 28 के 0189 जो 20 के.एल. पी. एस. के नीले केरोसिन से भरा था एवं जिसे आई ओ सी डिपो इटारसी से सप्लाई देकर आपकी फर्म इंडियन ट्रेडर्स परासिया भेजा गया था, जो वहाँ न जाकर मल्होत्रा ब्रदर्स थोक केरोसिन डीलर पिपरिया के केरोसिन कारोबार सील/परिसर से जप्त किया गया जो भिन्न व्यक्ति का भिन्न कारोबार सील तथा टेंकर के उक्त स्थल पर पाये जाने का कोई औचित्य नहीं था।

3. जांच के दौरान नीले केरोसीन से भरा टेंकर क्रमांक एम.पी. 28 एच 0189 के टेंक के ऊपर के चारों ढक्कन खुले पाये गये जिससे स्पष्ट है कि सार्वजनिक वितरण प्रणाली के तहत प्रदाय किया गया नीले केरोसीन को भिन्न प्रयोजन हेतु रखा गया था।

इस प्रकार आपका उक्त कृत्य केरोसीन (उपयोग कर निवर्धन तथा अधिकतम कीमत नियतन) आदेश 1993 की कडिका 3(2) का स्पष्ट उल्लंघन

की श्रेणी में आता है। जो कि आवश्यक वस्तु अधिनियम 1955 की धारा 3/7 के अंतर्गत दंडनीय है।

1. आपके विरुद्ध अभियोजन की कार्यवाही की जावे।
2. जप्त सामग्री शासन पक्ष में राजसात की जावे।
3. आपकी डीलरशीप निलंबित/निरस्त करने कार्यवाही की जाये।

उक्त कारण बताओ सूचना पत्र का उत्तर एक सप्ताह के अंदर अनिवार्य रूप से प्रस्तुत करें। अन्यथा आपके विरुद्ध एक तरफा कार्यवाही की जावेगी। जिसके लिए आप स्वयं जिम्मेदार रहेंगे।

सही/-

कलेक्टर

होशंगाबाद

(v) Reply of Sharad Rao Chouhan to the show cause notice is Annexure A/8 which is reproduced as under :-

1. यह कि कारण बताओ सूचना पत्र की कंडिका 1 आंशिक रूप से स्वीकार है। यह स्वीकार है कि दिनांक 15/03/08 को राजस्व खाद्य एवं पुलिस विभाग के संयुक्त दल द्वारा आकस्मिक रूप से जाँच के दौरान निम्न अनियमितताएँ पाई गई-यह अस्वीकार है कि जाँच के दौरान आवेदक के द्वारा कोई अनियमितताएँ की गई।

2. यह कि कारण बताओ सूचना पत्र की कंडिका 2 में यह स्वीकार है कि जाँच के दौरान टेंकर क्रमांक-एम.पी. 28एच के 0189 जो 20 के.एल.पी. डी.एस. के नीले केरोसिन से भरा था एवं जिसे आई.ओ.सी.डिपो इटारसी से सप्लाई देकर आपकी फर्म इंडियन ट्रेडर्स परासिया भेजा गया था जो वहाँ न जाकर मल्होत्रा ब्रदर्स थोक केरोसिन डीलर पिपरिया के केरोसिन कारोबार स्थल/परिसर से जप्त किया गया यह अस्वीकार है कि जो भिन्न व्यक्ति का भिन्न कारोबार स्थल तथा टेंकर के उक्त स्थल पर पाये जाने का कोई औचित्य नहीं था वास्तव में आवेदक के द्वारा ड्रायवर को पिपरिया से तुअर दाल की दो कट्टी लाने के लिये कहा गया था चूंकि वहाँ की दाल हमेशा से हमारे यहाँ उपयोग की जाती रही है। इसलिये ड्रायवर ने दाल लेने के लिये टेंकर अलका लॉज के सामने खड़ा किया परंतु अलका लॉज के चौकीदार के द्वारा आपत्ति जताये जाने पर की टेंकर यहाँ खड़ा मत करो यहाँ आवागमन से असुविधा होती है। इस कारण ड्रायवर के द्वारा उक्त वाहन को आगे खड़ा कर दिया। उक्त ड्रायवर ने उक्त टेंकर को सुरक्षा की दृष्टि से उपयुक्त स्थान पर सुरक्षा की दृष्टि से खड़ा कर दिया गया है।

3. यह कि कारण बताओ सूचना पत्र की कंडिका 3 अस्वीकार है यह

अस्वीकार है कि जाँच के दौरान नीले केरोसिन से भरा टैंकर क्रमांक एम.पी. 28 एच.0189 के टैंकर के ऊपर के चारों ढक्कन खुले पाये गये जिससे स्पष्ट है कि सार्वजनिक वितरण प्रणाली के तहत प्रदाय किया गया नीले केरोसिन को भिन्न प्रयोजन हेतु रखा गया था। वास्तविकता यह है कि टैंकर खड़ा होने के बाद पुलिस के द्वारा क्लीनर से पूछा कि टैंकर में क्या है व उसे देखने हेतु टैंकर का ढक्कन क्लीनर से पुलिस ने खुलवाया उसी समय पीछे से जाँच दल भी जाँच हेतु पहुँचा और जाँच दल के द्वारा ढक्कन खुले पाये गये। यह अस्वीकार है कि सार्वजनिक वितरण प्रणाली के तहत प्रदाय किया गया नीले केरोसिन को भिन्न प्रयोजन हेतु रखा गया था। टैंकर की केरोसिन निकासी का जो स्थान था वह बंद था उपरोक्त पेट्री में लॉक लगा हुआ था।

4. यह कि आवेदक के द्वारा किसी भी नियम का उल्लंघन नहीं किया गया है। यह कि उपरोक्त जाँच कार्यवाही के अतिरिक्त आवेदक की फर्म के विभिन्न गोदामों पर भी एक साथ उसी दिन छापा मारा गया था परंतु जाँच टीम को किसी प्रकार की अनियमितता कही भी प्राप्त नहीं हुई व्यवसायिक प्रतिस्पर्धा के चलते किसी व्यक्ति द्वारा उच्च अधिकार्यों को झूठी शिकायत कर यह कार्यवाही कराई गई है। परंतु मेरे द्वारा ऐसा कोई भी कृत्य नहीं किया गया है जो केरोसिन (उपयोग पर निवर्धन एवं अधिकतम कीमत नियतन) ओडर-1993 के किसी भी प्रावधान के अंतर्गत अपराध की श्रेणी में आता हो। मैं मेरी एजेंसी के माध्यम से विगत 30 वर्षों से केरोसिन के वितरण का कार्य कर रहा हूँ परंतु आज दिनांक तक न तो मेरे द्वारा केरोसिन के वितरण से किसी भी प्रकार की कोई अनियमितताएँ नहीं की गई है और न ही विगत 30 वर्षों में मेरी फर्म के विरुद्ध कोई प्रकरण बनाया गया है।

5. यह कि जहाँ तक केरोसिन के टैंकर को मल्होत्रा ब्रदर्स के परिसर में खड़ा करने का प्रश्न है। (पेट्रोलियम रूलस 2002 के नियम 74 में पेट्रोलियम पदार्थ से भरे किसी भी टैंकर के पार्क करने संबंधी प्रावधान दिये गये हैं जिसके अनुसार उक्त टैंकर को किसी भी सड़क के साइड में या किसी सार्वजनिक रास्ते पर या किसी भीड़ भरे इलाके में या अग्नि के स्रोत के 09 मीटर के दायरे में खड़ा नहीं किया जा सकता है) टैंकर ड्रायवर द्वारा उपरोक्त टैंकर मेरे परिचित मल्होत्रा ब्रदर्स के परिसर में सुरक्षा की दृष्टि से खाड़ा किया था। जो जाँच टीम के पहुँचने के दो-तीन घंटे पहले से वहाँ खड़ा हुआ था और ड्रायवर दाल लेने के लिये बाजार गया हुआ था यदि मेरी अथवा मेरे ड्रायवर की उक्त केरोसीन को अन्य उपयोग की मंशा होती तो जाँच के समय निश्चित रूप से टैंकर में केरोसीन कम पाया जाता।

6. यह कि उपरोक्त जप्तशुदा टैंकर में जो नीला केरोसीन भरा है वह छिंदवाड़ा जिले कि सार्वजनिक वितरण प्रणाली हेतु जारी किया गया था। होली का त्यौहार सामने है एवं ऐसी परिस्थिति में जबकि उपरोक्त टैंकर दिनांक

15.03.08 से थाना पिपरिया में खड़ा हुआ है नीले केरोसीन का वितरण छिंदवाड़ा से प्रभावित हो रहा है जिससे शासन की योजना के तहत गरीबों को एवं आम जनता को तकलीफ का सामना करना पड़ रहा है।

अतः श्रीमान् जी निवेदन है कि उपरोक्त प्रकरण समाप्त करने के आदेश पारित करने के कृपा करें।

4. From the stand taken by Sharad Rao Chouhan and Smt. Manjusha Chouhan as well as driver, it is clear that the tanker in question was stopped at the open land though belonging to the petitioner for the purpose of safety yet the Collector directed registration of the case under section 3/7 of the Essential Commodities Act against the petitioner only and ultimately a challan was filed in the Court of Judicial Magistrate First Class.

At the stage of framing of charge, written arguments were also filed by the petitioner but those arguments were not taken into consideration. The arguments as given by the petitioner is Annexure A/13 are reproduced as under:-

(अ). यह है कि आरोप पत्र में केरोसिन (उपयोग पर निर्बंधन तथा अधिकतम कीमत नियतन) आदेश 1993 की कंडिका 3(2) के उल्लंघन किये जाना तथा इस तरह आवश्यक वस्तु अधिनियम 1955 की धारा 7(सहपठित धारा 3) के अंतर्गत दंडनीय होना वर्णित है। सुलभ संदर्भ हेतु इस आदेश 1993 की कंडिका 3(2) अविकल रूप नीचे उद्धृत है:

"3. सार्वजनिक वितरण प्रणाली के अधीन प्रदाय किये गये केरोसीन के उपयोग पर निर्बंधन:

(1)

(2) सार्वजनिक वितरण प्रणाली के अधीन नियुक्त कोई व्यौहारी या परिवाहक, सार्वजनिक वितरण प्रणाली के अधीन ऐसे व्यक्ति से भिन्न किसी व्यक्ति को, जिसके लिये प्रदाय अभिप्रेत है, केरोसीन का विक्रय, वितरण या प्रदाय नहीं करेगा।"

ऊपर अंकित प्रावधान के अवलोकन मात्र से यह स्पष्ट है कि कंडिका 3(2) केवल सार्वजनिक वितरण प्रणाली के अधीन नियुक्त व्यौहारी एवं परिवाहक पर ही प्रतिबंध लगाती है कि वे नियमानुसार आशयित व्यक्ति के अलावा अन्य व्यक्ति को नीले केरोसीन का विक्रय, वितरण या प्रदाय नहीं करें प्रचलित प्रकरण में आरोपी क्रमांक-1 न तो सार्वजनिक वितरण प्रणाली के अधीन व्यौहारी की भूमिका में हैं न ही परिवाहक का कृत्य कर रहा है इसलिये कंडिका 3(2) के उल्लंघन के आरोप आरोपी क्रं-1 पर कानूनी तौर पर नहीं लगाए जा

सकते हैं इस तरह आरोपी क्र.-1 को इस आरोप से मुक्त किया जाना न्यायोचित होगा।

It appears that the case has been registered against the petitioner on the basis of the report made by Shri Ashok Kumar Rajvaidya, Junior Supply Officer, Piparia. Some paragraphs of the report made by Junior Supply Officer, Piparia are reproduced as under:-

जांच समय फर्म के कारोबार स्थल पर सूचना के मुताबिक लाल रंग का टैंकर क्रमांक एम.पी.28 एच 0189 खड़ा पाया गया। जांच करने पर टैंकर के चार कम्पार्टमेंटों के ऊपर के ढक्कन खुले पाये गये तथा टैंकर में प्रति कम्पार्टमेंट में पांच हजार लीटर के मान से 20000 लीटर (बीस के.एल.) नीला केरोसीन भरा बताया गया। टैंकर पर चालक नरेन्द्र देशमुख पुत्र बाबूराव देशमुख निवासी मुकाम पोस्ट रहेण्डी तहसील सुजालपुर जिला शाजापुर उपस्थित पाया गया। पूछताछ करने पर उसके पास एनवाईस क्रमांक (बिल) 624328485 दिनांक 15/03/08 बल्क पेट्रोलियम डिपो (आई ओ सी) इटारसी डिपो से इंडियन ट्रेडर्स परासिया (आई ओ सी डीलर) जिला छिंदवाड़ा के लिये भेजा गया था। इस टैंकर को पिपरिया शहर होकर काया मटकुली छिंदवाड़ा रोड से परासिया जाना था, परंतु टैंकर चालक द्वारा निर्धारित मार्ग से गन्तव्य को न जाकर केरोसीन से भरे इस टैंकर को पिपरिया के थोक केरोसीन डीलर मेसर्स मल्होत्रा ब्रदर्स (आई ओ सी डीलर) के नेहरू वार्ड, (अलका लाज/टाकीज के पास) स्थित केरोसीन डिपो (डिस्पेंसिंग यूनिट) परिसर में अवैध रूप से लाकर खड़ा कर दिया गया। इस संबंध में सूचना मिली थी कि इस स्थान से केरोसीन की कालाबाजारी की जाने की संभावना है। चालक के कथन लिये गये उसके द्वारा बताया गया कि उसके मालिक शरदराव द्वारा पिपरिया से दाल लाने का कहा था तथा यह दाल मल्होत्रा ब्रदर्स के प्रोप्रायटर्स के द्वारा दी जानी थी। परन्तु जब उससे यह पूछा गया कि वह केरोसीन से भरे टैंकर को यहां क्यों लाया गया केरोसीन डिस्पेंसिंग यूनिट पर टैंकर क्यों लगाया गया तथा टैंकर के ढक्कन क्यों खोले गये तो वह संतोषजनक जवाब नहीं दे पाया। इस संबंध में मल्होत्रा ब्रदर्स के प्रो. रसमितसिंह मल्होत्रा के भी कथन लिये गये। उनके द्वारा बताया गया कि टैंकर का चालक उससे बिना बताये टैंकर लेकर गोदाम पर आ गया। श्री मल्होत्रा ने स्वीकार किया कि यह बात सही है कि इंडियन ट्रेडर्स के मालिक शरद राव ने दाल दिलाने का कहा था परन्तु शनिवार होने व मार्केट बंद होने से पिपरिया में दाल नहीं मिल सकी थी। श्री मल्होत्रा ने बताया कि यह टैंकर शाम सात बजे से यहां खड़ा है एवं रात्रि 8.30 बजे जांच दल के आने पर उसे पता लगा कि शिकायत हुई है।

टैंकर में भरे केरोसीन के सैंपल लिये गये जिसमें नीला केरोसीन पाया गया सैंपलों को सील बंद किया गया। टैंकर में भरे केरोसीन की डीप लेकर सत्यापन

किया गया जिसमें प्रति कम्पार्टमेंट में पांच हजार लीटर के मान से बीस हजार लीटर केरोसीन सही पाया गया। इस प्रकार जांच में टैंकर क्रमांक एम.पी. 28 एच-0189 में भरे बीस के एल केरोसीन का अवैध परिवहन कर अवैध रूप से परासिया जाने के बजाय भिन्न स्थान पर भिन्न व्यक्ति भिन्न फर्म पर कालाबाजारी करने की नीयत से लाया जाना पाया गया। गवाहों के समक्ष पंचनामा बनाकर टैंकर सहित बीस के.एल. नीले केरोसीन को (मुताबिक जप्तीपत्रक) दस्तावेजों सहित जप्त कर थाना पिपरिया की अभिरक्षा में दिया गया।

5. The charges framed against the petitioner as per Annexure A/14 are reproduced as under :-

मैं कमलेश साहू न्यायिक मजिस्ट्रेट प्रथम श्रेणी पिपरिया म.प्र. आप आरोपी रसमित सिंह आत्मज श्री अजित सिंह उम्र 38 वर्ष निवासी नेहरू वार्ड पिपरिया पर नीचे लिखे आरोप विरचित करता हूँ :-

1- आपने घटना दिनांक 15.03.08 को रात्रि 8:30 बजे नेहरू वार्ड पिपरिया में टैंकर क्रमांक एम.पी. 28 एच. 0189 को मेसर्स मल्होत्रा ब्रदर्स पिपरिया के कारोबार सील पर 20 किलोलीटर नीले केरोसीन से भरा लाया जो वहा खडा पाया गया, जिसके ऊपर के चारों कम्पार्टमेंट के ढक्कन खुले पाये गये। उक्त टैंकर इंडियन आईल कार्पोरेशन के इटारसी डिपो से परासिया के लिये भेजा गया था, जो परासिया न ले जाकर भिन्न स्थान मेसर्स मल्होत्रा ब्रदर्स पिपरिया के डिस्पेचिंग युनिट में अवैध रूप से लाया गया तथा उक्त कृत्य में आपके द्वारा सहयोग किया गया।

इस प्रकार आपका उक्त कृत्य आवश्यक वस्तु अधिनियम 1955 की धारा 3 उल्लंघन होकर उक्त अधिनियम की धारा 7 के अन्तर्गत दण्डनीय अपराध है और इस न्यायालय के संज्ञान्तर्गत है।

एतत् द्वारा मैं निर्देश देता हूँ कि उपरोक्त अपराध का विचारण इस न्यायालय द्वारा किया जावे।

6. Sub-clause 3(2) of the Kerosene (Restriction on Use and Fixation of Ceiling Price) Order, 1993 reads as under:-

3. Restriction on use of kerosene supplied under public distribution system.--

(2) No dealer appointed under the public distribution system or a transporter shall sell, distribute or supply kerosene under the public distribution system to any person other than the person to whom the supplies are meant for;

A bare perusal of the aforesaid clause goes to show that no dealer appointed under the public distribution system or a transporter shall sell, distribute or supply kerosene under the public distribution system to any person other than the person to whom the supplies are meant for. **In so far as present petitioner is concerned, despite liberty granted to the respondents, they have not been able to place on record any document qua him to show how the petitioner was connected with the aforesaid tanker containing kerosene oil and in what way, his criminal liability arises in this case.**

7. I, therefore, find strength in the submissions made on behalf of the petitioner that it is a fit case where the case of the prosecution is required to be quashed for the following reasons:-

(i) In the instant matter, the petitioner is not involved in any way as nothing has been found against him in the search and enquiry. Merely the tanker was found stationed, may be for the purpose of safety, unauthorisedly in the open land belonging to the petitioner would in no way attract the criminal liability qua the petitioner. There is no evidence to connect the petitioner with the tanker in question. Moreover, there is no evidence to show that the employees working with the tanker were the employees of the petitioner.

(ii) No case is made out against the petitioner under Section 7 of the Essential Commodities Act as there is no violation of Control Order, 1993 i.e. Kerosene (Restriction on Use and Fixation of Ceiling Price) Order, 1993 and particularly clause 3(2) of the said order. According to sub-clause (2) of clause 3, it is the dealer of kerosene and the transporter who are responsible in the matter as it is not supposed for them to sell or distribute the kerosene to any person except entitled for the same under the Public Distribution System. In the instant case, the dealer is the Indian Traders proprietor, the transporter is the owner of the said tanker Smt.Manjusha Chouhan W/o Shri Sharad Rao Chouhan, but no action has been taken against them and the petitioner is implicated. Not only this, their tanker was also released by the respondent No.2 on supurdginama along with the kerosene meaning thereby that the action has been taken deliberately

against the petitioner because of some ulterior motive and colourable exercise of power.

(iii) The petitioner is also a kerosene dealer at Pipariya and, therefore, there is no question of any illegality in the matter as kerosene (sic:kerosene) found in the tanker was not meant for his user nor it was supplied to him and admittedly was supplied for M/s Indian Traders belonging to Shri Sharad Rao Chouhan sent by his wife Smt.Manjusha Chouhan.

(iv) Merely the petitioner was also kerosene dealer at Pipariya would not mean that in the absence of any evidence, the kerosene tanker was meant to be used by the petitioner until and unless any evidence could have been collected by the prosecution to show any link against Smt.Manjusha Chouhan and Sharad Rao Chouhan who have very categorically admitted that the tanker was placed at the place in question unauthorisedly (sic:unauthorisedly) and basically it was meant for procuring Tuar Dal in which the petitioner is dealing and the same was required by Sharad Rao Chouhan.

(v) Merely because the petitioner is known to Shri Sharad Rao Chouhan, the tanker was stationed on his land at Pipariya with a view to fetch Tuar Dal, it cannot be said that there is any violation of provisions of the Control Order, 1993 or any offence is made out under section 7 of the Essential Commodities Act.

(vi) It is matter of fact that in the enquiry, the kerosene in the tanker was found intact. Its valves were also found intact. The kerosene in the tanker of the applicant was also found intact.

In such a situation, when there is nothing against the petitioner, there was no question to implicate him in the alleged offence which is never committed and, therefore, the challan filed against him and ultimately charges framed against him all are bad in law.

(vii) It is also a matter of record that neither the dealer nor the transporter has been made party in the case as it seems

that respondent no.2 was satisfied with their reply and if it is the situation, the petitioner also is not liable to be implicated at all and no challan or charge should have been framed in spite of the fact that the petitioner has submitted before the Court below the written arguments and stated therein all true facts. The case is registered against him and now he is asked to face the trauma of the trial which is nothing but harassment of the petitioner for no fault on his part.

Even though the respondents have placed the record of this case before me and have argued the case but they have not filed written arguments to show as to how the petitioner is connected with the crime, as per order dated 1.10.2015.

8. In view of the aforesaid, taking note of the entire facts of the case and there being no evidence, available on record which may show that the petitioner was in any way connected with the tanker found stationed in the premises though belonging to the petitioner but without his sanction and authority at the instance of Sharad Rao Chouhan who was owner of the tanker containing kerosene for whose benefit, the kerosene was transported, it cannot be said that the petitioner is guilty of any crime.

9. Thus, this petition is allowed. The proceedings initiated against the petitioner in Criminal Case No.1225/2008 pending before the Court Judicial Magistrate First Class, Piparia, District Hoshangabad (FIR in Crime No.251/2008 registered at Police Station Piparia, District Hoshangabad dated 11.4.2008) are quashed and the petitioner is discharged from the charge levelled against him. His bail bonds are discharged.

Application allowed.