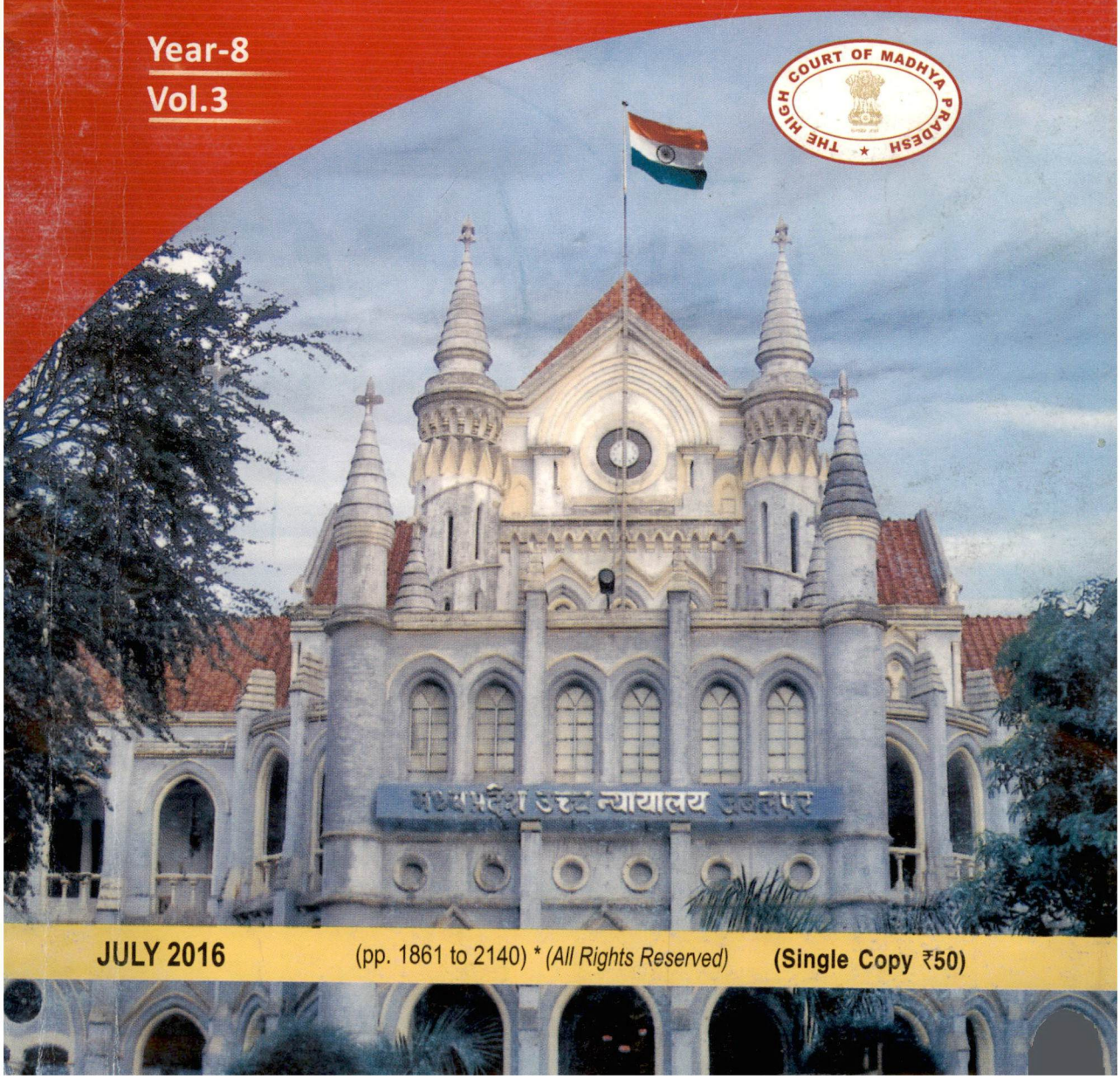
THE INDIAN LAW REPORTS

M.P. SERIES

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

Year-8
Vol.3



JULY 2016 (pp. 1861 to 2140) (Single Copy ₹50)

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सिविल प्रक्रिया संहिता (1908 का 5), आदेश 21 नियम 26 सहपठित धारा 151 व आदेश 26 नियम 13 व 14 सहपठित धारा 151 – क्या अंतिम डिक्री तैयार किए बिना, वाद मकान की चौहद्दी की दिशायें उल्लिखित करने एवं अंश अवधारित करते हुए बंटवारे का निदेश देने वाली डिक्री निष्पादन योग्य है – अभिनिर्धारित – नहीं, चूंकि डिक्री की प्रकृति के अनुसार पक्षकारों के मध्य अंशो का बंटवारा, माप और सीमांकन सहित किया जाना स्पष्टतः अपेक्षित है, इसलिए डिक्री को अंतिम होना नहीं माना जा सकता है – विचारण न्यायालय द्वारा आदेश 26 नियम 13 के अंतर्गत पहले कमिश्नर की नियुक्ति की जाना अपेक्षित है एवं तत्पश्चात् नियम 14 के अंतर्गत, न्यायालय द्वारा कमिश्नर रिपोर्ट पर आक्षेपों, यदि कोई हों तो, को विनिश्चित किया जाना एवं रिपोर्ट को पुष्ट अथवा अपास्त अथवा रिपोर्ट में फेरफार करते हुए निर्णय लिया जाना अपेक्षित है – तत्पश्चात् पारित डिक्री अंतिम डिक्री होगी जो कि आदेश 21 नियम 18 सि.प्र.सं. के अंतर्गत निष्पादन योग्य होगी – आगे यह भी अभिनिर्धारित – निष्पादन न्यायालय ने प्रारंभिक डिक्री के निष्पादन का आदेश देने में तथा अंतिम डिक्री तैयार करने हेतु कार्यवाही करने में अवैधता कारित की – आक्षेपित आदेश अपास्त करते हुए पुनरीक्षण मंजूर। (विजय सूद वि. कनक देवी) ...2054

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सेवा विधि – वेतनवृद्धि – अभिनिर्धारित – (क) भर्ती नियम, जो हिंदी मुद्रलेखन परीक्षा उत्तीर्ण करना आवश्यक बनाते हैं, के अनुसार नियुक्त एक कर्मचारी केवल उक्त परीक्षा उत्तीर्ण करने के उपरांत ही वेतनवृद्धि हेतु हकदार होगा – (ख) हिंदी मुद्रलेखन परीक्षा उत्तीर्ण करने पर वेतनवृद्धि की पात्रता के संबंध में यदि भर्ती नियम मौन हैं तब उस दशा में यदि हिंदी मुद्रलेखन परीक्षा उत्तीर्ण करने की शर्त नियुक्ति पत्र में समाविष्ट है तब कर्मचारी केवल हिंदी मुद्रलेखन परीक्षा उत्तीर्ण करने के उपरांत ही वेतनवृद्धि हेतु हकदार होगा – (ग) जहाँ भर्ती नियम यह उपबंध करते हैं कि उस अभ्यर्थी को अधिमान्यता प्रदान की जाएगी जिसने हिंदी मुद्रलेखन परीक्षा उत्तीर्ण कर ली है, तब उस दशा में भी नियुक्ति आदेश में ऐसी शर्त अन्तर्विष्ट होने पर कर्मचारी को वेतनवृद्धि की पात्रता नहीं होगी, वह हिंदी मुद्रलेखन परीक्षा उत्तीर्ण करने की दिनांक से वेतनवृद्धि पाने का हकदार होगा – (घ) जहाँ नीति तथा नियुक्ति पत्र के अंतर्गत हिंदी मुद्रलेखन परीक्षा उत्तीर्ण करने का उपबंध हो, तब ऐसे मामले में कर्मचारी केवल हिंदी मुद्रलेखन परीक्षा उत्तीर्ण करने के उपरांत ही वेतनवृद्धि हेतु हकदार होगा – (ङ) यदि कोई कर्मचारी अनुकंपा नियुक्ति अथवा नियमितीकरण की नीति के अंतर्गत नियुक्त किया गया है तथा यदि उक्त नीति के उपबंध अनुसार हिंदी मुद्रलेखन परीक्षा उत्तीर्ण किया जाना आवश्यक है, तब उस दशा में नियुक्ति पत्र में हिंदी

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सेवा विधि – पदोन्नति – रिपोर्ट देने वाले अधिकारी द्वारा वार्षिक गोपनीय प्रतिवेदन में किये गये आकलन का मूल्य – अभिनिर्धारित – वार्षिक गोपनीय प्रतिवेदन लिखे जाने के उद्देश्य से किसी कर्मचारी के कार्य का आकलन करने वाले प्राधिकारियों के क्रम में रिपोर्ट देने वाले अधिकारी द्वारा किया गया आकलन सर्वाधिक महत्वपूर्ण होता है एवं पुनर्विलोकन अधिकारी अथवा स्वीकारकर्ता अधिकारी द्वारा इसे अनौपचारिक रूप से अनदेखा अथवा उपेक्षित नहीं किया जा सकता – रिपोर्ट देने वाले अधिकारी के आकलन से असहमत होने के लिए तटस्थता अपेक्षित है जिससे कि कर्मचारी के निश्चित कार्य संपादन के बारे में निष्कर्ष पर पहुँचा जा सके – अभिनिर्धारित – वार्षिक गोपनीय प्रतिवेदनों को हिसाब बराबर करने के लिए एक औजार के रूप में उपयोग नहीं किया जाना चाहिए – याची को उसके रिपोर्ट देने वाले अधिकारी द्वारा निरंतर उत्कृष्ट श्रेणियाँ प्रदान की गई है – याची द्वारा अभ्यावेदन प्रस्तुत करने पर उसके मामले को विचार में लेने तथा याची के अर्ह पाये जाने की दशा में पुनर्विलोकन विभागीय पदोन्नति की बैठक आयोजित करने हेतु प्रत्यर्थीगण को निदेशित किया गया। (श्याम किशोर दीक्षित वि. म. प्र. राज्य) ...1977

Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986) as amended by Act No. 12 of 1994, Section 22 – Bank Guarantee **– Bank Guarantee was furnished on behalf of the Contractor to secure the liability due to non fulfillment of the terms and conditions of the work – The bank guarantee is a separate contract between the petitioner and the Bank – The Bank Guarantee ought to have been encashed on demand by the petitioner – Guarantee is not in respect of any loan or advance granted to an industrial company – BIFR and AAIFR has no jurisdiction to question encashment of the Bank guarantee – The Bank is directed to encash the bank guarantee forthwith and also pay the interest – Writ Petition allowed. [Narmada Valley Development Authority Vs. The Appellate Authority for Industrial & Financial Reconstruction] (DB)...1908**

रुग्ण औद्योगिक कम्पनी (विशेष उपबंध) अधिनियम, 1985 (1986 का 1) यथा संशोधित अधिनियम 1994 का 12, धारा 22 – बैंक गारंटी – कार्य के निबंधनों एवं शर्तों की पूर्ति न होने की दशा में दायित्व को प्रतिभूत करने के लिए ठेकेदार की ओर से बैंक गारंटी प्रस्तुत की गई थी – बैंक गारंटी याची एवं बैंक के मध्य एक पृथक् संविदा है – याची द्वारा मांग किये जाने पर बैंक गारंटी भुनाई जानी

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THE INDIAN LAW REPORTS M.P. SERIES, 2016

(VOL-3)

JOURNAL SECTION

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

THE SCHEDULED CASTES AND THE SCHEDULED TRIBES (PREVENTION OF ATROCITIES) AMENDMENT RULES, 2016.

[Ministry of Social Justice and Empowerment (Department of Social Justice and Empowerment) Notification No. G.S.R. 424(E) dated 14th April, 2016, published in the Gazette of India (Extraordinary) Part II, Section 3, Sub-section (i) dated 14.04.2016, Page no. 12-28]

In exercise of the powers conferred by sub-section (1) of section 23 of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (33 of 1989), the Central Government hereby makes the following rules further to amend the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Rules, 1995, namely:-

1. *(1)* These rules may be called the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Amendment Rules, 2016.

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

2. In the Scheduled Castes and the Scheduled Tribes (Prevention of

Atrocities) Rules, 1995 (hereinafter referred to as the said rules), in rule 2, for clause (b), the following clause shall be substituted, namely:-

'(b) "dependent" means the spouse, children, parents, brother and sister of the victim; who are dependent wholly or mainly on such victim for support and maintenance;'.

3. In the said rules, in rule 4, —

(a) for sub-rule (1), the following shall be substituted, namely:-

" (1) The State Government, on the recommendation of the District Magistrate, shall prepare for each District a panel of such number of eminent senior advocates who have been in practice for not less than seven years, as it may deem necessary for conducting cases in the Special Courts and Exclusive Special Courts.

(1A) The State Government in consultation with the Director Prosecution or in charge of the prosecution, shall also specify a panel of such number of Public Prosecutors and Exclusive Special Public Prosecutors, as it may deem necessary for conducting cases in the Special Courts and Exclusive Special Courts, as the case may be.

(1B) Both the panels referred to in sub-rule (1) and sub-rule (1A) shall be notified in the Official Gazette of the State and shall remain in force for a period of three years. " ;

(b) in sub-rule (2), for the words " Special Public Prosecutors", the words "Special Public Prosecutors and Exclusive Special Public Prosecutors" shall be substituted;

(c) in sub-rule (3), for the words "a Special Public Prosecutor", the words "a Special Public Prosecutor or an Exclusive Special Public Prosecutor" shall be substituted;

(d) for sub-rule (4) of rule 4, the following sub-rule shall be substituted, namely:-

"(4) The District Magistrate and the officer-in-charge of the prosecution at

the District level, shall review,—

(a) the position of cases registered under the Act ;

(b) the implementation of the rights of victims and witnesses, specified under the provisions of Chapter IV A of the Act,

and submit a monthly report on or before 20th day of each subsequent month to the Director of Prosecution and the State Government, which shall specify the actions taken or proposed to be taken in respect of investigation and prosecution of each case. ";

(e) in sub-rule (5), for the words "conducting cases in the Special Courts", the words "conducting cases in the Special Courts or Exclusive Special Courts" shall be substituted;

(f) in sub-rule (6), for the words " Special Public Prosecutor", the words "Special Public Prosecutor and Exclusive Special Public Prosecutor" shall be substituted.

4. In the said rules, in rule 7, —

(a) for sub-rule (2), the following shall be substituted, namely:-

" (2) The investigating officer so appointed under sub-rule (1) shall complete the investigation on top priority, submit the report to the Superintendent of Police, who in turn shall immediately forward the report to the Director General of Police or Commissioner of Police of the State Government, and the officer in- charge of the concerned police station shall file the charge sheet in the Special Court or the Exclusive Special Court within a period of sixty days (the period is inclusive of investigation and filing of charge-sheet).

(2A) The delay, if any, in investigation or filing of charge-sheet in accordance with sub-rule (2) shall be explained in writing by the investigating officer.";

(b) for sub-rule (3), the following sub-rule shall be substituted, namely:-

"(3) The Secretary, Home Department and the Secretary, Scheduled Castes

and Scheduled Tribes Development Department (the name of the Department may vary from State to State) of the State Government or Union territory Administration, Director of Prosecution, the officer in-charge of Prosecution and the Director General of Police or the Commissioner of Police in-charge of the concerned State or Union territory shall review by the end of every quarter the position of all investigations done by the investigating officer. ".

5. In the said rules, in rule 8, in sub-rule (1), after clause (vi), the following clause shall be inserted, namely:-

"(via) informing the nodal officer and the concerned District Magistrates about implementation of the rights of victims and witnesses specified under the provisions of Chapter IV A of the Act;".

6. In the said rules, in rule 9, after clause (vi), the following clause shall be inserted namely:-

"(vii) implementation of the rights of victims and witnesses specified under the provisions of Chapter IV A of the Act. ".

7. In the said rules, in rule 10, after clause (iii), the following clause shall be inserted, namely:-

"(iv) implementation of the rights of victims and witnesses specified under the provisions of Chapter IV A of the Act, in the identified areas. ".

8. In the said rules, in rule 12, —

(a) for sub-rule (4), the following shall be substituted, namely:-

"(4) The District Magistrate or the Sub-Divisional Magistrate or any other Executive Magistrate shall make necessary administrative and other arrangements and provide relief in cash or in kind or both within seven days to the victims of atrocity, their family members and dependents according to the scale as provided in Annexure-I read with Annexure-II of the Schedule annexed to these rules and such immediate relief shall also include food, water, clothing, shelter, medical aid, transport facilities and other essential items.

(4A) For immediate withdrawal of money from the treasury so as to timely provide the relief amount as specified in sub-rule (4), the concerned State Government or Union territory Administration may provide necessary authorisation and powers to the District Magistrate.

(4B) The Special Court or the Exclusive Special Court may also order socio-economic rehabilitation during investigation, inquiry and trial, as provided in clause (c) of sub-section 6 of section 15A of the Act. ";

(b) in sub-rule (7), for the words " Special Court" at both the places where they occur, the words "Special Court or Exclusive Special Court" shall respectively be substituted.

9. In the said rules, for rule 14, the following rule shall be substituted, namely:-

"14. SPECIFIC RESPONSIBILITY OF STATE GOVERNMENT.—(1) The State Government shall make necessary provisions in its annual budget for providing relief and rehabilitation facilities to the victims of atrocity, as well as for implementing an appropriate scheme for the rights and entitlements of victims and witnesses in accessing justice as specified in sub-section (11) of section 15A of Chapter IV A of the Act.

(2) The State Government shall review at least twice in a calendar year, in the month of January and July the performance of the Special Public Prosecutor and Exclusive Special Public Prosecutor specified or appointed under section 15 of the Act, various reports received, investigation made and preventive steps taken by the District Magistrate, Sub-Divisional Magistrate and Superintendent of Police, relief and rehabilitation facilities provided to the victims and the reports in respect of lapses on behalf of the concerned officers. ".

10. In the said rules, in rule 15, —

(i) in sub-rule (1),—

(A) for the words "shall prepare a model contingency plan for implementing",

the words "shall frame and implement a plan to effectively implement" shall be substituted;

(B) after clause (a), the following clause shall be inserted, namely:-

"(aa) an appropriate scheme for the rights and entitlements of victims and witnesses in accessing justice, as specified in sub-section (11) of section 15 A of Chapter IV A of the Act;

(ii) in sub-rule (2), for the words "to the Central Government in the Ministry of Welfare", the words "to the Central Government in the Department of Social Justice and Empowerment, Ministry of Social Justice and Empowerment" shall be substituted.

11. In the said rules, for rule 16, the following rule shall be substituted, namely:-

"16. CONSTITUTION OF STATE-LEVEL VIGILANCE AND MONITORING COMMITTEE:

(1) The State Government shall constitute high power vigilance and monitoring committee of not more than twenty-five members consisting of the following, namely:—

(i) Chief Minister or Administrator – Chairman (in case of a State under President's Rule, the Governor shall be the Chairman);

(ii) Home Minister, Finance Minister and Minister(s) in-charge of welfare and development of the Scheduled Castes and the Scheduled Tribes - Members (in case of a State under the President's Rule, the Advisors shall be Members);

(iii) all elected Members of Parliament and State Legislative Assembly and Legislative Council from the State belonging to the Scheduled Castes and the Scheduled Tribes shall be Members;

(iv) Chief Secretary, the Home Secretary, the Director General of Police, Director/Deputy Director, the National Commission for the Scheduled Castes and the National Commission for the Scheduled Tribes shall be Members;

(v) the Secretary in-charge to the welfare and development of the Scheduled Castes and the Scheduled Tribes shall be Convener.

(2) The high power vigilance and monitoring committee shall meet at least twice in a calendar year, in the month of January and July to review the implementation of the provisions of the Act, scheme for the rights and entitlements of victims and witnesses in accessing justice, as specified in sub-section (11) of section 15A of Chapter IV A of the Act, relief and rehabilitation facilities provided to the victims and other matters connected therewith, prosecution of cases under the Act, role of different officers or agencies responsible for implementing the provisions of the Act and review of various reports received by the State Government including that of the nodal officer and special officer."

12. In the said rules in rule 17, in sub-rule (1), after the words "review the implementation of the provisions of the Act, ", the words "scheme for the rights and entitlements of victims and witnesses in accessing justice, as specified in sub-section (11) of section 15A of Chapter IV A of the Act, " shall be inserted.

13. In the said rules, in rule 17A, in sub-rule(1), after the words, " review the implementation of the provisions of the Act", the words "scheme for the rights and entitlements of victims and witnesses in accessing justice, as specified in sub-section (11) of section 15A of Chapter IV A of the Act,", shall be inserted.

14. In the said rules, in the Schedule, for Annexure-I, the following Annexure shall be substituted, namely:-

"ANNEXURE-I

[See rule 12(4)]

NORMS FOR RELIEF AMOUNT

Sr. No.	Name of the offence	Minimum amount of relief
(1)	(2)	(3)
1.	Putting any inedible or obnoxious substance [Section 3(1)(a) of the Act]	One lakh rupees to the victim. Payment to the victim be made as follows: (i) 10 per cent. at First Information Report (FIR) stage for serial numbers (2) and (3) and 25 percent at FIR stage for serial numbers (1), (4) and (5); (ii) 50 per cent. when the charge sheet is sent to the court; (iii) 40 per cent. when the accused are convicted by the lower court for serial numbers (2) and (3) and likewise 25 percent for serial numbers (1), (4) and(5).
2.	Dumping excreta, sewage, carcasses or any other obnoxious substance [Section 3(1)(b) of the Act]	
3.	Dumping excreta, waste matter, carcasses with intent to cause injury, insult or annoyance [Section 3(1)(c) of the Act]	
4.	Garlanding with footwear or parading naked or semi-naked [Section 3(1)(d) of the Act]	
5.	Forcibly committing acts such as removing clothes, forcible tonsuring of head, removing moustaches, painting face or body [Section 3(1)(e) of the Act]	
6.	Wrongful occupation or cultivation of land [Section 3(1)(f) of the Act]	One lakh rupees to the victim. The land or premises or water supply or irrigation facility shall be restored where necessary at Government cost by the concerned State Government or Union territory Administration.
7.	Wrongful dispossession of land or premises or interfering with the rights, including forest rights.	

	[Section 3(1)(g) of the Act]	Payment to the victim be made as follows: (i) 25 per cent. at First Information Report (FIR) stage; (ii) 50 per cent. when the charge sheet is sent to the court; (iii) 25 per cent. when the accused are convicted by the lower court.
8.	Begar or other forms of forced or bonded labour [Section 3(1)(h) of the Act]	One lakh rupees to the victim. Payment to be made as follows: (i) Payment of 25 per cent. First Information Report (FIR) stage; (ii) 50 per cent. when the charge sheet is sent to the court; (iii) 25 per cent. when the accused are convicted by the lower court.
9.	Compelling to dispose or carry human or animal carcasses, or to dig graves [Section 3(1)(i) of the Act]	
10.	Making a member of the Scheduled Castes or the Scheduled Tribes to do manual scavenging or employing him for such purpose [Section 3(1)(j) of the Act]	
11.	Performing, or promoting dedication of a Scheduled Caste or a Scheduled Tribe woman as a devadasi [Section 3(1)(k) of the Act]	
12.	Prevention from voting, filing nomination [Section 3(1)(l) of the Act]	Eighty- five thousand rupees to the victim. Payment to be made as follows: (i) 25 per cent. at First Information Report (FIR) stage;
13.	Forcing, intimidating or obstructing a holder of office of Panchayat or Municipality from	

	performing duties [Section 3(1)(m) of the Act]	(ii) 50 per cent. when the charge sheet is sent to the court; (iii) 25 per cent .when the accused are convicted by the lower court.
14.	After poll violence and imposition of social and economic boycott [Section 3(1)(n) of the Act]	
15.	Committing any offence under this Act for having voted or not having voted for a particular candidate [Section 3(1)(o) of the Act]	
16.	Instituting false, malicious or vexatious legal proceedings [Section 3(1)(p) of the Act]	Eighty-five thousand rupees to the victim or reimbursement of actual legal expenses and damages, whichever is less. Payment to be made as follows: (i) 25 per cent. at First Information Report (FIR) stage; (ii) 50 per cent. when the charge sheet is sent to the court; (iii) 25 per cent. when the accused are convicted by the lower court.
17.	Giving false and frivolous information to a public servant [Section 3(1)(q) of the Act]	One lakh rupees to the victim or reimbursement of actual legal expenses and damages, whichever is less. Payment to be made as follows: (i) 25 per cent. at First Information Report (FIR) stage; (ii) 50 per cent. when the charge sheet is sent to the court;

		(iii) 25 per cent. when the accused are convicted by the lower court.
18.	Intentional insult or intimidation to humiliate in any place within public view [Section 3(1)(r) of the Act]	One lakh rupees to the victim. Payment to be made as follows: (i) 25 per cent. at First Information Report (FIR) stage; (ii) 50 per cent. when the charge sheet is sent to the court; (iii) 25 per cent. when the accused are convicted by the lower court.
19.	Abusing by caste name in any place within public view [Section 3(1)(s) of the Act]	
20.	Destroying, damaging or defiling any object held sacred or in high esteem [Section 3(1)(t) of the Act]	
21.	Promoting feelings of enmity, hatred or ill-will [Section 3(1)(u) of the Act]	
22.	Disrespecting by words or any other means of any late person held in high esteem [Section 3(1)(v) of the Act]	
23.	Intentionally touching a Scheduled Caste or a Scheduled Tribe woman without consent, using acts or gestures, as an act of sexual nature, [Section 3(1)(w) of the Act]	Two lakh rupees to the victim. Payment to be made as follows: (i) 25 per cent. at First Information Report (FIR) stage; (ii) 50 per cent. when the charge sheet is sent to the court; (iii) 25 per cent. when the accused are convicted by the lower court.

24.	Section 326B of the Indian Penal Code (45 of 1860)— Voluntarily throwing or attempting to throw acid. [Section 3(2)(va) read with Schedule to the Act]	(a) Eight lakh and twenty-five thousand rupees to the victim with burns exceeding and 2 per cent and above burns on face or in case of functional impairment of eye, ear, nose and mouth and or burn injury on body exceeding 30 per cent; (b) four lakh and fifteen thousand rupees to the victim with burns between 10 per cent. to 30 per cent. on the body; (c) eighty-five thousand rupees to the victim with burns less than 10 per cent. on the body other than on face. In addition, the State Government or Union territory Administration shall take full responsibility for the treatment of the victim of acid attack. The payment in terms of items (a) to (c) are to be made as follows: (i) 50 per cent. at First Information Report (FIR) stage; (ii) 50 per cent. after receipt of medical report.
25.	Section 354 of the Indian Penal Code (45 of 1860) — Assault or criminal force to woman with intent to outrage her modesty. [Section 3(2) (va) read with Schedule to the Act]	Two lakh rupees to the victim. Payment to be made as follows: (i) 50 per cent. at First Information Report (FIR) stage;

		(ii) 25 per cent. when the charge sheet is sent to the court; (iii) 25 per cent. on conclusion of trial by the lower court.
26.	Section 354 A of the Indian Penal Code (45 of 1860)—Sexual harassment and punishment for sexual harassment. [Section 3(2) (va) read with Schedule to the Act]	Two lakh rupees to the victim. Payment to be made as follows: (i) 50 per cent. at First Information Report (FIR) stage; (ii) 25 per cent. when the charge sheet is sent to the court; (iii) 25 per cent. on conclusion of trial by the lower court.
27.	Section 354 B of the Indian Penal Code (45 of 1860)—Assault or use of criminal force to woman with intent to disrobe [Section 3(2)(va) read with Schedule to the Act]	Two lakh rupees to the victim. Payment to be made as follows: (i) 50 per cent. at First Information Report (FIR) stage; (ii) 25 per cent. when the charge sheet is sent to the court; (iii) 25 per cent. on conclusion of trial by the lower court.
28.	Section 354 C of the Indian Penal Code (45 of 1860)—Voyeurism. [Section 3(2)(va) read with Schedule to the Act]	Two lakh rupees to the victim. Payment to be made as follows: (i) 10 per cent. at First Information Report (FIR) stage. (ii) 50 per cent. when the charge sheet is sent to the court. (iii) 40 per cent. when the accused are convicted by the lower court.

29.	Section 354 D of the Indian Penal Code (45 of 1860) — Stalking. [Section 3(2)(va) read with Schedule to the Act]	Two lakh rupees to the victim. Payment to be made as follows: (i) 10 per cent. at First Information Report (FIR) stage; (ii) 50 per cent. when the charge sheet is sent to the court; (iii) 40 per cent. when the accused are convicted by the lower court.
30.	Section 376 B of the Indian Penal Code (45 of 1860)— Sexual intercourse by husband upon his wife during separation. [Section 3(2)(va) read with Schedule to the Act]	Two lakh rupees to the victim. Payment to be made as follows: (i) 50 per cent. after medical examination and confirmatory medical report; (ii) 25 per cent. when the charge sheet is sent to the court; (iii) 25 per cent. when the accused are convicted by the lower court.
31.	Section 376 C of the Indian Penal Code (45 of 1860)— Sexual intercourse by a person in authority. [Section 3(2)(va) read with Schedule to the Act]	Four lakh rupees to the victim. Payment to be made as follows: (i) 50 per cent. after medical examination and confirmatory medical report; (ii) 25 per cent. when the charge sheet is sent to the court; (iii) 25 per cent. on conclusion of trial by the lower court.

32.	Section 509 of the Indian Penal Code (45 of 1860)—Word, gesture or act intended to insult the modesty of a woman. [Section 3(2)(va) read with Schedule to the Act]	Two lakh rupees to the victim. Payment to be made as follows: (i) 25 per cent. at First Information Report (FIR) stage; (ii) 50 per cent. when the charge sheet is sent to the court; (iii) 25 per cent. when the accused are convicted by the lower court.
33.	Fouling or corrupting of water [Section 3(1)(x) of the Act]	Full cost of restoration of normal facility, including cleaning when the water is fouled, to be borne by the concerned State Government or Union territory Administration. In addition, an amount of eight lakh twenty-five thousand rupees shall be deposited with the District Magistrate for creating community assets of the nature to be decided by the District Authority in consultation with the Local Body.
34.	Denial of customary right of passage to a place of public resort or obstruction from using or accessing public resort [Section 3(1)(y) of the Act]	Four lakh twenty-five thousand rupees to the victim and cost of restoration of right of passage by the concerned State Government or Union territory Administration. Payment to be made as follows: (i) 25 per cent. at First Information Report (FIR) stage; (ii) 50 per cent. when the charge

		sheet is sent to the court; (iii) 25 per cent. when the accused are convicted by the lower court.
35.	Forcing or causing to leave house, village, residence desert place of residence [Section 3(1)(z) of the Act]	Restoration of the site or right to stay in house, village or other place of residence by the concerned State Government or Union territory Administration and relief of one lakh rupees to the victim and reconstruction of the house at Government cost, if destroyed. Payment to be made as follows: (i) 25 per cent. at First Information Report (FIR) stage; (ii) 50 per cent. when the charge sheet is sent to the court; (iii) 25 per cent. when the accused are convicted by the lower court.
36.	Obstructing or preventing a member of a Scheduled Caste or a Scheduled Tribe in any manner with regard to— *(A)* using common property resources of an area, or burial or cremation ground equally with others or using any river, stream, spring, well, tank, cistern, water-tap or other watering place, or any bathing *ghat*, any public conveyance, any road, or passage [Section 3(1)(za)(A) of the Act]	*(A):* Restoration of the right using common property resources of an area, or burial or cremation ground equally with others or using any river, stream, spring, well, tank, cistern, water-tap or other watering place, or any bathing *ghat,* any public conveyance, any road, or passage equally with others, by the concerned State Government or Union Territory

		Administration and relief of one lakh rupees to the victim. Payment to be made as follows: (i) 25 per cent. at First Information Report (FIR) stage; (ii) 50 per cent. when the charge sheet is sent to the court; (iii) 25 per cent. when the accused are convicted by the lower court.
	(B) mounting or riding bicycles or motor cycles or wearing footwear or new clothes in public places or taking out wedding procession, or mounting a horse or any other vehicle during wedding processions [Section 3(1)(za)(B) of the Act]	*(B):* Restoration of the right of mounting or riding bicycles or motor cycles or wearing footwear or new clothes in public places or taking out wedding procession, or mounting a horse or any other vehicle during wedding processions, equally with others by the concerned State Government or Union territory Administration and relief of one lakh rupees to the victim. Payment to be made as follows: (i) Payment of 25 per cent. at First Information Report (FIR) stage; (ii) 50 per cent. when the charge sheet is sent to the court; (iii) 25 per cent. when the accused are convicted by the lower court;
	(C) entering any place of worship which is open to the public or other persons professing the same religion or	*(C):* Restoration of the right of entering any place of worship which is open to the public or other persons professing the same religion or taking part in, or taking

	taking part in, or taking out, any religious, social or cultural processions including *jatras* [Section 3(1)(za)(C) of the Act]	out any religious procession or jatras, as is open to the public or other persons professing the same religion, social or cultural processions including *jatras*, equally with other persons, by the concerned State Government or Union territory Administration and relief of one lakh rupees to the victim. Payment to be made as follows: (i) 25 per cent. at First Information Report (FIR) stage (ii) 50 per cent. when the charge sheet is sent to the court. (iii) 25 per cent. when the accused are convicted by the lower court.
	(D) entering any educational institution, hospital, dispensary, primary health centre, shop or place of public entertainment or any other public place; or using any utensils or articles meant for public use in any place open to the public [Section 3(1)(za)(D) of the Act]	*(D):* Restoration of the right of entering any educational institution, hospital, dispensary, primary health centre, shop or place of public entertainment or any other public place; or using any utensils or articles meant for public use in any place open to the public, equally with other persons by the concerned State Government or Union territory Administration and relief of one lakh rupees to the victim. Payment to be made as follows: (i) 25 per cent. at First Information Report (FIR) stage; (ii) 50 per cent. when the charge sheet is sent to the court;

	(E) practicing any profession or the carrying on of any occupation, trade or business or employment in any job which other members of the public, or any section thereof, have a right to use or have access to [Section 3(1)(za)(E) of the Act]	(iii) 25 per cent. when the accused are convicted by the lower court. *(E)*: Restoration of the right of practicing any profession or the carrying on of any occupation, trade or business or employment in any job which other members of the public, or any section thereof, have a right to use or have access to, by the concerned State Government / Union territory Administration and relief of one lakh rupees to the victim. Payment to be made as follows: (i) 25 per cent. at First Information Report (FIR) stage; (ii) 50 per cent. when the charge sheet is sent to the court; (iii) 25 per cent. when the accused are convicted by the lower court.
37.	Causing physical harm or mental agony on the allegation of being a witch or practicing witchcraft or being a witch [Section 3(1)(zb) of the Act]	One lakh rupees to the victim and also commensurate with the indignity, insult, injury and defamation suffered by the victim. Payment to be made as follows: (i) 25 per cent. at First Information Report (FIR) stage; (ii) 50 per cent. when the charge sheet is sent to the court; (iii) 25 per cent. when the accused are convicted by the lower court.

38.	Imposing or threatening a social or economic boycott. [Section 3(1)(zc) of the Act]	Restoration of provision of all economic and social services equally with other persons, by the concerned State Government or Union territory Administration and relief of one lakh rupees to the victim. To be paid in full when charge sheet is sent to the lower court.
39.	Giving or fabricating false evidence [Section 3(2)(i) and (ii) of the Act]	Four lakh fifteen thousand rupees to the victim. Payment to be made as follows: (i) 25 per cent. at First Information Report (FIR) stage; (ii) 50 per cent. when the charge sheet is sent to the court; (iii) 25 per cent. when the accused are convicted by the lower court.
40.	Committing offences under the Indian Penal Code (45 of 1860) punishable with imprisonment for a term of ten years or more [Section 3(2) of the Act]	Four lakh rupees to the victim and or his dependents. The amount would vary, if specifically otherwise provided in this Schedule. Payment to be made as follows: (i) 25 per cent. at First Information Report (FIR) stage; (ii) 50 per cent. when the charge sheet is sent to the court; (iii) 25 per cent. when the accused are convicted by the lower court.

41.	Committing offences under the Indian Penal Code (45 of 1860) specified in the Schedule to the Act punishable with such punishment as specified under the Indian Penal Code for such offences [Section 3(2) (va) read with the Schedule to the Act]	Two lakh rupees to the victim and or his dependents. The amount would vary if specifically otherwise provided in this Schedule. Payment to be made as follows: (i) 25 per cent. at First Information Report (FIR) stage; (ii) 50 per cent. when the charge sheet is sent to the court; (iii) 25 per cent. when the accused are convicted by the lower court;
42.	Victimisation at the hands of a public servant [Section 3(2) (vii) of the Act]	Two lakh rupees to the victim and or his dependents. Payment to be made as follows: (i) 25 per cent. at First Information Report (FIR) stage; (ii) 50 per cent. when the charge sheet is sent to the court; (iii) 25 per cent. when the accused are convicted by the lower court.
43.	Disability. Guidelines for evaluation of various disabilities and procedure for certification as contained in the Ministry of Social Justice and Empowerment Notification No. 16-18/97-NI, dated the 1st June, 2001. A copy of the notification is at Annexure-II. (a) 100 per cent. incapacitation	Eight lakh and twenty-five thousand rupees to the victim.

		Payment to be made as follows: (i) 50 per cent. after medical examination and confirmatory medical report; (ii) 50 per cent. when the charge sheet is sent to the court;
	(b) where incapacitation is less than 100 per cent. but more than 50 per cent.	Four lakh and fifty thousand rupees to the victim. Payment to be made as follows: (i) 50 per cent. after medical examination and confirmatory medical report; (ii) 50 per cent. when the charge sheet is sent to the court;
	(c) where incapacitation is less than 50 per cent.	Two lakh and fifty thousand rupees to the victim. Payment to be made as follows: (i) 50 per cent. after medical examination and confirmatory medical report; (ii) 50 per cent. when the charge sheet is sent to the court.
44.	Rape or Gang rape. (i) Rape [Section 375 of the Indian Penal Code (45 of 1860)]	Five lakh rupees to the victim. Payment to be made as follows: (i) 50 per cent. after medical examination and confirmatory medical report; (ii) 25 per cent. when the charge sheet is sent to the court; (iii) 25 per cent. on conclusion of trial by the lower court.

	(ii) Gang rape [Section 376D of the Indian Penal Code(45 of 1860)]	Eight lakh and twenty-five thousand rupees to the victim. Payment to be made as follows: (i) 50 per cent. after medical examination and confirmatory medical report; (ii) 25 per cent. when the charge sheet is sent to the court; (iii) 25 per cent .on conclusion of trial by the lower court.
45.	Murder or Death.	Eight lakh and twenty-five thousand rupees to the victim. Payment to be made as follows: (i) 50 per cent. after post mortem report; (ii) 50 per cent. when the charge sheet is sent to the court.
46.	Additional relief to victims of murder, death, massacre, rape, gang rape, permanent incapacitation and dacoity.	In addition to relief amounts paid under above items, relief may be arranged within three months of date of atrocity as follows:- (i) Basic Pension to the widow or other dependents of deceased persons belonging to a Scheduled Caste or a Scheduled Tribe amounting to five thousand rupees per month, as applicable to a Government servant of the concerned State Government or Union territory Administration, with admissible dearness allowance and employment to

		one member of the family of the deceased, and provision of agricultural land, an house, if necessary by outright purchase; (ii) Full cost of the education up to graduation level and maintenance of the children of the victims. Children may be admitted to Ashram schools or residential schools, fully funded by the Government; (iii) Provision of utensils, rice, wheat, dals, pulses, etc., for a period of three months.
47.	Complete destruction or burnt houses.	Brick or stone masonary house to be constructed or provided at Government cost where it has been burnt or destroyed."

[F. No. 11012/1/2016-PCR(Desk)]

AINDRI ANURAG, Jt. Secy.

Note: The principal rules were published in the Gazette of India, *Extraordinary*, *vide* notification number G.S.R. 316(E), dated the 31st March, 1995 and last amended vide G.S.R. 774(E), dated the 5th November, 2014.

I.L.R. [2016] M.P., 1861
FULL BENCH
Before Mr. Justice A.M. Khanwilkar, Chief Justice,
Mr. Justice S.K. Gangele & Mr. Justice Alok Aradhe
W.P. No. 13259/2011(S) (Jabalpur) decided on 23 November, 2015

MANOJ KUMAR PUROHIT & ors. ...Petitioners
Vs.
STATE OF M.P. & ors. ...Respondents

(Alongwith W.P. No. 12604/2009, W.A. No. 710/2010, W.P. No. 5887/2011, W.P. No. 826/2011, W.P. No. 16608/2011, W.P. No. 2974/2012, W.A. No. 280/2012, W.A. No. 444/2012, W.A. No. 354/2013, W.A. No. 753/2013, W.A. No. 1007/2013, W.A. No. 1008/2013, W.A. No. 1012/2013, W.A. No. 166/2014, W.A. No. 295/2014, W.A. No. 902/2014, W.A. No. 903/2014, W.A. No. 202/2015 & W.A. No. 233/2015)

Service Law - Increment **- Held - (A) An employee appointed in accordance with the Recruitment Rules which makes passing of the Hindi Typing Test essential, would be entitled to increment only after passing such test - (B) If the Recruitment Rules are silent with regard to entitlement to the grant of increment on passing the Hindi Typing Test, then in such a case if the requirement of passing Hindi Typing Test is incorporated in the letter of appointment, the employee would be entitled to increment only after passing the Hindi Typing Test - (C) Where the Recruitment Rules provide that preference would be given to the candidate who has passed Hindi Typing Test, in such a case also the employee would not be entitled to grant of increment, if the order of appointment contains such a stipulation. He would be entitled to grant of increment from the date of passing Hindi Typing Test - (D) Where under the policy as well as letter of appointment provide for passing of Hindi Typing Test, in such a case the employee would be entitled to increment only after passing Hindi Typing Test - (E) If an employee has been appointed under the policy either of compassionate appointment or regularization and if policy provides for requirement of passing Hindi Typing Test essential, the concerned employee would be entitled to benefit of increment only after having passed Hindi Typing Test, even in the absence of such a stipulation in the letter of appointment - (F)The decision rendered in the case of State of M.P.**

Vs. Onkarlal, 2011(3) MPLJ 404 and State of M.P. & ors. Vs. Ku. Ramani Bai Bhagat, 2013(1) MPHT 96 do not lay down correct proposition of law. (Para 20)

सेवा विधि – वेतनवृद्धि – अभिनिर्धारित – (क) भर्ती नियम, जो हिंदी मुद्रलेखन परीक्षा उत्तीर्ण करना आवश्यक बनाते हैं, के अनुसार नियुक्त एक कर्मचारी केवल उक्त परीक्षा उत्तीर्ण करने के उपरांत ही वेतनवृद्धि हेतु हकदार होगा – (ख) हिंदी मुद्रलेखन परीक्षा उत्तीर्ण करने पर वेतनवृद्धि की पात्रता के संबंध में यदि भर्ती नियम मौन हैं तब उस दशा में यदि हिंदी मुद्रलेखन परीक्षा उत्तीर्ण करने की शर्त नियुक्ति पत्र में समाविष्ट है तब कर्मचारी केवल हिंदी मुद्रलेखन परीक्षा उत्तीर्ण करने के उपरांत ही वेतनवृद्धि हेतु हकदार होगा – (ग) जहाँ भर्ती नियम यह उपबंध करते हैं कि उस अभ्यर्थी को अधिमान्यता प्रदान की जाएगी जिसने हिंदी मुद्रलेखन परीक्षा उत्तीर्ण कर ली है, तब उस दशा में भी नियुक्ति आदेश में ऐसी शर्त अन्तर्विष्ट होने पर कर्मचारी को वेतनवृद्धि की पात्रता नहीं होगी, वह हिंदी मुद्रलेखन परीक्षा उत्तीर्ण करने की दिनांक से वेतनवृद्धि पाने का हकदार होगा – (घ) जहाँ नीति तथा नियुक्ति पत्र के अंतर्गत हिंदी मुद्रलेखन परीक्षा उत्तीर्ण करने का उपबंध हो, तब ऐसे मामले में कर्मचारी केवल हिंदी मुद्रलेखन परीक्षा उत्तीर्ण करने के उपरांत ही वेतनवृद्धि हेतु हकदार होगा – (ङ) यदि कोई कर्मचारी अनुकंपा नियुक्ति अथवा नियमितीकरण की नीति के अंतर्गत नियुक्त किया गया है तथा यदि उक्त नीति के उपबंध अनुसार हिंदी मुद्रलेखन परीक्षा उत्तीर्ण किया जाना आवश्यक है, तब उस दशा में नियुक्ति पत्र में हिंदी मुद्रलेखन परीक्षा उत्तीर्ण करने की शर्त अनुपस्थित होने पर भी संबंधित कर्मचारी केवल हिंदी मुद्रलेखन परीक्षा उत्तीर्ण करने के उपरांत ही वेतनवृद्धि के लाभ हेतु हकदार होगा – (च) म.प्र.राज्य वि. ओंकारलाल, 2011(3) एम.पी.एल.जे. 404 तथा म.प्र.राज्य एवं अन्य वि. कु. रमानी बाई भगत, 2013(1) एम.पी.एच.टी. 96 के मामलों में दिए गए निर्णय विधि की सही प्रतिपादनाओं को प्रकट नहीं करते हैं।

Cases referred:

2005(III)MPWN SN 116, ILR 2008 MP 1869, 2011(3)MPLJ 404, (2001)5 SCC 482, 2013 (1)MPHT 96, (2011) 11 SCC 136, 1982 MPWN 275, (2006) 3 MPHT 352, (1994) 4 SCC 391, AIR 1956 SC 520, AIR 1976 SC 2049, AIR 1979 SC 52, AIR 1987 SC 1293, (2008) 14 SCC 370, (2004) 13 SCC 706, (1993) 2 SCC 310, (2007) 11 SCC 599, (1997) 1 SCC 607, (2001) 4 SCC 350.

D.K. Tripathi with *Sanjay K. Agrawal*, for the petitioners.
Samdarshi Tiwari, Dy. A.G.for the respondents.

ORDER

The Order of the Court was delivered by : **ALOK ARADHE, J. :-** This reference arises from an order dated 27.08.2011 passed by the learned Single Judge in Writ Petition No.13259/2011(S), to consider the following question:-

> *"Whether an employee is entitled to increment from the initial date of appointment after his appointment in accordance to the Recruitment Rule and whether he can be denied increment on the ground of non passing of Hindi Typing Test due to the condition stipulated in the appointment order?"*

2. Ordinarily, we must answer only the question as referred by the learned Single Judge, however, as other connected matters involving similar or overlapping issues have been directed to be linked with the leading writ petition in which reference order has been passed, we may have to examine the issues arising therein as well. After hearing the counsel appearing in the respective petitions, in this bunch of cases, we deem it appropriate to reformulate the questions which may have to be considered by us in all these matters as referred:

(A) Whether an employee is entitled to increment from the initial date of appointment or only from the date of passing of Hindi Typing Test, because of such condition specified in his letter of appointment? Further, is it open to the Appointing Authority to provide such a condition in the letter of appointment?

(a) When the Recruitment Rules expressly prescribe condition of passing Hindi Typing Test?

(b) When the Recruitment Rules are silent but the letter of appointment contains such stipulation about passing of Hindi Typing Test?

(c) When the Recruitment Rules provide that preference would be given to candidates who have passed Hindi Typing Test and the letter of appointment contains such stipulation?

(d) When the appointment is made under the Policy of Compassionate Appointment or Regularization specifying passing of Hindi Typing Test as essential and also the letter of appointment provides for that condition for entitlement of increment.

(B) When the appointment is made under the Policy of either Compassionate Appointment or Regularization and the Policy expressly provides that passing of Hindi Typing Test is essential, absence of such condition in the letter of appointment would make any difference.

(C) Whether decisions in the cases of *State of M.P. v. Onkarlal,* 2011 (3) MPLJ 404 and *State of M.P. vs. Ku.Ramani Bai Bhagat,* 2013 (1) MPHT 96 lay down correct proposition of law?

3. Facts giving rise to reference, in nut shell, are that the petitioners in W.P.No.13259/2011 were appointed on compassionate basis on the posts of Lower Division Clerks (LDCs) in School Education Department of Government of Madhya Pradesh between the period from 27.3.1991 to 30.9.1997. Admittedly, the orders of appointment of petitioners contain a stipulation that within the period prescribed in the order of appointment it is mandatory for the petitioners to pass Hindi Typing Test. It is also not in dispute that petitioners have passed Hindi Typing Test beyond the period prescribed in the letters of appointment. The petitioners in the instant writ petition have sought a direction to the respondents to grant benefit of increment on completion of one year from the dates of their initial appointment alongwith interest.

4. We may now briefly refer to the facts of other connected matters. The appellants in Writ Appeals No.280/2012, 354/2013, 166/2014, 903/2014 and 295/2014 and petitioners in WP No.2974/2012 were appointed under the scheme of appointment on compassionate basis, whereas the employees in the remaining cases, namely, Writ Petitions No.826/2011, 5887/2011, 13259/2011 & 12604/2009, 16608/2011 and Writ Appeals No.1007/2013, 1012/2013, 233/2015, 710/2010, 444/2012 753/2010 and 1008/2013 were initially appointed and thereafter under the scheme of regularisation their services were regularized. The respondent in W.A.No.902/2014 was appointed in accordance with Recruitment Rules in Treasury Accounts Department and

the Rules are silent with regard to passing Hindi Typing Test. However, letter of appointment contains such a stipulation, but the employees were deprived of the benefit of one increment. In the aforesaid factual background the employees have approached this Court with regard to their claim for grant of increment on completion of one year from the date of their initial appointment.

5. Learned Single Judge noticed that conflicting views have been expressed by the Division Benches of this Court in the cases of *State of M.P. vs. Smt.Sushma Surana,* 2005 (III) MPWN SN 116; *State of M.P. and others vs. Vinod Mohan Shrivastava,* ILR 2008 MP 1869 and by another Division Bench in the case of *State of M.P.and another vs. Onkar Lal,* 2011 (3) MPLJ 404. Accordingly, the order of reference was made.

6. Mr.D.K.Tripathi, learned counsel for the petitioners while referring to the decision of Supreme Court in the case of *Dr.Rajinder Singh vs. State of Punjab and others*, (2001) 5 SCC 482 submitted that service rules cannot be amended by a government order, circular or notification and the circular cannot override the statutory provision. In this connection, reliance was also placed on the Division Bench decision of this Court in 2013 (1) MPHT 96 *[State of M.P. and others vs. Ku.Ramani Bai Bhagat]* and decision of the Supreme Court in the case of *Ajaya Kumar Das vs. State of Orissa and others,* (2011) 11 SCC 136. It was also submitted that without amending the rule, the condition of passing Hindi Typing Test cannot be prescribed in the letter of appointment.

7. Mr.Sanjay K. Agrawal, learned counsel argued that since passing of Hindi Typing Test is not an essential eligibility qualification prescribed in Madhya Pradesh Treasury Clerical Services (Recruitment & Conditions) Rules, 1965, the benefit of increment cannot be denied to an employee. It was further argued that even if passing of Hindi Typing Test is an essential condition in the Rules, the benefit of increment cannot be denied to the petitioner in view of Fundamental Rule 25 as the petitioner was appointed on Time Scale of Pay. It was also urged that grant of annual increment is a matter of course and same cannot be withheld. In support of aforesaid submissions, reliance has been placed on the decisions rendered in the cases of *Jageshwar vs. State of M.P.* 1982 MPWN 275, *Dongar Singh Pawar vs. State of M.P. and others,* (2006) 3 MPHT 352 and *Ku.Ramani Bai Bhagat* (supra).

8. On the other hand, learned Deputy Advocate General submitted that

petitioners in the Writ Petition No.13259/2011 as well as in other connected matters were appointed either on compassionate basis or by way of regularization and not in accordance with the Recruitment Rules. It is also pointed out that except in Water Resources Department and Public Works Department, in all other departments of Government of Madhya Pradesh, the requirement of passing Hindi Typing Test is mandatory qualification under the Recruitment Rules. However, in the rules governing the service conditions of employees of Treasury & Accounts Department, such a condition is not prescribed. It was also argued that even under the policies of regularization as well as compassionate appointment, the condition of passing Hindi Typing Test is mandatory and Fundamental Rules do not apply to the case of petitioners, as they have been appointed under the scheme, either of regularization or compassionate appointment. While referring to circular dated 10.6.1994 it was submitted that if an employee does not pass Hindi Typing Test even after attaining 40 years of age, his services would be regularized. It is further argued that even if the essential qualification is prescribed under the Rules, the State Government can always prescribe higher qualification and the appointing authority can lay down the requisite qualification. In support of aforesaid submissions reliance was placed on the decisions in the cases of *S.Satyapal Reddy and others vs. Government of A.P. and others,* (1994) 4 SCC 391 and *Banarsidas vs. State of Uttar Pradesh*, AIR 1956 SC 520. Lastly, it was pointed out that decisions in the case of *Smt.Sushma Surana* (supra) and *Vinod Mohan Shrivastava* (supra) lay down correct proposition of law and have been approved by another Division Bench in the case of *State of Madhya Pradesh vs. Sunderlal Mehra* vide order dated 07.8.2012 passed in Writ Appeal No.73/2011.

9. We have considered the rival submissions made at the Bar. Before proceeding further, the nature of appointment and the scheme under which the appointments have been made, may be taken note of. The petitioners have been appointed by the following three modes:-

(i) in accordance with the Recruitment Rules;

(ii) under the scheme of regularisation; and

(iii) under the scheme of appointment on compassionate basis.

(i) **Under the Scheme of Appointment in accordance with the Recruitment Rules**

The Recruitment Rules of various Departments prescribe the procedure for recruitment. The process of recruitment under the said Rules is initiated by issuance of an advertisement, by which, the applications are invited from eligible candidates possessing educational qualification prescribed under the Recruitment Rules. The application of each such candidate is scrutinized by the Selection Committee and thereafter appointment of the most meritorious candidate(s) is made against the vacant substantive post. It is pertinent to mention that in all the Departments, except in the Water Resources Department and Public Works Department, the requirement of passing Hindi Typing Test for the post of Lower Division Clerk is a mandatory qualification. The Recruitment Rules of Public Works Department and Water Resources Department provide that preference shall be given to the candidate who has passed Hindi Typing Test, whereas the Madhya Pradesh Treasury Ministerial Service (Recruitment and Conditions of Service) Rules, 1965 are silent in this regard.

(ii) <u>Under the Scheme of Regularisation:</u>

The Government of Madhya Pradesh had issued instructions on 09.1.1990 for regularisation of appointment of the concerned employees not appointed in accordance with the Recruitment Rules. Clause 3 of the aforesaid instructions deals with the process for appointment of those employees, who have either been appointed on daily wage basis or working under the worked charged in contingency paid establishment prior to 31.12.1988. Clause 3 of the aforesaid instructions provides the procedure for making an appointment. The clause 3.5 of the aforesaid instructions reads as under:-

> *"3(5). नियुक्ति के लिये सम्बधित पद के लिये नियमों में निर्धारित शैक्षणिक एवं अन्य योग्यताएँ रखना अनिवार्य होगा। जिन व्यक्तियों के पास निर्धारित योग्यताएँ नहीं हैं, उनके नियमित वेतनमान में नियुक्ति पर ऐसी योग्याताएँ हासिल कर लेने पर विचार किया जा सकेगा।"*

Thereafter, the State Government by instructions dated 19.2.1990 provided that in case Lower Division Clerk has not passed Hindi Typing Test, he should be appointed against the vacant post subject to the condition that he shall have to pass Hindi Typing Test within a period of one year, and until and unless he passes Hindi Typing Test, he shall not be entitled to the benefit of annual increment. The said instructions dated 19.2.1990, issued by State Government, read as under:-

इस विभाग के ज्ञापन कमांक 16–1188–1–वे.आ.प्र.–89, दिनांक 9 जनवरी, 1990 की कंडिका 3(5) में यह उल्लेख है कि नियमित नियुक्ति के लिये सम्बधित पद के लिये नियमों में निर्धारित शैक्षणिक एवं अन्य योजनाएँ रखना अनिवार्य होगा। इस शर्त के कारण निम्न श्रेणी लिपिक के पद पर नियुक्ति में कई वरिष्ठ कर्मचारियों को कठिनाई आ रही है। इस पर सहानुभूतिपूर्वक विचार कर राज्य शासन द्वारा इस विभाग के ज्ञापन कमांक 146/75/1/वे.आ.प्र. /88, दिनांक 2–4–88 को अधिकमित करते हुए यह निर्णय लिया गया है कि हिन्दी मुद्रलेखन परीक्षा पास न होन पर भी कर्मचारियों की नियुक्ति रिक्त पदो के विरूद्ध कर दी जाये तथा इसमें यह शर्त रखी जाये कि नियुक्ति के पश्चात् एक वर्ष की अवधि के अन्दर उन्हें मुद्रलेखन परीक्षा पास करना होगा। जब तक वे मुद्रलेखन परीक्षा पास नहीं करेंगे तब तक उन्हें वेतन वृद्धि का लाभ नहीं मिलेगा और उनकी नियुक्ति नियमित नहीं मानी जायेगी।

Thus, it is evident that under the policy of regularisation a candidate is required to possess educational qualification including passing of Hindi Typing Test, which is prescribed under the Rules.

(iii). **Under the Scheme of Compassionate Appointment**

The General Administration Department of Government of Madhya Pradesh by order dated 10.6.1994 formulated a scheme for providing compassionate appointment. Clause 20 of the aforesaid Policy provides that it would not be necessary for the widow of a government servant to pass Hindi Typing Test, but in cases where children of deceased government servants are given appointment on compassionate basis, their services shall be regularized only after passing of Hindi Typing Test or on attaining the age of 40 years, whichever is earlier. Clause 20 of the policy reads as under:-

(बीस). निम्न श्रेणी लिपिक के पद पर, अनुकम्पा के आधार पर, नियुक्त की गई स्वर्गीय शासकीक सेवक की विधवा को हिन्दी मुद्रलेखन परीक्षा उत्तीर्ण करने का बन्धन नहीं होगा, लेकिन स्वर्गीय शासकीय सेवक के बच्चों की अनुकम्पा नियुक्ति के बाद उसकी आयु 40 वर्ष होने अथवा उनके द्वारा हिन्दी मुद्रलेखन परीक्षा उत्तीर्ण करने की तिथि से, इनमें से जो भी पहले हो, उनकी नियुक्ति नियमित की जावेगी।

Thus, it is evident that under the policy of regularisation and policy of appointment on compassionate basis, the condition of passing Hindi Typing Test is prescribed as a precondition for regularization of services.

10. Admittedly, the employees in the instant appeals/petitions have been

appointed either under the policy of regularisation or under the policy governing grant of appointment on compassionate basis. Thus, the Scheme under which the petitioners have been appointed itself provide for Hindi Typing Test as mandatory condition for regularization of their services.

11. After having noticed the modes of appointment, we may proceed to deal with the questions which arise for consideration *ad seriatim.*

(a) **Question No.(A)(a):**

Indisputably, when the Recruitment Rules stipulate that the candidate in order to be eligible for appointment to the post of Lower Division Clerk, should have passed Hindi Typing Test, then the appointee would be entitled to the grant of benefit of increment only after passing the Hindi Typing Test. In such cases, the initial appointment itself will be a conditional appointment.

(b) **Questions No.(A)(b) and (c):**

We may now examine another situation, namely, whether in the absence of any prescription in the Rules with regard to Hindi Typing Test or where such Rules provide for preference to the candidates who have passed Hindi Typing Test, is it permissible for the State to prescribe such a qualification in the letter of appointment as per the qualification prescribed in the public notice inviting application?

The expression "conditions of service" means all those conditions which regulate the holding of a post by a person right from the time of his appointment till his retirement and even beyond retirement in the matters like pension. [See: *I.N.Subba Reddy v. Andhra University,* AIR 1976 SC 2049 and *Lilliy Kurian vs. Sr.Lewine,* AIR 1979 SC 52]. Thus, passing of Hindi Typing Test after joining the service becomes a condition of service, be it for regularisation or grant of increment. It is well established that a new service condition may be brought into effect by an executive instructions and such condition would remain in force as long as it is not repealed either expressly or by necessary implication by another executive order or a Rule made under proviso to Article 309 of the Constitution or by a statute. A specific stipulation of passing the Hindi Typing Test can always be prescribed in the absence of any specific bar in the Rules. [See: *Sitaram Jivyabhai Gavali vs. Ramjibhai Potiyabhai Mahala and others,* AIR 1987 SC 1293]. Similar view has been taken by the Supreme Court in the case of *Punjab National Bank and another vs.*

Astamija Dash, (2008) 14 SCC 370. The Supreme Court in the case of *State of Rajasthan and others vs. Rajendra K. Verma*, (2004) 13 SCC 706 has held that an employee would be entitled for regularization of his services from the date when he passes the test as stipulated in the order of State Government. Therefore, in cases where the Rules are silent about passing of Hindi Typing Test or provide that preference will be given to candidate who passed Hindi Typing Test but the letter of appointment contains such a stipulation, then the employee would be entitled to increment only after passing Hindi Typing Test and not from the initial date of appointment.

(c) **Question No.(A)(c):**

Now, we may deal with another situation, namely, the case where, in the Rules it is provided that the candidates who have passed Hindi Typing Test shall be given preference at the time of appointment and letter of appointment contains such a stipulation. Such a condition has been incorporated in the Recruitment Rules governing service conditions of employees of Public Works Department and Water Resources Department.

It is indeed the prerogative of the employer to prescribe qualification including higher qualification and lay down suitable service conditions in respect of a post. In *Banarsidas* (supra) and *S.Satyapal Reddy* (supra) it has been held that the employer besides prescribing the minimum qualification can always prescribe higher qualification for appointment. It can prescribe any qualification which is not less than the qualification prescribed in the Rules. The Supreme Court has held that there is nothing arbitrary or unreasonable in the employer preferring a candidate with higher qualification for service. It is well settled by a catena of decisions that classification on the basis of higher educational qualification to achieve higher administrative efficiency is permissible under our Constitutional scheme and notwithstanding the preference Rule, it is always open to the recruitment agency to prescribe a minimum qualification with a view to demarcate and narrowing down the field of choice with ultimate objective of permitting the candidates with higher qualification to enter the zone of consideration. [See: *Government of Andhra Pradesh vs. P. Dilip Kumar,* (1993) 2 SCC 310]. Similar view has been taken by the Supreme in the case of *Surinder Singh Vs. Union of India and others,* (2007) 11 SCC 599.

Thus, it is evident that where the Recruitment Rules provide that

preference would be given to the persons possessing the certificate of Hindi Typing Test; it is open to the State Government to prescribe the qualification of passing Hindi Typing Test as essential and to make it mandatory. For the same reason, the State Government can prescribe such a qualification in the letter of appointment. The provision regarding preference gets exhausted at the time of entering the service; and despite prescription of such preference in the Rules, if a person who does not have such qualification, is allowed to enter the service, such a condition can always be prescribed in the appointment letter of such employee in view of aforesaid enunciation of law by the Supreme Court.

12. **Question No.(A)(d) and (B):**

The employees in the instant appeals/petitioners except in Writ Appeal No.902/2014, as stated supra, have been appointed either under the policy of compassionate appointment or under the policy of regularization. Admittedly, the policies under which the employees in writ petitioners/appeals were appointed contained a stipulation that they would be entitled to increment only after passing Hindi Typing test. The said policy has not been questioned. The petitioners joined the services with that clear understanding. Thus, the petitioners have acquiesced of that condition and have acted upon it. Resultantly, even in the absence of such stipulation in the letter of appointment, the concerned employee would become entitled to increment only after passing the Hindi Typing Test.

13. **Question No. (A)(d):**

Similarly, where an employee who has been appointed either under the scheme of compassionate appointment or regularization and his letter of appointment also contains a stipulation that he would be entitled to grant of increment only after passing Hindi Typing Test, in such cases also the employee would be entitled to increment only after passing the Hindi Typing Test. As stated supra, the employees in writ petitions/appeal have neither challenged the condition incorporated in the policy nor in the letter of appointment. But, on the contrary, have acquiesced with the same and, in fact, have acted upon it.

Therefore, the petitioners cannot be permitted to "blow hot and cold" or "approbate and reprobate". Henry N. Herman in his commentaries volume 2 pages 864-865 has observed that no one can maintain an action for a wrong which he has consented to the act which occasions his loss. [See: Law of

Estoppel & Resjudicata 4th Edition by Chief Justice M.Monir & A.C. Moitra]. Where one knowingly accepts the benefits of a contract or conveyance or any order, he is estopped from denying the validity of or the binding effect of such contract or conveyance or order upon himself. [See: *R.S.I.D.I Corporation v. Diamond and Gem Development Corporation Ltd.*, (2013) 5 SCC 470].

14. **Question No.(C):**

At this stage, we may also notice the Division Bench decisions, which have been referred to by the learned Single Judge in the order of reference. In case of *Smt.Sushma Surana* (supra) the petitioner was appointed on the post of Lower Division Clerk with the condition mentioned in the letter of appointment that she is required to pass Hindi Typing Test within a period of two years from the date of her appointment. But, the petitioner could not pass the Test. The State Government by circular dated 19.2.1990 provided that the employees who could not pass Hindi Typing Test and have completed 40 years of age, such employees would not be required to pass Hindi Typing Test, their services will be regularized on the post of Assistant Grade-III. In the aforesaid case, the requirement of passing Hindi Typing Test was not prescribed in the Rules. The Division Bench accordingly held that since the petitioner has not passed the Hindi Typing Test, she cannot claim regularization from the date of her initial appointment but from the date of regularistaion in terms of circular dated 19.2.1990. Similarly, in the case of *Vinod Mohan Shrivastava* (supra) the respondent was appointed on compassionate basis under the policy which contains a clear stipulation that the grant of regular increment shall be subject to passing of Hindi Typing Test. In the aforesaid case also there was no stipulation in the Rules prescribing passing of Hindi Typing Test.

15. In the case of *Onkar Lal* (supra) another Division Bench dealt with the case of an employee who was appointed in accordance with Rules, namely, M.P. Irrigation Department (Non-Gazetted) Service Recruitment Rules, 1969. The eligibility criteria prescribed in the Recruitment Rules for the post of Lower Division Clerk was passing of matriculation or equivalent examination. However, the Rules provided that preference shall be given to those possessing certificate in typing. The letter of appointment of the employee contained the stipulation that candidate will have to pass Hindi Typing Test within 2 years to earn regular increments. The Division Bench held that passing of Hindi Typing Test, not

being an essential qualification for the purpose of "recruitment to the said post", imposition of such pre-requisite condition for releasing the increment cannot be said to be justified and same was held to be contrary.

16. In the case of *Ku.Ramani Bai Bhagat* (supra) another Division Bench had an occasion to consider the case of an employee whose order of appointment contained a stipulation that he would be entitled to grant of increments after passing Hindi Typing Test. The Recruitment Rules provided that preference would be given to candidates who have passed the Hindi Typing Test. The Division Bench held that denial of benefit of increment is contrary to Fundamental Rules by relying on Fundamental Rule 24 and it was held that condition in the order of appointment is contrary to Fundamental Rules and an executive instruction cannot override eligibility conditions prescribed in the Recruitment Rules.

17. Even if contention of the petitioners that provisions of Fundamental Rules apply to their cases, is accepted, even then, same is of no assistance to the petitioners as under Fundamental Rule 24, an increment shall ordinarily be drawn as a matter of course unless it is withheld. Fundamental rule 24 reads as under:-

> *"F.R.24. An increment shall ordinarily be drawn as a matter of course unless it is withheld."*

The expression "ordinarily" used in Fundamental Rule 24 intrinsically recognizes, that there can be deviation which can be justified by reasons. The expression 'ordinarily' does not promote a cast iron rule, and it is flexible and is never used in a case where there are no exceptions. The exceptions implied by expression need not be limited to those specially provided for by law. [See: *Union of India vs. Majji Jangamayya* (1997) 1 SCC 607 and *Mohan Baitha vs. State of Bihar* (2001) 4 SCC 350]. Thus, even under Fundamental Rule 24 itself an increment can be withheld, by imposing a condition with regard to entitlement of the same, by an executive order in the absence of any express prohibition in the Rules. Similarly, the contention of the petitioners that Rules cannot be amended by an order issued by the State Government also does not deserve acceptance as the issue involved in this case is not of amendment of Rules by an executive order.

In this regard reference may be made to Fundamental Rules 9(28) and 9(31)(a), which read as under:-

"9(28). "Substantive pay" means the pay inclusive of special pay sanctioned in lieu of higher time-scale of pay, other than special pay, personal pay or emoluments classed as pay under Rule 9(21)(a)(iii) to which a Government servant is entitled on account of a post to which he has been appointed substantively or by reason of his substantive position in a cadre.

9(31)(a). "Time-scale pay" means which, subject to any condition prescribed in these rules, rises by periodical increments from a minimum to a maximum. It includes the class of pay hitherto known as progressive."

A conjoint reading of Fundamental Rule 9(31)(a) and Fundamental Rule 9(28) would make it clear that mere appointment in time scale of pay does not entail in automatic rise in pay necessarily adding periodical increment unless a person become entitled to draw substantive pay. The non-compliance of condition of passing Hindi Tying (sic:Typing) Test makes the appointment temporary and not substantive. Therefore, such temporary employee is not entitled to draw increment as per Fundamental Rule 22(b). Thus, the contention that benefit of increment cannot be denied to an employee who is appointed on time scale of pay also cannot be accepted.

18. As considered above, in our opinion, there is no conflict in the opinions expressed by Division Benches, as same is in relation to the facts of respective cases. Besides that, the decision rendered in the case of *Smt.Sushma Surana* (supra) was considered by another Division Bench in the case of *Sunder Lal Mehra* (supra) wherein the decisions rendered in the cases of *Smt.Sushma Surana* (supra) as well as *Vinod Mohan Shrivastava* (supra) have been followed. For the reasons already assigned by us, we hold that decisions rendered in *Onkar Lal* (supra) and *Ku.Ramani Bai Bhagat* (supra) do not lay down the correct proposition of law and are accordingly overruled.

19. While parting we make it clear that we have not dealt with the situation where neither the Recruitment Rules nor the Policy governing appointment on compassionate basis or regularization, as well as the letter of appointment does not provide for requirement of passing Hindi Typing Test. The question whether, in such a case, the condition of passing Hindi Typing Test can be prescribed by an administrative or executive order for entitlement to increment "after the person has entered the service". That question does not arise in the

fact situation of the present cases.

20. Thus, in view of preceding analysis, reference is answered by stating as follows:-

(i) **Question (A)(a):**

An employee appointed in accordance with the Recruitment Rules which makes passing of the Hindi Typing Test essential, would be entitled to increment only after passing such test.

(ii) **Question (A)(b):**

If the Recruitment Rules are silent with regard to entitlement to the grant of increment on passing the Hindi Typing Test, then in such a case if the requirement of passing Hindi Typing Test is incorporated in the letter of appointment, the employee would be entitled to increment only after passing the Hindi Typing Test.

(iii) **Question (A)(c):**

Where the Recruitment Rules provide that preference would be given to the candidate who has passed Hindi Typing Test, in such a case also the employee would not be entitled to grant of increment, if the order of appointment contains such a stipulation. He would be entitled to grant of increment from the date of passing Hindi Typing Test.

(iv) **Question (A)(d):**

Where under the policy as well as letter of appointment provide for passing of Hindi Typing Test, in such a case the employee would be entitled to increment only after passing Hindi Typing Test.

(v) **Question (B):**

If an employee has been appointed under the policy either of compassionate appointment or regularization and if policy provides for requirement of passing Hindi Typing Test essential, the concerned employee would be entitled to benefit of increment only after having passed Hindi Typing Test, even in the absence of such a stipulation in the letter of appointment.

(vi) **Question (C):**

The decisions rendered in the cases of *State of M.P. vs. Onkarlal,*

2011 (3) MPLJ 404 and *State of M.P. and others vs. Ku.Ramani Bai Bhagat,* 2013 (1) MPHT 96 do not lay down correct proposition of law.

Accordingly, the reference is **answered.**

21. Let the matters be placed before appropriate Benches for further consideration.

Order accordingly.

I.L.R. [2016] M.P., 1876
WRIT PETITION
Before Mr. Justice Rohit Arya
W.P. No. 522/2015 (Gwalior) decided on 12 February, 2015

VIDHYA MANJI (SMT.) ...Petitioner
Vs.
M.P. STATE ELECTION COMMISSION & ors. ...Respondents

Panchayat Nirvachan Niyam, M.P. 1995, Rule 40-A and Scheduled Caste & Scheduled Tribe Orders (Amendment) Act, (108 of 1976), Section 4, Second Schedule Part VIII **- Petitioner filed nomination for election to the post of Sarpanch - Rejection thereof on the ground that name of petitioner did not appear in the "Dayara Register" maintained in the office of S.D.O. - Post of Sarpanch reserved for Scheduled Tribe woman candidate - Held - As per Rule 40-A of Nirvachan Niyam 1995 the petitioner has filed an affidavit in lieu of notice issued under Rule 40-A(1) asserting that she belongs to the category of Scheduled Tribe, so the returning officer shall have no jurisdiction for further enquiry and is obliged to treat the nomination as valid by force of sub-rule(2) of rule 40-A of the Nirvachan Niyam 1995 and even otherwise the "Manjhi" caste finds place at serial No. 29 in the list of Scheduled Tribes for the State of M.P. as per the Act of 1976 - Impugned communication is quashed and petitioner permitted to contest the election for the post of Sarpanch. (Paras 11 to 19)**

पंचायत निर्वाचन नियम, म.प्र. 1995, नियम 40–ए एवं अनुसूचित जाति व अनुसूचित जनजाति आदेश (संशोधन) अधिनियम, (1976 का 108), धारा 4, द्वितीय अनुसूची भाग– VIII – याची ने सरपंच पद के चुनाव हेतु नामांकन दाखिल किया – नामांकन इस आधार पर अस्वीकार किया गया कि एस.डी.ओ. के कार्यालय में संधारित "दायरा पंजी" में याची का नाम मौजूद नहीं था – सरपंच का पद

अनुसूचित जनजाति की महिला प्रत्याशी के लिए आरक्षित था – अभिनिर्धारित – नियम 40–ए(1) के अंतर्गत याची को जारी नोटिस के बदले में याची ने निर्वाचन नियम 1995 के नियम 40–ए के अनुसार, यह प्राख्यान करते हुए शपथ पत्र प्रस्तुत किया है कि वह अनुसूचित जनजाति की श्रेणी में है, अतएव, रिटर्निंग अधिकारी को आगे जाँच करने हेतु अधिकारिता नहीं होगी तथा निर्वाचन नियम 1995 के नियम 40–ए के उपनियम (2) के बल पर वह नामांकन को वैध मानने हेतु बाध्य है तथा यहाँ तक कि अन्यथा भी, 1976 के अधिनियम के अनुसार म.प्र.राज्य की अनुसूचित जनजाति की सूची में "माँझी" जाति क्रम संख्या 29 पर स्थित है – प्रश्नगत संसूचना अभिखण्डित की गई तथा याची को सरपंच पद का चुनाव लड़ने की अनुमति दी गई।

Sandeep Kulshresth, for the petitioner.
Sangeeta Pachouri, G.A. for the respondents No. 2 to 4/State.
Shivendra Singh, for the intervenor.

ORDER

ROHIT ARYA, J. :- By this petition under Article 226 of the Constitution of India, challenge is made to the communication dated 19/01/2015 (Annexure P/1) whereby nomination of the petitioner, Smt.Vidhya Manjhi and one Smt.Bharti Manjhi w/o Bharat Manjhi have been rejected purportedly for the reason that their names did not appear in the "Dayara Register" maintained in the office of Sub-Divisional Officer (Lashkar), Gwalior as indicated in the communication No.Q/Reader2-/Jan.Pra.P.Satya/15dated 16/01/2015.

2. Relevant facts are to the effect that the petitioner has filed nomination paper for the election to the post of Sarpanch, Gram Panchayat, Bilokalan, Tahsil & District Shivpuri reserved for the Scheduled Tribe Women candidate. It is submitted that the petitioner belongs to 'Manjhi' caste which finds place at serial No.29 in the list of Schedule Tribes for the State of Madhya Pradesh by the Scheduled Castes and Scheduled Tribes Orders (Amendment) Act, 1976. Copy of notification published in the Madhya Pradesh Gazette dated 01/07/1977 is annexed as Annexure P/2. It is further submitted that alongwith required documents on oath, have been submitted on 08/01/2015. Copy of receipt of nomination form and receipt of security amount are placed on record as Annexure P/4. After scrutiny of nomination papers, petitioner was allotted the symbol of "Spectacles". Copy of such document is on record as Annexure P/5. It appears that on complaint by rival candidate, a notice dated 14/01/2015 was issued to the petitioner by the respondent No.4/Returning Officer to the effect that the caste of Manjhi is not included for the district Shivpuri. Copy of such notice is on record as Annexure P/6. Reply thereto was filed by

the petitioner on 15/01/2015 (Annexure P/7). Alongwith the reply, she has also filed number of documents, namely; (1) Notification No.72/99/5825 dated 13/10/1993 issued by the State of Madhya Pradesh, Scheduled Castes and Scheduled Tribes Department, Bhopal, (2) Order No.F..1/78/98/OC/1 dated 07/09/1998 issued by the General Administration Department, Mantralay, Bhopal, State of Madhya Pradesh. (3) Order No.Q/2B/ Sta/SOF-49/2002 dated 27/12/2002, Collector, District Gwalior (4) Order No.4592/Sta/6-2/ SOF/ 05 dated 02/09/2005 Collector, District Shivpuri, (5) Order No.F.1/7-36/ 2004/OC/1 dated 11/11/2005 issued by the General Administration Department, Mantralay Bhopal, State of Madhya Pradesh (6) Order No.F.1/ 7-36/2004/OC/1 dated 21/03/2013 issued by the General Administration Department, Mantralay, Bhopal, State of Madhya Pradesh (7) **Affidavit** dated 15/01/2015.

However, vide the impugned communication dated 19/01/2015 (Annexure P/1), the respondent No.4 has rejected nomination of the petitioner on the ground of non-inclusion of name of the petitioner in the 'Dayara Register" maintained in the office of Sub-Divisional Officer (Lashkar), Gwalior as referred to above.

3. Petitioner assails the aforesaid order on the premise that besides serious illegalities committed in passing the impugned communication, the principles of natural justice have been frightfully violated inasmuch as neither opportunity was afforded to the petitioner to present her case nor relevant documents alongwith affidavit filed by the petitioner were looked into instead by referring to communication dated 16/01/2015 (Annexure R/2) allegedly made from the office of Sub-Divisional Officer (Lashkar), Gwalior, the impugned communication, Annexure P/1 has been made to the petitioner. It is submitted that the caste of Manjhi has already been included in the entire State of Madhya Pradesh and no distinction is carved out for the district Shivpuri in the notification issued by the State of Madhya Pradesh dated 01/07/1977 as per the list of Schedule Tribes for the State of Madhya Pradesh by the Scheduled Castes and Scheduled Tribes Orders (Amendment) Act, 1976 (Annexure P/2). The reasons assigned in the communication are factually incorrect, illegal and unsustainable in the eye of law. That apart, it is further submitted that the caste certificate issued to the petitioner was from the office of Sub-Divisional Officer (Certification), Sub-Division Gwalior, District Gwalior (Annexure P/3) on 19/06/2002 wherein she is shown to be Manjhi caste which finds place at sl.No.29 in terms of the aforesaid notification (Annexure P/2) whereas the

communication dated 16/01/2015 is allegedly procured from the office of Sub Divisional Officer (Lashkar), Gwalior. Therefore, on the face of it, the impugned communication is wholly illegal, arbitrary and unsustainable in the eye of law.

4. That apart, it is further submitted that upon scrutiny of the nomination, petitioner was declared as an eligible candidate. Hence, after preparation of the list of contesting candidates and allotment of the symbol "Spectacles" vide Annexure P/5, the impugned communication is purportedly issued under rule 40-A of the Madhya Pradesh Panchayat Nirvachan Niyam, 1995. Counsel for the petitioner refers to and explains various steps required to be adhered to in the context of the aforesaid provision before any order is passed.

5. Before adverting to the submissions advanced by counsel for the petitioner with reference to the aforesaid provision, it is apposite to quote relevant rule 40-A of the Madhya Pradesh Panchayat Nirvachan Niyam, 1995 (hereinafter referred to as the Nirvachan Niyam, 1995).

> **"40-A. Stay on election in certain cases.**(1) Notwithstanding anything contained in these rules, if it comes to the notice of the Returning Officer at any time prior to the date of poll that the nomination of any candidate who, prima facie, does not belong to a Scheduled Caste, Scheduled Tribe or other Backward Class, has been accepted for a seat which is reserved for Scheduled Casts, Scheduled Tribes or Other Backward Classes as the case may be, through oversight or want of objection or for any other reason, he shall forthwith issue a notice to such candidate, asking him to file an affidavit that he belongs to the category for which the seat is reserved.
>
> (2) *In case the candidate concerned files an affidavit, the Returning Officer shall make no further inquiry into the matter and treat the nomination as valid.*
>
> (3) In case the concerned candidate fails to file an affidavit on or before the date specified in the notice, it shall be presumed that he does not belong to the category for which the seat is reserved and the Returning Officer shall report full facts to the following competent authority, as the case may be and seek its permission to review his own order, regarding the

validity of the nomination, namely:-

(i) Sub-Divisional Officer (Revenue) in case of election of a Panch or Sarpanch of a Gram Panchayat,

(ii) Collector in case of election of a member of Janpad Panchayat; and

(iii) Divisional Commissioner in case of a member of Zila Panchayat.

(4) The Competent Authority, shall immediately, dispose off every case referred to it under sub-rule (3), and communicate its order to the Returning Officer, as soon as possible.

(5) *After receiving the permission of the Competent Authority,* the Returning Officer, may review his own order and exclude the name of the concerned candidate from the list of validly nominated candidates prepared under rule 35 and from the list of contesting candidates, if such list has already been prepared and published the Returning Officer shall prepare a revised list of contesting candidates and publish it in accordance with the provision of Rule 40:

Provided that if the concerned candidate has in the meanwhile submitted an affidavit in response of the notice issued under sub-rule (1) the Returning Officer shall not review his order."

(Emphasis supplied)

6. Counsel for the petitioner submits that upon perusal of the aforesaid rule, following steps are required to be followed to take a decision in the matter:

(i) the nomination of any candidate has been accepted for a seat which is reserved for Scheduled Castes, Scheduled Tribes or Other Backward Classes as the case may be, through oversight or want of objection or for any other reason which *prmia facie* according to Returning Officer does not belong to a Scheduled

Castes, **Scheduled Tribes (as relevant in this case)** or Other Backward Classes, he shall forthwith issue a notice to such candidate asking him to file an affidavit that he belongs to the category for which the seat is reserved;

(ii) in case the candidate concerned files an affidavit, the Returning Officer shall make no further inquiry into the matter and treat the nomination as valid;

(iii) in case the concerned candidate fails to file an affidavit on or before the date specified in the notice as provided under sub-rule (3), it shall be presumed that the candidate does not belong to category for which the seat is reserved and the Returning Officer shall seek permission of the competent authority regarding validity of the nomination; Sub-Divisional Officer (Revenue) in case of election of a Panch or Sarpanch (relevant for the purpose of this case) of a Gram Panchayat;

(iv) after receiving the permission from the competent authority, the Returning Officer, may review his own order and exclude the name of the concerned candidate from the list of validly nominated candidates prepared under rule 35 and from the list of contesting candidates prepared and published and prepare a fresh revised list of contesting candidates and publish the same in accordance with the provisions of rule 40; and

(v) however, proviso appended to sub-rule (5) provides that if the concerned candidate has in the meanwhile submitted ***an affidavit*** in response of the notice issued under sub-rule (1), the ***Returning Officer shall not review his own order.***

(Emphasis supplied)

7. With the aforesaid submissions in the context of the scheme contemplated under rule 40-A of Nirvachan Niyam, 1995, learned counsel for the petitioner submits that as a matter of fact, after notice was issued to the petitioner vide notice dated 14/01/2015 (Annexure P/6), the petitioner

had submitted detailed reply thereto alongwith documents and **specific affidavit on 15/01/2015 (Annexure P/7)** stating *inter alia* that she belongs to Manjhi caste; Scheduled Tribe in terms of the notification dated 01/07/1977 (supra), therefore, the respondents were precluded from proceeding further in the matter in terms of sub-rule (2) and proviso to sub-rule (5) of rule 40-A of the Nirvachan Niyam, 1995. Hence, the subsequent action of the respondents' by communication dated 19/01/2015 (Annexure P/1) based on the alleged communication of the Sub-Divisional Officer (Lashkar), Gwalior dated 16/01/2015 (Annexure R/2) is absolutely without authority and jurisdiction and cannot be sustained in the eye of law. Apart from the vulnerability of the aforesaid communication dated 16/01/2015 (Annexure R/2) for the reason that the same is issued from the office of Sub-Divisional Officer (Lashkar), Gwalior on the premise that the name of the petitioner was not mentioned in the "Dayara Register" because the caste certificate has been issued from the office of Sub-Divisional Officer (Certification), Sub-Division, Gwalior, District Gwalior on 19/06/2002 (Annexure P/3) and not from the office of Sub-Divisional Officer (Lashkar), Gwalior. Therefore, the impugned communication is patently illegal and deserves to be set aside.

8. The respondents/State, however, supported the impugned communication dated 19/01/2015 (Annexure P/1) which is based on communication dated 16/01/2015 (Annexure R/2). However, the respondents have not brought on record any notification which excludes Manjhi caste; Scheduled Tribe in the District Shivpuri.

9. The intervenor, Smt.Ramo w/o Dhamola Aadiwasi has filed an application for intervention, I.A.No.656/2015 with the submission that consequent upon rejection of nomination of the petitioner, the sole surviving contestant (intervenor) for the post of Sarpanch, Gram Panchayat, Bilokalan, Tahsil & District Shivpuri has been declared elected as unopposed.

10. Heard counsel for the parties and record has been perused.

11. There is no cavil of doubt between the parties that after reservation of seat of Sarpanch, Gram Panchayat, Bilokalan, Tahsil & District Shivpuri for Women candidate of Scheduled Tribe; petitioner had filed her nomination paper as Scheduled Tribe candidate belonging to Manjhi caste. The nomination paper of the petitioner after scrutiny was accepted and her name appeared in the list of contesting candidates prepared under rule 38, followed by allotment of

symbol under rule 39 of Nirvachan Niyam, 1995. As such, rejection of nomination paper of the petitioner has to be judicially tested in the light of the provisions contained under rule 40A of the Nirvachan Niyam, 1995.

12. Before rejection of nomination by the impugned communication dated 19/01/2015 (Annexure P/1), petitioner had submitted reply on 15/01/2015 (Annexure P/7) in response to the notice dated 14/01/2015 (Annexure P/6) alongwith number of documents referred to above and specific affidavit that she belongs to Manjhi caste which finds place at serial No.29 in the list of Schedule Tribes for the State of Madhya Pradesh by the Scheduled Castes and Scheduled Tribes Orders (Amendment) Act, 1976 issued on 01/07/1977. She was born in the year 1986 at Mohalla Ladhedi, Municipal Corporation, Gwalior.

13. The petitioner has filed an affidavit and has asserted that she belonged to the category of the Scheduled Tribe for which the seat was reserved. The respondent No.4/Returning Officer shall have no jurisdiction for further enquiry and is obliged to treat the nomination as valid by force of sub-rule(2) of rule 40-A of the Nirvachan Niyam, 1995. That apart, the Returning Officer has altogether ignored the mandatory provisions as contained under the rules before passing the impugned communication (Annexure P/1).

14. As a matter of fact, if the petitioner had not filed affidavit, even in that eventuality before proceeding to reject the nomination paper of the petitioner, the Returning Officer was required to seek permission from the competent authority, i.e., Sub Divisional Officer (Revenue) to review his own order regarding the validity of the nomination in terms of sub-rule (3) of rule 40-A of Nirvachan Niyam, 1995. There is no order of the competent authority/ Sub-Divisional Officer (Revenue) in the instant case. As such, the impugned communication of the Returning Officer purportedly under sub-rule (5) of rule 40-A of the Nirvachan Niyam, 1995 is without authority and jurisdiction.

15. Even the justification for passing the impugned communication is also of disputed nature in the light of the caste certificate issued in favour of petitioner from the office of Sub-Divisional Officer (Certification), Sub-Division, Gwalior, District Gwalior (Annexure P/3) on 19/06/2002 whereas the alleged communication was issued from the office of the Sub-Divisional Officer (Lashkar), Gwalior dated 16/01/2015 (Annexure R/2).

16. That apart, it appears that Manjhi caste finds place at serial No.29 in

the list of Schedule Tribes for the State of Madhya Pradesh by the Scheduled Castes and Scheduled Tribes Orders (Amendment) Act, 1976 issued on 01/07/1977 has totally been ignored.

17. That apart, there is no such notification on record that the caste of Manjhi is not Scheduled Tribe in the District Shivpuri. Hence, such contention is *de hors* the material on record. Disputed questions of fact are required to be addressed upon after affording opportunity of leading evidence to either party and cannot be made basis for passing the impugned communication, Annexure P/1 by stroke of pen that too contrary to mandatory provision of rule 40-A (2) of the Nirvachan Niyam, 1995.

18. In view of the aforesaid, this Court is of the view that the Returning Officer had no authority to pass the impugned communication in the light of the provisions contained in sub-rule(2) of rule 40-A of the Nirvachan Niyam, 1995. Hence, the impugned communication, Annexure P/1 dated 19/01/2015 is quashed. The petitioner shall be permitted to contest the election for the post of Sarpanch, Gram Panchayat, Bilokalan, Tahsil & District Shivpuri, on the basis of nomination paper filed by her.

19. There is remedy to either party for filing the election petition on the grounds available under rule 21 of the Madhya Pradesh Panchayats (Election Petitions, Corrupt Practices and Disqualification for Membership) Rules, 1995 after declaration of result.

20. It is made clear that any observation made on facts in the order is for the purpose of this writ petition only.

Order accordingly.

I.L.R. [2016] M.P., 1884
WRIT PETITION
Before Mr. Justice K.K. Trivedi
W.P. No. 10111/2013 (Jabalpur) decided on 31 March, 2015

SHASHI PRABHA PANDEY (Dr.) & ors. ...Petitioners
Vs.
STATE OF M.P. & ors. ...Respondents

Service Law - No work, no pay - Recovery of monetary benefits **- The Principle of "No work no pay" would not be applicable universally,**

but would apply in such cases where the employee himself was found responsible for not discharging the duties of the post - In a case where the employer was in fault in not allowing the employee to work on a post carrying higher pay scale because of any reason, the principle of "No work, no pay" would not be attracted - Order directing recovery of monetary benefit retrospectively set aside - Petition allowed.

(Paras 13 & 18)

सेवा विधि – काम नहीं तो वेतन नहीं – आर्थिक लाभों की वसूली – "काम नहीं तो वेतन नहीं" का सिद्धांत सार्वभौमिक रूप से लागू नहीं होगा, परंतु यह उन प्रकरणों में लागू होगा जहाँ कर्मचारी स्वयं ही पदीय कर्तव्यों का निर्वहन न करने हेतु उत्तरदायी पाया गया था – किसी मामले में जहाँ नियोक्ता, किसी भी कारण से, कर्मचारी को उच्चतर वेतनमान के पद पर कार्य करने की अनुमति न देने की त्रुटि करता है, तब उस मामले में "काम नहीं तो वेतन नहीं" का सिद्धांत आकर्षित नहीं होगा – भूतलक्षी प्रभाव से आर्थिक लाभ की वसूली करने का आदेश अपास्त – याचिका मंजूर।

Cases referred:

1995 Supp. 1 SCC 18, W.P. (S) No. 3075/2003 decided on 19.12.2008, 2013 (1) MPHT 447, (1994) 2 SCC 521, (2012) 8 SCC 417, (2009) 3 SCC 475, 2015(1) MPHT 130(SC), W.P. No. 1573/2012 decided on 05.03.2013, AIR 1962 MP 139, W.P. No. 23371/2003 decided on 08.08.2005, (1998) 9 SCC 559, (1991) 4 SCC 109.

Rajendra Tiwari with *Vineet Dubey,* for the petitioner.
Vaibhav Tiwari, P.L. for the respondents.

ORDER

K.K. Trivedi, J. :- The petitioners, working as Medical Officers in Homeopathy Branch of Indian System of Medicine and Homeopathy, 8 in numbers, have approached this Court by way of filing writ petition under Article 226 of the Constitution of India, ventilating their grievance with respect to the order dated 15.5.2013 (Annx.P/10) said to be issued by the respondent-State in Public Health and Family Welfare Department directing that while granting the promotion with retrospective effect to the persons like petitioners on the post presently held by them, they were granted the benefit of revision of pay with retrospective effect and arrears of salary was paid to them, whereas, since they were not to be granted such a monetary benefit with

retrospective effect in terms of the circular of the Finance Department, on an objection, it is directed that the monetary benefit granted to the petitioners with retrospective effect is withdrawn, the said order is cancelled. As a consequence of this, it is also directed to make recovery from the petitioners. It is not in dispute that all arrears pursuance to the order of promotion and fixation of salary of the petitioners on the pay scale applicable to the promotional post was paid to the petitioners.

2. It is the case of the petitioners that in fact they were initially appointed as Assistant Medical Officers (Homeopathy). They were required to be considered for promotion on the post of Medical Officer (Homeopathy). At the relevant time, their claims were not considered by the respondents treating as if the post for promotion were not available though the amendments were made in the Rules at the relevant time and such posts were available. Since direct recruitment was initiated, instead of granting promotion, the similarly situated persons like petitioners have filed Original Application being O.A.No.135/1996 before the M.P. Administrative Tribunal, Bench at Bhopal. The said Original Application was pending consideration before the Tribunal when it was abolished and under the Act, the same was transmitted to this Court where it was registered as Writ Petition No.23371/2003. The said writ petition came up for hearing before this Court on 8.8.2005 and was allowed by this Court with a specific direction to consider the cases of those petitioners and persons like them in a review Departmental Promotion Committee (hereinafter referred to as DPC for brevity) for promotion on the post of Medical Officer (Homeopathy). Since the order pased (sic:passed) in the said petition was not complied with within the time prescribed, a Contempt Petition was filed before this Court by the said persons. During pendency of such litigation, it appears that some order was passed by the respondents granting retrospective promotion to the petitioners in that case, but with a rider of making payment of salary on the promotional post from the date of joining and further applying principle of no work no pay. That order was considered by this Court in the Contempt Petition No.868/2007 on 9.11.2009 and it was held that those who have approached the Court were entitled to grant of monetary benefits as well on account of their retrospective promotion. It is the case of the petitioners that those persons have been paid the amount of salary from the date they were promoted.

3. Further, contention raised in the writ petition is that in the review DPC,

certain other persons like petitioners were considered, were found fit for promotion and in their respect, the order was issued on 4.10.2008. Those persons were also granted the benefit of retrospective promotion with effect from 21.2.1995, but a condition was levelled against them that they will not get the salary from the date of their promotion. On the other hand, they will get the salary from the date they have joined on the post. Because of the order passed by this Court in the Contempt Case, a corrigendum order was issued on 21.12.2011 and the persons like petitioners were granted the benefit of salary from the date of retrospective promotion. All such amounts were calculated and paid to the petitioners. The present petitioners were one who were promoted by those orders and they were granted the benefit of salary from the date of retrospective promotion. There was no error committed in passing such order and there was no occasion to recall said order by the impugned order dated 15.5.2013, nor there was any question of directing recovery of the amount from the petitioners. It is, thus, contended that the order impugned is bad in law and is liable to be quashed.

4. Upon service of the notice of the writ petition, the respondents have filed their return and have contended that, the claims of promotion of petitioners were considered in the review DPC, even though they have not approached the Court of law in the matter of their promotion, extending the similar benefit though not available as was granted by the Court, to the petitioners of the Writ Petition No.23371/2003, and the retrospective promotion was granted to the petitioners specifically directing that they will not be paid monetary benefit with retrospective effect. However, on the representations of persons like petitioners, the said condition was withdrawn by a subsequent order. This was objected to by the Finance Department and it was said that in terms of the memorandum dated 26.4.1974, persons like petitioners were not entitled to the grant of monetary benefit of arrears of salary from the retrospective date of promotion. They were entitled to the notional fixation of their pay on the promotional post and not the actual payment of salary, since they have not worked on the promotional post. In view of this, when the objections were raised by the Finance Department rightly the order was passed by the respondents rectifying the error committed in granting financial benefits to the petitioner on account of their retrospective promotion and since excess amount has already been paid to the petitioners, a direction for recovery of the same has been issued. It is contended that the interim stay was granted without hearing such objections of the respondents and, therefore,

the same is liable to be vacated. The writ petition being misconceived is liable to be dismissed. Though a rejoinder has been filed by the petitioners, to meet out such a stand taken by the respondents, the note sheets have been placed on record to indicate that the claims of persons like petitioners were rightly considered and the orders were issued in their respect, but it is contended that in view of the settled position of law even after payment, recovery from the petitioners of such an amount is not permissible.

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

6. The issue relating to the recovery of excess payment from the respondents is no longer *res integra* as these aspects have been considered by the Apex Court in several cases. At the initial stage, in the case of *Sahib Ram Vs. State of Haryana* [1995 Supp. 1 SCC 18], it was held that the employee alone will not be held responsible for receiving the amount in excess to his entitlement unless certain facts relating to misrepresentation etc. are proved. In the case of *Mahendra Kumar Dubey Vs. State of M.P. & others,* W.P.(S) No.3075/2003, decided on 19.12.2008, this aspect was again considered by this Court. All these circumstances were again considered in the case of *Ram Siya Kanojia vs. State of M.P. and others,* [2013 (1) MPHT 447]. This Court has taken note of one more aspect which was considered by the Apex Court in the case of *Shyam Babu Verma & others vs. Union of India & others [(1994) 2* SCC 521], and has categorically held that in such circumstances, the recovery of the alleged exdcess (sic:excess) payment from such employees was not to be made. The Apex Court in the case of *Chandi Prasad Uniyal and others Vs. State of Uttarakhand and others* [(2012) 8 SCC 417], has held that the amount paid from the public exchequer is neither the amount of executant of the order or of the beneficiary and, therefore, if any loss to the public exchequer is caused, the same has to be recovered from the employee concerned. Considering various aspects as were looked into, in the case of *Sayed Abdul Qadir vs. State of Bihar,* [(2009) 3 SCC 475], has dealt with the situation in which recovery could be made from the employee concerned.

7. Recently, after looking to all the previous decisions and the orders passed by the Apex Court in various cases, the Apex Court in the case of *State of Punjab and others etc. Vs. Rafiq Masih (White Washter) etc.*, [2015(1) MPHT 130 (SC)], decided on 18.12.2014, has held that it is not necessary that recovery in all cases should be ordered. In case, it is found that

the excess payment has been made on account of any misrepresentation or fraud, undoubtedly, the amount of excess payment can be recovered. Various factors have to be taken into consideration while ordering the recovery against an employee and in certain circumstances, the recovery of excess payment would not be permissible, but in other cases it may be. Summarising the findings, the Apex Court has held in paragraph 12 that in certain conditions the recovery cannot be made, which reads thus :-

> "12. It is not possible to postulate all situations of hardship, which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to herein above, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law :
>
> (i) Recovery from employees belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' service).
>
> (ii) Recovery from retired employees, or employees who are due to retire within one year, of the order of recovery.
>
> (iii) Recovery from employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.
>
> (iv) Recovery in cases where an employees has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.
>
> (v) In any other case, where the Court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover."

8. Keeping in view the law well settled in respect of ordering recovery, this Court has also held in the case of *Smt. Sushma Pyasi Vs. State of M.P. and others,* W.P.No.1573/2012, decided on 5.3.2013, that recovery of the

amount paid to the employee is not permissible and such alleged excess payment is not to be recovered from such petitioners.

9. After discussing the law in respect of the recovery, the circumstances in the present case for issuance of the impugned order are required to be looked into. Learned Senior counsel for the petitioners has submitted that the law is well settled that once a particular Act of the respondents is found to be incorrect and a direction to remedy the wrong has been issued that direction would not be limited to only those who have come before the Court, but similar treatment is required to be granted to all similarly situated persons as has been held by the Division Bench of this Court in the case of *N.K. Doongaji and others Vs. Collector, Surguja* (AIR 1962 MP139). It is submitted by learned Senior counsel for the petitioner that if once the demand was said to be bad in law in respect of persons who have approached the Court, the demand of very same nature cannot be made to the other similarly situated person, irrespective of the fact whether they have approached the Court or not.

10. Per contra, it is contended by the counsel for the respondents that the petitioners though were also affected by not considering the cases for promotion at the relevant time have not approached the Court of law in time and, therefore, the benefit of order passed in case of those who were vigilant about their claims, cannot be extended to the petitioners.

11. Such submissions of learned counsel for the parties are considered. No doubt the petitioners have not approached this Court nor have challenged the inaction of the respondent-State in not promoting them within time in M.P. Administrative Tribunal, but the fact remains that their claim was not considered only because it was treated as if the vacancies were not available for promotion of those persons. After testing such submission of the respondent- State in the case of *Dr. Manzoor Ahmad and another Vs. State of Madhya Pradesh and others,* O.A.No.135/1996, which was registered as Writ Petition No.23371/2003 (decided on 8.8.2005), this Court came to the conclusion that there was error on the part of respondents in not treating the post of Medical Officers available for promotion, whereas, such posts were lying vacant and were required to be filled in by 75% promotion and such suitable number of Assistant Medical Officers were already serving in the department, who have completed the requisite years of service for consideration of their cases for promotion on the aforesaid posts. This was in fact a direction to

treat 107 posts of Medical Officers available for the purposes of promotion of Assistant Medical Officer (Homeopathy) and that being so, the non-consideration was said to be bad in law. The respondents themselves have accepted the correctness of the order passed by this Court as they have not challenged it in any higher Forum. On the other hand, in compliance of the said order, they convened the review DPC. Therefore, at the time when the review DPC was convened, they were required to consider the cases of all other eligible persons who were not considered in the previous DPC as was the case of *Dr. Manzoor Ahmad* (supra). Similar treatment was not to be denied to all other similarly situated persons. This Court in the case of *N.K. Doongaji and others* (supra) has specifically dealt with such a situation and has very categorically recorded the reasons as to why such a benefit should be extended to all the similar persons by applying the law laid down by the Courts, in para 3, which read thus :-

> "3. Before leaving this case it seems to us necessary to say that we do not appreciate the attitude of the Opponents in persisting in their demands against the petitioners even after their attention had been drawn to the decision of this Court in 1960 MP LJ 39 : (AIR 1960 Madh Pra 129) (supra). That decision unmistakably and in clear words said that the recovery of surcharge on account of fuel and mahua leaves collected by the liquor contractors was wholly illegal. But strangely enough, despite this decision the opponents pressed their demand against the petitioners and on 22nd September 1960 the Under Secretary to Government in the Separate Revenue Department addressed a letter to the Excise Commissioner saying that the decision of this Court in the case of *Surajdin Laxman,* 1960 MP LJ 39 : (AIR 1960 Madh Pra 129) (supra) was "not binding on the Government in its dealing with those contractors who were not parties in the case before the High Court" and that in regard to those contractors who were not parties the "recovery of cess should continue as usual till the same is prohibited by a competent Court" (Annex. R- 4 to the Return).
>
> Now, it is no doubt true that a decision given by a court is binding only on the parties to the proceedings. But the

Government was bound by the ratio of the decision in *Surajdin Laxman's* Case, 1980 MP LJ 39 : (AIR 1960 Madh Pra 129) and the legal position expounded therein as regards the validity of the surcharge. One would have expected the Government to give effect to that decision by applying it to cases indistinguishable from the case of *Surajdin*. That they failed to do so leads only to three conclusions namely, either that the authorities did not care to read the decision of this court in *Surajdin's* Case, 1960 MP LJ 39 : (AIR 1960 Madh Pra 129) or that if they did read, they failed to understand it; or that if they read and understood it, then they sought to get rid of the effect of the decision by relying on a puerile technicality. We condemn in no uncertain terms such an attitude, on the part Of the authorities indicating little respect for the decisions of this Court and desire it to be known that as often as it may be necessary we will sternly repress such an attitude.

In this connection it would be pertinent to reproduce the observations- which Chagla C.J. made in *Firm Kaluram Sitaram v. Dominion of India,* AIR 1954 Bom 50 while dismissing a suitor's claim for compensation from railway administration for the loss of some silver bear due to the dishonesty of a railway employee. The learned Chief Justice said :

"Now we have often had occasion to say that when the State deals with a citizen, it should not ordinarily rely on technicalities, and if the state is satisfied that the case of the citizen is a just one, even though legal defences may be open to it, it must act, as has been said by eminent judges, as an honest person."

These remarks apply with greater force here as no legal defence of any kind was open to the respondents in resisting the petitioners' claim that the recovery sought to be made was wholly illegal. But for the recalcitrant attitude of the opponents, the petitioners would not have been driven to the necessity of filing this petition."

12. Now, it has to be examined whether principle of 'No Work no pay'

would be applicable in such cases and whether the circular of the Finance Department No.F-1-2/73/Nil/4 dated 26.4.1974 would be invariably applicable in case of the petitioners, or not. The said circular though referred in the impugned order, but has not been placed on record of the writ petition by the respondents. Much emphasis is placed on the said circular by the respondents, but in what circumstances, the circular has to be applied, has not been explained in the return by the respondents. Of course, power is available to the respondent-State to put such restrictions in the matter of claim of arrears of salary by the employees of State, but the reasonable classification of those employees has to be done who would not be entitled to arrears of salary in case of retrospective promotion. If for the reasons or causes attributable to the employee, the timely promotion could not be granted to him or her, he or she may be denied the arrears of salary even in the case of retrospective promotion. But for the fault of employer, the employee is not to be denied legitimate claim of arrears of salary on retrospective promotion.

13. The Apex Court in the case of *J.N. Srivastava Vs. Union of India and another* [(1998) 9 SCC 559] has dealt with such a situation though in the case of withdrawal of notice of voluntary retirement of employee, which was wrongly rejected by the employer. The abstracted part of finding and reasoning given in para 3 of report reads thus :-

> "3. It was submitted by learned Senior Counsel for the respondent-authorities that no back salary should be allowed to the appellant as the appellant did not work and therefore, on the principle of "no work, no pay" this amount should not be given to the appellant. This submission of learned Senior Counsel does not bear scrutiny as the appellant was always ready and willing to work but the respondents did not allow him to work after 31.1.1990. The respondents are directed to make available all the requisite monetary benefits to the appellant as per the present order within a period of 8 weeks on the receipt of copy of this order at their end. Office shall send the same to the respondents at the earliest."

This makes it logically clear that the principle of "No work, no pay" would not be applicable universally, but would apply in such cases where the employee himself was found responsible for not discharging the duties of the post. Specially in a case where the employer was in fault in not allowing the

employee to work on a post carrying higher pay scale because of any reason, the principle of "No work, no pay" would not be attracted.

14. Though the specific provisions are made under Fundamental Rule 17 with respect to the date from which pay and allowances are to be paid to the employee/officer and it is specifically provided that subject to any exceptions specifically made in the Rules, the Officer shall begin to draw the pay and allowances attached to his tenure post with effect from the date when he assumes the duty of that post and ceases to draw them as soon as he ceases to discharge those duties and further a rider is put that an officer who is absent from duty unauthorisedly shall not be entitled to any pay and allowances during the period of such absence, it has to be seen that this enumeration of the principle of "No work, no pay" has to be applied in specific circumstances. The very same principle was considered by the Apex Court in the case of *Union of India Vs. K.V. Jankiraman and others* [(1991) 4 SCC 109]. There also the memorandum issued by the Central Government in respect of grant of salary with retrospective effect, to the persons who were facing the departmental enquiry or criminal prosecution was looked into. Though here in the case in hand, neither the petitioners were facing the departmental enquiry nor a criminal prosecution and for them a different circular is made applicable, but underlying principles of making such application of the Fundamental Rule is the same; that means not performing the duty of the post and, therefore, no payment of salary of the post. The Apex Court considering various aspects has reached to the conclusion that it is not necessary that invariably an employee, who has been considered fit for promotion while was facing departmental enquiry or criminal prosecution and later on, was promoted on the said post because of his exoneration in the departmental enquiry or acquittal in the criminal prosecution would not be paid the benefit of salary of the promotional post with retrospective effect. After due deliberation, the Apex Court has said that if such a restriction is put in reference to Fundamental Rule 17, which is also applicable in the Central Government services, the legitimate claims of the employee would be taken away. It is the finding recorded by the Apex Court that in case such a retrospective promotion is required to be granted, analysis of such a claim should be done and all consideration is required to be done keeping in mind the circumstances in which timely promotion was not granted to the employee. If the employee is ultimately found not responsible to such a delay, he would be entitled to the monetary benefits as well.

15. If that analogy is made applicable here in the case in hand, the fact remains that the respondents themselves have considered all these aspects when the representations were made by the persons like petitioners, the note sheets were written a precis was prepared, the same was placed before the Government and ultimately it was decided that persons like petitioners be extended the monetary benefit from the date of promotion. In view of this, again the orders were issued by the respondents in case of some of other employees like petitioners. If it is examined whether the rightful consideration of the petitioners was done or not, it would be amply clear that the principle of "No work, no pay" was not to be made applicable in the case of present petitioners and, as such, there was no occasion to issue the impugned order in their respect.

16. In light of the aforesaid, if the justification of impugned order explained by the respondent is seen, on 4.10.2008, the order of promotion was issued in respect of persons like petitioners stating that the review DPC was held by following the criteria as were adopted by the DPC of 10.10.1994. That means with retrospective effect the claims were considered for promotion. Pursuance to the said DPC of 1994, the Assistant Medical Officers (Homeopathy) were promoted on the next higher post of Medical Officer (Homeopathy) on 21.2.1995. That benefit was extended to the petitioners also with retrospective effect, but only with a rider that they will not get the arrears of the salary on the application of principle of no work no pay. This aspect was also considered by this Court in the case of *Dr. Manzoor Ahmad* (supra) and this was specifically ordered by this Court in paragraph 7 of the said order that in case the persons are found fit for promotion, they were to be granted the promotion with all the consequential benefits. In the Contempt Case, the correctness of the order passed by the respondents in the case of *Dr. Manzoor Ahmad* (supra) was tested and it was held that once the consequential benefits are allowed, the principle of no work no pay cannot be made applicable. Considering these aspects, the respondents themselves have passed the order on 21.12.2011 and granted promotion to the petitioners with all the monetary benefits with retrospective effect and removed the said condition made applicable in the order dated 4.10.2008. In such circumstances when the arrears were paid to the petitioners, there was no occasion for the respondents to recall that order and to direct recovery from the petitioners. For these peculiar circumstances, if the ratio laid down by the Apex Court in the case of *State of Punjab and others etc. Vs. Rafiq Masih (White Washter) etc.*

(supra) is made applicable, the recovery from the petitioners was not permissible. As such, the order dated 15.5.2013 cannot be said to be just and proper order.

17. In view of the discussions made herein above, the writ petition is allowed. The impugned order dated 15.5.2013 (Annx.P/10) is hereby quashed. No recovery whatsoever is made from the petitioners pursuance to the interim protection granted by this Court, therefore, no recovery be made from the petitioner.

18. The writ petition stands allowed and disposed of. There shall be no order as to costs.

Petition allowed.

I.L.R. [2016] M.P., 1896
WRIT PETITION
Before Mr. Justice J.K. Maheshwari
W.P. No. 407/2014 (Jabalpur) decided on 7 April, 2015

THAMMAN CHAND KOSHTA ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

***Urban Land (Ceiling and Regulation) Act, (33 of 1976), Section 10 and Urban Land (Ceiling and Regulation) Repeal Act (15 of 1999) - Mutation of name in revenue records* - Due to non-compliance of Section 10(5) and 10(6) of the Urban Land (Ceiling and Regulation) Act, 1976, physical possession has not been taken from holder on the date of commencement of the Repeal Act, however, the proceedings shall stand abate - Respondents shall record the name of the petitioner in revenue papers - Petition allowed. (Para 17)**

नगर भूमि (अधिकतम सीमा और विनियमन) अधिनियम, (1976 का 33), धारा 10 एवं नगर भूमि (अधिकतम सीमा और विनियमन) निरसन अधिनियम (1999 का 15) – राजस्व अभिलेखों में नामांतरण – नगर भूमि (अधिकतम सीमा और विनियमन) अधिनियम, 1976 की धारा 10(5) एवं 10(6) के अननुपालन के कारण निरसित अधिनियम के प्रारंभ होने की तिथि को धारक से भौतिक कब्जा नहीं लिया गया है, तथापि, कार्यवाहियों का उपशमन हो जाएगा – प्रत्यर्थीगण राजस्व कागजातों में याची का नाम अभिलिखित करेंगे – याचिका मंजूर।

Cases referred:

W.A. No. 734/2008 decided on 18.07.2012, 2012(4) SCC 718, 2013(4) SCC 280, (2010) 10 SCC 677, (2013) 4 SCC 277, 2003 (1) MPJR SN 63, 2004 (1) MPJR SN 42, (2003) 4 MPHT 16 NOC, W.P. No. 4394/2005 decided on 30.06.2005.

Abhijeet A. Awasthi, for the petitioner.
A.A. Bernard, G.A. for the respondents.

ORDER

J.K. MAHESHWARI, J. :- This petition under Article 226 of the Constitution of India has been filed seeking following reliefs -

(i) To hold that the respondents did not comply with the procedure laid down under Section 10 of the Act of 1976.

(ii) To set aside the impugned order dated 27-12-2013 (Annexure P/10).

(iii) To direct the respondents to restore name of present petitioner in the revenue records.

(iv) To grant any other relief deemed just and proper in the facts circumstances of the case.

(v) cost may be awarded.

2. As per the facts pleaded in the writ petition, father of the petitioner was the holder of the land of Khasra Nos. 9, 10, 13/2 and 14 situated in village Garha, Tahsil and District Jabalpur. After his death, petitioner inherited the property and became holder of the land. It is the grievance of petitioner that the proceedings as drawn under Section 10(5) and 10(6) of the Urban Land (Ceiling and Regulation) Act, 1976 (hereinafter it shall be called as "the Principal Act") to take over the possession is not in conformity to law and he remained in actual physical possession on the date of commencement of the Urban Land (Ceiling and Regulation) Repeal Act, 1999, (hereinafter it be referred as "the Repeal Act"). In such circumstances, the proceedings shall deemed to be abated and his name may directed to be recorded in revenue papers. But ignoring the same, the application filed by him to mutate his name has been rejected by an order dated 27/12/2013 (Annexure P/10), however,

this petition has been filed invoking the jurisdiction of this Court under Article 226 of the Constitution of India.

3. Learned counsel appearing on behalf of the petitioner has strenuously urged that vide Annexures P/2, P/3 and P/4, actual possession has not been taken following the procedure as prescribed. According to him as per Section 10(5) of the Principal Act, minimum 30 days notice for delivery of possession from the date of its service is mandatory and if possession is not delivered within the said period, it may be taken by respondents as per section 10(6) of the Principal Act. In this regard, judgment of the Division Bench of this Court in the case of *Ram Kumar Pathak & ors vs State of M.P.* passed in W.A. No. 734/08 decided on 18-07-2012 has been relied upon. However, in absence of taking possession on the date of commencement of the Repeal Act, the proceeding shall stand abate. It is also brought to the notice that against the said judgment, Special Leave Petitions No.28344/2013 and S.L.P.No.28345/ 2013 preferred by the State Govt. have been dismissed by Hon'ble the Supreme Court. The reliance has also been placed on the judgments of the apex court in the cases of *Vinayak Kashinath Shilkar vs Deputy Collector & Competent Authority* 2012 (4) SCC 718 and *State of U.P. Vs Hariram* 2013 (4) SCC 280. In view of the aforesaid, it is submitted that possession has not been taken following the mandatory provisions of the Principal Act, however, possession of the petitioner shall be deemed to be continued on the date of commencement of the Repeal Act and the rejection of application to record his name vide order dated 27/ 12/2013 (Annexure P/ 10) is also illegal which may be quashed, issuing direction to record his name in the revenue records.

4. The respondents by filing the return has not disputed the documents Annexures P/2, P/3 and P/4, and said that as per the order passed by the competent authority, notice to take possession was issued on 28-06-1989 for delivery of the possession fixing the date 15-07-1989. On the said date father of the petitioner was not present, however ex-parte possession had taken. As the intimation to take over the possession was not given by the Tahsildar to the competent authority, however another notice Annexure P/3 was issued on 24.2.1992 and possession was taken on 03-03-1992 vide Annexure P/4. In view of the aforesaid, it is urged that after taking possession of land by the State Government in the year 1989 and in 1992, the challenge made by petitioner in the year 2014 is belated and against public interest,

therefore, the petition filed by the petitioner may be dismissed.

5. After hearing learned counsel for both the parties and looking to the relief(s), prayed for in this petition, the core issue arises for determination is that on vesting of excess land as per section 10(3) of the Principal Act, whether actual physical possession has been taken by the State Government following the procedure under section 10(5) and 10(6) of the Principal Act and the proceedings would not abate as per section 3(1)(a) and 4 of the Repeal Act. To advert the aforesaid question language of sections 10(5) and 10(6) of the Principal Act is relevant, however, it is reproduced as under :-

> "10(5) Where any vacant land is vested in the State Government under sub-Section (3), the competent authority may, by notice in writing, order any person who may be in possession of it to surrender or deliver possession thereof to the State Government or to any person duly authorised by the State Government in this behalf within thirty days of the service of the notice.
>
> (6) If any person refuses or fails to comply with an order made under sub-Section (5), the competent authority may take possession of the vacant land or cause it to be given to the concerned State Government or to any person duly authorised by such State Government in this behalf and may for that purpose use such force as may be necessary.

6. On perusal of the aforesaid, it is apparent that on passing the order of vesting of the excess land, under Sub-Section 3 of Section 10; the competent authority is required to serve the notice in writing to the holder directing delivery of possession within 30 days to him or to the State Government or to a person authorised. If the said holder refuses or fails to deliver the possession to the State Government or to the person authorised, then action under Section 10(6) may be taken and the competent authority may take possession of the land by use of such force, as may be necessary.

7. The Urban Land (Ceiling and Regulation) Repeal Act, 1999, has came into force w.e.f. 18.3.1999. As per section 2 of the said Act it is clear that the Urban Land (Ceiling and Regulation) Act, 1976, which is referred as "the Principal Act" is hereby repealed. Section 3 thereof provides and specify for saving from the repeal of the Principal Act which is relevant. However, it is

reproduced as under :-

> "3. Saving.- (1) The repeal 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 by 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 (1) 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.

A bare reading of the aforesaid it is clear that on vesting of the land, where the possession has not been taken over by the State Government or by any person duly authorised in this behalf or by the competent authority, the proceeding under the Repeal Act would abate.

8. Hon'ble the apex court has considered the issue of vesting of land as per section 10(3) of the Principal Act without taking of the possession in the case of *Ritesh Tewari and another Vs. State of M.P. and others,* reported in (2010)10 SCC 677. In para 14 and 15 the Apex Court has observed as under:-

"14. Shri Jayant Bhushan,learned Senior Counsel appearing for the appellants has submitted that as the State Government had not taken possession of the land in exercise of its powers under section 10(6) of the 1976 Act, on coming of the 1999 Act into force, the proceedings stood abated and the respondents have no business to interfere with the peaceful possession and enjoyment of the property.

15. We find full force in the submissions so made by Shri Jayant Bhushan to a certain extent, and hold that all proceedings pending before any court/authority under the 1976 Act, stood abated automatically on coming of the 1999 Act into force, provided the possession of the land involved in a particular case had not been taken by the State. Such a view is in consonance with the law laid down by this Court in *Pt.Madan Swaroop Shrotiya Public Charitable Trust Vs. State of U.P.* (2000)6 SCC 325; *Ghasitey Lal Sahu V. Competent Authority,* (2004)13 SCC 452; *Mukarram Ali Khan Vs. State of U.P.* (2007)11 SCC 90 and *Sulochana Chandrakant Galande Vs. Pune Municipal Transport,* (2010)8 SCC 467.

9. Thereafter, in the case of *Vinayak Kashinath Shilkar Vs.Deputy Collector and competent Authority and others*, (2012)4 SCC 718, the Apex Court relying upon the judgment of *Ritesh Tewari* (supra) held as under:-

"12. In view of the legal position enunciated by this Court in *Ritesh Tewari* and the factual situation that the possession of the subject land has not been taken by the Government of Maharashtra, we are satisfied that the appellant was entitled to the relief in terms of para 9 (b) in the Writ Petition and the High Court ought to have declared that the proceedings under the Act in relation to the subject property stood abated. Now it is declared accordingly.

10. Recently, Hon'ble the Apex Court in the case of *Hardeep Singh Vs. State of Punjab and others*, reported in (2013)4 SCC 277, held that mere vesting of excess land under section 10(3) after issuance of notification under section 10(1) of the Principal Act and by issuing a notice under section 10(5) directing the land owners to hand over the possession of the surplus land

would not amount to deemed vesting of title in the State Govt. merely by issuance of notice under section 10(5), without taking/handing over of the defacto/factual possession of the surplus land. The Court held that if actual possession of the land is not taken then ceiling proceeding would abate in all cases after coming into force of the Repeal Act. It has further been held that any such pending or incomplete ceiling proceeding would not be saved by section 3 of the Repeal Act.

11. This Court relying upon the judgment of *Vinayak Kashinath Shilkar* (supra) has considered the similar issue in the case of *Rajkumar Pathak and another Vs. State of M.P.* in W.A.No.734/2008 decided on 18.7.2012 and held as under :-

> "Aforesaid provision specifically provides that a notice of minimum 30 days was required to be served on the holder, but as is apparent from the perusal of the order-sheet that on 29.2.1992; the notice was issued and the date of delivery of possession was fixed as 3.3.1992. It appears that only 4 days notice was issued to the holder and the order-sheet was written for taking over the possession. It is also apparent that notice under Section 10(5) of the Act was not served upon the holder. When the notice was served by affixture also does not find place in the notice. Even the person who had affixed the notice did not care to call two independent witnesses to witness affixture of notice at the house of the holder. The notice is also silent that on which date and at what time, the affixture was made. The possession was not taken from the holder. Though the Kotwar had signed the document but why two independent witnesses were not called. Though two names are appearing in the notice but without any particulars. Why the holder was not called for handing over the possession?, nothing is available on record. Apart from this, no proper Panchnama was drawn for taking possession of the land. These facts show that in fact possession of the land was not taken on 3.3.1992 as stated in the reply by the respondents. When possession of the land was not taken after issuance of due notice under Section 10(5) of the Act, in accordance with law, the proceedings shall be deemed to be pending as on the date when the Urban Land

(Ceiling and Regulation) Repeal Act, 1999 came into force. When the proceedings were pending as on 22.3.1999, then in view of the Repeal Act of 1999, the proceedings shall be deemed to be abated.

8. Now the question remains whether on coming into force of Repeal Act, 1999, whether the proceedings were pending? In this case, no notice under Section 10(5) of the Act was served upon the appellants while it was the mandatory requirement of the law to serve this notice. Even for the sake of arguments, if it is assumed that the notice dated 29.2.1992 was issued to the appellants, even then 30 days' notice was the mandatory requirement of the law and until and unless a notice of 30 days could have been issued, the provision shall be deemed to be not complied with. Factually, neither notice under Section 10(5) was served upon the appellants nor any notice before handing over possession was given to the appellants. Neither the notice under Section 10(5) of the Act nor the warrant of possession bears the signature of the appellants. Apart from this, the possession which was stated to be taken on 3.3.1992 was not in the presence of witnesses. Even if it is assumed that the two names which are appearing in the notice were witnesses, but no particulars of the witnesses are on record. No specific Panchnama was prepared on the spot that in the presence of these witnesses, the possession was taken. When, at what time and in whose presence, the possession was taken, letter of possession is silent. In view of non-compliance of mandatory provision as contained under Section 10(5) of the Act or the suspicious circumstances in taking possession, it is apparent that the factual possession on the spot was not taken. Apart from this, the appellants/ petitioners from the very inception were claiming their possession on the land and had come forward with the plea that the appellants were dispossessed after interim order in this appeal. The fact which has been established is that no factual possession was taken from the appellants and they continued to be in possession till filing of the appeal which was filed 24.6.2002 after coming into force of Repeal Act,

1999. In aforesaid circumstances, the appellants were in possession of the land, as on the date, on which the Repeal Act, 1999 came into force. In such circumstances, it can very well be said that the proceedings were pending on the date when the Repeal Act came into force. If the appellants remained in possession of the land and their possession was not disturbed, then they were entitled to retain the land and the proceedings shall be deemed to have been abated [See: *Vinayak Kashinath Shilkar Vs. Deputy Collector and Competent Authority & others* (2012) 4 SCC 718].

9. Now the question remains whether there were any laches on the part of the appellants in filing the writ petition? So far as the contention of respondents that the possession was already taken on 3.3.1992 and the petition was filed belatedly, is concerned, we have already recorded the finding that no notice under Section 10(5) of the Act was served upon the appellants and in fact the appellants were in possession of the land, then there were no laches on the part of the appellants in filing the writ petition. The learned Single Judge has dismissed the writ petition without considering the merits of the case merely on the ground of laches which order cannot be affirmed. In aforesaid circumstances, we find that the proceedings were pending as on the date when the Repeal Act had come into force. The appellants were in possession of the land on the date when this appeal was filed. So the appellants are entitled for the benefit of the Repeal Act, 1999."

Against the said judgment Special Leave Petitions bearing Nos.28344/2013 and 28345/2013 were filed which were dismissed on 26.8.2013 by Hon'ble the Apex Court. Thus, legal position with respect to vesting of surplus land on which possession is not taken as per section 10(5) and 10(6) of the principal Act has been interpreted by Hon'ble the Apex Court and also by this Court in the manner described hereinabove.

12. In view of the provisions contained under the statute as well as the law laid down by Hon'ble the Apex court and by this Court in various pronouncements, the factual aspect of this case requires consideration. In the facts of this case it is not in dispute that on vesting of the land under section

10(3) of the Principal Act of Khasra No.9, 10, 13/2 and 14 of Village Garha, Patwari Halka No.28, Tahsil and District Jabalpur, the notice under Section 10(5) of the Principal Act issued by the competent authority has not filed along with acknowledgment of service upon the holder. Only a notice issued by Tahsildar, Nazul on 28-06-1989 fixing date for delivery of possession on 15-07-1989 is on record as annexure P/2, however, it cannot be said to be a notice under section 10(5) issued by competent Authority, but it may presumably be a notice under section 10(6) of the Principal Act, though not issued by competent Authority. In the reply nothing is said that the notice under section 10(5) was issued by the competent authority asking delivery of possession within 30 days, which was served upon the father of the petitioner, however, vide notice, annexure P/2, delivery of possession sought by the Tahsildar is not as per spirit of the Principal Act. It is seen that annexure P/2 is the order dated 28.6.1989 of the Tahsildar, Nazul, directing delivery of possession of the land of Khasra No.9, 10, 13/2 and 14 on 15.7.1989, but he is not competent to issue the same either as per section 10(5) or 10(6), but the Tahsildar by taking paper possession has send the intimation to the competent Authority on 18.4.1991. It is surprising that again after three years vide annexure P/3 Tahsildar was authorised to exercise the power under section 10(5) of the Principal Act. The said authorisation is undated, received by the Revenue Inspector on 24.2.1992. In the said authorisation description of all the Khasra Nos. were shown mentioning that possession of Khasra No.9 and 10/2 (wrongly shown in place of Khasra No.10) had already been taken in 1989-90. It is relevant to note that notice under section 10(5) issued by competent Authority prior to the authorisation to Tahsildar, Nazul, is not on record, however, again the paper possession, as alleged, had taken by them vide order dated 3.3.1992 with respect to all the Khasra Nos.9, 10, 13/2 and 14 which reveals from the said order and its intimation was sent to competent authority on 25.7.1992. The State Government in its return has taken the defence that steps to take possession in 1992 were started again because intimation to take possession in 1989 was not furnished to the competent authority, but such averments are incorrect as per the order of Tahsildar dated 15.7.1989 and 18.4.1991 filed along with annexure P/2 and the authorisation which is also of only two survey nos. as reveal vide annexure P/3.

13. In view of the said factual discussion and looking to the language of section 10(5) and 10(6) of the Principal Act, it can safely be concluded that

prior to notice, annexure P/2, either in the year 1989 or prior to authorisation annexure P/ 3 in the year 1992 the competent Authority has not given any notice to the holder directing delivery of possession to the State Government or to the person authorised. Thus, it can safely be held that compliance of section 10(5) of the Principal Act has not done on both the occasions. On perusal of language of annexure P/3, the competent Authority has assigned his power of section 10(5) to the Tahsildar, Nazul, though such delegation or assignment is against legislative intent. It may further be observed that without complying the provisions of section 10(5), compliance of section 10(6) of the Principal Act cannot be done to follow the procedure prescribed. Thus, looking to the language of section 10(5) and 10(6) of the Principal Act, it is clear like a broad day light that notice should be issued by the competent Authority to the holder directing delivery of possession within 30 days from the date of service of the notice to the State Govt. or to the person authorised. In compliance of the said notice if the possession has not been delivered then the competent authority shall issue notice for taking over of possession, on the land by the State Govt. or by any person duly authorised, using such force as may be necessary. Thus, Tahsildar may be authorised by competent authority to take actual physical possession but not to exercise of power under section 10(5) or 10(6) of the Principal Act to issue notice to the holder. As per the judgment of this Court in the case of *Babu lal Tiwari Vs. State of M.P. and others,* 2003(1) MPJR SN 63 and in the case of *Sudhir Agrawal and Anr. Vs. State of M.P. & Ors.*, 2004(1) MPJR SN 42, it is apparent that if possession has not taken as per the procedure prescribed under the law, the proceeding drawn to take over the possession is no proceeding under the law.

14. In view of the aforsaid, issuance of notice, annexure P/2 and the authorisation vide annexure P/3 is contrary to the statute, however, it cannot carry out the compliance of section 10(5) and 10(6) of the Principal Act. More so, the stand of the State Govt. regarding service of notice, annexures P/2, P/3 and P/4 treating it to be a notice under section 10(5) is not acceptable because in none of the notice 30 days time for delivery of possession has been given to the holder. Thus, it is to be held that either as per the stand taken by the State Govt. or looking to the documents, neither the compliance of section 10(5) nor the compliance of section 10(6) is available on record. It can safely be held further that if possession has not been delivered within the time so specified in the notice under section 10(5), then only the proceedings

under section 10(6) would commence and in absence of compliance of section 10(5) which is mandatory, taking recourse of section 10(6) is not permissible. Thus, it can safely be held that in absence of following the procedure as specified in the Principal Act taking over of the possession, as per stand of the State Government is unsustainable.

15. In the present case, the petitioner submitted an application to the competent Authority making request to record his name in the revenue papers, which was not considered in right perspective, however, he approached to this Court by filing W.P.No.8669/2007 *inter alia* contending that the action taken by the revenue authorities to delete his name from the revenue entries is without following the procedure and without taking actual physical possession is unsustainable. The said writ petition was disposed of on 16.7.2007 in the light of the order passed in the case of *Khuman Singh and others Vs. State of M.P. and others* decided on 17.1.2002, *Sudhir Agarwal and others Vs. State of M.P. and others*, (2003)4 MPHT 16 NOC and W.P.No.4394/2005 *(Suresh Chandra, s/o Shyamlal Choubey Vs. State of M.P. and another)* decided on 30.6.2005. By the said order it was directed to the competent authority to decide the objection of petitioner in accordance with law. The Court permitted the petitioner to raise all the contention including objection regarding validity of the proceeding of taking over the possession by competent authority. In furtherance to the said direction, application, annexure P/8 filed by the petitioner was decided vide annexure P/ 10 on 27.12.2013 rejecting the same. On perusal of the order passed by the competent Authority and looking to the documents, annexures P/2, P/3 and P/4 which is not' disputed by them and also looking to the detailed discussion made hereinabove, it is apparent that compliance of section 10(5) and 10(6) of the Principal Act has not duly considered while passing the order, however, the findings to reject the representation recorded in annexure P/10 is unsustainable in law. In the said sequel of facts, it can safely be held that possession has not taken by following the procedure established by law, and actual physical possession of land remained with holder on the date of commencement of the Repeal Act. However, as per provisions of section 3 of the Repeal Act, if possession has not taken by the competent authority, mere vesting of the land would not affect the right of the holder who is in possession on the date of commencement of the Repeal Act, thus, the proceedings would abate automatically as per section 3 and 4 of the Repeal Act.

16. Now, the question remains, whether there is any delay and laches on the part of the petitioner in filing the writ petition? So far as the contention of

respondents that the possession had already taken on 15.7. 1989 and again on 3.3. 1992, however, this petition was filed belatedly. In this respect, as per discussion made above the findings have already recorded that notice under section 10(5) and 10(6) of the Act issued by the competent authority was not served upon the petitioner and he remained in actual physical possession on the land. In addition, the petitioner has already approached to this Court in earlier round by filing a writ petition and as directed by this Court, order impugned, annexure P/10, was passed on 27.12.2013, and immediate thereafter present petition has been filed. In such circumstances, I find that there is no delay and laches on the part of petitioner.

17. In view of the foregoing discussion, writ petition filed by the petitioner is hereby allowed. The order impugned annexure P/10 dated 27.12.2013 is quashed. It is held that due to non-compliance of section 10(5) and 10(6) of the Principal Act, physical possession has not taken from holder, on the date of commencement of the Repeal Act, however, the proceedings shall stand abate. Consequently, the respondents shall record the name of the petitioner in revenue papers within a period of three months from the date of production of certified copy of this order. In the facts and circumstances of the case, parties are directed to bear their own costs.

Petition allowed.

I.L.R. [2016] M.P., 1908
WRIT PETITION
Before Mr. Justice P.K. Jaiswal & Mr. Justice Alok Verma
W.P. No. 6439/2014 (Indore) decided on 24 April, 2015

NARMADA VALLEY DEVELOPMENT AUTHORITY ...Petitioner
Vs.
THE APPELLATE AUTHORITY FOR INDUSTRIAL & FINANCIAL RECONSTRUCTION& ors. ...Respondents

Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986) as amended by Act No. 12 of 1994, Section 22 - Bank Guarantee **- Bank Guarantee was furnished on behalf of the Contractor to secure the liability due to non fulfillment of the terms and conditions of the work - The bank guarantee is a separate contract between the petitioner**

and the Bank - The Bank Guarantee ought to have been encashed on demand by the petitioner - Guarantee is not in respect of any loan or advance granted to an industrial company - BIFR and AAIFR has no jurisdiction to question encashment of the Bank guarantee - The Bank is directed to encash the bank guarantee forthwith and also pay the interest - Writ Petition allowed. (Paras 37, 41 & 42)

रुग्ण औद्योगिक कम्पनी (विशेष उपबंध) अधिनियम, 1985 (1986 का 1) यथा संशोधित अधिनियम 1994 का 12, धारा 22 – बैंक गारंटी – कार्य के निबंधनों एवं शर्तों की पूर्ति न होने की दशा में दायित्व को प्रतिभूत करने के लिए ठेकेदार की ओर से बैंक गारंटी प्रस्तुत की गई थी – बैंक गारंटी याची एवं बैंक के मध्य एक पृथक् संविदा है – याची द्वारा मांग किये जाने पर बैंक गारंटी भुनाई जानी चाहिए – गारंटी किसी औद्योगिक कंपनी को प्रदत्त ऋण अथवा अग्रिम के संबंध में नहीं है – बी.आई.एफ.आर. एवं ए.ए.आई.एफ.आर. को बैंक गारंटी भुनाए जाने के संबंध में प्रश्न उठाने की अधिकारिता नहीं है – बैंक गारंटी को तत्काल भुनाने एवं ब्याज का भुगतान भी करने हेतु बैंक को निदेशित किया गया – रिट याचिका मंजूर।

Cases referred:

(1992) 2 SCC 330, (2003) 4 SCC 305, (2014) 2 SCC 229.

Vivek Patwa, for the petitioner.
None for the respondent No. 1 & 2.
Vinay Saraf, for the respondent No. 3.
R.C. Singhal, for the respondent No. 5/Bank.
Prasanna Prasad, for the respondent No. 7.
Swati Mehta, for the respondent No. 17.
Mini Ravindran, Dy. G.A. for the respondent No.18.
None for the other respondents.

ORDER

The Order of the Court was delivered by : **P.K. JAISWAL, J. :-** By this writ petition under Article 226 of the Constitution of India, the petitioner is praying for the following reliefs:

> (i) Issue a writ direction or order in the nature of CERTIORARI or other appropriate writ calling for the records of the petitioner's case from BIFR and AAIFR.

(ii) Issue a writ, direction or order in the nature of CERTIORARI or other appropriate writ quashing the impugned orders dated and passed by BIFR and AAIFR and direct the respondent Bank and/or Company to renew the Bank guarantee and further permit the petitioner to encash the same in accordance with the terms of the contract.

(iii) Award the costs of the petition and,

(iv) Grant such other relief or reliefs as it deems fit in the facts and circumstances of the case.

2. The short question which arises for decision in the instant case is whether the bar created by Section 22 of the Sick Industrial Companies (Special Provisions) Act (1 of 1986 as amended by Act No.12 of 1994) will apply to the beneficiary who is invoking a bank guarantee, executed by the Bank on behalf of Contractor to secure the liability due to non-fulfillment of the terms and conditions of the work awarded to the respondent No.3 which stands referred to the Board for Industrial and Financial Reconstructions(for short 'BIFR').

3. The facts are in a very narrow compass:

(i) The petitioner – Narmada Valley Development is an authority working under the Narmada Valley Development Department of the State Government and has been constituted for exploring and implementation of various projects on river Narmada and its tributaries. In the process a dam has been constructed on river "MAN" by which irrigation facility shall be provided in the drought prone area of Manawar, District Dhar.

(ii) Respondent No.3 is the Company which has been awarded with the work under a contract for installation of Gates on the MAN Dam.

(iii) That, the petitioner called upon NIT bearing no.22/1997-98 for design, drawing, supply performance erection and commissioning, stop logs and Gentry crain etc. complete of redial gates(12m X 12m) 9 numbers for spillway of MAN Project. The respondent No.3 was awarded the said work in the tender process and as per the terms of the tender document, the respondent No.3 was required to furnish a Bank Guarantee towards the performance security.

4. As per Clause 18 of the tender document of MAN Project, the Security

Deposit shall be 5 percent of the amount of contract.

5. Clause 2.8 of the tender document of MAN Project deals with the security and security for performance which reads as under:

2.8 SECURITY AND SECURITY FOR PERFORMANCE

Within fifteen days from the date of receipt of the letter accepting his tenders, the tenderer shall furnish an initial security deposit equal to 5% of contract value in any one of the following form :

(a) A Demand Draft on any Bank at :

(b) A fixed deposit receipt with any scheduled Indian Bank pledged to the Executive Engineer, or

(c) Bank Guarantee in the form of at Annexure "G-2" from scheduled Indian Bank

In addition to the above initial security deposit, the Executive Engineer shall deduct from the running account bills, an amount at the rate of Ten (10) percent of the total value of each bill as additional security deposit subject to the condition that the total amount of such deductions together with the amount of initial security deposit shall not exceed 10(Ten) percent of the contract value

If the contractor expressly requested in writing he will be permitted to convert the security deposit recovered from his bills into interest bearing Government Securities or interest bearing deposits pledged to the Executive Engineer with any scheduled Indian Bank.

The Bank Guarantee, the interest bearing Government Securities and the interest bearing deposits shall remain valid upto 30 months after the certified date of completion of the work:

The security deposit less any amounts due shall be returned to the contractor after the defects liability period is

over and subject to the Executive Engineer certifying that no liability attaches to the contractor.

6. The respondent No.3 submitted a performance security of Rs.37,82,973/- drawn on the State Bank of India Hospet Branch Karnataka.

7. Clause 1 to 8 of Bank Guarantee No.9 dated 24/01/2002 reads as under:

> 1. We, State Bank of India, Hospet (hereinafter referred to as "the Bank") do hereby undertake to pay to the Government an amount not exceeding Rs. 37,82,973/- (Rupees thirty seven lakhs eighty two thousand nine hundred seventy three only) against any loss or damage caused to or suffered or would be caused to or suffered by the Government by reason of any breach by the said Contractor(s) of any of the terms or conditions contained in the Agreement.
>
> 2. We, State Bank of India, Hospet do hereby undertake to pay the amount's due and payable under this guarantee without any demur merely on demand from the Government stating that the amount claimed is due by way of loss or damage caused to or would be caused to or suffered by the Government by reason of any breach by the said Contractor (s) of any of the terms of conditions contained in the said Agreement or by reason of the Contractor(s) failure of performance the said Agreement any such demand made on the bank shall be conclusive as regards the amount due or payable by the bank under this guarantee. However, our liability under this guarantee shall be restricted to an amount not exceeding Rs.37,82,973/- (Rupees thirty seven lakhs eighty two thousand nine hundred seventy three only).
>
> 3. We, State Bank of India, Hospet undertake to pay to the Government any money so demanded not withstanding any dispute or dispute raised by the Contractor(s) in any suit or proceeding pending before any Court or Tribunal relating thereto our liability under this present being absolute and unequivocal. The payment so made by us under this bond shall be a valid discharge of our liability for payment thereunder

and the Contractor(s) shall have no claim against us for making such payment.

4. We, State Bank of India, Hospet further agree that the guarantee herein contained shall remain in full force and effect during the period that would be taken for the performance of the said Agreement and that it shall continue to the enforceable till all the dues of Government under or by virtue of the said Agreement have been fully paid and its claims satisfied or discharged or till the Executive Engineer, Narmada Development E/M Division No.15, Indore (MP) certifies that the terms and conditions of the said Agreement have been fully and properly carried out by the Contractor(s) and accordingly discharge the guarantee, unless a demand for claim under this guarantee is made on us in writing on or before the 23.07.2003. We shall be discharged from all liability under this guarantee thereafter.

5. We, State Bank of India, Hospet further agree with the Government that the Government shall have the fullest liberty without our consent and without affecting in any manner our obligation hereunder to vary any of the terms and conditions of the said Agreement or to extend time of performance by the said Contractor(s) from time to time or to postpone for any time of powers exercisable by the Government. Against the Contractor(s) and to forbear or enforce any of the terms and conditions relating to the said Agreement and we shall not be relieved from our liability by reason of any such variation or extension being granted to the said Contractor(s) or for any forbearance Act or omission on the part of the Government or any indulgence by the Government to the said Contractor(s) or any such matter or thing whatsoever which under the law relating to sureties would but for this provision have effect of so relieving us.

6. This guarantee will not be discharged due the change in the constitution of the bank of Contractor(s).

7. We, State Bank of India, Hospet lastly undertake not

to revoke this guarantee during its currency except with the previous consent of the Government in writing.

8. Not withstanding anything contained herein:

(i) Our liability under this Guarantee shall not exceed Rs.37,82,973/- (Rupees thirty seven lakhs eighty two thousand nine hundred seventy three only).

(ii) This Bank Guarantee shall be valid upto 23.07.2003 and,

(iii) We are liable to pay the guaranteed amount or any part thereof under this Guarantee only and only if you serve upon us a written claim or demand on or before 23.07.2002.

8. The bank guarantee dated 24/01/2002 was initially valid for a period of 18 months i.e., upto 23/07/2003. As per terms of the bank guarantee the same will be kept in force till the contractual obligations are fulfilled.

9. The respondent No.5 – Bank extended the validity of the bank guarantee from time to time upto 23/01/2009.

10. The respondent No.3 – Contractor did not perform the work awarded to it in accordance with the terms of the contract and three gates bearing nos. 4, 7 and 8 installed by the respondent No.3 are not functioning properly due to which the respondent No.3 was time and again called upon to rectify the defects. But, it failed to do so, leaving the petitioner with no option but to terminate the contract awarded to it and forfeit the security deposit. Accordingly, on 14/11/2008 vide Annexure P/3 the petitioner invoked the Bank Guarantee and directed the State Bank of India to encash the same in favour of the petitioner.

11. The respondent No.5 – Bank, vide its letter dated 22/01/2009 advised the petitioner that in view of the BIFR's order dated 11/12/2006, passed under Section 22 (1) & (3) of Sick Industrial Companies(Special Provisions) Act [in short, 'SICA'), not to invoke the said bank guarantee and adopt any coercive measures and, therefore, the amount of bank guarantee was not encashed nor they renewed the bank guarantee.

12. On 9/03/2009, the petitioner filed an application before the BIFR for issuance of necessary directions to the respondent No.5 – Bank for encashment

of the Bank Guarantee. The BIFR by order dated 9/03/2009(AnnexureP/ 6) directed that "Board's order dated 25/04/2006 and 11/12/2006 not to invoke the bank guarantees issued on behalf of the Company have become final and actions take in defiance of these orders by Sardar Sarovar Nigam Ltd., State Bank of India, Narmada Valley Development Authority, water Resources Department, Government of Jharkhand is liable to attract action under Section 33/34 of SICA".

13. In the meanwhile, the validity period of bank guarantee has been expired on 21/03/2009. The Bank thereafter neither extended the validity period of the bank guarantee nor renewed the bank guarantee.

14. On 4/10/2011, the petitioner again filed M.A. No.626/BC/2011 before the BIFR and requested to direct the respondent No.5 – Bank to renew the Bank Guarantee and allow them to revoke the same. The BIFR vide its order dated 1/12/2011 directed that the Bank is not under obligation to renew the Bank Guarantee as the issue of its renewal is between the Bank and the Company.

15. The petitioner challenged the aforesaid said order dated 1/12/2011 passed by the BIFR by filing an appeal bearing No.50/12 before the AAIFR. The AAIFR by the impugned order dated 9/05/2013 dismissed the appeal by passing the following order:-

> **9.5.2013** Heard the Learned Counsel for the appellant as well as respondent State Bank of India (SBI). This appeal has been filed against the impugned order of BIFR dated 01/ 12/2011, wherein the prayer of the appellant made in MA No.626/BC/2011 before BIFR requesting the BIFR to direct SBI to renew the Bank Guarantee has been rejected. It is not disputed that the BG issued by the SBI on behalf of its client M/s. Tungabhadra Steel Products Ltd.(TSPL) in favour of the appellant has expired on 23.07.2009. Extension/renewal of an already expired BG amounts to issue of a fresh BG. It is also a fact that BG is a tripartite instrument which is issued by the Bank on the request of a party, say, A on fulfillment of certain terms and conditions in favour of another Party, say, B. Under the BG, the Bank undertakes to pay certain amount on behalf of Party A to Party B on occurrence of certain events

as per terms of BG. As such a BG can be issued by a Bank only on the request of Party A i.e. M/s TSPL in the present case. In the absence of such a request, directing the Bank to issue a BG in favour of the appellant amounts to directing the Bank to pay the liabilities/dues of M/s. TSPL to the appellant. Admittedly, the Bank is not liable to pay any dues to the appellant. If the appellant has any claim, the same lies against M/s. TSPL and not against the Bank. In the circumstances no order can be issued directing the Bank to pay the dues of M/s. TSPL to the appellant. In other words the prayer of appellant cannot be granted. The argument of the appellant that since the SBI did not honour the BG earlier due to the restraint order passed by the BIFR on 11.12.2006, it is for the BIFR and AAIFR to direct SBI to renew the BG, is not tenable. The appellant cannot seek relief against the said order of BIFR through the present appeal. Appropriate course of action for the appellant would have been to challenge the said order or non-compliance of BG by SBI at an appropriate forum at appropriate time. Today, if the appellant has any claim against M/s. TSPL, it can seek relief against M/s. TSPL and not against SBI at an appropriate forum. AAIFR and BIFR are not the forum to adjudicate contractual disputes between the appellant and M/s. TSPL. As such, we do not find any merit in the appeal and it is liable to be dismissed. The appeal is dismissed accordingly.

16. The petitioner being aggrieved by the order dated 1/12/2011 passed by BIFR and order dated 9/05/2013 passed by AAIFR, challenged the same in this writ petition on the ground that due to interim orders passed by the BIFR on 11/12/2006 the petitioner could not encash the bank guarantee. It is also submitted that the bank guarantee is a separate contract between the petitioner and the Bank and the bank guarantee ought to have been encashed on demand by the petitioner. The BIFR and AAIFR had no jurisdiction to question encashment of the bank guarantee.

17. **Relevant part of the order dated 1/12/2011 passed by the BIFR reads as under:**

2.2. Ld. Representative of applicant (Narmada

Valley Development Authority) reiterated that the Hon'ble BIFR in its order dated 11.12.2006 directed the authority concerned, including NVDA not to invoke the BG and not to adopt any coercive action against the company for non-compliance of terms of contract, without permission of the Board. On 09.03.2009 the NVDA requested the BIFR to grant them permission for encashment of BG. The application is still pending. The company and SBI have now stopped even renewing BG. In view of aforesaid the NVDA prayed that at least renewal the original BG No.0076302BG0090001 for an amount Rs.37,82,973/- may ordered. He agreed that there is a dispute between TSPL and NVDC on execution of work but that dispute is pending before the appropriate forum. The Hon'ble BIFR had imposed restriction on invocation of BG by the NVDC. Hence request is made before this Hon'ble Bench to direct the SBI who had given BG on behalf of company to renew the BG, so that the remedy of invoking BG shall remain available with the NVDC. He added that the statement of the company(TSPL) is not correct. The work is only partially completed. Hence, BG is required for security purpose. The security deposit of Rs.41.88 lakh and extra deposit of Rs.31.68 lakhs aggregating about Rs.73.56 lakh is available with NVDC. Whereas, on the other hand recovery of interest on loan from company is also pending to the tune of app. Rs. 82 lakhs.

3. Having considered the material on records and submissions made during the hearing the Bench observed that Applicant has made a prayer for issued of directions to the SBI to rebnew (sic:renew) the BG. The Bench was of the opinion that the SBI has no such obligation, as the BG was given by the Bank on behalf of company and after completion of all necessary formalities, including payment of interest guaranteed amount by the company. Hence the issue fo (sic:for) remewal (sic:renewal) of BG is between company and the Applicant (NVDC). The SBI Bank is not the party concerned from whom the relief claimed in the MA could be sought. Hence the Bench decided to reject the MA on these grounds. The

Applicant is at liberty to file a fresh MA with an appropriate prayer against the party concerned.

18. The Bank Guarantee No.09/24.1.2002 was to remain in force upto 23/01/2009 and a claim under the same was to be made and served on respondent No.5 – Bank on or before 22/01/2009.

19. The said bank guarantee was irrevocable and specifically provided that the respondent No.5 – Bank agreed and undertook to pay the amount due and payable under the said guarantee without any demur, merely on a demand from the petitioner that the amount claimed had become due by reasons of non-fulfillment of the contractual obligations. The said bank guarantee further provided that any such demand made by the petitioner would be conclusive in regard to the amount due and payable by the respondent No.5 – Bank to the petitioner under the said bank guarantee.

20. As the petitioner suffered a huge loss due to non-completion of the contractual obligations, therefore, the petitioner invoked the bank guarantee vide letter dated 14/11/2008. The Bank inspite of receipt of letter failed to make the payment on the pretext that restrained order has been passed by the BIFR. The petitioner also requested the Bank to renew the bank guarantee till the matter is decided by the BIFR but the Bank on one pretext or the other failed to renew the bank guarantee whereas the Bank is bound to renew and release the amount of the bank guarantee by demand draft in terms of Clause 4 of the bank guarantee within 48 hours from the date of receipt of demand.

21. In reply, the stand of the respondent No.5 – Bank that since the respondent No.3 on whose behalf the bank guarantee was issued was registered with the BIFR, the bar of Section 22 of SICA was attracted and the guarantee in question could not be realized by the petitioner without the permission of the BIFR. The impugned orders passed from time to time restrained Bank to encash the bank guarantee and, therefore, the same could not be paid.

22. It is the case of the petitioner that there is no dispute that there has been a failure on the part of the respondent No.3 to carry out the work in time as required under the terms of the contract. In respect of performance guarantee the petitioner instead of depositing the amount in cash furnished the bank guarantee in terms of Clause 2.8 of the contract, the tenderer shall furnish an initial security deposit equal to 5% of the contract value and the bank

guarantee shall remain valid upto 30 months after the certified date of completion of work issued by petitioner – Department. The bank guarantee being unconditional and irrevocable, the respondent No.5 – Bank cannot take refuge under the provisions of Section 22 of SICA. It is further the case of the petitioner that the bar of Section 22 is to the filing of a proceeding against the respondent No.3 – Company or a suit on a guarantee in respect of any loan or advance granted to the respondent No.3– Company. Petitioner asserts that it is apparent that the bank guarantee given by the respondent No.5 – Bank was not in respect of any loan or advance granted to the respondent No.3 – Company and, thus, there is no bar under the said section for the respondent No.5 – Bank defendant to make payment under the said bank guarantee.

23. The respondent No.5 – Bank does not dispute the bank guarantee No.9 dated 24/01/2002 or that the said bank guarantee was extended from year to year or that the petitioner invoked the said bank guarantee vide its letter dated 14/11/2008, but categorically denies that the bank guarantee in the present case stands on a different footing than any other third party guarantee given to secure a loan or advance.

24. We have heard the learned Counsel for the parties at length and scrutinized the records of the case.

25. Before dealing with the rival contentions of parties, we propose first to set out the provisions of Section 22(1) of the SICA as amended by the Act of 1994. The same read as follows:

> 22. Suspension of legal proceedings, contracts, etc. - (1) Where in respect of an industrial company, an inquiry under section 16 is pending or any scheme referred to under section 17 is under preparation or consideration or a sanctioned scheme is under implementation or where an appeal under sections 25 relating to an industrial company is pending, then, notwithstanding anything contained in the Companies Act, 1956 (1 of 1956), or any other law or the memorandum and articles of association of the industrial company or any other instrument having effect under the said Act or other law, no proceedings for the winding up of the industrial company or for execution, distress or the like against any of the properties

of the industrial company or for the appointment of a receiver in respect thereof [and no suit for the recovery of money or for the enforcement of any security against the industrial company or of any guarantee in respect of any loans or advance granted to the industrial company] shall lie or be proceeded with further, except with the consent of the Board or, as the case may be, the Appellate Authority.

26. Looking to the plain and unambiguous wording of Section 22(1) of SICA, it is clear that where an industrial company has been referred to the Board, as is the case here with respondent No.3 – M/s Tungabhadra Steel Products Ltd. Tungabhadra Dam, no suit for the recovery of money or for the enforcement of any security against an industrial company would lie without the consent of the Board. Learned counsel for the petitioner, however, contends that the instant claim is not directed against the industrial company at all, but against the respondent No.5 – Bank which executed an irrevocable bank guarantee in favour of the petitioner. The bank guarantee is an independent contract between the petitioner and the bank and it specifically provided that the respondent No.5 – Bank agreed and undertook to pay the amount forthwith to which the provisions of Section 22(1) of the SICA are not attracted.

27. The question, thus, which arises for consideration is whether the bar created by Section 22(1) of SICA applies to the instant proceedings for encashment of a bank guarantee against the defendant bank, and whether the instant claim lodged on 14.11.2008 is not maintainable in the absence of the consent of the Board for Industrial and Financial Reconstruction as envisaged by the provisions of the said section.

28. At the outset, learned Counsel for the petitioner emphasized the following undisputed facts:

(i) The respondent No.5 – bank has not disputed that it executed a bank guarantee dated 24/01/2002 in favour of the petitioner for an amount of Rs.37,82,973/- at the request of respondent No.3 – M/s Tungabhadra Steel Products Ltd. Tungabhadra Dam and had thereby irrevocably agreed and undertaken to pay to the petitioner the said amount in case the respondent No.3 fails to carry out contractual obligations on demand within 48 hours from the date of receipt of demand.

(ii) The respondent No.5 – Bank has not disputed that the said guarantee

provided that the bank agrees that the petitioner's decision with regard to the amount of the guarantees having become payable by the buyer shall be final and binding on the bank.

(iii) The respondent No.5- bank has not disputed that the said guarantee provides that the bank agrees and undertakes to pay the amount due and payable under the guarantee without demur, merely on a demand from the contractor that the amount claimed has become due as pe (sic:per) clause 1 of the Bank Guarantee and encash within 48 hours, and, further, that such demand shall be conclusive as regards the amount due and payable by the bank under the said guarantee.

(iv) The respondent No.5- bank has not disputed that the petitioner invoked the said bank guarantee vide its letter dated 14/11/2008 and since there was no response from the respondent No.5- Bank, the petitioner again called upon the respondent No.5 – Bank to pay the said amount under the said bank guarantee to the petitioner.

(v) Admittedly, the respondent No.5 bank has not disputed the amounts due and payable under the bank guarantee, but seeks to take refuge under the embargo engrafted in Section 22(1) of the Sick Industrial Companies (Special Provisions) Act, 1985.

29. As regards the second part of section 22(1), counsel for the petitioner urges that though it is apparent from a plain reading of Section 22(1) of the Act that no suit for the encashment of any guarantee in respect of any loan or advance granted to an industrial company that has been referred to BIFR would lie or can be proceeded with, except with the consent of the Board, the instant bank guarantee was not in respect of any loan or advance granted to respondent No.3 –Company (the Industrial company), but admittedly was executed to secure the faithful performance of work awarded to respondent No.3 by the petitioner. As such, it is not a guarantee 'in respect of any loan or advance granted to any industrial company', within the meaning of the aforesaid section, and the instant suit for enforcement of the same is not, therefore, barred by the provisions of Section 22(1) of the SICA.

30. The contention of learned Counsel for the petitioner is that the above view is bolstered by the well settled principles regarding enforcement of bank guarantees, according to which a bank guarantee is an autonomous contract, imposing an absolute obligation on the bank to fulfill the bank guarantee.

Payment becomes due under a bank guarantee on the happening of a contingency, on the occurrence of which the guarantee becomes enforceable. In the instant case, there is no dispute that the said contingency has occurred (See *Syndicate Bank v. Vijay Kumar* (1992) 2 SCC 330).

31. Dealing first with the contention of the petitioner that the guarantee in question is not in respect of any loan or advance granted to the industrial company, it would be apposite to note that the Apex Court in *Patheja Bros. Forging & Stamping v. ICICI Limited* decided on 24th July, 2000 held that the words no suit for the recovery of money or for the enforcement of any security against the industrial company or any guarantee in respect of any loans or advance granted to the industrial company, inserted into Section 22 by the Act 12 of 1994, are crystal clear. There is no ambiguity therein. The Court further held that no suit for the enforcement of a guarantee in respect of a loan or advance granted to the industrial company will lie or can be proceeded with, without the consent of the Board or the Appellate Authority under the said Act. It was observed by the Apex Court that when the words of legislation are clear, the court must give effect to them as they stand and cannot demur on the ground that the legislature must have intended otherwise, therefore, the respondent's suit for the enforcement of the guarantees in respect of the loans granted to the appellant cannot be proceeded with unless consent as required by Section 22 is obtained.

32. In a subsequent decision of the Hon'ble Supreme Court, *Kailash Nath Aggarwal v. Pardeshiya Industrial and Investment Corporation of Uttar Pradesh Limited,* (2003) 4 SCC 305, the Court held that having regard to the semantic difference between the words suit and proceeding and the absence of such omnibus expression and expansive words or the like, which appear after the expression proceedings, after the word suit, it is not possible to accede to the submission of the appellants that the word suit in Section 22(1) of the Act means anything other than some form of curial process. In paragraph 34 at page 316 of the Report, the Court further held as follows:

...The court in ***Patheja Case*** merely observed that the creditor could recover its sum from the principal debtor under the scheme and, therefore, the claim on the guarantee would not arise if the amount is so recovered under the scheme. We do not read the observations quoted as holding that protection of guarantors of loan to a sick company is an object of the 1994 Amendment which object must colour our interpretation of the amendment. Till 1994 no

protection was afforded to the guarantors under the Act at all. A limited protection has been given in 1994. The expression used being clear and unambiguous, it is not for us to question the wisdom of the legislature in giving the limited protection it did or why such protection was necessary at all.

33. After making the above observations, the Supreme Court in *Kailash Nath* (supra) held that since Section 22(1) only prohibits recovery against the industrial company, there is no protection afforded to guarantors against recovery proceedings under the U.P. Public Moneys (Recovery of Dues) Act, 1972.

34. On the basis of the aforesaid, counsel for petitioner contended that no doubt there is a certain protection provided to a guarantor under Section 22(1) of the SICA, but this protection is limited in nature. He further contended that where the concerned guarantee, as in the instant case, is not in respect of any loan or advance granted to an industrial company, a suit for the enforcement of the said guarantee can be proceeded with without the permission required in terms of Section 22(1) of the SICA. The Court in *Patheja Bros.* (supra), and *Kailash Nath* (supra), he pointed out, was not concerned with the question whether a suit for enforcement of a guarantee will lie or can be proceeded with against the guarantor in view of Section 22(1), where the guarantee is not in respect of a loan or advance granted to the concerned industrial company. Therefore, the judicial pronouncements of the Apex Court in *Patheja Bros.* (supra) and *Kailash Nath Agarwal* (supra) are not applicable to the facts of the present case, where the bank guarantee is not in respect of a loan or advance granted to the concerned industrial company viz. Respondent No.3.

35. In the case of *Inderjeet Arya Vs. ICICI Bank Ltd.,* (2014) 2 SCC 229 the Apex Court held that the protection under Section 22(1) is available only against action that comes within ambit in term "suit". Term "suit" in Section 22(1) applies only to proceedings in Civil Court and not actions or recovery proceedings filed by banks and financial institutions before a tribunal such as DRT.

36. Prima facie, we are of the opinion that non-compliance of contractual obligations cannot be a loan or an advance. In case it is not a loan or an advance granted to the company, the provisions of Section 22 of Sick Industrial Companies (Special Provisions) Act, 1985 will not be applicable, and consequently, the claim is not barred by the said Act.

37. In our considered view, therefore, the present claim cannot be labelled as a suit for enforcement of a guarantee in respect of a loan or advance to the industrial company, but is a claim based on an independent contract between the petitioner and respondent No.5 – bank to which the industrial company viz. Respondent No.3 is not a party. The necessary corollary is that the sanction of the Board or the Appellate Authority under Section 22(1) of the SICA cannot be said to be a *sine qua non* for the institution of the claim for encashment of bank guarantee.

38. In the case in hand, the liability of the Bank to pay the amount as per letter of guarantee did not made dependent upon prior permission on the part of respondent No.3 – Company. The Bank has to pay the amount itself due under the letter of guarantee given by it to the petitioner. On such payment it is open to the Bank to have recourse to the securities given by the Company in liquidation for the purpose of the issue of the letter of guarantee. The petitioner is not concerned with what the Bank does in order to reimburse itself after making payment of the amount guaranteed by it. It is the responsibility of the Bank to deal with the securities held by it in accordance with law. It was not, however, open to the BIFR and AAIFR to make any order under the SICA prohibiting the petitioner from realising the amount guaranteed by the Bank as this had nothing to do with the assets of the Sick Company in liquidation.

39. The law in respect of unequivocally and unconditionally Bank guarantee is well-settled.

40. The contention of the learned counsel for the respondent No.5 – Bank that as the petitioner was restrained from invoking the said Bank Guarantee by BIFR's said order dated 11/12/2006(AnnexureR/5/2) and as during currency of BIFR's said order the petitioner demanded encashment of the said BG vide its said letter dated 14.11.2008(AnnexureP/3), the petitioner's said letter(AnnexureP/3) was not only in defiance of BIFR's order dated 11.12.2006(AnnexureR/5/2) but was also contrary to the provisions of Section 22(1) and (3) of SICA and as such being not applicable to respondent No.5 – Bank, the petitioner's said letter did not constitute or amount to invocation of the said bank guarantee. Even, the claim lodged by the petitioner was well in time and during the validity period of the bank guarantee itself.

41. In the case in hand, the bank guarantee states that it is in consideration of respondent No.3 having agreed to accept it in lieu of cash deposit by way

of security due and towards performance security. Thereafter, respondent No.5 – Bank has agreed to pay the unequivocal and unconditional amount due within a period of 48 hours on return demand of petitioner or either by authorised officer.

42. In view of the aforesaid, the orders of the BIFR and AAIFR dated 1/12/2011 and 9/05/2013 respectively are, therefore, liable to be quashed. Accordingly, the same is quashed. The Bank is directed to encash the bank guarantee, forthwith, on the basis of claim lodged by the petitioner dated 14.11.2008 and shall also pay the interest from the date of refusal at the rate fixed by the Reserve Bank of India from time to time, to the petitioner – Department till its realisation.

43. The writ petition is allowed with cost of Rs.10,000/-. Counsel fee Rs.5,000/- if certified.

Petition allowed.

I.L.R. [2016] M.P., 1925
WRIT PETITION
Before Mr. Justice Sanjay Yadav
W.P. No. 5900/2008 (Jabalpur) decided on 30 April, 2015

SHACHEENDRA KUMAR CHATURVEDI ...Petitioner
Vs.
AWADESH PRATAP SINGH
VISHWAVIDHYALYA & ors. ...Respondents

***A. Vishwavidyalaya Adhiniyam, M.P. (22 of 1973), Section 37 - Awadesh Pratap Singh Vishwavidhyalya Ordinance 16(1) - Forged Mark Sheet* - Petitioner on the basis of forged marksheets of graduation appeared in Post Graduate Examinations and thereafter got job - University called upon the petitioner to submit original marksheet but he did not furnish on a plea that entire record have washed away in flood - Information was called from University Examination Cell and it was found that petitioner had not passed graduate examination - University rightly cancelled the marksheets. (Paras 11, 18 & 19)**

क. विश्वविद्यालय अधिनियम, म.प्र. (1973 का 22), धारा 37 – अवधेश प्रताप सिंह विश्वविद्यालय अध्यादेश 16(1) – कूटरचित अंकसूची – स्नातक की कूटरचित अंकसूची के आधार पर याची स्नातकोत्तर परीक्षाओं में सम्मिलित हुआ एवं

तत्पश्चात् उसे नौकरी मिली – विश्वविद्यालय ने याची को मूल अंकसूची प्रस्तुत करने हेतु बुलाया, परंतु उसने संपूर्ण अभिलेख बाढ़ में बह जाने का अभिवाक् करते हुए अंकसूची प्रस्तुत नहीं की – विश्वविद्यालय के परीक्षा विभाग से जानकारी बुलाई गई तथा यह पाया गया कि याची ने स्नातक परीक्षा उत्तीर्ण नहीं की थी – विश्वविद्यालय ने उचित रूप से अंकसूचियां निरस्त की।

B. Awadesh Pratap Singh Vishwavidyalya Ordinance 16(1)(2) - Cancellation of marksheets - Opportunity of hearing - **Notice was issued to petitioner for submitting original marksheets but he took a plea that entire record has washed away in flood - No attempt on the part of petitioner to obtain duplicate marksheet - No more opportunity is required to be given - Principle of Natural Justice cannot be put in straight jacket formula. (Paras 22 & 24)**

ख. अवधेश प्रताप सिंह विश्वविद्यालय अध्यादेश 16(1)(2) – अंकसूचियों का निरस्त किया जाना – सुनवाई का अवसर – मूल अंकसूची प्रस्तुत किये जाने हेतु याची को नोटिस जारी किया गया था, परंतु उसने संपूर्ण अभिलेख बाढ़ में बह जाने का अभिवाक् किया – अंकसूची की अनुलिपि प्राप्त करने हेतु याची की ओर से कोई प्रयास नहीं किया गया – अब और अवसर दिया जाना अपेक्षित नहीं है – प्राकृतिक न्याय के सिद्धांत को किसी निश्चित सूत्र में नहीं रखा जा सकता है।

C. Interpretation of statutes - Fraud - **Fraud vitiates every solemn act. (Para 23)**

ग. कानूनों का निर्वचन – कपट – कपट प्रत्येक सत्यनिष्ठ कार्य को दूषित करता है।

Cases referred:

AIR 1987 SC 821, (2003) 8 SCC 319, (2004) 6 SCC 325.

Vijay Kumar Shukla, for the petitioner.
Vibhudendu Mishra, for the respondents No. 1 & 2.
Suyash Mohan Guru, for the respondent No. 3.
Abhai Raj Singh, P.L. for the respondent No. 4.

(Supplied: Paragraph numbers)

ORDER

SANJAY YADAV, J. :- As to respondent No.5 which was impleaded on 2.3.2015 the notices were sent on 5.3.2015 by Registered Acknowledgment

Due Post. The notice having not returned is presumed to be served on respondent No.5.

2. The matter is posted for hearing.

3. It is observed from the record that an application: I. A. No.12366/2013 whereby, petitioner seeks direction to respondents to produce (i) report of enquiry Committee, (ii) folders of petitioners maintained in University, (iii) mark sheets, admission forums, (sic:forms) examination forms other records relating to admission and examination of B.A. And M. A. That by order dated 4.9.2013 it was observed that the application shall be considered after service of notice on respondent No.5. Since despite of notice there is no appearance on behalf of respondent No.5; therefore, since matter is posted for final hearing this application shall now be considered at appropriate stage.

4. Parties are heard.

5. Petition is directed against the notification dated 5.4.2008 issued by the Respondent University cancelling Petitioner's examination of B.A. Part I, B.A. Part II, B.A. Part III, M.A. (Economics) Previous, M.A. (Economics) Final and a further direction of being debarred from appearing in any examination conducted by the respondent University.

6. The notification as apparent therefrom is on the basis of recommendation of enquiry committee which found the petitioner having appeared in these examinations on the basis of forged marksheets.

7. As borne out from material on record the issue as regard to genuineness of the petitioner's educational degree emanates from the complaint filed by respondent No.3 with the respondent University alleging that the petitioner on the basis of fabricated and forged marksheet had obtained an employment in the State Government as Assistant Statistical Officer in the office of Women and Child Development, Rewa. The complaint led the respondent University call upon the petitioner on 17.10.2007 to furnish the relevant marksheets of B.A. Part I (Roll No.504 Year 1997) B.A. Part II (Roll No.302 Year 1978) BA Part III (Roll No.272 Year 1979) Centre Thakur Ranmat Singh Mahavidyalaya, Rewa as regular student. Marksheet of M.A. (Commercial Economics) Previous Year 1982 Roll No.21, M.A. (Commercial Economics) Final Year 1983 Roll No.3990. Regular student of Commercial Economics

Department A. P. Singh University failing which, the petitioner was informed that the matter would be handed over to the police.

8. Petitioner responded vide his letter dated 24.10.2007 stating-

"प्रति,

श्रीमान कुल सचिव महोदय,

अवधेश सिंह विश्वविद्यालय रीवा

जिला रीवा (म.प्र.)

विषय :– स्नातक एवं स्नाकोत्तर परीक्षा की मूल अंकसूचियों के सम्बन्ध में।

संदर्भ :– उप कुल सचिव परीक्षा का पत्र कमाकं परीक्षा /स्टोर 22007/1937 रीवा दिनांक 17.10.2007 के तारतम्य में।

महोदय,

विषयाकितं अनुरोध कर निवेदन है कि बी.ए.भाग 1,2,3, केन्द्र ठाकुर रणमत सिंह महाविद्यालय से नियमित छात्र के रूप में परीक्षा में सम्मिलित होते हुये स्नातक उर्त्तीण किया था तथा अंक सूची अवधेश प्रताप सिंह विश्वविद्यालय रीवा द्वारा दी गई थी जिसके आधार पर वर्ष 1982–83 में नियमित छात्र के रूप में व्यवसायिक अर्थशास्त्र विभाग विश्वविद्यालय से परीक्षा में सम्मिलित होकर उर्त्तीण किया था जिसकी अंकसूची दी गयी थी।

यह कि शासन के सेवाकाल के समय (भर्ती के समय) ए.पी.एस. द्वारा जारी अंकसूची का परीक्षण उपरान्त मेरी अंक सूची जमा कर ली गयी है और में आज बीस वर्ष से अधिक समय से शासन की सेवा में सेवारत हूँ।

यह कि 1997–98 में रीवा में भयंकर बाढ आयी थी उस समय में पद्मध र कालोनी ढेकहा रीवा में मकान किराये से रहता था आपको विदित होगा कि छोटी पुल से लगा मोहल्ला होने के कारण प्रथमतल से पांच फीट उपर पानी था लिहाजा हजारों लोगों का सम्पूर्ण सामान एवं रिकार्ड नष्ट हो गया था। इस कारण मेरे पास उपरोक्त दस्तावेज नहीं है। उल्लेखनीय है कि विश्वविद्यालय द्वारा पूर्व में भी पत्राचार किया गया था भ्रामक अंक सूची के सम्बन्ध में इसमें विनम्र अनुरोध है कि में सात वर्ष 1977 से 1983–84 तक नियमित छात्र के रूप में अध्ययरत था अंकसूची विश्वविद्यालय द्वारा उपलब्ध कराई जाती है इस स्थिति में मुझे ज्ञात नही है कि विश्वविद्यालय द्वारा जारी अंक सूची किस स्तर की है। शिकायतकर्ता द्वारा जो विश्वविद्यलाय को जानकारी दी गई है। सच यही है कि विश्वविद्यालय से उन लोगों का ही सम्पर्क तत्कालीन समय में था जिससे हो सकता है कि मेरे साथ विभाग के संलग्न कर्मचारियों के सह से साजिस की गई हो। उक्त नोटिस से मुझे गंभीर

सदमा लगा है तथा यह स्पष्ट होता है कि मेरे प्रकरण में अन्य लोगों की गलती को मेरे उपर थोपा जा रहा हैं। जबकि हमने ऐसा कोई दस्तावेज संधारित नहीं किया है जो विभाग एवं मेरे गरिमा के प्रतिकूल हों।

अतः अनुरोध है कि उक्त प्रकरण की निष्पक्ष जांच कराकर दोषी लोगों के विरूद्ध कार्यवाही की जाय तथा मेरे साथ न्याय प्रदान करने का कष्ट करें। उक्त पत्र दिनांक 23.10.2007 को प्राप्त हुआ है जिससे विलम्ब के लिये में उत्तरदायी नहीं हूँ।"

9. That in the meantime on an information sought for by Public Information Officer, Awadesh Pratap Singh University form (sic:from) Deputy Registrar (Examination), following facts were divulged:

"श्री शचीन्द्र कुमार चतुर्वेदी आत्मज श्री देवेन्द्र कुमार ठाकुर रणमत सिंह महाविद्यालय रीवा से निम्न विषय लेकर बी.ए. में नियमित छात्र के रूप परीक्षा में सम्मिलित हुये है।

1. बी.ए.प्रथम मुख्य परीक्षा वर्ष 1977 अनुकमांक 504 नामांकन बी.75. 424 से

1. सामान्य अंग्रजी– 10– 10 – 10 – 10
2. राजशास्त्र – 35– 20 – 55 – 55
3. अर्थशास्त्र – 25– 23 – 48 – 48
4. संगीत – 30– 25 – 55 – 81

.....

194/500 अनुत्तीर्ण

2. बी.ए.प्रथम पूरक परीक्षा 1977 में उक्त छात्र परीक्षा में नहीं बैठा है।

3. बी.ए.भाग–2 मुख्य परीक्षा 1978 अनुकमांक 302 नियमित छात्र के रूप में।

1. सामान्य अंग्रजी– 08– 08 – 08 – 08
2. राजशास्त्र – 32– 22 – 54 – 54
3. अर्थशास्त्र – 27– 35 – 62 – 62
4. संगीत – 18– 29 –47 21 – 68

.....

192/500 अनुत्तीर्ण

4. बी.ए. भाग–2 पूरक परीक्षा 1978 में छात्र परीक्षा में नहीं बैठा है।

5. बी.ए.भाग–3 मुख्य परीक्षा 1979 अनुकमांक 272 नियमित छात्र के रूप में।

1.	सामान्य अंग्रजी– –	11 – 11 – 11
2.	राजशास्त्र –	25– 26 – 51 – 51
3.	अर्थशास्त्र –	32– 16 – 48 – 48
4.	संगीत –	23– 40 – 63 36 99

.....

बी.ए तृतीय 212/500 अनुत्तीर्ण

6. बी.ए.भाग–3 पूरक परीक्षा 1979 में छात्र परीक्षा में नहीं बंठै है।

बी.ए.द्वितीय 212/500

.....

कुलयोग–421/1000 अनुत्तीर्ण।"

10. It is the contention on behalf of respondent University that for admission to Post Graduate Course imperative it is for an incumbent to have Bachelor's Degree through regular course as per ordinance No.16 (2) which provides for:

> "A candidate who, after taking his Bachelor's Degree of the Vishwavidyalaya or any statutory University in India, has completed a regular course of study in a college affiliated to the Vishwavidyalaya or Vishwavidyalaya Teaching Department in the subject in which he offers himself for examination for one academic year, shall be admitted to the previous examination for the Degree of Masters of Arts."

11. It is contended that despite of being called upon to furnish the original marksheets of having passed First Year, Second Year and Third Year of Bachelor of Arts, the petitioner did not furnish the mark sheet on a plea that the entire record have washed away in flood. It is urged that being left with no option the information was sought from the University Examination Cell whereon it was informed that the petitioner had not passed the under graduate examination which led the University to cancel the marksheets by order dated

5.4.2003:

12. The main plank of challenge by the petitioner is that he was not afforded an opportunity of hearing and even if there was an enquiry the same was behind his back and he was not made a part of it. It is the contention that there being violation of principle of natural justice, the impugned notification deserves to be quashed.

13. The issue which arises for consideration is whether petitioner possesses valid marksheet of Graduate Course and of Post Graduate Course.

14. In case of a student who undertakes the studies there are two sources from where it can be ascertained as to the fact of his successfully undertaking the courses. The first source is the student himself and the second source is the examining body. It can be said that third source would be an institution where the student is enrolled. This could be only when the same institution is an examining body and not an affiliate. In the case at hand the College wherein the petitioner has allegedly undergone the studies being not an examining body is not a potential source of the fact of the petitioner having successfully passed the Graduate Course. Thus in the present case it is either the petitioner or the University which are the only two sources to affirm as to genuineness of the marksheets of BA First Year, Second Year and Third Year and of M.A. Previous and Final Year.

15. In the present case the examining body, i.e.; the University on receiving the complaint calls upon the petitioner to furnish the original of Undergraduate Course and Post Graduate Course to ascertain their genuineness. This action of the University cannot be said to be arbitrary. Because it is expected of a student who later on takes up the job with the State Government on the basis of these marksheets to be in possession thereof. The petitioner very conveniently replied of having lost these marksheet in a flood. If that was so incumbent it was upon him to have obtained the duplicate from the University but there is no material on record to suggest any effort being made by the petitioner in obtaining the duplicate of the marksheets allegedly lost in the flood. Thus there being non-cooperation from the petitioner led the University to find out from their own records as to genuineness of the complaint as also of the marksheets in possession of the petitioner. Whereon, it was found that the petitioner had failed in under graduate Course this is evident from the information dated 24.7.2007 since the information, as apparent therefrom, has been received from the records maintained in due course of business,

incumbent it was upon the petitioner to have contradicted the same. The petitioner except filing a certificate issued by the Principal, Government Thakur Ranmat Singh College stating of petitioner having passed the B.A. Examination no other documents have been filed and has attempted to shift the burden by filing an application for production of those very documents, which existence whereof are doubtful,i.e, marksheets of various year. The certificate containing the information as to passing of the petitioner in under graduate examination also does not disclose the source from which such information is given.

16. Being trite it is under law (as borne out from Section 101- 104 Evidence Act) that it is incumbent on each party to disclose the burden of proof which rest on himself. Thus having taken the defence in response to the notice to produce the original certificate of having lost in floods the burden lay on the petitioner to have proved the loss and the effort made by him to retrieve, restore or reconstruct those documents , which the petitioner miserably failed.

17. The University on their turn through the records maintained in due course of business could produce the information as contained in letter dated 24.7.2007, which is not been contradicted.

18. The inevitable conclusion which emerges from these facts are that the petitioner has not passed B.A. Ist Year, IInd year and IIIrd Year and that on forged marksheets have been appearing in examination but could not pass those examinations. And that he took admission to Post Graduate Course which under Ordinance 16 (1) he was not eligible.

19. Considered thus the impugned notification is upheld. The respondents are at liberty to launch Criminal Prosecution and take all such steps under law in respect of the fraud played by the petitioner.

20. Contention that an inference of fraud cannot be drawn. The contention deserves to be rejected, as the cogent material documents available on record are sufficient to bring home the fact that the petitioner has been forging the marksheets for an unlawful gain.

21. In *Bank of India v. Yeturi Maredi Shanker Rao and another*; AIR 1987 SC 821 it is held:

> "15- As regards the offence under Section 467 read with Sec. 109, the learned High Court acquitted the respondent because it came to the conclusion that there is no evidence to establish

as to who forged the signatures of P.W. 1 on the withdrawal form. It is no doubt true that so far as the evidence about the forgery of the signatures of P.W. 1 on the withdrawal form is concerned there is no evidence except the fact that the signatures are forged and the further fact that this withdrawal form was in the possession of respondent-accused who presented it in the Bank and obtained money therefrom and pocketed the same. From these facts an inference could safely be drawn that it was the respondent-accused who got signatures of P.W. 1 forged on this document as it was he who used it to obtain money from the Bank from the account of P.W. 1 and pocketed the same It is no doubt true that there is no evidence as to who forged the signatures of the withdrawal form but the circumstances indicated above will lead to the only inference that it was the accused-respondent who got the signatures of P.W. 1 forged on the withdrawal form. In this view of the matter therefore the acquittal of the respondent for an offence under Section 467 read with Sec. 109 also could not be justified."(emphasis supplied).

22. Another contention that the petitioner was not been afforded an opportunity of hearing. What more opportunity is required in a case as present one wherein the petitioner was called upon to furnish the marksheets in possession, which a normal person is expected of being in possession, but the petitioner conveniently got away by stating that the mark sheets were lost in flood with no further prove of making any attempt to obtain the duplicate.

23. As to the proposition that fraud vitiates every solemn act reference can be had of the decision in *Ram Chandra Singh v. Savitri Davi and others*: (2003) 8 SCC 319-

"15. Commission of fraud on court and suppression of material facts are the core issues involved in these matters. Fraud as is wellknown vitiates every solemn act. Fraud and justice never dwells together.

16. Fraud is a conduct either by letter or words, which induces the other person, or authority to take a definite determinative stand as a response to the conduct of former either by word

or letter.

17. It is also well settled that misrepresentation itself amounts to fraud. Indeed, innocent misrepresentations may also give reason to claim relief against fraud.

18. A fraudulent misrepresentation is called deceit and consists in leading a man into damage by willfully or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations which he knows to be false, and injury ensues therefrom although the motive from which the representations proceeded may not have been bad.

24. The principle of natural justice as held in *Vice Chairman, Kendriya Vidyalaya Sangathan and another v. Girdharilal Yadav:* (2004) 6 SCC 325 should not be stretched too far and the same cannot be put in a straight jacket formula. It has been held by their Lordships:

"11. The admitted facts remain that the respondent is a permanent resident of Haryana. It further stands admitted that at the relevant time, Ahirs/Yadavs of Haryana were not treated as OBC. It further stands admitted that the respondent obtained a certificate showing that he was a resident of Rajasthan, which he was not. It is not disputed that a detailed enquiry was conducted by the District Magistrate, Kota, wherein the respondent had been given an opportunity of hearing. It is also not in dispute that he had given an opportunity to show cause as to why his appointment should not cancelled not by the appointing authority but also by the Appellate Authority. In terms of Section 58 of the Evidence Act, 1872 facts admitted need not be proved. It is also a well-settled principle of law that the principles of natural justice should not be stretched too far and the same cannot be put in a straitjacket formula. In *Bar Council of India v. High Court of Kerala* this Court has noticed that:(SCC p.324, paras 49-50) "

'24. The principles of natural justice, it is well settled, cannot be put into a straitjacket formula. Its application will depend upon the facts and circumstances of each case. It is also well settled that if a party after having proper notice chose

not to appear, he at later stage cannot be permitted to say that he had not been given a fair opportunity of hearing. The question had been considered by a Bench of this Court in *Sohan Lal Gupta v. Asha Devi Gupta* of which two of us (V.N.Khare, C.J. and Sinha,J.) are parties wherein upon noticing a large number of decisions it was held:(SCC p.506, para 29)

"29.The principles of natural justice, it is trite, cannot be put in a straitjacket formula. In a given case the party should not only be required to show that he did not have a proper notice resulting in violation of principles of natural justice but also to show that he was seriously prejudiced thereby."

25. The principles of natural justice, it is well settled, must not be stretched too far.'

(See also *Mardia Chemicals Ltd. v. Union of India and CAnara Bank v. Debasis Das*.)

In *Union of India v. Tulsiram Patel* whereupon reliance has been placed by Mr.Reddy, this Court held:(SCC p.477, para 97)

'97.Though the two rules of natural justice, namely, nemo judex in causa sua and audi alteram partem, have now a definite meaning and connotation in law and their content and implications are well understood and firmly established, they are nonetheless not statutory rules. Each of these rules yields to and changes with the exigencies of different situations. They do not apply in the same manner to situations which are not alike. These rules are not cast in a rigid mould nor can they be put in a legal straitjacket. They are not immutable but flexible. These rules can be adapted and modified by statutes and statutory rules and also by the constitution of the Tribunal which has to decide a particular matter and the rules by which such Tribunal is governed.".

25. Having thus considered this Court does not find any good reason to summon the record as sought for vide I. A. No.12366/2013, accordingly, the

application is dismissed.

26. In the result petition fails and is dismissed, with costs quantified to Rs.5000/-. Interim order is vacated.

Petition dismissed.

I.L.R. [2016] M.P., 1936
WRIT PETITION
Before Mr. Justice S.K. Gangele
W.P. No. 671/2015 (Jabalpur) decided on 19 August, 2015

PUSHPENDRA MISHRA ...Petitioner
Vs.
STATE OF M.P. ...Respondent

Service Law - Appointment - Petitioner was selected **- Criminal case was registered against the petitioner for commission of offences punishable u/S 294, 323, 451, 506-B & 34 of I.P.C. - He was acquitted after giving benefit of doubt - Held - Petitioner has been acquitted from the offences after trial - The Trial Court specifically observed that false implication of the petitioner in the case cannot be ruled out - There was a quarrel between the parties and a counter case was also lodged against the complainant party - Authority did not consider the case of the petitioner in proper perspective and rejected the candidature of the petitioner only on the ground that the petitioner was tried for commission of offence - This approach of the authority is not proper - Impugned order dated 23.12.2014 quashed - Respondent was not justified in rejecting the petitioner's candidature - Petition is allowed.**
(Paras 2, 3, 16 & 17)

सेवा विधि – नियुक्ति – याची का चयन किया गया – भा.दं.सं. की धाराएँ 294, 323, 451, 506–बी एवं 34 के अंतर्गत दण्डनीय अपराध कारित करने हेतु याची के विरूद्ध दाण्डिक प्रकरण दर्ज किया गया – संदेह का लाभ देते हुए उसे दोषमुक्त किया गया – अभिनिर्धारित – याची को विचारण पश्चात् आरोपों से दोषमुक्त किया गया है – विचारण न्यायालय ने विनिर्दिष्ट रूप से यह संवीक्षा की कि प्रकरण में याची के असत्य आलिप्तन से इंकार नहीं किया जा सकता है – पक्षकारों के मध्य झगड़ा हुआ था तथा परिवादी पक्ष के विरूद्ध एक काउंटर केस भी दर्ज कराया गया था – प्राधिकारी ने याची के मामले पर उचित परिप्रेक्ष्य में विचार नहीं किया एवं मात्र इस आधार पर याची की अभ्यर्थिता निरस्त कर दी कि अपराध कारित करने हेतु

याची का विचारण किया गया था – प्राधिकारी का यह दृष्टिकोण उचित नहीं है – आक्षेपित आदेश दिनांक 23.12.2014 अभिखण्डित – याची की अभ्यर्थिता निरस्त करने में प्रत्यर्थी विधि सम्मत नहीं था – याचिका मंजूर।

Cases referred:

(2013) 7 SCC 685, (2011) 4 SCC 644, 2015 (1) MPHT 1 (SC), (2011) 10 SCC 184, 1996 SCC (4) 17.

V.D.S. Chouhan, for the petitioner.
Lalit Joglikar, P.L. for the respondent/State.

(Supplied: Paragraph numbers)

ORDER

S.K. GANGELE, J. :- Heard.

The petitioner has filed this petition against the order dated 23.12.2014.

2. The petitioner participated in a selection process named as Police Constable Recruitment Test (Second) 2013. The petitioner cleared the written examination after getting sufficient marks. He was called for physical test. He was also directed to submit his choice of posting at District. The petitioner mentioned District Anuppur of his choice. The Screening Committee rejected the candidature of the petitioner by the impugned order dated 23.12.2014 (Ann. P.5) for appointment to the post of Constable on the ground that a criminal case was registered against the petitioner vide Crime No.27/13 for commission of offences under Section 294, 323, 451, 506-B and 34 of IPC. The charge sheet was filed against the petitioner. After holding trial the petitioner was acquitted from the offences vide judgment dated 19.6.2014 passed in criminal case No.2506/13. Because the petitioner was involved in commission of offence, hence it was not in the interest of the Police Department to appoint the petitioner on the post of Constable.

3. The respondents in reply pleaded that a criminal case was registered against the petitioner for commission of offences punishable under Section 294, 323, 451, 506-B and 34 of IPC. He was acquitted after giving benefit of doubt. However, looking to the facts of the case, it was not proper to appoint the petitioner on the post of Constable.

4. Learned counsel for the petitioner has contended that acquittal of the

petitioner was honourable one and there was no evidence in the criminal case, hence the finding recorded by the authority that the petitioner was given benefit of doubt is contrary to law. From the judgment passed by the Magistrate, it is clear that the petitioner was falsely implicated in the criminal case and in such circumstances, the petitioner couuld (sic:could) not be denied the benefit of appointment to the post of Constable on account of his selection. In support of his contention learned counsel relied on the judgment of Supreme Court in *Commissioner of Police, New Delhi and another Vs. Mehar Singh and others* reported in (2013) 7 SCC 685 and *Commissioner of Police and others Vs. Sandeep Kumar,* reported in (2011) 4 SCC 644.

5. Contrary to this, learned P.L. has contended that the petitioner was tried in a criminal case, although he was acquitted. The offence was serious in nature, hence competent authority has rightly rejected the claim of the petitioner for appointment on the post of Constable. In support of his contention, learned PL has relied on the judgment of the Supreme Court in *State of M.P. and others Vs. Parvez Khan* reported in 2015 (1) M.P.H.T. 1 (SC).

6. Undisputed facts of the case are that the petitioner mentioned in verification form that he was tried for commission of offences punishable under Section 294, 323, 451, 506-B and 34 of IPC by the Magistrate and he was acquitted from the said offences. Copy of the judgment of acquittal passed by the Magistrate has been filed by the petitioner alongwith petition as Annexure P-5, dated 19.6.2014 passed in Criminal Case No. 2506 of 2013. The criminal Court in the judgment has recorded the findings in para 9 that after appreciation of evidence the prosecution story appears to be suspicious. The present petitioner in his evidence deposed that he was selected on the post of the Police Constable. The complainant had ill-will against the family of the petitioner. Hence, a complaint was lodged at police station. On the date of incident there were verbal abuses between the wife of the complainant and the mother of the present petitioner. The family members of the petitioner had submitted a complaint to the Superintendent of police in this regard. Thereafter, the police had conducted an inquiry and counter case was also registered against the complainant.

7. From the facts of the criminal case, it is clear that family member of the petitioner and complainant party were neighbour and there was some dispute between mother of the petitioner and wife of the complainant. Thereafter, both the parties filed compliant against each other. Counter case was also

registered against the complainant party. After appreciation of evidence the Court observed that prosecution story is suspicious. In such circumstances, it could not be ruled out that the petitioner was falsely implicated in the case. The trial Court has acquitted the petitioner from the charge of offences.

8. The authority has rejected the claim of the petitioner for appointment to the post of Constable on the ground that a criminal case was registered against the petitioner. However, authority did not consider the merit of the criminal case. The authority has also not taken into consideration the fact that a counter case was also registered against the complainant party. The petitioner and complainant party are neighbour. The offences are minor in nature. The trial Court already observed that the story put-forth by the prosecution is suspicious. It is a fact that a person who has criminal antecedents cannot be appointed in the police department. However, it has also to be taken into consideration that whether a person was falsely implicated in the case or not. In certain circumstances, there is a possibility that a person may have been falsely implicated in the case.

9. The judgment relied on by the learned PL *State of M.P. and others Vs. Parvez Khan* (supra) is distinguishable on facts because in the aforesaid judgment the person was tried in two criminal cases. In one case he was prosecuted for commission of offences under Sections 323, 324, 325, 294, 506-B/34 of IPC and other case under Section 452, 394, 395 of IPC. Certainly commission of offences under Section 394, 395 of IPC is serious offnece. The Supreme Court in the matter of *State of West Bengal and others Vs. S. K. Nazrul Islam* reported (2011) 10 SCC 184 has observed in regard to cancellation of appointment of a Constable on the ground that he had submitted false information to the effect that criminal case was registered against him or not as under:

> "Surely, the authorities entrusted with the responsibility of appointing constables were under duty to verify the antecedents of a candidate to find out whether he is suitable for the post of constable and so long as the candidate has not been acquitted in the criminal case of the charges under Sections 148/323/380/427/596 IPC, he cannot possibly be held to be suitable for appointment to the post of constable."

10. The Supreme Court further observed in the matter of *Commissioner of Police and Ors Vs. Sandeep Kumar* passed in Civil Appeal No.1430/

2007, as under:

> "When the incident happened the respondent must have been about 20 years of age. At that age young people often commit indiscretions, and such indiscretions can often been condoned. After all, youth will be youth. They are not expected to behave in as mature a manner as older people. Hence, our approach should be to condone minor indiscretions made by young people rather than to brand them as criminals for the rest of their lives."

11. Although the matter has been referred by the Supreme court to larger Bench but in my opinion, the observation made in the aforesaid case by the Court are relevant to decide the controversy involved in this case.

12. The Supreme Court in the matter of *Pawan Kumar Vs. State of Haryana and another* reported in1996 SCC (4) 17 has observed as under:

> "Before concluding this judgment we hereby draw attention of the Parliament to step in and perceive the large many cases which per law and public policy are tried summarily, involving thousands and thousands of people through out the country appearing before summary courts and paying small amounts of fine, more often than not, as a measure of plea-bargaining. Foremost along them being traffic, municipal and other petty offences under the India; Penal Code, mostly committed by the young and/or the inexperienced. The cruel result of a conviction of that kind and a fine of payment of a paltry sum on plea-bargaining is the end of the career, future or present, as the case may be, of that young and/or in experienced person, putting a blast to his life and his dreams. Life is too precious to be staked over a petty incident like this. Immediate remedial measures are therefore necessary in raising the toleration limits with regard to petty offences especially when tried summarily. Provision need be made that punishment of fine upto a certain limit, say upto Rs.2000/- or so, on a summary/ordinary conviction shall not be treated as conviction at all for any purpose and all the more for entry into and retention in government service. This can brook no delay, whatsoever."

13. From the observation made by the Supreme Court in the aforesaid cases, it is clear that life of the young person to get the job could not be jeopardise merely on the ground that a criminal case was registered against

him.

In the present case the petitioner has been acquitted from the offence after trial. The trial Court specifically observed that false implication of the petitioner in the case cannot be not ruled out. As per facts of the criminal case, in which the petitioner was prosecuted there was a quarrel between the parties and thereafter FIR was lodged. A counter case was also lodged against the complainant party.

14. Regulation 64 of Madhya Pradesh Police reads as under:

> **64. General Condition of Service**- Every candidate for an appointment in the police should be made acquainted, prior to appointment, with the general conditions of police service, which are as follows: -
>
> **(1)** Each police officer shall devote his whole time to the police service alone. He shall not take part in any trade or calling whatever, unless expressly permitted to do so.
>
> **(2)** He shall faithfully and honestly use his best abilities to fulfill all his duties as a police officer.
>
> **(3)** He shall confirm himself simplicity to all rules, which shall, from time to time, be made for the regulation and good order of the service. And shall cultivate a proper regard for its honour and respectability.
>
> **(4)** He shall submit to discipline, observe subordination and promptly obey All lawful orders.
>
> **(5)** He shall serve and reside wherever he may be directed to serve and reside.
>
> **(6)** He shall wear, when on duty, such dress and accoutrements as shall, from time to time, be prescribed for each rank of the service and shall be always neat and clean in his appearance. At no time shall any police officer appears partly in uniform and partly in mufti.
>
> **(7)** He shall allow such deductions to be made, from his pay and allowances as may be required for kit, quarters and

the like, under the rules of the service.

(8) He shall promptly discharge such debts as the Superintendent may direct and shall not without the Superintendent's permission, have money transactions with any other police officer, or borrow money from a resident of the district in which he is employed.

(9) He shall not withdraw from the service without distinct permission in writing, or (in the absence of such permission) without giving two months' previous warning of his intention to do so.

(10) He shall not on any occasion or under any pretext, directly or indirectly take or receive any present, gratuity or fee from any person what so ever, without the sanction of the Superintendent.

(11) He shall act with respect and deference towards all officers of Government and with forbearance, kindness and civility towards private persons of all ranks. In private life he shall set an example of peaceful behaviors and shall avoid all partisanship.

(12) On ceasing to belong to the force, he will immediately deliver up all kit and accoutrements, and vacate any quarters that have been supplied to him at the public cost.

15. From the facts of the case, conclusion cannot be drawn that the petitioner was not suitable candidate to be appointed in police service.

16. In my opinion, the authority did not consider the case of the petitioner in proper perspective and rejected the candidature of the petitioner only on the ground that the petitioner was tried for commission of offence. This approach of the authority is not proper.

17. Consequently, the petition filed by the petitioner is allowed. The impugned order dated 23.12.2014 , (Ann. P-5) is hereby quashed. It is ordered that the petitioner be given appointment on the post of Constable in pursuance to his selection within a period of four weeks from the date of receipt or copy of this order. The petitioner shall not be eligible to receive arrears of salary but he shall be entitled to get benefit of seniority and other benefits from the

date of his initial appointment on which date other persons were appointed in pursuance to same selection to the post of Constable.

18. No order as to costs.

Petition allowed.

I.L.R. [2016] M.P., 1943
WRIT PETITION
Before Mr. Justice R.S. Jha
W.P. (S) No. 1349/2005 (Gwalior) decided on 24 August, 2015

GEETA SINGH SISODIYA (Smt.) ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

Constitution - Article 226 - Promotion **- Petitioner placed at Sr.No. 2 in waiting list - The candidates whose names are included in the waiting list are not entitled to be appointed against unfilled posts as of right - The waiting list has not been acted upon by the respondent authorities and in such circumstances even if the person whose name appears at Sr.No. 2 of the selection list had not joined and his post was vacant, the same could have been filled up by authorities by considering the name of the candidate who was at Sr.No. 1 and not by the name of the candidate who was below him in the waiting list - Petition dismissed.** **(Paras 7 to 9)**

संविधान – अनुच्छेद 226 – पदोन्नति – याची को प्रतीक्षा सूची में क्रम संख्या 2 पर रखा गया – अभ्यर्थीगण जिनके नाम प्रतीक्षा सूची में सम्मिलित हैं, उन्हें अधिकार के रूप में रिक्त पदों के विरूद्ध नियुक्त होने की पात्रता नहीं है – प्रत्यर्थी प्राधिकारियों द्वारा प्रतीक्षा सूची पर कार्यवाही नहीं की गई एवं ऐसी परिस्थितियों में यदि चयन सूची में क्रम संख्या 2 पर अंकित नाम वाले व्यक्ति ने पदभार ग्रहण नहीं किया तथा उसका पद रिक्त था, तब क्रम संख्या 1 पर अंकित अभ्यर्थी के नाम पर विचार करके प्राधिकारियों द्वारा उक्त पद भरा जा सकता था एवं न कि उस अभ्यर्थी के नाम पर विचार करके जो प्रतीक्षा सूची में उससे नीचे था – याचिका खारिज।

Cases referred:

1994 (Supp-2) SCC 591, (2013) 12 SCC 243.

U.K. Bohare, for the petitioner.

Sudha Shrivastava, P.L. for the respondents/State.

(Supplied: Paragraph numbers)

ORDER

R.S. JHA, J. :- The petitioner has filed this petition praying for a direction to the respondents/authorities to grant promotion to the petitioner on the post of Physical Instructor in accordance with the selection list which is Annexure P/7.

2. The brief facts leading to the filing of this petition, are that the petitioner is working on the post of LDT/Assistant Teacher and her case was taken up for consideration for promotion in the departmental Promotion Committee proceedings held for making promotions on the post of Physical Instructor. The Departmental Promotion Committee meeting was held on 9-10/7/04. Pursuant to the proceedings of the Departmental Promotion Committee a selection list was published which has been filed alongwith the petition as Annexure P-7. Seven post of Physical Instructor were to be filled up and therefore seven persons were selected and two persons were shown in the waiting list. The petitioner is at S.No.2 in the waiting list.

3. The learned counsel for the petitioner submits that the person mentioned at S.No.2 Tukanand Pathak in the selection list for making promotion on the post of Physical Instructor did not join, and therefore, the petitioner was entitled to the grant of promotion. It is stated that one Devendra Solanki whose name was mentioned at Sr.No.7 in the select list joined and after joining was sent elsewhere and that post also became vacant and, therefore, the petitioner was entitled to grant of promotion on the post of Physical Instructor.

4. The respondents have filed a return wherein they have stated that a Departmental Promotion Committee was held on 9-10/7/04 in which seven persons were selected. It is stated that the petitioner was in fact at S.No.2 in the waiting list and therefore her seniority was at Sr.No.9 and as she is lower down in the selection list, therefore, she is not entitled for promotion on the post of Physical Instructor. As far as the contention of the petitioner regarding Tukanand Pathak is concerned, no specific averments have been made in the return except for stating that the petitioner has not filed any documents in that regard. The respondents in their return have also stated that Devendra Solanki

who was mentioned at S.No.7 in the select list was in fact promoted and joined his post and merely because he has been shifted elsewhere, the post did not become vacant and therefore no post is vacant for appointment as far as petitioner is concerned.

5. Having heard the learned counsel for the parties it is observed that the petitioner was not shown in the selection list but was in fact shown in the waiting list. There is nothing on record to indicate that the respondents have in fact operated the waiting list or that any person, below the petitioner in the waiting list, has been granted promotion on the post of Physical Instructor. On a perusal of the record, it is also clear that the petitioner has not made any averments in respect of Anil Kumar Gupta the person who has been placed at Sr.No.1 of the waiting list above the petitioner and who is entitled to preference in promotion before the petitioner. In fact the person placed above the petitioner in the waiting list i.e. Anil Kumar Gupta has also not been granted promotion and therefore, I do not find any merit in the submission of the learned counsel for the petitioner that she is entitled to grant of promotion on the post of Physical Instructor by directing the respondents to act upon the waiting list. Quite apart from the above, it is apparent from a perusal of the record that the select list has been published in the year 2004 and there is no interim order of this Court to keep it alive. In such circumstances the direction and prayer made by the petitioner that the list be implemented cannot be considered after a lapse of more than a period of 10 years as the selection list has already outlived its life.

6. The learned counsel for the petitioner has relied upon the decision of the Supreme Court rendered in the case of *Gujrat State Dy.Executive Engineers vs. State of Gujrat and ors.* reported in 1994 (Supp-2) SCC 591, and has stated that in view of the aforesaid decision once a person's name is included in the waiting list he/she has a right to claim promotion or appointment in order of merit.

7. Having heard the learned counsel for the parties, it is observed that the reliance placed by the learned counsel for the petitioner on the aforesaid judgment quoted by him is misconceived. From a perusal of the decision of the Supreme Court, it is apparent that the Supreme Court has stated that the person whose name has appeared in the waiting list has a right to claim for being appointed if one or the other selected candidate does not join in the order of merit, But his claim is subject to his order of merit. The Supreme

Court has gone on to state that once a selected candidate joins and no vacancy arises due to his resignation, etc. or for any other reason within the period the list is alive and operative under the rules or within a reasonable time, then the candidate whose name has appeared in the waiting list has no right to claim appointment.

8. In the instant case, admittedly and apparently the petitioner has been placed at Sr.No.2 in the waiting list and one Anil Kumar Gupta has been placed above the petitioner at Sr.No. 1 in the waiting list. It is also undisputed that the waiting list has not been acted upon by the respondent authorities and in such circumstances, even if the person whose name appears at Sr.No.2 of the select list, Tukanand Páthak had not joined and his post was vacant, the same could have been filled up by the authorities by consideration the name of Anil Kumar Gupta who was at Sr. No.1 and not the petitioner who was below him in the waiting list in view of the law laid down by the Supreme Court in the above mentioned decision.

9. In the circumstances the law laid down by the Supreme Court in the case relied upon by the petitioner does not render any assistance to the petitioner. On the contrary the Supreme Court in the case of *Raj Rishi Mehra and others vs. State of Punjab and another*, (2013) 12 SCC 243, has held that candidates whose name are included in the waiting list are not entitled to be appointed against unfilled posts as of right by taking into consideration several previous judgments in the following terms :-

> "15. The question whether the candidates whose names are included in the waiting list are entitled to be appointed against the unfilled posts as of right is no longer res integra and must be answered in negative in view of the judgments of this Court in *Union of India v. Ishwar Singh Khatri* 1992 Supp (3) SCC 84, *Gujarat State Dy. Executive Engineers' Association V. State of Gujarat and others* 1994 Supp (2) SCC 591,*State of Bihar v. Secretariat Assistant Successful Examinees Union 1986 and others* (1994) 1 SCC 126, *Prem Singh and others v. Haryana SEB and others* (1996)4, SCC 319, *Ashok Kumar and others v. Chairman, Banking Service Recruitment Board & others*(1996) 1 SCC 283, *Surinder Singh and others v. State of Punjab and another* (1997) 8 SCC 488,*Madan Lal and others v. State of J&K*

and others (1995) 3 SCC 486, *Kamlesh Kumar Sharma v. Yogesh Kumar Gupta and. others* (1998) 3 SCC 45, *State of J&K and others v. Sanjeev Kumar and others* (2005) 4 SCC 148, *State of U.P. and others v. Rajkumar Sharma and others* (2006) 3 SCC 330, *Ram Avtar Patwari and others v. State of Haryana and others* (2007) 10 SCC 94 and *Rakhi Ray and others V. High Court of Delhi and others* (2010) 2 SCC 637.

16. In *Surinder Singh's* case, this Court observed as under (SCC p. 494, para 14):.

> "14..... 9. A waiting list prepared in an examination conducted by the Commission does not furnish a source of recruitment. It is operative only for the contingency that if any of the selected candidates does not join then the person from the waiting list may be pushed up and be appointed in the vacancy so caused or if there is some extreme exigency the Government may as a matter of policy decision pick up persons in order of merit from the waiting list. But the view taken by the High Court that since the vacancies have not been worked out properly, therefore, the candidates from the waiting list were liable to be appointed does not appear to be sound. This practice, may result in depriving those candidates who become eligible for competing for the vacancies available in future. If the waiting list in one examination was to operate as an infinite stock for appointments, there is a danger that the State Government may resort to the device of not holding an examination for years together and pick up candidates from the waiting list as and when required. The constitutional discipline requires that this Court should not permit such improper exercise of power which may result in creating a vested interest and perpetrate waiting list for the candidates of one examination at the cost of entire set of fresh candidates either from the open or even from service.

17. In *Rakhi Ray's* case, this Court referred to a number of judicial precedents and held (SCC 651, para 7):

> "7. It is a settled legal proposition that vacancies cannot be filled up over and above the number of vacancies advertised as "the recruitment of the candidates in excess of the notified vacancies is a denial and deprivation of the constitutional right under Article 14 read with Article 16(1) of the Constitution", of those persons who acquired eligibility for the post in question in accordance with the statutory rules subsequent to the date of notification of vacancies. Filling up the vacancies over the notified vacancies is neither permissible 'nor desirable, for the reason, that it amounts to "improper exercise of power and only in a rare and exceptional circumstance and in emergent situation, such a rule can be deviated from and such a deviation is permissible only after adopting policy decision based on some rationale", otherwise the exercise would be arbitrary. Filling up of vacancies over the notified vacancies amounts to filling up of future vacancies and thus, is not permissible in law."

18. In *State of Punjab v. Raghbir Chand Sharma* (2002) 1SCC 113, a two Judge Bench considered the questions as to when the recruitment process can be said to have come to an end and whether the select list can be operated qua the posts/ vacancies which become available due to resignation of the existing incumbent and answered the same in negative by making the following observations (SCC p 115, para 4):

> "4..... With the appointment of the first candidate for the only post in respect of which the consideration came to be made and select panel prepared, the panel ceased to exist and has outlived its utility and, at any rate, no one else in the panel can legitimately contend that he should have been offered appointment either in the vacancy arising on account of the subsequent resignation of the person appointed from the panel or any other vacancies

arising subsequently. The circular order dated 22-3-1957, in our view, relates to select panels prepared by the Public Service Commission and not a panel of the nature under consideration. That apart, even as per the circular orders as also the decision relied upon for the first respondent, no claim can be asserted and countenanced for appointment after the expiry of six months. We find no rhyme or reason for such a claim to be enforced before courts, leave alone there being any legally protected right in the first respondent to get appointed to any vacancy arising subsequently, when somebody else was appointed by the process of promotion taking into account his experience and needs as well as administrative exigencies."

19. In *Mukul Saikia v. State of Assam* (2009) 1 SCC 386, this Court held that once the appointments are made against the advertised posts, the select list gets exhausted and those who are placed below the last appointee cannot claim appointment against the posts which subsequently become available. Paragraph 33 of the judgment which contains discussion on this issue is reproduced below (SCC pp.394-95, para 33):

"33. At the outset it should be noticed that the select list prepared by APSC could be used to fill the notified vacancies and not future vacancies. If the requisition and advertisement was only for 27 posts, the State cannot appoint more than the number of posts advertised, even though APSC had prepared a select list of 64 candidates. The select list got exhausted when all the 27 posts were filled. Thereafter, the candidates below the 27 appointed candidates have no right to claim appointment to any vacancy in regard to which selection was not held. The fact that evidently and admittedly the names of the appellants appeared in the select list dated 17-7-2000 below the persons who have been appointed on merit against the said 27

vacancies, and as such they could not have been appointed in excess of the number of posts advertised as the currency of select list had expired as soon as the number of posts advertised are filled up, therefore, appointments beyond the number of posts advertised would amount to filling up future vacancies meant for direct candidates in violation of quota rules. Therefore, the appellants are not entitled to claim any relief for themselves. The question that remains for consideration is whether there is any ground for challenging the regularisation of the private respondents."

10. In view of the law laid down by the Supreme Court in the case of *Raj Rishi Mehra* (supra) and in view of the fact that the list is no longer alive. I do not find any merit or substance in the petition.

11. The petition filed by the petitioner being meritless is hereby dismissed.

Petition dismissed.

I.L.R. [2016] M.P., 1950
WRIT PETITION
Before Mr. Justice R.S. Jha
W.P. No.3292/2014 (Gwalior) decided on 16 September, 2015

PINKI MISHRA (Smt.) ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

Constitution - Article 226 - Principle of Natural Justice **- Show Cause Notice - Petition against the performance appraisal report and proposal to take action against the petitioner which has been forwarded to the competent authorities - Authority is yet to take any cognizance of it or act upon it or take a decision - Question of issuance of any notice to the petitioner by the authority forwarding the performance appraisal/proposal does not arise - Petition dismissed. (Para 9)**

संविधान – अनुच्छेद 226 – नैसर्गिक न्याय का सिद्धांत – कारण बताओ नोटिस – सक्षम प्राधिकारी को प्रेषित किए गए याची के विरूद्ध कार्यवाही करने के प्रस्ताव तथा कार्य आकलन प्रतिवेदन के विरूद्ध याचिका – प्राधिकारी द्वारा उस पर अभी कोई संज्ञान लेना अथवा उस पर कार्यवाही करना अथवा निर्णय लेना शेष है

– कार्य आकलन/प्रस्ताव प्रेषक प्राधिकारी द्वारा याची को कोई नोटिस जारी किये जाने का प्रश्न उत्पन्न नहीं होता – याचिका खारिज।

Cases referred:

2013 (I) MPWN 101, 2014(2) MPHT 531, AIR 1993 SC 2592, (2007) 1 SCC 331.

Deo Krishna Katare, for the petitioner.
R.B.S. Tomar, G.A. for the respondents/State.

(Supplied: Paragraph numbers)

ORDER

R.S. JHA, J. :- The petitioner has filed this petition being aggrieved by the communication dated 2-6-2014 sent by the Chief Medical and Health Officer, Datia, to the Director, National Rural Health Mission, Bhopal whereby he has proposed that action against the petitioner be taken for bringing the contractual service of the petitioner to an end.

2. Learned counsel appearing for the petitioner submits that the petitioner was engaged as Block Programme Manager by the order dated 4-8-2009 on contract basis for a period of one year. It is submitted that the period of the contractual appointment of the petitioner was extended from time to time for successive periods of one year.

3. It is submitted that the petitioner has been discharging duties regularly. However, the Chief Medical and Health Officer, Datia who has no power or authority to do so has sent the impugned communication to the Director which deserves to be quashed. It is submitted that no opportunity of hearing has been given to the petitioner prior to issuance of Annexure P/1 and, therefore, the impugned communication is violative of Article 14 of the Constitution of India as has been held in by this Court in the cases *Prem Chand Yadav V. Madhya Pradesh Poorva Kshetra Vidyut Vitarn Company Ltd*, 2013 (1) MPWN 101 and *Deepak Nagle V. State of M.P.*, 2014 (2) M.P.H.T. 531.

4. It is further submitted that the impugned communication deserves to be quashed on account of the fact that the respondent No. 3 has forwarded the impugned communication on account of malafides. The Learned counsel for the appellant has also contended that the averments made by the petitioner have not been denied and, therefore, in view of the decision of the

Supreme Court rendered in the case of *Smt. Naseem Bano Vs. State of U.P. & others,* AIR 1993 SC 2592 the same should be deemed to be admitted.

5. The respondents No.1 and 2 have filed a return and have stated that the petitioner was not discharging her duties properly and her conduct was very offensive, negligent and disobedient and as she had misbehaved with her senior officer, therefore, the competent authority who is required to send her performance appraisal for the purposes of considering the case of the contract employee for extention of the period of contract has stated the aforesaid aspect and has proposed the competent authority that the petitioner's contract appointment be cancelled. The respondents in the return have also stated that on the previous occasion also the petitioner was warned but she did not improve and, therefore, the authority had no option but to forward the aforesaid proposal to the competent authority. It is further contended that the petition filed by the petitioner is premature as the competent authority has not taken any final decision or passed any final order and the petition has been filed only against the proposal and not against the final order of the competent authority and, therefore, the petition be dismissed at this stage.

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

7. From a perusal of the impugned communication dated 2-6-2014 it is clear that the Chief Medical and Health Officer has not passed any order bringing to an end the contractual service of the petitioner. On the contrary it is apparent from a perusal of Annexure P/1 that he has referred the matter for decision to the Director, National Rural Health Mission, Bhopal with his proposal and, therefore, at the outset the contention of the learned counsel for the petitioner to the effect that the petitioner's contractual service has been brought to an end by respondent no. 3 without issuing notice or giving an opportunity or that the authority has passed an order which is stigmatic is factually misconceived. In fact the impugned letter has not even been issued to the petitioner and has been sent to the director and the director has not taken any further steps in the matter till date. In the facts and circumstances of the case as the petitioner's services have not been terminated as yet nor have any steps against the petitioner been taken pursuant to Annexure P-1 the reliance placed by the petitioner on the aforesaid decisions of this Court is misconceived as the said decisions have no applicability to the facts of the present case.

8. I may hasten to add that the aforesaid decisions of this Court relied upon

by the petitioner would be applicable only in cases where the authority concerned has terminated the contract of appointment during the period of its existence and such an order of termination of contract issued during the contractual period is stigmatic. In other words, where the contract has ceased to exist or has come to an end with the efflux of time and on that count the services come to an end then the question of issuance of notice etc. does not arise.

9. In the instant case, the present petition has been filed by the petitioner merely against the performance appraisal report and proposal to take action against the petitioner which has been forwarded to the competent authority and the authority is yet to take any cognizance of it or act upon it or take a decision in that regard and, therefore, in such circumstances, the question of issuance of any notice to the petitioner by the authority forwarding the performance appraisal/proposal does not arise and the contention to the contrary of the petitioner is misconceived and is hereby rejected.

10. In view of the aforesaid apparent facts, the contention of the learned counsel for the petitioner to the effect that the impugned order is an order in the form of a notice by placing reliance on the decision of the Supreme Court in the case of *Shekhar Ghosh Vs Union of India and another*, (2007) 1 SCC 331 is misconceived and is hereby rejected as the facts of the present case are totally different inasmuch as in the instant case the Chief Medical and Health Officer has not taken any decision in the matter nor has he issued any notice to the petitioner but has simply forwarded his report and proposal to the competent authority by letter dated 2-6-2014 and in such circumstances the aforesaid decision of the Supreme Court has no applicability to the facts and circumstances of the present case.

11. It is also pertinent to take note of the fact that there is nothing on record to indicate that the petitioner's contractual services have been extended except for a bald averment made in this regard by the petitioner. Even if it is assumed to be true that the petitioner's Contractual service was extended periodically for a period of one year from time to time, it is observed that the order of appointment is dated 4-8-2009 and was for a period of one year and therefore the extended period ends on 4th of August of each year including this year and there is nothing on record to indicate that it has been extended beyond that date in the current year.

12. As far as the contention of the petitioner regarding mala-fide is

concerned, it is settled law that the allegations made by the petitioner against the authority should be clear and specific. In the instant case the petitioner has not filed any specific document or mentioned any specific instance to indicate that the respondent No..3 harbours any mala-fide against the petitioner. On the contrary, it is evident from Annexure P-1 that the respondent No.3 himself has not taken any decision but has forwarded the matter to the competent authority against whom there are no allegations of mala-fide and who has yet not taken any decision or action in the matter which fact in itself belies the assertions of mala-fide made by the petitioner.

13. In view of the aforesaid facts and circumstances, I do not find any merit in the petition which is accordingly, dismissed with an observation that the petitioner, if so advised, may approach the authority to whom the respondent No. 3 has forwarded the matter for decision, by filing a representation before it. It goes without saying that the said authority concerned shall take action in accordance with law if occasion so arises.

14. With the aforesaid observations the petition filed by the petitioner stands dismissed.

Petition dismissed.

I.L.R. [2016] M.P., 1954
WRIT PETITION
Before Mr. Justice Prakash Shrivastava
W.P. No. 6323/2014 (Indore) decided on 14 October, 2015

VIJAY KUMAR MANDLOI ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

(Alongwith W.P. Nos. 6326/2014, 6329/2014 & 6331/2014)

Service Law - Continuation of Service **- Petitioner appointed as counsellor in RCH project on contractual basis on 13.06.2007 for one year, which was further extended up to 31.03.2010 - Contract was not renewed and services terminated on 15.09.2010 after giving one month's notice - No fresh advertisement for the post - Held - Contract period of petitioner is over and the project itself has come to an end, no case of interference - Petition dismissed. (Paras 4, 6, 7 & 12)**

सेवा विधि – सेवा जारी रखना – याची 13.06.2007 को एक वर्ष के लिए संविदा के आधार पर आर.सी.एच. परियोजना में परामर्शदाता के रूप में नियुक्त हुआ जिसे 31.03.2010 तक आगे बढ़ाया गया – संविदा नवीकृत नहीं की गई एवं एक माह का नोटिस देने के उपरांत 15.09.2010 को सेवाएं समाप्त कर दी गई – पद हेतु कोई नया विज्ञापन नहीं – अभिनिर्धारित – याची की संविदा अवधि समाप्त हो चुकी है एवं परियोजना स्वयं समाप्त हो चुकी है, हस्तक्षेप का प्रकरण नहीं – याचिका खारिज।

Cases referred:

W.P. No. 8982/2011 decided on 04.05.2012, 2013 (2) MPLJ 323, (2011) 15 SCC 16, AIR 1953 SC 250, 2004(2) MPLJ 306, (2007) 11 SCC 102.

Jitendra Verma, for the petitioner.
Rohit Mangal, for the respondents.

(Supplied: Paragraph numbers)

ORDER

PRAKASH SHRIVASTAVA, J. :- This order will govern disposal of WP Nos. 6323/14, 6326/14, 6329/14 & 6331/14 since it is jointly stated by counsel for the parties that all these writ petitions involve common issue in identical facts situation.

2. For convenience the facts have been noted from WP No.6323/14.

3. The petitioner was appointed on the post of Counsellor in pursuance to the advertisement and on expiry of the contract period his services were terminated by order dated 15/9/10. The petitioner had earlier filed writ petition No. 296/2011 alongwith other candidates and the writ petition was disposed of by order dated 27/8/11 with direction to the respondents to decide the petitioner's representation and to permit the petitioner to continue till the representation is decided and pay salary including arrears. The representation filed by petitioner was rejected by the respondents by order dated 23/5/12. Against the said order the petitioner had preferred WP No. 9711/12 which was dismissed by order dated 28/1/14. In writ appeal No.430/14 by order dated 25/7/14 the petitioner was permitted to withdraw writ appeal as well as writ petition with liberty to file a fresh petition and thereafter this writ petition has been filed.

4. Learned counsel for petitioner submits that no notice was given to the petitioner before terminating the services and order of termination is passed in violation of principle of natural justice. He has also prayed for continuation

of services of the petitioner on the basis of order dated 4/5/12 passed in writ petition No. 8982/2011 *(Takhat Singh and others Vs. State of MP & others).*

5. Learned counsel for respondents has opposed the writ petitions and has supported the impugned order of termination.

6. Having heard the learned counsel for the parties and on perusal of the record, it is noticed that petitioner was appointed on contract basis by order dated 13/6/07 for a period of one year and in terms of the agreement entered into between the parties the contract period was upto 31/3/08. Thereafter the contract period was extended upto 31/3/09 and then again by order dated 27/5/09 upto 31/3/2010 and thereafter the contract was not renewed and by order dated 15/9/10 the services of petitioner were terminated.

7. In the earlier round of litigation, Principal Seat of this court while passing the order dated 27/8/11 in WP No. 296/11 had not set aside the order dated 15/9/10 and had also not found any flaw in the said order but considering the orders passed in writ petition Nos. 13042/11(s), 13044/11(s) and 13048/11(s) the court had disposed of the writ petition with a direction to decide the representation and further direction to continue the petitioner. Copies of the orders passed in writ petition Nos. 13042/11(s), 13044/11(s) and 13048/11(s) have not been placed on record by the petitioner. Thereafter the case of petitioner has been examined in detail while deciding the petitioner's representation and by order dated 23/5/12 the petitioner's representation has been rejected finding that services of petitioner have been terminated in accordance with the terms of contract.

8. The impugned order dated 23/5/12 reveals that services of petitioner are no longer required and no fresh advertisement has been issued for appointing on said post. The record also reveals that at the time of contract appointment, the petitioner had executed an agreement which contains the condition that the appointee would not be entitled to claim regularisation and his services could be terminated by giving one month's notice or payment in lieu of notice.

9. The uncontroverted reply of respondents reveals that before terminating the services of petitioner one month's notice was given. Even otherwise the respondents have disclosed that petitioner was appointed as counsellor in RCH Project and project itself has come to an end.

10. Counsel for petitioner has placed reliance upon the judgment of this

Court in the matter of *Takhat Singh* (supra) but that was a case of discontinuance of service of male nurse which stands on different footing in respect to which there appears to be some scheme.

11. Counsel for petitioner has placed reliance upon judgment of Gwalior Bench of this court in the matter of *Prem Chand Yadav Vs. M.P. Poorva Kshetra Vidyut Vitaran Company Ltd* reported in 2013(2) MPLJ 323 but since in the present case services of petitioner have been terminated after giving one month 's notice and on expiry of period of contract therefore the petitioner is not entitled to the benefit of said judgment.

12. Supreme court in the matter of *Gridco Limited and another Vs. Sadananda Doloi and others* reported in (2011) 15 SCC 16 while considering the similar issue of termination of contract appointment has held as under:

> 41. It is also evident that the renewal of the contract of employment depended upon the perception of the management as to the usefulness of the respondent and the need for an incumbent in the position held by him. Both these aspects rested entirely in the discretion of the Corporation. The respondent was in the service of another employer before he chose to accept a contractual employment offered to him by the Corporation which was limited in tenure and terminable by three months' notice on either side. In that view, therefore, there was no element of any unfair treatment or unequal bargaining power between the appellant and the respondent to call for an over-sympathetic or protective approach towards the latter.
>
> 42. We need to remind ourselves that in the modern commercial world, executives are engaged on account of their expertise in a particular field and those who are so employed are free to leave or be asked to leave by the employer. Contractual appointments work only if the same are mutually beneficial to both the contracting parties and not otherwise."

13. In the matter of *Satish Chandra Anand Vs. The Union of India,* reported in AIR 1953 SC 250 the Four Judges Bench of Supreme court has laid down that the termination of contract appointee after notice as per contract

is neither a dismissal nor removal from service or reduction in rank but is an ordinary case of a contract being terminated by notice under one of its clauses and in such cases the remedy of writ is misconceived and if such an appointee has been denied any right under the contract, assuming he has any, then he should pursue in the ordinary Courts of the land such remedies for a breach as are open to him. It is also settled that if the order of termination of a contract apppointee is in innocuous and not on the basis of any allegation, no opportunity of hearing is necessary (See: *Brahamdutta Gupta Vs. State of MP & others*, reported in 2004(2) MPLJ 306). Supreme court also in the matter of *Gurbachan Lal Vs. Regional Engineering College Kurukshetra and others* reported in (2007) 11 SCC 102 in a case where the temporary employee had completed more than 10 years of continuous service has held that even such an employee cannot have right to continue when scheme on the basis of which he was appointed and was working itself has come to an end. It is settled that project/scheme employees appointment solely on basis of scheme are not entitled to regularisation specially when the scheme has come to end.

14. Keeping in view the above legal position and considering the facts of this case specially that contract period of the petitioners is over, and the project itself has come to an end, I am of the opinion that no case for interference in the impugned order is made out. The writ petitions are accordingly dismissed. The signed order be placed in the record of WP No. 6323/14 and copy whereof be placed in the record of connected writ petitions.

C.C. as per rules.

Petition dismissed.

I.L.R. [2016] M.P., 1958
WRIT PETITION
Before Mr. Justice Alok Aradhe
W.P. No. 8101/2015 (Gwalior) decided on 14 December, 2015

J.B. MANGARAM MAZDOOR SANGH. ...Petitioner
Vs.
J.B. MANGARAM KARAMCHARI UNION & ors. ...Respondents

A. ***Industrial Relations Act, M.P. (27 of 1960), Section 22 - Interpretation of Statute*** **- Section 22 provides for an appeal to the Industrial Court from the order passed by the Registrar under chapter**

III - Section 22 is not ambiguous and therefore heading appended to it cannot be referred as an aid in construing the provision and cannot be used for cutting down the application of clear words. (Para 7)

क. औद्योगिक संबंध अधिनियम, म.प्र. (1960 का 27), धारा 22 – कानून का निर्वचन – धारा 22 रजिस्ट्रार द्वारा अध्याय III के अंतर्गत पारित आदेश से उत्पन्न अपील को औद्योगिक न्यायालय के समक्ष प्रस्तुत किये जाने का उपबंध करती है – धारा 22 संदिग्धार्थ नहीं है एवं इसलिए इसके साथ संलग्न शीर्षक को उपबंध के अर्थान्वयन हेतु एक सहायता के तौर पर निर्देशित नहीं किया जा सकता एवं इसे स्पष्ट शब्दों की प्रयोज्यता को विखंडित करने हेतु भी प्रयुक्त नहीं किया जा सकता।

***B. Constitution - Article 227* - Petition against exparte interim order of stay passed by the Industrial Court - Held - Petitioner having remedy to approach the tribunal and to file application therein - Petition dismissed. (Para 8)**

ख. संविधान – अनुच्छेद 227 – औद्योगिक न्यायालय द्वारा पारित एकपक्षीय अंतरिम स्थगन आदेश के विरूद्ध याचिका – अभिनिर्धारित – याची को अधिकरण की शरण लेने एवं वहाँ आवेदन प्रस्तुत करने का उपचार प्राप्त है – याचिका खारिज।

***C. Practice - Appeal* - An appeal is the "right of entering a superior court and invoking its aid and interposition to redress an error of the Court below" and though procedure does surround an appeal the central idea is the right - The right is a statutory right and it can be circumscribed by the conditions of the statute granting it - It is not a natural or inherent right and cannot be assumed to exist unless provided by the statute. (Para 5)**

ग. परिपाटी – अपील – एक अपील "निचले न्यायालय की त्रुटि को दूर किये जाने हेतु वरिष्ठ न्यायालय की शरण लेने एवं उसकी सहायता तथा हस्तक्षेप का अवलंब लेने का अधिकार है" एवं यद्यपि, अपील की एक प्रक्रिया होती है, परंतु इसका केंद्रीय विचार अधिकार है – यह अधिकार एक कानूनी अधिकार है तथा इस अधिकार को प्रदान करने वाले कानून की शर्तों द्वारा इसे परिसीमित किया जा सकता है – यह एक नैसर्गिक अथवा अंतर्निहित अधिकार नहीं है तथा इसकी विद्यमानता उपधारित नहीं की जा सकती जब तक कि कानून द्वारा वह उपबंधित न हो।

***D. Interpretation of Statutes - Internal aids* - When the words are clear and unambiguous, marginal notes appended to a Section cannot be used for construing the Section - It is well settled that heading prefixed to Sections cannot control the plain words of the provision**

nor can they be used for cutting down the plain meaning of the words - Only in the case of ambiguity or doubt the heading or sub-heading may be referred to as an aid in construing the provision but even in such a case it could not be used for cutting down the wide application of the clear words used in the provision. (Para 5)

घ. कानूनों का निर्वचन – आंतरिक सहायताएँ – जब शब्द स्पष्ट एवं असंदिग्ध हों तब धारा के साथ संलग्न पार्श्व टिप्पणियाँ धारा के अर्थान्वयन हेतु प्रयुक्त नहीं की जा सकती हैं – यह सुस्थापित है कि धाराओं के पूर्व जोड़े गए शीर्षक उपबंध के साफ शब्दों को नियंत्रित नहीं कर सकते है तथा न ही उन्हें ऐसे शब्दों के स्पष्ट अर्थ को विखंडित करने हेतु उपयोग किया जा सकता है – केवल संदिग्धता अथवा शंका होने पर शीर्षक अथवा उप–शीर्षक को उपबंध के अर्थान्वयन हेतु एक सहायता के तौर पर निर्देशित किया जा सकता है, परंतु यहाँ तक कि ऐसे मामले में भी उपबंध में प्रयोग किये गये स्पष्ट शब्दों के विस्तृत उपयोजन को विखंडित करने हेतु इन्हें प्रयुक्त नहीं किया जा सकता है।

***E. Interpretation of Statutes* - Conflict between the plain language of the provision and the meaning of the heading or the title - In case of conflict between the plain language of the provision and the meaning of the heading or title, the heading or title would not control the meaning which is clearly and plainly discernible from the language of the provision there under. (Para 5)**

ङ. कानूनों का निर्वचन – उपबंध की साफ भाषा एवं शीर्षक अथवा नाम के अर्थ में विरोध – उपबंध की साफ भाषा एवं शीर्षक अथवा नाम के अर्थ में विरोध होने की दशा में, उक्त शीर्षक अथवा नाम, उसके अधीन उपबंध की भाषा से स्पष्टतः एवं साफ तौर पर दृष्टिगोचर होने वाले अर्थ को नियंत्रित नहीं करेगा।

Cases referred:

1985 MPLJ 481, (2004) 4 SCC 766, (2009) 3 SCC 240.

Alok Kumar Sharma, for the petitioner.
Kuldeep Bhargava, for the respondent No. 1.

ORDER

ALOK ARADHE, J. :- With the consent of parties, the matter is heard finally.

In this writ petition, under Article 227 of the Constitution of India the petitioner has assailed the validity of the *ex parte* interim order dated

16.11.2015, by which, the Industrial Court has stayed the order passed by the Registrar, Trade Union dated 31.10.2015 and has fixed the case for final arguments on 15.12.2015.

2. Facts giving rise to filing of the writ petition, briefly stated, are that petitioner is a registered Trade Union under the Trade Unions Act, 1926. The petitioner as well as respondent No.1 are the Trade Unions registered under the provisions of the Trade Unions Act. It is the case of the petitioner that respondent No.1 is a Union sponsored by the Management of the Undertaking and is no longer enjoying the support and faith of the majority of the workmen of the industry. The petitioner-union submitted an application under section 17 of the Madhya Pradesh Industrial Relations Act, 1960 (hereinafter referred to as the "Act") before the Registrar for its recognition as representative union for biscuits and confectionary industry for revenue district Gwalior in place of respondent No.1 on the ground that it has large number of membership of the employees in the industry. On receipt of the application, the Registrar issued a show-cause notice to respondent No.1 to show-cause as to why the petitioner be not recognized in place of respondent No.1. Pursuant to which, the respondent No.1 raised an objection before the Registrar. The Registrar after calling the necessary information and other relevant documents conducted hearing and by order dated 31.10.2015 decided the objection preferred by the respondent No.1 and held that respondent No.1 is unable to prove its majority. After rejection of the objections preferred by the respondent No.1 the Registrar observed that it is prepared to verify the physical verification about the majority of workman, as to who is associated with which Trade Union. The Registrar fixed the date for physical verification on 16.11.2015 and directed that verification shall be conducted by Assistant Labour Commissioner. Being aggrieved by the order dated 31.10.2015, the petitioner filed an appeal under section 22 of the Act before the Industrial Court. The Industrial Court by an *ex parte* interim order dated 16.11.2015 stayed the order of Registrar Trade Union and fixed the case for reply of the petitioner and final arguments on 15.12.2015. In the aforesaid factual background the petitioner visited this Court.

3. Learned counsel for the petitioner submitted that the appeal preferred by the respondent No.1 under section 22 of the Act is not mainainable as the appeal to the Industrial Court lies from the order of the Registrar cancelling the recognition. It is further submitted that the order of the Industrial Court is ineffective as the order of Registrar dated 31.10.2015 has already been carried out and no useful purpose would be served by staying the order of the Registrar.

4. On the other hand, learned counsel for respondent No.1 has submitted that since the Registrar has passed the order under Chapter III of the Act, therefore, the appeal under section 22 of the Act is maintainable. It is further submitted that order passed by the Industrial Court is an *ex parte* interim order and the petitioner is at liberty to file an application for vacating stay. In support of aforesaid submission, reliance has been placed on a Division Bench decision of this Court in *M.P.Bijlee Karmchari Mahasangh and others vs. Registrar of Representative Unions and others*, 1985 MPLJ 481.

5. I have considered the submissions made by learned counsel for the parties. An appeal is the "right of entering a superior court and invoking its aid and interposition to redress an error of the Court below and "though procedure does surround an appeal the central idea is a right. The right is a statutory right and it can be circumscribed by the conditions of the statute granting it. It is not a natural or inherent right and cannot be assumed to exist unless provided by statute. [See: Principles of Statutory Interpretation, 14th Edition by Justice G.P.Singh]. It is well settled that marginal notes appended to section cannot be used for construing the section. It is well settled that the headings prefixed to sections cannot control the plain words of the provision; they cannot also be referred to for the purpose of construing the provision when the words used in the provision are clear and unambiguous; nor can they be used for cutting down the plain meaning of the words in the provision. Only in the case of ambiguity or doubt, the heading or sub-heading may be referred to as an aid in construing the provision but even in such a case it could not be used for cutting down the wide application of the clear words used in the provision. It is permissible to assign the headings or title to a section a limited role to play in the construction of statutes. They may be taken as a very broad and general indicators of the nature of the subject matter dealt with thereunder. The heading or title may also be taken as a condensed name assigned to indicate collectively the characteristics of the subject matter dealt with by the enactment underneath; though the name would always be brief having its own limitations. In case of conflict between the plain language of the provision and the meaning of the heading or title, the heading or title would not control the meaning which is clearly and plainly discernible from the language of the provision thereunder. [See: *Raichurmatham Prabhakar Rawatmal Dugar*, (2004) 4 SCC 766 and *Karnataka Power Transmission Corporation v. Ashok Iron Works Pvt. Ltd.*, (2009) 3 SCC 240.]

6. In the backdrop of well settled legal position the provisions of the Act

may be noticed. Chapter III of the Act deals with the recognition of representative unions and association of employees. Section 17 of the Act deals with recognition of another union in place of existing representative union. Section 17 stipulates that any Union may make an application to the Registrar for being recognized in place of Union already recognized as the representative union for an industry in a local area on the ground that it has large membership of the employees employed in such industry. Section 22 of the Act, which is relevant for the purpose of controversy involved in the *lis*, read as under:-

> "22. Appeal to Industrial Court from order of Registrar cancelling recognition.- (1) Any party in a proceeding before the Registrar may, within thirty days from the date of the communication of the order passed by the Registrar under this Chapter, appeal against such order to the Industrial Court:
>
> Provided that the Industrial Court may, for sufficient reason, admit any appeal made after the expiry of such period.
>
> (2) The Industrial Court may admit an appeal under sub-section (1) if on a perusal of the memorandum of appeal and the decision appealed against it finds that the decision is contrary to law or is otherwise erroneous.
>
> (3) The Industrial Court in appeal may confirm, modify or rescind any order passed by the Registrar and may pass such consequential orders as it may deem fit. A copy of the orders passed by the Industrial Court shall be sent to the Registrar."

7. From perusal of section 22 of the Act it is evident that it provides for an appeal from the order passed by the Registrar under Chapter III to the Industrial Court. Sub-section (3) of Section 22 of the aforesaid Act further provides that Industrial Court in any appeal may confirm, modify or rescind any order passed by the Registrar and may pass such consequential orders as it may deem fit. Thus, Section 22 of the Act is not ambiguous. Therefore, heading appended to it cannot be referred to as an aid in construing the provision and cannot be used for cutting down the application of clear words which provides for an appeal against the order passed under Chapter III of the Act. Admittedly, the order dated 31.10.2015 has been passed under Chapter III of the Act. Therefore, the Act itself confers statutory right to an aggrieved person to file an appeal. In view of preceding analysis the contention raised on behalf of the petitioner that an appeal filed by the respondent No.1 is not maintainable before the Indsutrial Court is required to be

stated to be rejected.

8. It is also pertinent to mention here that the order impugned in this writ petition is an *ex parte* interim order and the petitioner has a remedy to approach the Industrial Tribunal and to file an application for stay in the proceeding which are pending before the Industrial Court. For this reason also, I am not inclined to interfere with the ad interim *ex parte* order in exercise of writ jurisdiction of this Court.

9. In the result, the writ petition fails and is hereby dismissed.

Petition dismissed.

I.L.R. [2016] M.P., 1964
WRIT PETITION
Before Mr. Justice A.M. Khanwilkar, Chief Justice &
Mr. Justice K.K. Trivedi
W.P. No. 9951/2015 (Jabalpur) decided on 6 January, 2016

BANWARI LAL YADAV ...Petitioner
Vs.
HIGH COURT BAR ASSOCIATION ...Respondent

***Advocates Act, (25 of 1961), Sections 7, 34, 48a & 49 - Constitution - Article 145 & 226 - Strike* - Petitioner expelled from the membership of Bar Association in the backdrop of defiance of petitioner to abide by resolution passed by Bar Association to abstain from Court work - In view of law expounded by Supreme Court in the case of Harish Uppal (Ex. Capt.) Vs. Union of India, the decision taken by Bar Association is non-est in the eyes of law - Petition allowed. (Para 2)**

अधिवक्ता अधिनियम (1961 का 25)ए धाराएँ 7, 34, 48ए व 49 – संविधान – अनुच्छेद 145 व 226 – हड़ताल – अभिभाषक संघ द्वारा पारित, न्यायालयीन कार्य से विरत रहने के संकल्प का पालन करने में याची की अवज्ञा के कारण, अभिभाषक संघ की सदस्यता से याची को निष्कासित किया गया – हरीश उप्पल (पूर्व कैप्टन) विरूद्ध यूनियन ऑफ इंडिया के याची को प्रकरण में उच्चतम न्यायालय द्वारा प्रतिपादित विधि के आलोक में, अभिभाषक संघ द्वारा लिया गया निर्णय विधि की दृष्टि में शून्य है – याचिका मंजूर।

Case referred:

2003(2) SCC 45.

Ajay Shukla, for the petitioner.
Gaurav Tiwari, for the respondent.

(Supplied: Paragraph numbers)

ORDER

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

2. This petition takes exception to the decision of the Bar Association dated 12.5.2015 taken pursuant to show-cause notice dated 30.4.2015 in the backdrop of defiance of the petitioner to abide by the resolution passed by the Bar Association to abstain from the Court. The law on this subject is no more *res integra*. The Constituion Bench of the Supreme Court in *Ex-Capt.Harish Uppal Vs. Union of India and others* – 2003(2) SCC 45 has expounded that the Bar Association cannot threaten the Advocates nor take any action against them who want to appear before the Court by disregarding the protest call given by the Bar Association on the given day. Paragraph 35 of the reported decision reads thus :

> "35. In conclusion, it is held that lawyers have no right to go on strike or give a call for boycott, not even on a token strike. The protest, if any is required, can only be by giving press statements, TV interviews, carrying out a Court premises banners and/or placards, wearing black or white or any colour arm bands, peaceful protest marches outside and away from Court premises, going on dharnas or relay fasts etc. **It is held that lawyers holding Vakalats on behalf of their clients cannot not attend Courts in pursuance of a call for strike or boycott. All lawyers must boldly refuse to abide by any call for strike or boycott. No lawyer can be visited with any adverse consequences by the Association or the Council and no threat or coercion of any nature including that of expulsion can be held out**. It is held that no Bar Council or Bar Association can permit calling of a meeting for purposes of considering a call for strike or boycott and requisition, if any, for such meeting must be ignored. It is held that only in the rarest of rare cases where the dignity, integrity and independence of the Bar and/or the Bench are at stake,

Courts may ignore (turn a blind eye) to a protest abstention from work for not more than one day. It is being clarified that it will be for the Court to decide whether or not the issue involves dignity or integrity or independence of the Bar and/or the Bench. Therefore in such cases the President of the Bar must first consult the Chief Justice or the District Judge would be final and have to be abided by the Bar. It is held that Courts are under no obligation to adjourn matters because lawyers are on strike. On the contrary, it is the duty of all Courts to go on with matters on their boards even in the absence of lawyers. In other words, Courts must not be privy to strikes or calls for boycotts. **It is held that if a lawyer, holding a Vakalat of a client, abstains from attending Court due to a strike call, he shall be personally liable to pay costs which shall be addition to damages which he might have to pay his client for loss suffered by him."**

(emphasis supplied)

3. In view of the settled legal position, the impugned action taken by the Bar Association to expel the petitioner is nonest in the eyes of law and must be treated as such for all purposes.

4. Petition is **allowed.**

Petition allowed.

I.L.R. [2016] M.P., 1966
WRIT PETITION
Before Mr. Justice P.K. Jaiswal & Mr. Justice Vivek Rusia
W.P. No. 2390/2013 (Indore) decided on 20 April, 2016

CHHAYA KOTHARI (SMT.) & ors. ...Petitioners
Vs.
UJJAIN MUNICIPAL CORPORATION,
UJJAIN & ors. ...Respondents

***Land Acquisition Act (1 of 1894), Sections 4(1), 17(1) & 17 (4) - Question of fact* - Petitioners are claiming ownership of the land over which the road is being constructed - But respondents are denying the ownership - Whether petitioners are owner of the land or it is a**

government land is a serious disputed question of fact, which cannot be decided in the Writ Petition - Writ Petition dismissed with liberty to challenge the order and ownership of the land in the question in accordance with the law before the appropriate forum. (Para 16)

भूमि अर्जन अधिनियम (1894 का 1), धाराएँ 4(1), 17(1) व 17 (4) – तथ्य का प्रश्न – याचीगण ने उस भूमि के स्वामित्व का दावा किया है, जिस पर सड़क निर्मित की जा रही है – परंतु प्रत्यर्थीगण ने स्वामित्व से इंकार किया है – क्या याचीगण भूमि के स्वामी हैं अथवा यह शासकीय भूमि है, यह तथ्य का एक ऐसा गंभीर विवादित प्रश्न है, जिसे रिट याचिका में विनिश्चित नहीं किया जा सकता – आदेश एवं प्रश्नगत भूमि के स्वामित्व को विधि अनुसार समुचित फोरम के समक्ष चुनौती देने की स्वतंत्रता के साथ रिट याचिका खारिज।

Cases referred:

AIR 2012 SC 412, AIR 2011 SC 2582, 1999 (2) MPLJ 714, (1997) 1 SCC 134, (2008) 9 SCC 552, (2002) 4 SCC 160.

M.K. Jain, for the petitioners.

Sunil Jain, Addl. A.G. with *Pushyamitra Bhargava,* Dy. A.G. for the respondents.

Anil Ojha, for the intervener.

ORDER

The Order of the Court was delivered by : VIVEK RUSIA, J. :- Petitioners No.1 to 6 have filed the present petition through power of attorney holder Shri Ramanlal and Aakesh Jain. Petitioners being residents of House No.1 are claiming ownership of the property situated at Khidwadkar Marg, Ujjain known as Premchaya Parisar. In the first round of litigation, the petitioners approached this Court by way of writ petition No.4401/2011 challenging action of the respondent Municipal Corporation, Ujjain by which widening of road was proposed by demolishing their house. In the said writ petition notices were issued and interim protection was granted in the nature of maintaining status quo till the next date of hearing. During pendency of the said writ petition, notification under section 4(1) read with section 17(1) of the Land Acquisition Act 1894 was issued which was published in the gazette notification dated 02.11.2012 by which some portion of house and land of Premchaya Parisar and Mastram Akhara were proposed to acquire for construction of new and widening of road for public purpose.

Being aggrieved by the notification under section 4(1) and 17(1) of the Act of 1894, petitioners have filed the present writ petition. Vide order dated 06.03.2013 notices were issued to the respondents and thereafter vide order dated 04.04.2014 respondents were restrained not to carry out any demolition activities.

2. That since the present petition was filed and in which the interim relief was granted by this Court the writ petition earlier filed i.e. W.P.No.4401/2011 was disposed of vide order dated 14.08.2013 because the respondents No.1 & 2 have already initiated proceedings for taking possession of the land as per the Land Acquition (sic:Acquisition) Act, 1894. By way of interim protection, respondents were directed not to dispossess the petitioners without following the prescribed procedure under the Land Acquisition Act.

3. Petitioners have filed the present petition challenging the notification under section 4(1) of the Land Acquisition Act mainly on the ground of mala fides and availability of alternative roads in the relevant areas. The contention of the petitioners is that respondents wanted to vacate the premises of Mastram Akhada which is occupied by the tenants, hence the present road has been proposed for construction. Petitioners have also contended that the urgency clause under section 17(1) of the Land Acquisition Act has wrongly been invoked as there is no urgency arises in the present facts and circumstances.

4. That after notice respondents No.1 & 2 have filed detailed return in which the ownership of the petitioners was denied and disputed. It is contended that the Municipal Corporation, Ujjain has passed a resolution for acquisition of the land for construction of road and request was sent to the Government vide letter dated 17.04.2012 for initiating the proceeding under the Land Acquisition Act. On the basis of the proposal sent by the Municipal Corporation, Ujjain, the Land Acquisition Officer has registered a case as 4397/Land Acquisition/2013. The notification under section 4(1) and 6 has been published and notified in the gazette notification. Thereafter permission has been obtained to initiate proceedings under section 17(1) and 17(4) of the Land Acquisition Act. The Municipal Corporation, Ujjain has already deposited an amount of Rs.3,21,40,361/- in the office of Land Acquisition Officer for payment of compensation after award. The allegation of mala fide was specifically denied by the respondents. It was submitted that the new road is proposed from Chamunda Temple to New Road through Prem Chhaya premises and Bhatgali and for the said purpose an amount of Rs.575 lacs

have already been sanctioned. The said land is also proposed in the Ujjain Development Plan 2011 & 2021 in anticipation of expecting crowd in the upcoming Sinhasta, 2016. There is a public purpose behind the construction of the new road and the acquisition proceedings.

5. The Municipal Corporation, Ujjain has also filed an independent return denying the allegation made in the writ petition and in para-b has specifically stated that the house of the petitioner is situated at survey No.1977 area 2.749 hectares which is "Abadi land" and the construction comes under the category of illegal construction. Despite that the Executive Engineer, P.W.D, Municipal Corporation, Ujjain has assessed the compensation of Rs.7,80,840/- payable to the petitioners. It is further contended that during pendency of the writ petition Land Acquisition Officer has passed the final award dated 06.01.2015 which is filed as Annexure R-3/2. In the award the Land Acquisition Officer in para-7 has mentioned the status of the land claimed by the petitioners. Para-7 of the award reads as under:-

> प्रकरण का अवलोकन किया गया। प्रकरण में प्रस्तुत खसरा वर्ष 1971–72 एवं 1972–73 में सर्वे कमांक 1977 रकबा 2.749 कॉलम नंबर 2 मे आबादी नजूल अंकित है और कॉलम नंबर 12 में शा.प्रा'वि., शा.मा.वि., शा.उ.मा.वि. दौलतगंज का इंद्राज है। इसी प्रकार सर्वे कमांक 1978 रकबा 0.240 हेक्टर आबादी नजूल की भूमि होने का उल्लेख कॉलम नंबर 2 में पाया गया। इसी प्रकार सर्वे कमांक 1977 खसरा वर्ष 2008–09 में आबादी नगर पालिका निगम एवं कॉलम नंबर 12 में शाप्रा' वि., शा.मा.वि., शा.उ.मा.वि. दौलतगंज उज्जैन है। कलेक्टर कार्यालय नजूल जिला उज्जैन के पत्र कमांक रीडर/नजूल/2012/14226 दिनांक 01.05.2012 के अनुसार सर्वे कमाकर 1977 रकबा 2..749 हेक्टर आबादी नगर पालिका निगत दर्ज है एवं कॉलम नंबर 12 कैफियत में भी शा.प्रा'वि., शा.मा.वि., शा.उ.मा.वि. दौलतगंज उज्जैन है। उक्त स्थिति से स्पष्ट है कि भू–अर्जन में अधिग्रहित होने वाली भूमि स्वामित्व की भूमि नही है। ऐसी दशा मे अपने स्वामित्व की भूमि के खसरा प्रति इत्यादि दस्तावेज प्रस्तुत करने हेतु हितबद्ध पक्षकारो का सुनवाई हेतु आहुत करना आवश्यक प्रतीत हुआ।

6. The Land Acquisition officer has issued notice to the petitioners with the direction to submit documents relating to the title. In para-8 which has specifically mentioned that despite notice they have failed to produce any documents relating to the title. As per the revenue records, the land which was proposed to be acquired was government land, hence the payment of compensation was denied but on the basis of the report of the Executive

Engineer the amount of Rs.7,80,840/- was directed to be paid subject to the outcome of the writ petition No.2390/2013. In view of the above, the respondent No.3 prayed for dismissal of the writ petition. Along with the return an application for urgent hearing and vacation of stay was filed on the ground that except the land in possessions of the petitioners the remaining road has already been constructed by the respondents.

7. That with the consent of the parties, the writ petition was heard finally today looking to the urgency in the matter at motion hearing stage.

8. That Mr.M.K.Jain, counsel for the petitioners have contended that they are the owner of the land and they cannot be dispossessed without payment of adequate compensation. Petitioners have also contended that there was no reasons to initiate urgency clause under section 17(1) and 17(4) of the Land Acquisition Act as there was no urgency in the matter. The respondents ought to have initiated proceedings under section 4,6 and 9 and thereafter 12 of the Land Acquisition Act before passing the final award. The petitioners are also aggrieved by the less amount of compensation awarded by the Land Acquisition Officer. In support of the contentions the counsel for the petitioners have placed reliance of judgment passed by the Supreme Court in the case of *Darshan Lal Nagpal (dead) by L.Rs. Vs. Government of NCT of Delhi & Ors.* reported in AIR 2012 SC 412. Para-14 of the judgment reads as under:-

> 14. What needs to be emphasized is that although in exercise of the power of eminent domain, the State can acquire the private property for public purpose, it must be remembered that compulsory acquisition of the property belonging to a private individual is a serious matter and has grave repercussions on his Constitutional right of not being deprived of his property without the sanction of law – Article 300A and the legal rights. Therefore, the State must exercise this power with great care and circumspection. At times, compulsory acquisition of land is likely to make the owner landless. The degree of care required to be taken by the State is greater when the power of compulsory acquisition of private land is exercised by invoking the provisions like the one contained in Section 17 of the Act because that results in depriving the owner of his property without being afforded an opportunity of hearing.

9. He has also placed reliance on the judgment of *Devendra Singh & Ors. Vs. State of UP & Ors.* reported in AIR 2011 SC 2582. Para-9 of the judgment reads as under:-

> 9. In view of the above it is well settled that acquisition of the land for public purpose by itself shall not justify the exercise of power of eliminating enquiry under Section 5-A in terms of Section 17(1) and Section 17(4) of the Act. The Court should take judicial notice of the fact that certain public purpose such as development of residential, commercial, industrial or institutional areas by their intrinsic nature and character contemplates planning, execution and implementation of the schemes which generally takes time of few years. Therefore, the land acquisition for said public purpose does not justify the invoking of urgency provisions under the Act. In *Radhey Shyam* (2011) 5 SCC 559 (supra), this Court, whilst considering the conduct or attitude of the State Government vis-a-vis urgency for acquisition of the land for the public purpose of planned industrial development in District Gautam Budh Nagar has observed:
>
> *"In this case, the Development Authority sent the proposal sometime in 2006. The authorities up to the level of the Commissioner completed the exercise of survey and preparation of documents by the end of December 2006 but it took one year and almost three months for the State Government to issue notification under Section 4 read with Sections 17(1) and 17(4). If this much time was consumed between the receipt of proposal for the acquisition of land and issue of notification, it is not possible to accept the argument that four to five weeks within which the objections could be filed under sub-section (1) of Section 5-A and the time spent by the Collector in making enquiry under subsection (2) of Section 5-A would have defeated the object of the acquisition.*

10. Counsel for the petitioners have also argued on the point of mala fides but the allegations are very vague in nature and are not supported by any material.

11. Per contra, Shri Sunil Jain, learned Additional Advocate General for the respondents has argued that government has rightly exercised the urgency clause looking to the upcoming Simhastha, 2016 at Ujjain. There is no mala fides behind the construction of new road and in a land acquisition proceeding the scope of judicial review is very limited and interference in the policy matter without illegality is impermissible. He has placed reliance over the judgment passed by the Full Bench of the High Court of Madhya Pradesh in the matter of *Siyaram and others Vs. State of M.P and others* reported in 1999 (2) MPLJ 714. Para- 33 and 37 of the judgment reads as under:-

> 33. So far as the question relating to vagueness of the notification is concerned, suffice it to say that in the case of an acquisition of a large area of land comprising several plots belonging to different persons, the specification of the purpose can only be with reference to the acquisition of the whole area. Unlike in the cases of a small area, it may be practically difficult to specify the particular public purpose for which each and every item of land comprised in the area is needed. As observed by the Apex Court in its decision in the case of *State of T.N and others vs. L.Krishnan and others*, reported in 1996 (1) SCC 250, it is not appropriate to insist upon the Government particularising the use of each and every bit of the land so notified would be put to.
>
> 37. In fact, as clarified by the Apex Court in its decision in the case of *Ramniklal N.Bhutta and another Vs. State of Maharashtra and others*, reported in 1997 (1) SCC 134, the power under Article 226 of the Constitution is discretionary. It has to be exercised only in furtherance of interests of justice and not merely on the making out of a legal point and in the matter of land acquisition for public purposes, the interests of justice and the public interest coalesce. The courts have to weigh the public interest vis-a-vis the private interest while exercising the power under Article 226 of the constitution and it is open to the High Court to direct, in case it finds finally that the acquisition was vitiated on account of non-compliance with some legal requirement that the persons interested shall also be entitled to a particular amount of damages to be awarded

as a lump sum or calculated at a certain percentage of compensation payable. It was made amply clear that there are many ways of affording appropriate relief and redressing a wrong. The quashing of the acquisition proceedings is not the only mode of redress and it is ultimately a matter of balancing the competing interests.

12. He has also relied judgment of *Ramniklal N.Bhutta and another Vs. State of Maharashtra and others* reported in (1997) 1 SCC 134 on the point that the Court should keep its public interest in mind while exercising its powers and while granting stay/injunction in the matter of land acquisition. Para-10 of the judgment reads as under:

> 10. Before parting with this case, we think it necessary to make a few observations relevant to land acquisition proceedings. Our country is now launched upon an ambitious programme of all-round economic advancement to make our economy competitive in the world market. We are anxious to attract foreign direct investment to the maximum extent. We propose to compete with china economically. We wish to attain the pace of progress achieved by some of the Asian countries, referred to as "Asian tigers". e.g., South Korea, Taiwan and Singapore. It is, however, recognized on all hands that the infrastructure necessary for sustaining such a pace of progress is woefully lacking in our country. The means of transportation, power and communications are in dire need of substantial improvement, expansion and modernisation. These things very often call for acquisition of land and that too without any delay. It is, however, natural that in most of these cases, the persons affected challenge the acquisition proceedings in courts. These challenges are generally in the shape of writ petitions filed in High Courts. Invariably, stay of acquisition is asked for and in some cases, orders by way of stay or injunction are also made. Whatever may have been the practices in the past, a time has come where the courts should keep the larger public interest in mind while exercising their power of granting stay/injunction. The power under Article 226 us discretionary. It will be exercised only in furtherance of interests of justice and not

merely on the making out of a legal point. And in the matter of land acquisition for public purposes, the interests of justice and the public interest coalesce. They are very often one and the same. Even in a civil suit, granting of injunction or other similar orders, more particularly of an interlocutory nature, is equally discretionary. The courts have to weigh the public interest vis-a-vis the private interest while exercising the power under Article 226 – indeed any of their discretionary powers. It may even be open to the high Court to direct, in case it finds finally that the acquisition was vitiated on account of non-compliance with some legal requirement that the persons interested shall also be entitled to a particular amount of damages to be awarded as a lump sum or calculated at a certain percentage of compensation payable. There are many ways of affording appropriate relief and redressing a wrong; quashing the acquisition proceedings is not the only mode of redress. To wit, it is ultimately a matter of balancing the competing interests. Beyond this, it is neither possible nor advisable to say. We hope and trust that these considerations will be duly borne in mind by the courts while dealing with challenges to acquisition proceedings.

13. He has also placed reliance over the judgment of Hon.Supreme Court in the case of *Sooraram Pratap Reddy and others Vs. District Collector, Ranga Reddy District and others* reported in (2008) 9 SCC 552 and para-5 of the judgment in the matter of *First Land Acquisition Collector and others Vs. Nirodhi Prakash Gangoli and another* reported in (2002) 4 SCC 160 on the point of scope of judicial review in the matter of land acquisition. Para-5 reads as under:-

> **5.** The question of urgency of an acquisition under Sections 17(1) and (4) of the Act is a matter of subjective satisfaction of the Government and ordinarily it is not open to the court to make a scrutiny of the propriety of that satisfaction on an objective appraisal of facts. In this view of the matter when the Government takes a decision, taking all relevant considerations into account and is satisfied that there exists emergency for invoking powers under Sections 17(1) and (4)

of the Act, and issues notification accordingly, the same should not be interfered with by the court unless the court comes to the conclusion that the appropriate authority had not applied its mind to the relevant factors or that the decision has been taken by the appropriate authority mala fide. Whether in a given situation there existed urgency or not is left to the discretion and decision of the authorities concerned. If an order invoking power under section 17(4) is assailed, the courts may enquire whether the appropriate authority had all the relevant materials before it or whether the order has been passed by non-application of mind. Any post notification delay subsequent to the decision of the State Government dispensing with an enquiry under section 5-A by invoking powers under section 17(1) of the Act would not invalidate the decision itself specially when no mala fides on the part of the Government or its officers are alleged. Opinion of the State Government can be challenged in a Court of law if it could be shown that the State Government never applied its mind to the matter or that action of the State Government is mala fide. Though the satisfaction under Section 17(4) is a subjective one and is not open to challenge before a court of law, except for the grounds already indicated but the said satisfaction must be as to the existence of an urgency. The conclusion of the Government that there was urgency, even though cannot be conclusive, but is entitled to great weight, as has been held by this Court in *Jage Ram V. State of Haryana*. Even a mere allegation that power was exercised mala fide would not be enough and in support of such allegation specific materials should be placed before the court. The burden of establishing mala fides is very heavy on the persons who alleges it. Bearing in mind the aforesaid principles, if the circumstances of the case in hand are examined it would appear that the premises in question were required for the students of National Medical College, Calcutta and notification issued in December 1982 had been quashed by the Court and the subsequent notification issued on 25-2-1994 also had been quashed by the Court. It is only thereafter the notification was issued under Sections 4(1) and 17(4) of the Act on 29.11.1994,

which came up for consideration before the High Court. Apart from the fact that there had already been considerable delay in acquiring the premises in question on account of the intervention by courts, the premises were badly needed for the occupation by the students of National Medical college Calcutta. Thus, existence of urgency was writ large on the facts of the case and therefore, the said exercise of power in the case in hand, cannot be interfered with by a court of law on a conclusion that there did not exist any emergency. The conclusion of the Division Bench of the Calcutta High Court, therefore, is unsustainable.

14. Mr.Anil Ozjha, Counsel for the intervener has supported and adopted the argument of Additional Advocate General and submitted that entire road has already been constructed except the part occupied by the petitioners due to the interim order and public at large is suffering because of the jam in the traffic.

15. Petitioner has challenged the acquisition on the ground that there is no public purpose behind the acquisition of their property is liable to be rejected solely on the ground that whether acquisition is for public purpose or not is the discretion of the government. The word "public purpose" is defined under clause (f) of section 2 of the Act which has very wide amplitude. The Hon'ble Supreme Court has considered the public purpose in the case of *Sooraram Pratap Reddy and others Vs. District Collector, Ranga Reddy District and others* reported in (2008) 9 SCC 552 and has held that an appropriate government may acquite (sic:acquire) land for any public purpose and in para 119 it has further held that government is the best judge to decide whether acquisition is for public purpose and in such matter a writ Court will not interfere by substituting its judgment against the judgment of government. In view of the above, the argument of the counsel for the petitioners is liable to be rejected that there is no public purpose behind the acquisition. The reasons are already mentioned in the notification that the land is being acquired for construction of the public road which definitely comes under the category of public purpose.

16. In view of above submission of parties, we are of the opinion that in the present case though the petitioners are claiming ownership of the land over which the road is being constructed but the respondents are denying the ownership. Whether petitioners are owners of the land or it is a government

land is serious disputed question of fact which cannot be decided in the present writ petition. Even the Land Acquisition Officer gave a liberty to the petitioners to place the material relating to the ownership. The petitioners have failed to produce or did not produce any material before the Land Acquisition Officer. On the basis of the revenue records as reproduced in para-7 of the award the Land Acquisition Officer has passed the final award dated 05.01.2015 during pendency of the present petition. The petitioners have a remedy under section 18 seeking reference for challenging the award if they are aggrieved by the quantum and the finding recorded by the Land Acquisition officer. The reasons best known to the petitioners have not challenged the award so far. Since the disputed question of facts are involved the same cannot be decided in the writ petition and especially when the final award has already been passed and as per the contention of the respondents major work of the construction of the road has already been completed, therefore, we have no option but to dismiss the present writ petition with liberty to the petitioners to challenge the award and ownership of the land in question in accordance with law before the appropriate forum.

17. Petition is accordingly dismissed.

Petition dismissed.

I.L.R. [2016] M.P., 1977
WRIT PETITION
Before Mr. Justice Anand Pathak
W.P. No. 1640/2014 (Gwalior) decided on 3 May, 2016

SHYAM KISHORE DIXIT ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

Service Law - Promotion - Value of Assessment made by the reporting officer in ACR **- Held - Assessment made by the reporting officer is of paramount importance in the series of the authorities which assessed the performance of an employee for the purpose of Writing ACR and cannot be overlooked or ignored by the reviewing officer or accepting officer in a casual manner - Objectivity is required to disagree with the assessment of reporting officer so as to reach to a conclusion about the exact performance of the employee - Held - ACRs should not be used as a tool to settle scores - Petitioner constantly received**

excellent grades by his reporting officer - Respondents directed to consider the case of the petitioner on his filing representation and to convene review DPC, if petitioner is found eligible.(Paras 13, 15 & 17)

सेवा विधि – पदोन्नति – रिपोर्ट देने वाले अधिकारी द्वारा वार्षिक गोपनीय प्रतिवेदन में किये गये आकलन का मूल्य – अभिनिर्धारित – वार्षिक गोपनीय प्रतिवेदन लिखे जाने के उद्देश्य से किसी कर्मचारी के कार्य का आकलन करने वाले प्राधिकारियों के क्रम में रिपोर्ट देने वाले अधिकारी द्वारा किया गया आकलन सर्वाधिक महत्वपूर्ण होता है एवं पुनर्विलोकन अधिकारी अथवा स्वीकारकर्ता अधिकारी द्वारा इसे अनौपचारिक रूप से अनदेखा अथवा उपेक्षित नहीं किया जा सकता – रिपोर्ट देने वाले अधिकारी के आकलन से असहमत होने के लिए तटस्थता अपेक्षित है जिससे कि कर्मचारी के निश्चित कार्य संपादन के बारे में निष्कर्ष पर पहुँचा जा सके – अभिनिर्धारित – वार्षिक गोपनीय प्रतिवेदनों को हिसाब बराबर करने के लिए एक औजार के रूप में उपयोग नहीं किया जाना चाहिए – याची को उसके रिपोर्ट देने वाले अधिकारी द्वारा निरंतर उत्कृष्ट श्रेणियाँ प्रदान की गई है – याची द्वारा अभ्यावेदन प्रस्तुत करने पर उसके मामले को विचार में लेने तथा याची के अर्ह पाये जाने की दशा में पुनर्विलोकन विभागीय पदोन्नति की बैठक आयोजित करने हेतु प्रत्यर्थीगण को निदेशित किया गया।

Cases referred:

(2008) 8 SCC 725, (2013) 9 SCC 566.

Prashant Sharma, for the petitioner.
Sangeeta Pachori, G.A. for the respondents/State.

ORDER

ANAND PATHAK, J. :- With the consent of parties matter is finally heard.

1. The petitioner in this petition has assailed the order dated 22-01-2014 passed by the Engineer-in-chief, Rural Engineering Services by Annexure P/1 wherein the representation of petitioner in pursuance to the order passed in Writ Petition No.7724/2013 has been rejected. Through the said representation, petitioner has sought promotion from the post of Sub Engineer to the post of Assistant Engineer in respondent No.1 department.

2. As per the submission of petitioner, he was appointed as Sub Engineer in Rural Engineering Services Department on 09-01-1983. Further submission of the petitioner is that his name was reflected at serial No.355 in the gradation

list issued by the department as on 01-04-2014. As per the fit list issued by the Development Commissioner on 05-02- 2012, petitioner was at serial No.120 and was fit for consideration for promotion. On 29-08-2013 the Departmental Promotion Committee was convened but did not consider the case of petitioner and found him unfit for promotion because of not fulfilling the criterion/benchmark prescribed by the Departmental Promotion Committee (DPC). On 03-10-2013 promotion list has been issued by the department, ignoring the claim of the petitioner for promotion and junior officers to the petitioner have been promoted. Being aggrieved by such non consideration, the petitioner preferred a writ petition vide No.7724/2013 which was disposed of with a direction to the respondents to consider the claim of petitioner for promotion vide order dated 28-10-2013. In pursuance to the said order, the petitioner preferred a representation dated 05-11-2013 which in turn got rejected by the impugned order dated 22-01-2014 (Annexure P/1). Petitioner has attached copy of his ACRs from 2007-08 to 2011-12 vide Annexure P/9 collectively obtained under the Right to Information Act, 2005, which were before DPC for consideration.

3. Perusal of ACR pertaining to 2007-08 reflects that his reporting officer (SDO, Rural Engineering Services) has given him excellent (A+) which was approved by the reviewing officer (Executive Engineer, Rural Engineering Services) but downgraded by the accepting officer (Superintending Engineer, Rural Engineering Services) to category 'B' (good). The reason assigned for the said downgrading was less knowledge of English.

4. In the ACR of 2008-09, again the SDO given excellent (A+), approved by the Executive Engineer but downgraded by the same person to 'A' (very good). The said downgrading was again made without any cogent reason or explanation.

5. In the ACR of 2009-10, the SDO has given very good (A), approved by the Executive Engineer but the same person who was working as Superintending Engineer, Rural Engineering Services, downgraded to 'B' for no cogent reason.

6. In the ACR of 2010-11 a peculiar situation has cropped up wherein initially 'A+' was given to the petitioner and the said endorsement find place just below 'A+' wherein tick mark has been issued over Excellent Category but later on it seems that 'A+' has been downgraded to 'A' and both the

authorities i.e. Executive Engineer as well as Superintending Engineer, Rural Engineering Services showed their approval. According to petitioner, the said grading was 'A+' and still it would be treated as A+ but without any rhyme and reason, the Executive Engineer and Superintending Engineer have downgraded it to 'A'. According to the petitioner, this peculiarity of behaviour cannot be explained by the respondents in any term.

7. In the ACR pertaining to 2011-12, petitioner again performed well and he was given 'A+' by the SDO which was approved by the Executive Engineer but again downgraded by the Superintending Engineer to the category 'B'. The reason assigned for downgrading is again self-contradictory.

8. The main thrust of the arguments of the petitioner is that the said ACRs reflect that the petitioner is a sincere, honest and diligent worker but has been unduly targeted by the authorities and in the ACR of 2010-11, the grading was given as excellent which is denoted by the tick mark put over excellent category but some how the said excellent category has been reduced to very good.

9. Further argument of the petitioner is that despite downgrading the petitioner's grade, time and again; the respondents have not intimated the petitioner regarding such downgrading, therefore, he did not have any chance to improve his performance, if any required by the respondents. Although according to the petitioner, his sincerity and working have always been to the utmost satisfaction of the authorities and he always performed his duties diligently and honestly and always completed the task assigned to him in a proper manner. According to the petitioner, the law laid down in the case of *Dev Dutt Vs. Union of India and others,* (2008) 8 SCC 725, petitioner is entitled for the relief by way of promotion to the post of Assistant Engineer from the date when his juniors have been promoted.

10. Per contra, the respondents have filed their reply and contested the case by saying that petitioner did not fulfill the benchmark as prescribed by the DPC therefore, the DPC has not found him fit for promotion for the post of Assistant Engineer, therefore, the impugned order has rightly been passed. According to the respondents, ACRs of the petitioner were not in accordance with the norms of DPC for consideration for promotion. The respondents have narrated the grade acquired by the petitioner from year 2007-08 till 2011-12 and on the basis of entries in the ACRs tried to contend that the

petitioner is not entitled for any relief in respect of promotion. The respondents have attached the circular dated 29-06-1991 vide Annexure R/1 and contended that the State Government has issued the circular dated 29-06-1991 in this regard and no arbitrariness and illegality has been caused to the petitioner.

11. The respondents have further submitted that the DPC has prescribed 13 and above benchmarks and petitioner had only 12 benchmarks in the concerned period, therefore, he could not be considered for promotion and those officers; who acquired 13 and above benchmarks; were promoted. In short, the respondents contested the case and prayed for dismissal of the petition.

12. Heard learned counsel for the parties and with their assistance perused the record.

13. From perusal of record, it is clear that the petitioner constantly received excellent grades by his reporting officer who happens to be the authority who monitors day to day performances of an employee at shop floor level/ground level. The assessment made by the reporting officer is of paramount importance in the series of authorities which assessed the performance of an employee for the purpose of writing ACR. Therefore, the assessment of reporting officer cannot be overlooked or ignored by the reviewing officer or accepting officer in a casual manner. Objectivity is required to disagree with the assessment of the reporting officer so as to reach to a conclusion about the exact performance of an employee. The said authority has always graded him as Excellent except in 2009-10. The reporting officer found him four times as excellent performer but interestingly or surprisingly, the accepting authority has downgraded the grade of petitioner. The said attempt on the part of Superintending Engineer/ Accepting Authority in such subjective manner substantiates the apprehension of petitioner. Besides that, one entry of ACR of 2010-11 gives contradictory findings wherein he has been adjudged as Excellent performer but gave 'Ka' (A) only. Entry at page 57 of the writ petition in Annexure P/9 reveals such peculiar situation.

14. Petitioner in his petition has annexed the proceedings of the DPC dated 29-08-2013 vide Annexure P/11, wherein the benchmark has been prescribed as 13 or above. In para 7 of the DPC proceedings, this fact has been acknowledged by the respondents also. It is also an admitted fact that the

petitioner has acquired 12 marks in last 5 years' ACRs and if he would have received one mark then he would have also been considered for promotion. From the record, it appears that accepting officer has downgraded the grade of petitioner in a very casual manner and his assessment of performance of petitioner, lacked objectivity.

15. Respondents have to come out from the colonial past and should avoid using Annual Confidential Reports as a tool to settle scores.

16. Adding salt to the injuries, the respondents have not taken care of intimating the petitioner about such downgrading for giving any chance to the petitioner to represent his case either to improve his performance year by year and/or to make representation narrating/disclosing his part of truth. The said non supply of intimation of downgrading to the petitioner adds misery to the petitioner ending up in denial of promotion. The said action of respondents is deprecated by the Apex Court in a series of judgments including *Dev Dutt* (supra) as well as *Sukhdev Singh Vs. Union of India and others*, (2013) 9 SCC 566. Following paras of the judgment of *Dev Dutt* (supra) needs emphasis:

> *"17. In our opinion, every entry in the A.C.R. of a public servant must be communicated to him within a reasonable period, whether it is a poor, fair, average, good or very good entry. This is because non-communication of such an entry may adversely affect the employee in two ways : (1) Had the entry been communicated to him he would know about the assessment of his work and conduct by his superiors, which would enable him to improve his work in future (2) He would have an opportunity of making a representation against the entry if he feels it is unjustified, and pray for its upgradation. Hence non-communication of an entry is arbitrary, and it has been held by the Constitution Bench decision of this Court in Maneka Gandhi vs. Union of India(supra) that arbitrariness violates Article 14 of the Constitution.*
>
> *18. Thus it is not only when there is a benchmark but in all cases that an entry (whether it is poor, fair, average, good or very good) must be communicated to a public servant, otherwise there is violation of the principle of*

fairness, which is the soul of natural justice. Even an outstanding entry should be communicated since that would boost the morale of the employee and make him work harder.

22. It may be mentioned that communication of entries and giving opportunity to represent against them is particularly important on higher posts which are in a pyramidical structure where often the principle of elimination is followed in selection for promotion, and even a single entry can destroy the career of an officer which has otherwise been outstanding throughout. This often results in grave injustice and heartburning, and may shatter the morale of many good officers who are superseded due to this arbitrariness, while officers of inferior merit may be promoted.

37. We further hold that when the entry is communicated to him the public servant should have a right to make a representation against the entry to the concerned authority, and the concerned authority must decide the representation in a fair manner and within a reasonable period. We also hold that the representation must be decided by an authority higher than the one who gave the entry, otherwise the likelihood is that the representation will be summarily rejected without adequate consideration as it would be an appeal from Caesar to Caesar. All this would be conducive to fairness and transparency in public administration, and would result in fairness to public servants. The State must be a model employer, and must act fairly towards its employees. Only then would good governance be possible.

41. In our opinion, non-communication of entries in the Annual Confidential Report of a public servant, whether he is in civil, judicial, police or any other service (other than the military), certainly has civil consequences because it may affect his chances for promotion or get other benefits (as already discussed above). Hence, such non-

communication would be arbitrary, and as such violative of Article 14 of the Constitution."

17. In view of the above, the impugned communication dated 22-01-2014 Annexure P/1 is hereby set aside. Petitioner is directed to submit a representation to respondents afresh elaborating all the necessary events and respondents would be duty bound to consider the representation of petitioner in the light of judgments of *Dev Dutt* (supra) and *Sukhdev Singh* (supra) as well as the findings given by this Court above. After appropriate decision over the representation being taken by the respondents, if petitioner is found eligible otherwise and in all respects, then the review DPC may be convened for consideration of case of petitioner for promotion retrospectively, in accordance with law. The whole exercise be completed within four months from the date of receipt of certified copy of this order.

18. Petition is allowed accordingly.

Petition allowed.

I.L.R. [2016] M.P., 1984
ELECTION PETITION
Before Mr. Justice S.K. Palo
E.P. No. 14/2014 (Gwalior) decided on 22 June, 2015

PEEYUSH SHARMA ...Petitioner
Vs.
VASHODHRA RAJE SCINDHIA ...Respondent

A. ***Representation of the People Act (43 of 1951), Sections 109 & 110 - Election*** **- Non-prosecution or abandonment is not a withdrawal - Withdrawal is positive or voluntary act - Non-prosecution or abandonment might have caused due to negligence, indifference, inaction or even incapacity or inability to prosecute - But it cannot be equated to that of withdrawal. (Para 4)**

क. लोक प्रतिनिधित्व अधिनियम (1951 का 43), धाराएँ 109 व 110 – निर्वाचन – मामले का अभियोजन न करना अथवा परित्याग करना, उसे वापस लेना नहीं है – वापस लेना सकारात्मक अथवा स्वैच्छिक कृत्य है – मामले का अभियोजन न किया जाना अथवा उसका परित्याग करना उपेक्षा, उदासीनता, अक्रियता अथवा यहाँ तक कि अभियोजन करने में अक्षमता अथवा अयोग्यता के कारण कारित हो सकता है – परंतु इसे वापस लिये जाने के बराबर नहीं माना जा सकता।

***B. Civil Procedure Code (5 of 1908), Order 9 Rule 8 and Representation of the People Act (43 of 1951), Section 87* - If there is no provision in the Act to the contrary, provisions of C.P.C. 1908 would apply - Election petition dismissed in default. (Para 5)**

ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 9 नियम 8 एवं लोक प्रतिनिधित्व अधिनियम (1951 का 43), धारा 87 – यदि अधिनियम में कोई प्रतिकूल उपबंध नहीं है, तब सि.प्र.सं. 1908 के उपबंध लागू होंगे – निर्वाचन याचिका व्यतिक्रम में खारिज।

Cases referred:

AIR 1970 Allahabad-1, 1976 1 SCR 255, AIR 1984 SC 135.

None for the petitioner.

V.K. Bhardwaj with *Sanjay Dwivedi*, for the respondent.

(Supplied: Paragraph numbers)

ORDER

S.K. Palo, J. :- On 15.6.2015, the counsel for the petitioner has pleaded no instruction on behalf of the petitioner. None appears for the petitioner today, which reflects the petitioner's intend not to further prosecute the petition.

2. Keeping in mind the provision of Section 109 & 110 of the Representation of People Act, 1951, non-prosecution of election petition or default of appearance by petitioner is examined.

3. Whether the default of appearance or non prosecution can be treated as on par with withdrawal or abandonment ?

4. There is clear provision in the said Act, 1951. In the opinion of this Court, non-prosecution or abandonment is certainly not withdrawal. Withdrawal is positive or voluntarily act while non-prosecution or abandonment may not necessarily be an act of volition. Non- prosecution or abatement (sic:abandonment) might have caused due to negligence, indifference, inaction or even in-capacity or inability to prosecute. But, it cannot be equated to that of withdrawal. Legislature has incorporated or envisaged different steps in case of withdrawal. But in case of non-prosecution or abandonment, if the election petitioner does not appear before the Court, the statute has not

provided any prescribed procedure. This Court has hesitation to lay down different procedure, then what has been provided in the statute. Nor the provision of the Representation of People Act, 1951 can be enlarged or extended by analogy.

5. Section 87 of the Act, 1951 provides that if there is no provision in the Act to the contrary, provisions of Civil Procedure Code 1908 would apply, which include Order 9 Rule 8 Code of Civil Procedure under which the election petition is liable to be dismissed, if the petitioner does not appear to prosecute the petition. As there is no provision, in the Act, 1951 as regard when the petitioner choses to commit default either in appearance or in prosecuting the petition, certainly, the provision of Code of Civil Procedure, 1908 would apply, as is provided under Section 87 of the Act, 1951. Therefore, in absence of any express provision, Order 9 Rule 8 of the Code of Civil Procedure will apply. This view is fortified by the judgments rendered in *Sunderlal Mannalal Vs. Nandramdas Dwarkadas* (AIR 1958 260), Full Bench of the Allahabad High Court in *Duryodhan Vs. Sitaram* (AIR 1970 Allahabad -1), *Rajendra Kumari Bajpai Vs. Ram Adhar Yadav* (1976 1 SCR 255) and Full Bench decision of "*Dr. P. Nalla Thampy Thera Vs. B.L. Shanker and others* (AIR 1984 SC 135). It is not necessary for this Court to express any opinion as to whether the omission to do so by the petitioner is deliberate or inadvertant, but the fact remains that the petitioner has failed to appear and has committed default of appearance or there is non prosecution of the election petition.

6. In view of the above discussion, and looking to the ratio of the decisions mentioned above, the present election petition is hereby dismissed in default.

7. No order as to costs.

Petition dismissed.

I.L.R. [2016] M.P., 1986
ELECTION PETITION
Before Mr. Justice Alok Verma
E.P. No. 15/2014 (Indore) order passed on 2 February, 2016

ANTAR SINGH DARBAR ...Petitioner
Vs.
SHRI KAILASH VIJAYVARGIYA & ors. ...Respondents

A. Evidence Act (1 of 1872), Sections 35, 63, 65 & 76 and Bankers' Books Evidence Act (18 of 1891) - **Certified copies whether given under Section 76 of Evidence Act or under the provisions of Right to Information Act can only be admitted in evidence without examining the author of the documents and without comparing them with the original - For rest of the documents which are not public documents the original should be called before Court and the persons in whose possession such documents are kept should be called for evidence. (Paras 7 & 15)**

क. साक्ष्य अधिनियम (1872 का 1), धाराएँ 35, 63, 65 व 76 एवं बैंककार बही साक्ष्य अधिनियम (1891 का 18) – केवल साक्ष्य अधिनियम की धारा 76 के अंतर्गत अथवा सूचना का अधिकार अधिनियम के उपबंधों के अंतर्गत प्रदत्त प्रमाणित प्रतियाँ ही दस्तावेजों के लेखक का परीक्षण किये बिना एवं मूल प्रतियों से मिलान किये बिना साक्ष्य में ग्राह्य की जा सकती है – शेष दस्तावेजों हेतु, जो लोक दस्तावेज नहीं हैं, उनकी मूल प्रतियों को न्यायालय के समक्ष बुलाया जाना चाहिए तथा व्यक्ति, जिसके आधिपत्य में ऐसे दस्तावेज रखे हैं, उसे साक्ष्य हेतु बुलाया जाना चाहिए।

B. Right to Information Act (22 of 2005), Section 2(J) - Definition - **"Right to information" means the right to information accessible under this Act, which is held by or under the control of any public authority - Purpose of Right to Information Act is to provide information which are kept in form of document or otherwise by any Public Authority - This provision does not override the provisions of Evidence Act. (Paras 12 & 13)**

ख. सूचना का अधिकार अधिनियम (2005 का 22), धारा 2(जे) – परिभाषा – "सूचना का अधिकार" का अर्थ इस अधिनियम के अंतर्गत सुलभ ऐसी सूचना के अधिकार से है जो किसी लोक प्राधिकारी द्वारा धारित है अथवा उसके नियंत्रण के अधीन है – सूचना का अधिकार अधिनियम का प्रयोजन उस जानकारी को प्रदाय करना है जो किसी लोक सूचना प्राधिकारी के पास दस्तावेज के रूप में अथवा अन्यथा रखी हुई है – यह उपबंध, साक्ष्य अधिनियम के उपबंधों पर अभिभावी नहीं होता है।

C. Representation of the People Act (43 of 1951), Sections 99 & 123 - Issuance of notice to Chief Minister - Bribery - **When the act alleged against Chief Minister falls within the definition of sub clause (b) of clause (A) of sub Section 1 of Section 123 of the Representation of the People Act then notice be issued - No harm in issuing the notice to Chief Minister who may cross examine the witnesses produced by the petitioner**

who spoke against him in this petition - Notice be issued under Section 99 of the Representation of the People Act on payment of necessary process fee as per law. (Paras 18 to 21)

ग. लोक प्रतिनिधित्व अधिनियम (1951 का 43), धाराएँ 99 व 123 – मुख्यमंत्री को नोटिस जारी किया जाना – रिश्वतखोरी – जब मुख्यमंत्री के विरूद्ध अभिकथित कृत्य लोक प्रतिनिधित्व अधिनियम की धारा 123 की उपधारा 1 के खंड (ए) के उप खंड (बी) की परिभाषा की परिधि में आता है तब नोटिस जारी किया जा सकता है – मुख्यमंत्री को नोटिस जारी करने में कोई हानि नहीं है तथा वह याची की ओर से प्रस्तुत उन साक्षियों का प्रतिपरीक्षण कर सकता है जिसने याचिका में उसके विरूद्ध कथन किया है – विधि अनुसार आवश्यक आदेशिका शुल्क का भुगतान किये जाने पर लोक प्रतिनिधित्व अधिनियम की धारा 99 के अंतर्गत नोटिस जारी किये जाएं।

Cases referred:

(1981) 1 SCC 560, 2015 (II) MPWN 31, E.P. No. 23/2014 decided on 20.10.2015.

R.S. Chhabra and *Vibhor Khandelwal*, for the petitioner.
S. Bhargav with *Vivek Patwa,* for the respondent.

(Supplied: Paragraph numbers)

ORDER

ALOK VERMA, J. :- This order shall govern disposal of **I.A. No. 9282/2015** and the objection raised by the counsel for the respondent against issuance of notice under Section 99 of Representation of the People Act, 1951 (hereinafter referred to as "R.P. Act, 1951" in short) to Shri Shivraj Singh Chouhan.

2. **I.A. No.9282/2015** has been filed under Section 151 of Civil Procedure Code read with section 35 of Indian Evidence Act.

3. According to the petitioner, this court vide order dated 11.09.2015 allowed the application (I.A. No.6303/2015) filed by the petitioner under Order 7 Rule 14(3) read with Section 151 C.P.C. whereby the documents annexed with the application were allowed to be taken on record. Thereafter, on 23.11.2015, the court allowed another application (I.A. No.7510/2015) filed under Order 7 Rule 14 read with Section 151 C.P.C. whereby the additional documents annexed with the application were permitted to be taken on record. Copies of the documents which were taken on record were given

to the petitioner under the provisions of Right to Information Act, 2005, and thus, such documents being certified copies of their respective original documents need not be compared with the original documents and also examination of their authors is not necessary. The aforesaid documents are permissible under Section 35 of Indian Evidence Act. Accordingly, it is prayed that the documents produced by the petitioner may be allowed to be marked as exhibits in this election petition treating the same as admissible in the evidence. The application is supported by an affidavit.

4. Counsel for the respondent opposed the application on the ground that if such documents are permitted to be admitted in the evidence, this would be against the provisions of Indian Evidence Act.

5. Counsel for the petitioner relied upon a judgment of Hon'ble Apex Court in case of "*Harpal Singh and another Vs. State of Himachal Pradesh* reported at (1981) 1 SCC 560" in which the age of the prosecutrix was to be decided by the court. In this case, entries in the birth register, even in the absence of officers/chowkidar who recorded them, held admissible under Section 35 of Indian Evidence Act, as they were made by the concerning officers in discharge of their official duties. On this point, he also relied upon a judgment passed by Co-ordinate Bench of this court in case of "*Narayan Singh Vs. Kallaram @ Kalluram Kushwaha & others* reported at 2015 (II) M.P.W.N. 31" in which it was held that the certified copies of documents obtained from Right to Information Act can be admitted as secondary evidence and needs not to compare the same from original.

6. The Co-ordinate Bench of this court in case of *Narayan Singh* (supra) referred to Section 65 Clause-(e) & (f) of Indian Evidence At (sic:Act) and held that if copies are obtained under Right to Information Act then such copies are admissible.

7. To see whether all the copies of documents which are obtained under Right to Information Act is admissible without examining the author of such documents and without comparing them with the original, the relevant provisions of Indian Evidence Act may be referred to here. In this regard, counsel for the petitioner has quoted Section 35 of Indian Evidence Act which may read as under :-

> **"35. Relevancy of entry in public [record or an electronic record] made in performance of duty. - An entry in any**

public or other official book, register or [record or an elctronic record], stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register, or [record or an electronic record] is kept, is itself a relevant fact."

8. It is apparent that this section provides the relevancy of facts as a part of Chapter-2 of the Indian Evidence Act. However, it does not say that every document whether it is a public document or a private document can be admissible in evidence, if copy of this document is given under the provisions of any Act or any other law in force in India under Clause-(f) of section 65 of Indian Evidence Act.

9. **Section 63** describes the secondary evidence, which is reproduced below:-

"63. Secondary evidence. - Secondary evidence means and includes -

(1) Certified copies given under the provisions hereinafter contained;

(2) Copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies;

(3) Copies made from or compared with the original;

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

(5) Oral accounts of the contents of a document given by some person who has himself seen it."

10. Other relevant provisions quoted by Co-ordinate Bench of this court in case of *Narayan Singh* (supra) is section 65 clause-(e) & (f) which may also be reproduced below :-

"65. Cases in which secondary evidence relating to documents may be given. - Secondary evidence may be given of the existence, condition, or contents of a

document in the following cases:-

(a) .....

(b) .....

(c) .....

(d) .....

(e) when the original is a public document within the meaning of section 74;

(f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in [India] to be given in evidence;"

(g) .....

In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible."

11. It may be seen that in clause-(f) of section 65 of Indian Evidence Act, the copies should be given to the petitioner to be given in evidence before any court. The Banker's Books Evidence Act, 1891 comes under this category. This clause does not provide that any other document copy of which is not given under any Act or law in force in India which are not provided to the petitioner for giving it an evidence.

12. 'Right of information' as defined in the Right to Information Act, 2005 means the right to information accessible under this Act which is held by or under the control of any public authority and includes. (section 2 (j)).

13. Thus, purpose of Right to Information Act is to provide information which are kept in form of document or otherwise by any public authority. This provision does not override the provisions of Evidence Act.

14. Copies of public documents are provided under Section 76 of Indian Evidence Act, which may read as under :-

"76. Certified copies of public documents. - Every public officer having the custody of a public document, which any person has a right to inspect, shall give that person on demand a copy of it on payment of the legal fees

therefore, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is authorized by law to make use of a seal; and such copies so certified shall be called certified copies."

15. Taking these provisions of Indian Evidence Act into consideration, it is apparent that certified copies whether given under section 76 of Indian Evidence Act or under the provisions of Right to Information Act can only be admitted in evidence without examining the author of the documents and without comparing them with the original. For rest of the documents which are not public document, the original should be called before the court and the persons in whose possession such documents are kept, should be called for evidence. So far as the principles laid down in case of *Narayan Singh* (supra), the question before the Co-ordinate Bench of this court was whether a copy obtained under Right to Information Act should be admitted for evidence. In that case, document was a public document. It was a map of the house and building construction permission from the Nagar Nigam. This document falls under the category of the public document, and therefore, the principles laid down in case of *Narayan Singh* (supra) cannot be applied on all the documents in derogation of provisions of Indian Evidence Act.

16. Accordingly, this application is disposed of with the observation that all the documents which are taken on record by the earlier order of this court referred to above shall be admitted and proved in evidence depending upon their nature whether they are public documents or private documents under the relevant provisions of Evidence Act.

17. This brought us to the objections raised by the counsel for the respondent against issuance of notice to Shri Shivraj Singh Chouhan the then Chief Minister and leader of Bhartiya Janta Party in the year 2013 when the Vidhan Sabha election took place. The main objection appears to be that the examination of petitioner's witness is still in progress and there is nothing in evidence so far recorded which would justify the naming of any person under Section 99 of R.P. Act, 1951.

18. This apart, witnesses of respondent are yet to be examined. Thus, at this stage, issuance of notice under Section 99 of R.P. Act is not called for, and therefore, it is prayed that the issuance of notice may be postponed till recording of evidence.

19. Counsel for the petitioner, however, submits that there are specific allegations against Shri Shivraj Singh Chouhan who gave a speech in a public meeting in which the respondent- Kailash Vijaywargiya was also present on the stage alongwith Shri Shivraj Singh Chouhan, and therefore, he has likely to be named under section 99 of the Act, and therefore, notice should be given at this stage so that he may have an opportunity to cross-examine the witnesses produced by the petitioner.

20. The question whether the notice is to be issued under section 99 of R.P. Act after conclusion of trial or during the trial was decided by this court in **E.P. No.23/2014** vide order dated **20.10.2015.** In this order after referring to various judgments of Hon'ble Apex Court, it was held that notices are to be issued during the trial and not at the conclusion of the trial, and therefore, if at all, the notice is to be issued to Shri Shivraj Singh Chouhan, it has to be issued at this stage so that the proceedings are concluded simultaneously.

21. The petitioner pleaded following allegations against Shri Shivraj Singh Chouhan in Para-27 of petition. The relevant portion of his pleadings may read as under :-

> **27. That, the Chief Minister of the State Shri Shivraj Singh Chouhan had addressed a public meeting on 20.11.2013 between 12.00 noon to 3.00 p.m. in Padmashree Shankar Laxman Stadium, Mhow. Thousands of persons were present in such public meeting. During his speech in such public meeting, the Chief Minister had declared that a Metro train would be provided from Mhow to Indore. He further made a declaration that the poor persons would be provided 'patta' of the land and thereby they would be made Bhumi-swamis. The aforesaid acts amount to an offer or promise by the Chief Minister to the electors of the Constituency for inducing them to vote for the Bhartiya Janta Party candidate i.e. respondent No.1 in the**

elections. The respondent no.1 was also present on the stage alongwith the Chief Minister in such public meeting. The respondent no.1 was thus a consenting party to the offer or promise or inducement made by the Chief Minister of the State to the voters of the Constituency for inducing them to vote for him. Such offer or promise made by the Chief Minister with the consent of the respondent no.1 amounts to committing corrupt practice as defined under Section 123 of the Act, therefore, the election of the respondent no.1 deserves to be set aside on this ground also.

22. Counsel for the petitioner submits that sub-section 1 of section 123 of R.P. Act, 1951 describes bribery. The act alleged against Shri Shivraj Singh Chouhan falls within the definition of sub-clause (b) of clause (A) of sub-section 1 of Section 123 of R.P. Act. The relevant sub-section 1 of section 123 of R.P. Act, 1951 may read as under :-

(1) "Bribery", that is to say, -

(A) any gift, offer or promise by a candidate or his agent or by any other person with the consent of a candidate or his election agent of any gratification, to any person whomsoever, with the object, directly or indirectly of inducing -

(a) a person to stand or not to stand as, or [to withdraw or not to withdraw] from being a candidate at an election, or

(b) an elector to vote or refrain from voting at an election, or as a reward to -

(i) a person for having so stood or not stood, or for [having withdrawn or not having withdrawn] his candidature; or

(ii) an elector for having voted or refrained from voting;

(B) the receipt of, or agreement to receive, any gratification, whether as a motive or a reward -

(a) by a person for standing or not standing as, or for [withdrawing or not withdrawing] from being, a candidate; or

(b) by any person whomsoever for himself or any other person for voting or refraining from voting, or inducing or attempting to induce any elector to vote or refrain from voting, or any candidate [to withdraw or not to withdraw] his candidature.

23. Whether the act alleged in the petition falls within the purview of above provisions of Act needs not be decided and it may be decided at the end of the trial. If at this stage, any inference is given, this may affect decision of this court on merit, and therefore, presently, there appears to be no harm in issuing the notice to Shri Shivraj Singh Chouhan, who may cross-examine the witnesses produced by the petitioner who spoke against him in this petition. In this view of the matter, the objections raised by the counsel for the respondent are rejected. It is directed that the notice under section 99 of R.P. Act be issued on payment of necessary process fee as per law and supply copy of relevant portion of the petition by the petitioner to Shri Shivraj Singh Chouhan by Hamdast as well as by regular mode.

Order accordingly.

I.L.R. [2016] M.P., 1995
ELECTION PETITION
Before Mr. Justice C.V. Sirpurkar
E.P.No. 4/2014 (Jabalpur) order passed on 18 February, 2016

VIVEK TIWARI (Dr.) ...Petitioner
Vs.
SHRI DIVYARAJ SINGH ...Respondent

A. ***Election Petition - Proper Parties*** **- No other person can be allowed to be impleaded as a respondent howsoever desirable it may be - Even if there are specific and direct allegations against the officers/officials of the Election Commission, they cannot be allowed**

to be impleaded as respondents on the plea that otherwise they would not have any opportunity to explain their position and would thus be condemned unheard. (Para 13)

क. निर्वाचन याचिका – उचित पक्षकारगण – किसी भी अन्य व्यक्ति को, चाहे वह कितना भी वांछनीय हो, प्रत्यर्थी के तौर पर पक्षकार बनाये जाने की अनुमति नहीं दी जा सकती है – यहाँ तक कि, निर्वाचन आयोग के अधिकारी/कर्मचारीगण के विरूद्ध विनिर्दिष्ट एवं प्रत्यक्ष अभिकथन होने पर भी उन्हें प्रत्यर्थी के रूप में पक्षकार बनाये जाने हेतु इस अभिवाक् के आधार पर अनुमति नहीं दी जा सकती कि अन्यथा उन्हें उनकी स्थिति स्पष्ट करने हेतु अवसर प्राप्त नहीं होगा एवं इस प्रकार बिना सुनवाई के उन्हें दोषी ठहरा दिया जाएगा।

***B. Election Petition - Amendment* - There is complete prohibition against any amendment being allowed which may have the effect of introducing any material fact not already pleaded. (Para 24)**

ख. निर्वाचन याचिका – संशोधन – किसी भी ऐसे संशोधन को अनुमति दिये जाने पर पूर्ण प्रतिषेध है, जिसके प्रभाववश, किसी ऐसे तात्विक तथ्य का पुरःस्थापन होता हो जिसका अभिवाक् पहले नहीं किया गया था।

Cases referred:

AIR 1982 SC 983, 1991 Supp. (2) SCC 624, AIR 1984 SC 135, AIR 2002 SC 1041, AIR 1991 SC 1557, AIR 1995 SC 2284.

R.P. Agrawal with *Anuj Agrawal,* for the petitioner.
Anuvad Shrivastava, for the respondent No. 1.
Siddharth Seth, for the respondent Nos. 2, 3 & 4.

JUDGMENT

C.V. SIRPURKAR, J. :- This is an application filed on behalf of respondent No.2 Election Commission of India, respondent No.3 State Election Commission and respondent No.4 Smt.Vimlesh Singh, Returning Officer of 68, Sirmour Vidhan Sabha Constituency for striking off their names from the array of respondents on the ground that they cannot be impleaded as respondents in an election petition.

2. Placing reliance upon the judgments rendered by Supreme Court in the case of *Jyoti Basu and others vs. Debi Ghosal and others,* AIR 1982 SC 983 and *B. Sundara Rami Reddy vs. Election Commission of India and others,* 1991 Supp. (2) SCC 624, learned counsel for the respondent

nos. 2, 3 & 4 have submitted that right to elect, to be elected or to dispute election, are neither fundamental rights nor common law rights but are statutory rights, confined to the provisions of the Representation of People Act, 1951, (hereinafter referred to in this order as "the Act") and the Rules made thereunder. Only candidates, expressly mentioned in sections 82 and 86 (4) of the Act, can be joined as respondents by the election petitioner and no one else can be so joined. Therefore, it has been prayed that the names of Respondent Nos.2, 3 & 4 be struck off as respondents from this election petition. It has further been submitted the respondent nos. 2, 3 and 4 shall be duty bound to produce documents, appear as witnesses or otherwise assist the Court in disposal of this election petition.

3. The petitioner has opposed the application by filing a written reply on the ground that the cases of *Jyoti Basu* (supra) and *B. Sundara Rami Reddy* (supra) are distinguishable on facts as in neither of aforementioned cases, allegations of bias and extending unfair advantage by the Election Commission to the elected candidate were made. In this case, the respondent Nos.2, 3 & 4 have been impleaded because the petitioner has made specific allegations against them. There have been allegations with regard to changing electronic voting machines in five polling booths. In three of them, a total of 5,288 votes were already cast. It is not clear whether those votes were counted or not. There are also allegations that the information required to be supplied to the polling agents to the election petitioner in Form No.17-C was furnished in plain papers. Some of the entries made thereunder were blank or incorrect. The original of those forms available on record of the Returning Officer differ from those supplied to the election petitioner which indicates that they were filled-up latter to rectify the defects in the record.

4. It has further been contended on behalf of the petitioner that if the names of respondent Nos.2, 3 & 4 are struck off from the array of respondents in this election petition, aforesaid discrepancies and irregularities committed by the officers/officials of the election commission in general and respondent no.4 in particular, would not have an opportunity of explaining these discrepancies. The cardinal principle of jurisprudence is that no one should be condemned unheard. Thus, respondent Nos.2, 3 & 4, against whom the allegations have been made, are necessary parties or at least proper parties. Therefore, it has been prayed that I.A.No.49/2016 be dismissed.

5. On due consideration of the rival contentions, perusal of record of the

case and appraisal of the law applicable, this Court is of the view that I.A.No.49/2016 must be allowed for the reasons hereinafter stated:

6. This election petition has been filed on the grounds of non-compliance with Rules 49-S and 49-T of the Conduct of Election Rules, 1961. It has been contended that the officers/officials of the Election Commission colluded with respondent No.1, the successful candidate, in order to extend unfair advantage to him over the petitioner. This has materially affected the result of the election insofar as it concerns the respondent No.1.

7. It has been held by a three judge bench of the Supreme Court in the case of *Dr. P. Nalla Thampy Thera vs. B.L. Shanker and others,* AIR 1984 SC 135 that:

"8. This Court has consistently taken the view that elections and election disputes are a matter of special nature and that though the right to franchise and right to office are involved in an election dispute, it is not a lis at common law nor an action in equity. As early as 1952 when the first election under the Constitution took place, a Constitution Bench of this Court in N P. Ponnuswami v. Returning Officer, Namakkal Constituency, 1952 SCR 218 : (AIR 1952 SC 64), observed (para l8):

"The right to vote or stand as a candidate for election is not a civil right but is a creature of statute or special law and must be subject to the limitations imposed by it."

While dealing with an appeal in an election dispute arising out of the first series of elections under the Constitution, Mahajan, C. J., speaking for a Constitution Bench of this Court stated in Jagan Nath v. Jaswant Singh, 1954 SCR 892 at p. 895: (AIR 1954 SC 210 at p. 212):

"The general rule is well settled that the statutory requirements of election law must be strictly observed and that an election contest is not an action at law or a suit in equity but is a purely statutory proceeding unknown to the common law and the Court possesses no common law power. It is also well settled that it is a sound principle of natural justice that the success of a candidate who has won at an election should not be lightly interfered with and any petition seeking such interference must strictly conform to the requirements of the law.

In Charan Lal Sahu v. NandkishoreBhatt, (1974) 1 SCR 294 at p. 296:

(AIR 1973 SC 2464 at P. 2466) this Court observed:

"The right conferred being a statutory right, the terms of that statute had to be complied with. There is no question of any common law right to challenge an election. Any discretion to condone the delay in presentation of the petition or to absolve the petitioner from payment of security for costs can only be provided under the statute governing election disputes. If no discretion is conferred in respect of any of these matters, none can be exercised under any general law or on any principle of equity. This Court has held that the right to vote or stand as a candidate for election is not a civil right but is a creature of statute or special law and must be subject to the limitations imposed by it."

In N. P. Ponnuswami's case it was pointed out that strictly speaking it is the sole right of the Legislature to examine and determine all matters relating to the election of its own members and if the legislature takes it out of its own' hands and vests, in a special tribunal an entirely new and unknown jurisdiction, that special jurisdiction should be exercised in accordance with the law which creates it. In Jyoti Basu v. Debi Ghosal, (1982) 3 SCR 318 at pp. 326-327: (AIR 1982 SC 983 at p. 986) this Court said:

"A right to elect, fundamental though it is to democracy, is, anomalously enough, neither a fundamental right nor a Common Law right It is pure and simple, a statutory right So is the right to be elected So is the right to dispute an election. Outside of statute, there is no right to elect, no right to be elected and no right to dispute an election. Statutory creations they are, and therefore, subject to statutory limitation. An election petition is not an action at Common Law, nor in equity. It is a statutory proceeding to which neither the common law nor the principles of equity apply but only those rules which the statute makes and applies. It is a special jurisdiction, and a special jurisdiction has always to be exercised in accordance with the statute creating it. Concepts familiar to Common Law and Equity must remain strangers to Election Law unless statutorily embodied. A Court has no right to resort to them on considerations of alleged policy because policy in such matters, as those, relating to the trial of election disputes, is what the statute lays down. In the trial of election disputes, Court is put in a straight-jacket. Thus the entire election process commencing from the issuance of the notification calling upon a

constituency to elect a member or members right up to the final resolution of the dispute if any, concerning the election is regulated by the Representation of the People Act, 1951, different stages of the process being dealt with by different provisions of the Act."

That view has been endorsed in Arun Kumar Bose v. Mohd. Furkan Ansari, CA. 2618/83 decided on September 28, 1983: (reported in AIR 1983 SC 1311), where two of us were parties to the decision.

9. The legal position is, therefore, well settled that election disputes are strictly statutory proceedings.

8. Thus, it is settled position of law that the Representation of People Act, 1951 is a complete code and election disputes are strictly statutory proceedings which are to be regulated by the Representation of People Act, 1951. It has further been held in the case of *Jyoti Basu* (supra) that right to elect, to be elected or to dispute election are neither fundamental rights nor common law rights but are confined to the provisions of Representation of People Act and the Rules made thereunder.

9. The persons who may be joined as respondents in an election petition are governed exclusively by sections 82 and 86(4) of the Act. Aforesaid provisions are reproduced herein below for ready reference:

***82. Parties of the petition.**-A petitioner shall join as respondents to his petition-*

(a) where the petitioner, in addition to claiming declaration that the election of all or any of the returned candidates is void, claims a further declaration that he himself or any other candidate has been duly elected, all the contesting candidates other than the petitioner, and where no such further declaration is claimed, all the returned candidates; and

(b) any other candidate against whom allegations of any corrupt practice are made in the petition.

86. (4) Any candidate not already a respondent shall, upon application made by him to the High Court within fourteen days from the date of commencement of the trial and subject to any order as to security for costs which may be made by the High Court, be entitled to be joined as a respondent.

Explanation.-For the purposes of this sub-section and of Section 97, the trial of a petition shall be deemed to commence on the date fixed for the respondents to appear before the High Court and answer the claim or claims made in the petition.

10. In this regard, the Supreme Court has held in the case of *Jyoti Basu* (supra) as hereunder:

".....There is no other provision dealing with the question as to who may be joined as respondents. It is significant that while cl. (b) of S. 82 obliges the petitioner to join as a respondent any candidate against whom allegations of any corrupt practice are made in the petition, it does not oblige the petitioner to join as a respondent any other person against whom allegations of any corrupt practice are made. It is equally significant that while any candidate not already a respondent may seek and, if he so seeks, is entitled to be joined as a respondent under S. 86 (4), any other person cannot, under that provision seek to be joined as a respondent, even if, allegations of any corrupt practice are made against him. It is clear that the contest of the election petition is designed to be confined to the candidates at the election. All others are excluded. The ring is closed to all except the petitioner and the candidates at the election. If such is the design of the statute, how can the notion of 'proper parties' enter the picture at all? We think that the concept of 'proper parties' is and must remain alien to an election dispute under the Representation of the People Act, 1951. Only those may be joined as respondents to an election petition who are mentioned in S. 82 and S. 86 (4) and no others. **However, desirable it may appear to be, none else shall be joined as respondents.**

10. It is said, the Civil Procedure Code applies to the trial of election petitions and so proper parties whose presence may be necessary in order to enable the Court 'effectually and completely to adjudicate upon and settle all questions involved' may be joined as respondents to the petitions. The question is not whether the Civil Procedure Code applies because it undoubtedly does, but only 'as far as may be and subject to the provisions of the Representation of the People Act, 1951 and the rules made thereunder. Section 87 (1) expressly says so. The question is whether the provisions of the Civil Procedure Code can be invoked to permit that which the Representation of the People Act does not.

....."That is why Public Policy and legislative wisdom both seem to point

to an interpretation of the provisions of the Representation of the People Act which does not permit the joining, as parties, of persons other than those mentioned in Sections 82 and 86 (4). That is why Public Policy and legislative wisdom both seem to point to an interpretation of the provisions of the Representation of the People Act which does not permit the joining, as parties, of persons other than those mentioned in Sections 82 and 86 (4). It is not as if a person guilty of a corrupt practice can get away with it. Where at the concluding stage of the trial of an election petition, after evidence has been given, the Court finds that there is sufficient material to hold a person guilty of a corrupt practice, the Court may then issue a notice to him to show cause under Section 99 and proceed with further action. In our view the legislative provision contained in Sec. 99 which enables the Court, towards the end of the trial of an election petition, to issue a notice to a person not a party to the proceeding to show cause why he should not be 'named' is sufficient clarification of the legislative intent that such person may not be permitted to be joined as a party to the election petition."

..... . "If a person who is not a candidate but against whom allegations of any corrupt practice are made is joined as a party to the petition then, by virtue of his position as a party, he would also be entitled to 'recriminate' under Sec. 97. Surely such a construction of the statute would throw the doors of an election petition wide open and convert the petition into a 'free for all' fight. A necessary consequence would be an unending, disorderly election dispute with no hope of achieving the goal contemplated by Sec. 96 (6) of the Act that the trial of the election petition should be concluded in six months. It is just as well to remember that 'corrupt practice' as at present, defined by Sec. 123 of the Act is not confined to the giving of a bribe but extends to the taking of a bribe too and, therefore, the number of persons who may be alleged to be guilty of a corrupt practice may indeed be very large, with the consequence that all of them may possibly be joined as respondents.

13. In view of the foregoing discussion we are of the opinion that no one may be joined as a party to an election petition otherwise than as provided by Sections 82 and 86 (4) of the Act. It follows that a person who is not a candidate may not be joined as a respondent to the election petition."

(Emphasis supplied)

11. Learned Senior Counsel for the petitioner has contended that this case

has not been filed alleging corrupt practice against any candidate but has been filed on the ground of non-compliance by officers/officials of Election Commission in collusion with respondent no.1 in order to extend unfair electoral benefit to him. Therefore, the law as laid down in the case of *Jyoti Basu* (supra) would not be applicable to the present case. However, in the case of *B. Sundara Rami Reddy* (supra) the orders of Election Commission were challenged in the election petition; therefore, it was argued in that case that the Election Commission, even if not a necessary party, was a proper party. It was further urged in that case that Code of Civil Procedure, 1908, is applicable to trial of an election petition; as such the concept of proper party is applicable but aforesaid argument was rejected by the Supreme Court and it was held that:

"Since Section 82 designates the persons who are to be joined as respondents to the petition, provisions of the Civil Procedure Code, 1908 relating to the joinder of parties stands excluded Under the Code even if a party is not necessary party, he is required to be joined as a party to a suit or proceedings if such person is a proper party, but the Representation of the People Act, 1951 does not provide for joinder of a proper party to an election petition. The concept of joining a proper party to an election petition is ruled out by the provisions of the Act. The concept of joinder of a proper party to a suit or proceeding underlying Order I of the Civil Procedure Code cannot be imported to the trial of election petition, in view of the express provisions of Sections 82 and 87 of the Act. The Act is a self-contained Code which does not contemplate joinder of a person or authority to an election petition on the ground of proper party."

12. It may further be noted that in the case of *Michael B. Fernandes Vs. C.K. Jaffar Sharief and others*, A.I.R. 2002 S.C. 1041, the allegations made were in relation to the use of voting electoral machines, under section 61-A of the Act. The gravamen of the allegations in the election petition were that the Returning Officer as well as the Chief Electoral Officer had not complied with several provisions of Conduct of Election Rules and respondent Nos. 7 & 8 had not acted in accordance with the guidelines issued by the Election Commission of India. Thus, the grounds were similar to those, taken in the present election petition. A three judge bench of Supreme Court held that:

..... "the Court took the view that the public policy and legislative wisdom both seem to point to an interpretation of the provisions of the Representation

of the People Act which does not permit the joining, as parties, of persons other than those mentioned in Sections 82 and 86(4).The Court also in paragraph (12) considered the consequences if persons other than those mentioned in S. 82 are permitted to be added as parties and held that the necessary consequences would be an unending, disorderly election dispute with no hope of achieving the goal contemplated by S. 86(6) of the Act. In the aforesaid premises, we reiterate the views taken by this Court in *Jyoti Basu's* case and reaffirmed in the latter case in *B. Sundara Rami Reddy* and we see no infirmity with the impugned judgment, requiring our interference under Art. 136 of the Constitution. This appeal accordingly fails and is dismissed."

13. On the basis of aforesaid authoritative pronouncements of the Supreme Court, it is clear that the Representation of People Act, 1951 is a complete Code. Only a candidate who falls in any of the categories enumerated under section 82 or 86(4) of the Act, can be impleaded as respondents in an election petition and none else. The concept of proper party is alien to the proceedings under Representation of People Act, 1951. Thus, no other person can be allowed to be impleaded as a respondent howsoever desirable it may be. Even if there are specific and direct allegations against the officers/officials of the Election Commission of India, they cannot be allowed to be impleaded as respondents on the plea that otherwise they would not have any opportunity to explain their position and would thus be condemned unheard.

14. In aforesaid view of the matter, I.A.No.49/2016 deserves to be and is accordingly **allowed.** The petitioner is directed to strike off the names of respondent Nos.2, 3 & 4 from the array of respondents in the election petition within two weeks.

I.A. No. 14259 of 2015

15. This application has been filed on behalf of the election petitioner under Order 6 Rule 17 of the Code of Criminal Procedure for incorporating certain amendments in the election petition.

16. It has been submitted that by virtue of order dated 13.10.2015 passed by Court, the petitioner could inspect the documents filed in sealed cover by the Returning Officer of the concerned constituency, on 27.10.2015. On inspection, particulars of certain deficiencies and irregularities having a bearing on the result of the election, were noted by the petitioner; therefore, the petitioner proposes to incorporate pleadings regarding such deficiencies and

irregularities committed by the officers/officials of the election commission by way of incorporating paragraphs nos. 20-A and 10-A in the election petition. The particulars proposed to be incorporated relate to particulars of cover up of irregularities committed by the officers/officials in issuing form number 17-C by interpolating the record kept in the office of Returning Officer. The proposed amendments also relate to particulars with regard to change in electronic voting machine used in certain polling booths which showed that a particular number of votes had already been cast even before the polling had begun. It has been submitted that proposed amendments are absolutely necessary for just adjudication of the petition and have been proposed without any delay.

17. Though, the respondents have not filed any written reply to I.A. No.14259/2015, they have opposed the application.

18. A perusal of the record reveals that this election petition has been filed mainly on the ground that Presiding Officer had failed to comply with rules 49-S and 49-T of Conduct of Election Rules, 1961 and thus improper reception, refusal or rejection of votes and non-compliance with rules 49-S and 49-T of aforesaid Rules has materially affected the result of the election. In aforesaid circumstances, it is clear that this election petition has been filed on the ground of Section 100 (1) (d) (iii) and (iv) of the Representation of the People Act, 1951. This election petition has not been filed on the ground of Section 100 (1) (b) alleging any corrupt practice committed by the returned candidate or his election agent or by any other person with the consent of a returned candidate or his election agent.

19. As already observed while deciding the I.A. No.49/2016 in foregoing paragraphs of this order that the conduct of proceedings in the election petition is regulated by Representation of People Act 1951. The different stages of the process are dealt with by different provisions of the Act. The Code of Civil Procedure no doubt applies to such proceedings but only "as far as may be" and subject to the provisions of Representation of People Act, 1951 and the Rules made thereunder.

20. The law of amendment in election petitions is governed by sub-section 5 of Section 86 of the Representation of People Act, 1951, which reads as follows:

86 (5) The High Court may, upon such terms as to costs and otherwise as

it may deem fit, allow the particulars of any corrupt practice alleged in the petition to be amended or amplified in such manner as may in its opinion be necessary for ensuring a fair and effective trial of the petition, but shall not allow any amendment of the petition which will have the effect of introducing particulars of a corrupt practice not previously alleged in the petition.

21. With regard to scope of Section 86 (5), a three Judge Bench of Supreme Court in the case of *F.A. Sapa Vs. Singora,* AIR 1991 SC 1557 has held that:-

17. The law in regard to the adjudication of an election dispute has been set out, as stated earlier, in Part VI of the R.P. Act, the provisions whereof constitute a self-contained Code. Therefore, an election petition calling in question the election of a returned candidate must be made in accordance with the provisions of this part of the statute. Under the provisions of this part an election petition calling in question the election of a returned candidate must be founded on one or more of the grounds specified in Sections 100 and 101 for any of the reliefs specified in Section 84 thereof. Section 100 specifies several grounds, one of them being commission of a corrupt practice by the returned candidate. Section 83(1)(a) stipulates that every election petition shall contain a concise statement of the 'material facts' on which the petitioner relies. That means the entire bundle of facts which would constitute a complete cause of action must be concisely stated in an election petition. Section 83(1)(b) next requires an election petitioner to set forth full particulars of any corrupt practice alleged against a returned candidate. These 'particulars' are obviously different from the 'material facts' on which the petition is founded and are intended to afford to the returned candidate an adequate opportunity to effectively meet with such an allegation. The underlying idea in requiring the election petitioner to set out in a concise manner all the 'material facts' as well as the 'full particulars', where commission of corrupt practice is complained of, is to delineate, the scope, ambit and limits of the inquiry at the trial of the election petition.

18. Before the amendment of the R. P. Act by Act 27 of 1956, Section 83(3) provided for an amendment of an election petition insofar as 'particulars' of corrupt practice were concerned. By the 1956 amendment this provision was replaced by Section 90(5) which in turn came to be

deleted and transferred as sub-section (5) of Section 86 by the Amendment Act 47 of 1966. Section 86(5) as it presently stands empowers the High Court to allow the 'particulars' of any corrupt practice alleged in the petition to be amended or amplified provided the amendment does not have the effect of widening the scope of the election Petition by introducing particulars in regard to a corrupt practice not previously alleged or pleaded within the period of limitation in the election petition. In other words the amendment or amplification must relate to particulars of a corrupt practice already pleaded and must not be an effort to expand the scope of the inquiry by introducing particulars regarding a different corrupt practice not earlier pleaded. Only the particulars of that corrupt practice of which the germ exists in the election petition can be amended or amplified and there can be no question of introducing a new corrupt practice. It is significant to note that Section 86(5) permits 'particulars' of any corrupt practice 'alleged in the petition' to be amended or amplified and not the 'material facts'. It is, therefore, clear from the trinity of clauses (a) and (b) of Section 83 and subsection (5) of Section 86 that there is a distinction between 'material facts' referred to in clause (a) and 'particulars' referred to in clause (b) and what Section 86(5) permits is the amendment/ amplification of the latter and not the former. Thus the power of amendment granted by Section 86(5) is relatable to clause (b) of Section 83(1) and is coupled with a prohibition, namely, the amendment will not relate to a corrupt practice not already pleaded in the election petition. The power is not relatable to clause (a) of Section 83(1) as the plain language of Section 86(5) confines itself to the amendments of 'particulars' of any corrupt practice alleged in the petition and does not extend to 'material facts'. This becomes crystal clear on the plain words of the closely connected trinity of Ss. 83(1)(a), 83(l)(b) and 86(5) and is also supported by authority. See Samant N. Balkrishna v. George Fernandez, (1969) 3 SCR 603: (AIR 1969 SC 1201) and D. P. Mishra v. Kamal Narayan Sharma, (1971) 1 SCR 8: (AIR 1970 SC 1477), In Balwan Singh v. Lakshmi Narain, (1961) 22 ELR 273: (AIR 1960 SC 770) this Court held that if full particulars of an alleged corrupt practice are not supplied, the proper course would be to give an opportunity to the petitioner to cure the defect and if he fails to avail of that opportunity that part of the charge may be struck down. We may, however, hasten to add that once the amendment sought falls within the purview of Sec.

86(5), the High Court should be liberal in allowing the same unless, in the facts and circumstances of the case, the Court finds it unjust and prejudicial to the opposite party to allow the same. Such prejudice must, however, be distinguished from mere inconvenience, vide Raj Narain v. Indira Nehru Gandhi, (1972) 3 SCR 841: (AIR 1972 SC 1302).

22. Likewise, in the case of *Gajanan Krishnaji Bapat & Anr. Vs. Dattaji Raghobaji Meghe & Ors.*, AIR 1995 SC 2284, it has been held that:

86. Section 86(5) of the Act deals with the amendment of an Election Petition. It lays down that the High Court may upon such terms as to costs or otherwise, as it deems fit, allow amendment in respect of particulars but there is a complete prohibition against any amendment being allowed which may have the effect of introducing either material facts not already pleaded or of introducing particulars of a corrupt practice not previously alleged in the petition. The first part of S. 86(5) of the Act, therefore, is an enabling provision while the second part creates a positive bar. Of course, the power of amendment given in the Code of Civil Procedure can be invoked by the High Court because S.86 of the Act itself makes the procedure applicable, as nearly as may be, to the trial of election petition, but it must not be ignored that some of the Rules framed under the Act itself over-ride certain provisions of the Civil Procedure Code and thus, the general power of amendment drawn from the Code of civil Procedure must be construed in the light of the provisions of the election law and applied with such restraints as are inherent in an election petition.

23. It is clear from aforesaid pronouncements of the Supreme Court that Section 86 (5) of the Act permits only "particulars" in corrupt practice "alleged in the petition" to be amended or amplified and not material facts. Further, there is distinction between the "material facts" referred to in clause (a) of Section 83(1) and 'particulars' referred to in clause (b) thereof. Section 86 (5) permits amendment/amplification of the particulars as referred to in clause (b) but no amendment/amplification of material facts as referred to in clause (a) of Section 83(1): Thus, Section 86 (5) is relatable to clause (b) of Section 83 (1) but does not relate to Clause (a) of Section 83 (1); as such, the power to amend the election petition does not extend to "material facts". There is complete prohibition against any amendment being allowed that may have the effect of introducing either material facts not already pleaded or of introducing

particulars of a corrupt practice not previously alleged in the petition.

24. In view of the legal position culled out from aforesaid pronouncements of the Supreme Court, it may be noted that the present election petition has not been filed on the ground of any corrupt practice on the part of the returned candidate or his election agent or any person with the consent of the elected candidate or his election agent. It has been filed on the ground of improper reception or rejection of votes and non-compliance with the provisions of the Act and the Rules made thereunder. Thus, what has already been pleaded in the election petition is a statement of material facts on which the petitioner relies as envisaged under Section 83(1) (a) of the Act and as held by Supreme Court in aforesaid authorities, there is complete prohibition against any amendment being allowed which may have the effect of introducing any material fact not already pleaded. In aforesaid view of the matter, petitioner can also not be allowed to take recourse to Order 6 Rule 17 of the C.P.C. for introducing material facts not already pleaded.

25. On the basis of foregoing discussions, I.A.No. 4259/2015 cannot be allowed and is therefore, dismissed.

Order accordingly.

I.L.R. [2016] M.P., 2009
APPELLATE CIVIL
Before Mr. Justice S.A. Dharmadhikari
S.A. No. 1714/2005 (Gwalior) decided on 30 April, 2016

SUNIL RAO ...Appellant
Vs.
STATE OF M.P. & ors. ...Respondents

*A. **Civil Procedure Code (5 of 1908), Section 100 - No substantial question of law involved** -* **No interference in concurrent findings of fact warranted - Held - Both the Courts have recorded pure findings of facts that too after proper appreciation of entire evidence on record and dismissed the suit - No substantial question of law arises warranting interference - Appeal dismissed. (Para 6)**

क. सिविल प्रक्रिया संहिता (1908 का 5), धारा 100 – विधि का कोई सारवान प्रश्न अंतर्ग्रस्त नहीं – तथ्य के समवर्ती निष्कर्षों में हस्तक्षेप की कोई आवश्यकता नहीं – अभिनिर्धारित – दोनों ही न्यायालयों ने अभिलेख पर उपलब्ध

संपूर्ण साक्ष्य के उचित मूल्यांकन पश्चात् तथ्य के शुद्ध निष्कर्ष अभिलिखित किए हैं एवं वाद खारिज किया है – हस्तक्षेप किये जाने हेतु विधि का कोई सारवान प्रश्न उत्पन्न नहीं होता है – अपील खारिज।

B. Adverse Possession - Nature and Essentials thereof* - Held - Non-use of property by the owner even for a long time won't affect his title - Adverse possession is a hostile possession by clearly asserting hostile title in denial of title of true owner - Party claiming adverse possession must prove that his possession is *"nec vi, nec clam, nec precario." **(Para 5)**

ख. प्रतिकूल कब्जा – उसका स्वरूप एवं आवश्यकताएँ – अभिनिर्धारित – स्वामी द्वारा संपत्ति का लंबे समय तक उपयोग न किये जाने पर भी उसका हक प्रभावित नहीं होगा – प्रतिकूल कब्जा, वह विरोधी कब्जा है जिसके द्वारा स्पष्ट रूप से विरोधी हक का प्राख्यान करते हुए वास्तविक स्वामी के हक का प्रत्याख्यान किया जाता है – प्रतिकूल कब्जे का दावा करने वाले पक्षकार को यह अवश्य साबित करना चाहिए कि उसका कब्जा न तो बलपूर्वक, न ही गुप्त रीति से एवं न ही किसी अनुज्ञप्ति के अंतर्गत है।

Case referred:

(2004) 10 SCC 779.

Ravindra Sarvate, for the appellant.
Amit Bansal, G.A. for the respondent No. 1.
None for respondents No. 2 & 3.

JUDGMENT

S.A. DHARMADHIKARI, J. :- Heard on the question of admission. Records of the case is perused.

1. This appeal by the plaintiff under Section 100 of CPC is directed against the concurring judgment and decree dated 18.08.2005 passed in Civil Appeal No.77-A/2005 by the learned District Judge, Sheopur, confirming the judgment dated 15.04.2005 passed in Civil Suit No.19-A/2004 by II Civil Judge, Class-I, Sheopur. Plaintiff's suit for declaration and permanent injunction has been dismissed.

2. Facts necessary for the disposal of this appeal are that the plaintiff claimed to be in possession of the suit land of Area 5 Bigha 14 Viswa falling in

Survey No.1134/1. The said land is registered as Government land in the Khasra entries and is in the name of Khidak Maveshi. Out of the said Survey number 0.251 Hectare land is in the possession of the plaintiff and on that a house has been constructed and he is living in the same. The land is being used for housing purpose and many houses have been built on the said land. The plaintiff is residing in that house for about 35-36 years and the Gram Panchayat has granted permission for construction of a new house. The plaintiff has acquired the title on the basis of adverse possession but the Respondent/ Defendant No.1 has initiated the proceedings for dispossessing him from the suit land. As such, the instant suit has been filed for Declaration and Permanent Injunction.

3. Respondent/Defendant No.1 has not filed written statement whereas Respondents/Defendants No.2 and 3 have filed the written statement and denied the plaint allegations. It is submitted that the suit land is a Government land. The Appellant/Plaintiff is not in possession for the last 35-36 years. The Gram Panchayat has not given any permission but the land was permitted to be used as cattle yard. The Plaintiff is an encroacher and does not have the title over the suit land. With the aforesaid pleadings, suit was prayed to be dismissed.

4. On the aforesaid pleadings the trial Court framed issues and allowed the parties to lead evidence. Upon critical evaluation of the entire evidence on record, the trial Court has dismissed the suit. Aggrieved, the Appellant/Plaintiff filed an appeal. The first Appellate Court has again re-appreciated the entire oral and documentary evidence on record. As per Exhibit P-13 which is a *Khasra Panchsala* from Samvat 2046 (year 1989) to Samvat 2050 (year 1993) in which the Survey No.1134/1 has been registered in the name of Khidak Maveshi and is a Government land. Plaintiff's possession was registered in Samvat 2047 (year 1990). No documents were produced by the Plaintiff to prove that he was in continuous possession of the suit land. The Plaintiff's claim to be in possession for 35-40 years stands negated for the reason that he himself was aged about 37 years at the time of filing of the suit. Non filing of *Khasra Panchsala* for the earlier years itself proves that the Plaintiff was not in possession of the suit land for last 35-36 years but in fact he had encroached the land in Samvat 2047 (year 1990). Moreover, the defendant State had filed Exhibits P-6, P-7 & P-8 to show that the Plaintiff has been fined from time to time for being an encroacher. Exhibit P/9 is the notice for

eviction. As such the Plaintiff has failed to establish his assertion of becoming *"bhumiswami"* over the suit land by virtue of adverse possession. Suit land has been found to be in ownership of the Government. The First appellate Court while concurring with the findings has affirmed the judgment and decree passed by the trial Court.

5. Law with regard to adverse possession is well settled. The Hon'ble Supreme Court in the case of *Karnataka Board of Wakf Vs. Government of India and Others,* (2004) 10 SCC 779, in paragraph 11 has observed as under:-

> **"11. In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is "nec vi, nec clam, nec precario", that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period."**

6. Having gone through the concurrent impugned judgments rendered by the Courts below and after perusal of the records, I am of the opinion that both the Courts below have recorded the pure finding of facts that too after proper appreciation of the entire evidence on record and dismissed the suit. As such the Courts below are fully justified in dismissing the suit of the Plaintiff. No substantial question of law arises warranting interference under Section 100 of the Code of Civil Procedure.

7. Accordingly, the appeal being bereft of merit and substance, is hereby, dismissed.

No order as to costs.

Appeal dismissed.

I.L.R. [2016] M.P., 2013
ARBITRATION APPEAL
Before Mrs. Justice S.R. Waghmare &
Mr. Justice Prakash Shrivastava
A.A. No. 11/2015 (Indore) decided on 4 February, 2016

ASHOKA INFRAWAYS LIMITED & anr. ...Appellants
Vs.
STATE OF M.P. & anr. ...Respondents

Arbitration and Conciliation Act (26 of 1996), Sections 2(4)(5) & 9 - Applicability - Interim measures - Dispute **- Works contract or concession agreement pertains to the concession or concessional period given in terms of the concession right or concession area during the contract period - Provision of Arbitration and Conciliation Act 1996 apply. (Para 20)**

माध्यस्थम् और सुलह अधिनियम (1996 का 26), धाराएँ 2(4)(5) व 9 – प्रयोज्यता – अंतरिम उपाय – विवाद – कार्य संविदा अथवा रियायत करार, संविदा अवधि के दौरान रियायत अधिकार अथवा रियायत क्षेत्र के निबंधनों के अनुसार प्रदाय की गई रियायत अथवा रियायती अवधि से संबंध रखता है – माध्यस्थम् और सुलह अधिनियम 1996 का उपबंध लागू होता है।

Cases referred:

AIR 1988 MP 111, 2002(5) MPHT 245, 2007 (4) MPHT 444(FB), 2014(2) MPLJ 276.

Piyush Mathur with *Akash Vijaywargiya, H.Y. Mehta & Paresh Joshi*, for the appellants.

Pushyamitra Bhargava, Dy. A.G. with *Rohit Mangal*, for the respondent/State.

ORDER

The Order of the Court was delivered by :
S.R. WAGHMARE, J. :- By this Arbitration Appeal under Section 37 of the Arbitration and Conciliation Act, 1996 the appellant Ashoka Infraways Limited is aggrieved by order dated 16.02.2015 passed by the Ist Additional District Judge, Dewas in Arbitration Case No.1/15 whereby the learned Judge dismissed the application under Section 9 of the Arbitration and Conciliation

Act, 1996 (hereinafter called "the Act" for brevity) filed by the appellants holding that the dispute was covered under the Madhya Pradesh Madhyastham Adhikaran Adhiniyam, 1983 Act and not under the Act of 1996.

2. Briefly stated the facts of the case are that the Ashoka Infraways Limited was a subsidiary of appellant No.2 Ashoka Buildcon Limited and the appellant No.1 was incorporated as "Special Purpose Vehicle" (SPV) for the purpose of implementing the Dewas Bypass Road Project. Thereby indicating that the appellant No.2-Company was engaged inter alia in the business of construction and civil works. It has been submitted by the Counsel for the appellants that it was one of the leading highway developers in the country and have executed various prestigious projects on the national as well as state level. That the respondent no.1 State of MP through its Principal Secretary, Public Works Department, Bhopal issued bid notice No.13/2000-2001/SAC/ Dewas dated 18.07.2001 inviting bids for construction, replacement, periodical renewal and maintenance of Dewas Bypass Road for a total length of 19.8 kilometers and the construction included of one medium bridge, 27 culverts, junctions and rotaries, protection works, toll tax barriers and booth, plantation, fencing, truck parking lay-bye and longitudinal drains etc as fully detailed in the petition. The project was to be under the B.O.T. Scheme i.e., under the Build Operate Transfer Scheme whereby the Contractor has the right to collect the toll and the other revenue from the vehicles and users of the said Project during the Concession Period. Appellant no.2 Ashoka Buildcon Limited submitted its bid which was accepted by the respondents vide letter dated 17.04.2001. Thereafter to facilitate the process of financing the Project, appellant No.1 was incorporated as an SPV by the appellant No.2 for implementing the Project on the agreed terms and conditions.

3. Thereafter on 03.01.2002 an agreement for execution of the project was entered into interse by the appellant No.2 Ashoka Buildcon and appellant No.1 Ashoka Infraways and the respondents agreed to the arrangement vide letter dated 16.01.2003 (Annexure A/3). Notifications were duly issued on 24.05.2004 & 29.12.2011 (Annexure A/4 & Annexure A/5). The completion certificate was given to the appellants-petitioners on 14.05.2004 and that prior to this letter the respondent-State Government vide letter dated 09.03.2004 (Annexure A/6) additional work in terms of the Clause 22.7 of the special Condition of contract was awarded to the appellants-petitioners and assessed at amount of Rs.10,26,22,743/- and was approved by the

Additional Works Committee on 16.01.2006 and, therefore, the appellants-petitioners were entitled to collect toll tax for extra days of the approved additional work. As it is the appellant was entitled to 77 additional days for collecting the toll tax since a delay of 77 days was caused by respondent No.1 in handing over the land to the appellant. Similarly for early completion of the project vide letter dated 24.01.2006 (Annexure A/8) the petitioners-appellants was awarded additional 103 days and thus the appellants-petitioners claimed that they were entitled to collect toll tax for 4102 days (original 3922 + 77 +103 = 4102 days). However, the additional works Approval Committee assessed the number of days in consultation with the respondent No.2 Executive Engineer and awarded only 1211 days against the additional work. The same was approved by the Superintendent Engineer and hence the dispute arose and the appellants-petitioners filed an application under Section 9 of the 1996 Act since the toll was going to be handed over to a different agency. The learned ADJ, Dewas however, held that the dispute was covered under the Act of 1983 and not under the Act of 1996 and dismissed the application by the impugned order dated 16.02.2015 annexed as Annexure A/16. The appellants therefore filed Writ Petition No.1122/15 under Article 226 of the Constitution of India. The Writ Court, however, dismissed the petition as not being maintainable, but granted liberty to challenge the impugned order dated 16.02.2015 in appeal. The petitioner being affected, however filed a Review Petition urging that the impugned agreement was a concession agreement and amenable to writ jurisdiction as well as provision of the Arbitration Act of 1996. The review was, however, dismissed by holding that the contract was a "works contract" as defined under the Madhya Pradesh Madhyastam Adhikaran Adhiniyam, 1983. And thereafter by way of precaution the petitioner filed both the Arbitration Appeal and at the same time also filed an SLP before the Apex Court. The Apex Court held that "the finding of the High Court, that the dispute between the parties pertains to the works contract; and as per terms of the contract any dispute that arises, the matter would be referred to the M.P. Arbitration Tribunal under the Madhya Pradesh Madhyastam Adhikaran Adhiniyam, 1983"; shall not stand in the way of the appellants-petitioners in prosecuting the First Appeal. The Apex Court held thus:-

> "The aforesaid observation of the Court will not come in the way of the petitioners in prosecuting First Appeal under Section 37 of the Arbitration and Conciliation Act, 1996, being Arbitration Appeal No.11 of 2015 pending before the Madhya

Pradesh High Court."

4. Counsel for the appellant has vehemently urged the fact that the action of the respondent was grossly arbitrary, unjust and unreasonable. The failure on the part of the respondent to give the additional days after approval and diminishing the legal and valid claim for 1374 days to a meager 186 days was in violation of Article 14 of the Constitution of India and the respondents themselves were responsible for 180 days delay in handing over the said land. Considering the fact that Rs.10,26,22,743/- was already admitted but such a lopsided attitude belied the arbitrary approach and defeated the rightful contractual demand for additional 1374 days. It was also urged vehemently that the Arbitral Tribunal was precluded from issuing any interim orders under Section 17 A of the 1983 Act and in this light the appellant cannot be rendered remediless and till the claims are adjudicated, the appellant would be left without remedy; and hence application had been filed under Section 9 of the Act of 1996, but the fact the learned A.D.J. has erred in holding that the dispute to be considered in accordance with the Act of 1983 and that Section 9 of the Act 1996 is not applicable. Further Counsel vehemently urged the fact that the Additional Work Approval Committee (formed by respondent No.2 itself) as well as the Executive Engineer of the Respondent No.2 had already approved of 1194 and 1211 additional toll days respectively on account of the additional work carried out by the appellant. Then it is unfathomable as to how it has come to a decision of accepting only 186 additional toll days as full and final settlement.

5. Counsel also urged that from the reply of the State Govt. regarding the benefits of the Concession Agreement and regarding the additional work, it appears that the respondent-State is denying the extension of toll collection days to which the petitioner was entitled as fully stated above. Whereas the learned lower Court had erred in holding that the provisions of the Arbitration and Conciliation Act of 1996 were not applicable to the present dispute. Counsel submitted that the trial Court had also erred in denying opportunity of lawful remedy to the appellant.

6. **Per contra** Counsel for the Respondents has vehemently urged the fact that the State had already taken over the Toll collection from the appellant on the Dewas Bypass road and impugned order dated 16.02.2015 passed by the First Additional Sessions Judge, Dewas was in accordance with the provisions of law since the dispute between the parties falls within the purview

of Works Contract and hence the learned Judge has rightly rejected the application under Section 9 of the Act of 1996. Besides the appellant also had the alternative remedy to approach the M.P. Arbitration Tribunal under the Madhya Pradesh Madhyastam Adhikaran Adhiniyam, 1983. Moreover Section 17-A of the Adhiniyam of 1983 also provides for grant of interim relief and the appellant has failed to approach the Arbitration Tribunal; whereas the appellant has filed an application under Section 9 of the Act of 1996 which was contrary to the provisions of law. So also Clause 26.2 of the Agreement also contains the Arbitration Clause and the fact that the appellant should have referred the matter to the Arbitration Tribunal under Section 17-A of the Adhiniyam 1983 but chose to refer the impugned application under Section 9 of the 1996 Act and has, therefore, been rightly rejected. Counsel vehemently urged the fact that Clause (d) of the Section 2 of Madhya Pradesh Madhyastam Adhikaran Adhiniyam, 1983 indicates that the dispute has to be regarding claim of money valued at Rs.50,000/- or more relating to any difference arising out of execution or non-execution of a works contract or part thereof. Similarly Section 2(1) of the Adhiniyam 1983 defines Works Contract and three basic ingredients which constitute the works contract are number one, an agreement in writing, one of the party must be the Government and the agreement must be for construction, replacement, periodical renewal and maintenance of Dewas Bypass road starting from 159/4 of Bhopal – Ujjain Road (SH-18) and joining Km. 577/6 of Agra-Bombay Road (NH-3) intersecting NH-3 in Km. 567/8 and SH-18 in Km. 151/8 (total length of 19.8 Kms.) including construction of one medium bridge, 27 culverts, junctions and rotaries, protection works toll tax barriers and booth, plantation, fenching, (sic:fencing) truck parking lay-bye and longitudinal drains etc under the BOT Scheme. Hence Counsel vehemently urged the fact that the agreement between the parties was a works contract and the appellants have wrongly used the nomenclature as a concessionaire agreement. Counsel submitted that it would be misnomer to call the agreement as such since there is no State support agreement, even the Clause 7 of the N.I.T. clearly provides that the entrepreneur shall not be entitled to Special Tax Concession, therefore, an agreement in the present case is not a concessionaire agreement and falls **only** within the purview of works contract. Moreover the concessionaire agreement contemplates a tri party agreement as one of its basic ingredients which is missing and a modular concession agreement has been filed along with the reply as Annexure R/1. Counsel denied that there was concessionaire

agreement as is alleged by the Counsel for the appellant. Referring to Clause 22.6.1 and 22.7 Counsel admitted that there was extra work carried out by the appellant. However, the amount of Rs.10.26 crores spent by the appellant was to be adjusted towards 186 extra days granted to the appellants for collection of toll but the appellant was again under misapprehension claiming 1374 days and hence the entire dispute arose between the parties.

7. Counsel for the respondents submitted that proviso to Clause 26.2 provided for the appropriate remedy to approach the Arbitration Tribunal constituted under the Adhiniyam 1983. Simpliciter the construction was to be made by the appellant at his own cost (capital). However, consequently as per the scheme of the BOT the petitioner was to recover the capital or money used by him in the construction by collecting the toll for a fixed number of days as stated in the bid by the appellant himself under the principles of yearly Cash Flow Statement and FIRR (Financial Internal Rate of Return) method. Moreover the Additional Works Committee had fixed the number of toll days and in its meeting dated 16.01.2006, the Committee had approved of the extra cost of the additional work at Rs.10,26,22,743/- and additional works of the contract are allotted. The audit took an objection by report dated 09.10.2009 indicating that the advantages were given to the contractor without considering the long completion of work. In fact Counsel vehemently urged that left out work was yet to be certified despite which authorization for collection of toll of 103 and 77 days for the additional work was given.

8. Thereafter the Committee comprising of the Chief Engineer, BOT, MPRDC, Chief Engineer, MP PWD, Ujjain Zone and the Joint Director, Finance Department scrutinised the entire matter in the meeting dated 28.09.2011 and accepted that the additional work of Rs.10.26 crores was done by the petitioner. The calculation of the toll days was not undertaken as per Annexure-H, Clause No.22.7. In its next meeting on 28.12.2011 bifurcating the undone work from the total undone work; it was found to be 9.4 Crores. Therefore, a further Committee was constituted and held a meeting on 27.08.2013 and days calculated were 366 as per the terms of the agreement. The Committee also on the said date held that 77 days and 103 toll days calculated by the earlier committee were erroneous and had to be subtracted and calculated appropriately as fully stated in the minutes of meeting. These recommendations thereafter were referred to the Cabinet and the Under Secretary, Govt. of M.P., PWD, Bhopal which communicated the decision of

the Cabinet to the Engineer-in-Chief vide letter dated 22.10.2014.

9. Counsel also submitted that the agreement had been executed between the parties on 31.08.2001 and again petitioner further entered into an agreement with the Government by creating a SPV by the name of Ashoka Infraways Ltd. This did not amount to modifying the original agreement nor was the agreement rescinded in any manner. In fact it was clearly specified that if any Clause of the Agreement was found to be in violation of the letter or the item of the original agreement shall be null and void (Annexure P/5). The word 'Concession Agreement' was used in the letter wrongly and wrong phraseology by the Executive Engineer was contrary to the decision of the State Government which has maintained all through out that it is a works contract under the BOT scheme and action as also taken accordingly, but wrong terminology in the letter dated 16.01.2003 has given impression that it was the concession agreement. Besides Counsel urged that the terms and conditions and the various clauses mentioned in the original agreement dated 31.08.2001 were to prevail over the extended agreement and the original agreement contains the clause for referring of any dispute to the Arbitration Tribunal under the provisions of Madhyastam Adhikaran Adhiniyam 1983.

10. Relying on *M/s. Spedra Engineering Corporation Engineers and Contractors, Bhopal Vs. State of M.P. & Others* [AIR 1988 MP 111] the Court had held that even if there is no clause for the appointment of an Arbitrator, the M.P. Madhyastham Adhikaran Adhiniyam is a special enactment providing for statutory arbitration arising out of disputes in respect of works contract and would prevail over Arbitration Act in Madhya Pradesh in view of Art. 254(2).

11. Also placing reliance on *Smt. Kamini Malhotra Vs. State of M.P. & Others* [2002(5) MPHT 245] this Court had held that the work of construction of Water Treatment Plant was a work relating to "works contract" and on combined reading of Sections 7 and 20 of M.P. Madhyastham Adhikaran Adhiniyam, 1983, the Civil Court's jurisdiction to entertain and decide any dispute relating to "works contract" was barred and the order of the Court of the A.D.J. returning the application for presentation to proper forum, affirmed.

12. Counsel for Respondent has vehemently urged the fact that a Full Bench decision in the matter of *Shri Shankaranarayana Construction Company Vs. State of M.P. and others* [2007 (4) M.P.H.T. 444 (FB)] has

categorically held that the 1996 Act expressly saves the provisions of the 1983 Adhiniyam in sub-sections (4) and (5) of Section 2 of the 1996 Act, both in respect of statutory arbitrations and arbitrations pursuant to arbitration agreements in respect of disputes arising out of works contracts, from the provisions of Part I of the 1996 Act, which are not inconsistent with the provisions of 1983 Adhiniyam. Hence, the provisions of the 1983 Adhiniyam are not repugnant to the provisions of the 1996 Act and are not void and do not stand impliedly repealed by the 1996 Act.

13. Counsel for the respondents has referred to the Farlex Financial Dictionary to state that a concession agreement is an agreement in which a Government especially a local government, gives preferential treatment to a private sector company and then generally speaking, a concession agreement involves special tax considerations, and is designed to encourage a company to come or to stay in an area and the Government makes concession agreements to promote job growth or stability which is not the present case. The concession agreement is in fact an extension of the works contract whereby additional work was assigned to the petitioner/appellant and the payment was also to be paid by the B.O.T. Scheme which is in the original contract. In this light also there is no substance in the submissions put forth by the Counsel for the appellant. Counsel prayed that the appeal be dismissed.

14. On considering the above submissions, this Court is of the opinion that two important questions arise for consideration i.e. (1) whether the contract in dispute is a "works contract" or "concession agreement"? (2) And secondly regarding the dispute whether the provisions of the Madhya Pradesh Madhyastham Adhikaran Adhiniyam, 1983 Act would apply or provisions under Section M.P. Arbitration and Conciliation Act, 1996 would apply. Both the Counsel also relied on *Jabalpur Corridor (India) Pvt. Ltd. and another Vs. M.P. Road Development Corporation Ltd. and others* [2014(2) MPLJ 276] to bolster their submissions. Besides this decision was upheld by the Supreme Court in Special Leave to Appeal (C) No(s).3811/2014; and has attained finality.

15. Before we embark on considering the questions; it is important to note the most important fact that the State respondents have also taken over the toll collections from the petitioner and made a categoric statement that the petitioner is not collecting any toll on Dewas Bypass road at present. Hence the urgency and efficacy of the application under Section 9 of the Arbitration

and Conciliation Act 1996 for grant of interim relief before the A.D.J. Dewas has lost its urgency and efficacy and now the purely legality of the questions remain to be answered whether the contract in dispute would be a works contract or it would be a concession agreement. At this juncture it is also important to note that the dispute between the parties arose on 28.12.2014 during the subsistence/existence of the contract period since the contract period commenced from 24.05.2004 to 31.03.2012 and by the additional contract from 01.04.2012 to 17.12.2015, when the application under Section 9 of the 1996 Act was moved.

16. Then placing reliance on *Jabalpur Corridor (India) Pvt. Ltd.* (supra) we have no hesitation in holding that in the present case it was the Ashoka Buildcon who had to utilise and arrange the funds and after completion of the construction recovers the amount invested by it for completion of the project by way of toll. Thus the project is deemed to be leased out to the petitioners for maintenance as well as collection of the toll and regular entry and exit taking care of the project road, **till the expiry of the concession period.** Similarly although there is no State Support Agreement as such to Annexure A/3, dated 16.01.2003 by which the respondent No.2 ratified the arrangement, transfer of the enterprise, implementing the project by appellant No.1 along with appellant No.2 and entered into the agreement on 03.01.2002 for execution of the project is indicative of the fact that the disputed agreement was a concession agreement. Similarly considering Clause 22.1.1 of the disputed agreement regarding the Bankability of the Agreement appears to be tripartite security and in case of termination of the agreement due to force majeure or otherwise, the payments due and payable to the Entrepreneur would be paid by the Government in the first instance, directly to the lenders to the Entrepreneur. Similarly under Clause 22.1.2 the Contractor or the Entrepreneur was required to open an escrow account and credit all the revenues from the project and the funds raised for the project to the same before drawing funds from it, this account would be open to inspection to the Lenders as well as the Government, so as to be transparent and lend comfort to the Lenders. And in this regard also the ratio laid down in the matter of *Jabalpur Corridor (India) Pvt. Ltd.* (supra) is fully satisfied.

It would be, therefore, more appropriate under the circumstances to reproduce the concerned extract in the matter of *Jabalpur Corridor (India) Pvt. Ltd.*, Supra [2014(2) MPLJ 276] as under:-

12. "The expression 'works contract' as defined in the 1983 Act has a restricted meaning and has special and limited connotation and the same does not include detailed design, financing and operation of the contract. The works contract is a lump sum contract wherein the contractor has to quote the amount for execution of the work based on details furnished by the employer. There is no necessity for creation of any Escrow Account in works contract. In works contract the payment is made against the running account bills prepared by contractor and submitted to the employer periodically. Whereas in concession agreement, the concessionaire has to utilise and arrange the funds. The concessionaire under the agreement after completion of the construction recovers the amount invested by him for completion of the project by way of toll. No State Support Agreement is executed in case of a works contract whereas the same is executed in a case of concession agreement. Under the agreement the petitioners are under an obligation to prepare a detailed design, engineering, financing, procurement, construction, operation and maintenance of the project road. Thus, the project is deemed to be leased out to the petitioners for maintenance as well as collection of toll and regular entry and exit taking care of the project road, till the expiry of the concession period. The agreement provides execution of EPC contract and other contracts for execution of the project. The petitioner was also at liberty to employ other contractors for items of works as considered necessary for execution of the project. The petitioner, respondent No.1 as well as the State Government have entered into an agreement, namely, State Support Agreement on 14.04.2003 in pursuance of the concession agreement. From perusal of the State Support Agreement, it is evident that it forms an integral part of concession agreement. By no stretch of imagination State support Agreement can be termed as 'works contract', and both the aforesaid agreements contain provisions with regard to resolution of dispute under 1996 Act. For this reason also concession agreement cannot be termed as works contract. The dispute between the parties has to be resolved

under the provisions of the 1996 Act. (2011) 13 SCC 261, (2012) 3 SCC 513 and Civil Appeal No.1888-889 of 2011 (SC) *A.P.S. Kushwaha (SSI Unit) vs. Municipal Corporation, Gwalior and others* dated 17.02.2011, Rel. (Paras 11, 12, 18 and 19)"

17. Consequently the said case has also considered the fact and dichotomy regarding the resolving of the dispute under the Arbitration and Conciliation Act of 1996 or to resolve the dispute under the Madhya Pradesh Madhyastham Adhikaran Adhiniyam, 1983 Act. Both the parties clearly entered into the agreement as a 'concession agreement' and had taken such a decision as is evident from Clause 24, 25 & 26 of the Agreement.

18. We are reinforced in our decision due to the use of the term 'concession' used at several places in the Agreement itself. Clause 2 of the definitions has defined concession right meaning the facility of Dewas Bypass including all related works to maintain this facility and the right to collect the toll from the beneficiaries, retain the toll and transfer the facility to the Department on completion of the concession period.

Secondly 2(q) defines concession Area meaning the area within right of way between km. 159/4 of Bhopal-Ujjain road etc. Then 2(r) defines 'Contract Period' from the commencement of the date till the date of transfer of the facility back to the deptt. thereby indicating that the concession area is to be used in the concession period. Similarly 2(u) refers of the same period and toll to be collected only after notification of the concession period.

Next in Clause 4.1 the land for the proposed project will be handed over on a licence basis to the Entrepreneur for the concession period, thereby clearly indicating that it was a 'concessional agreement'. Although Clause-7.1 does not give any concessional tax benefits to the Contractor but the same is to be considered in juxtaposition to the fact that the scheme was BOT as framed by the State Government (Build, Operate, Transfer). The word 'concession' has been used repeatedly in the agreement and although it has been discarded cursorily by the Counsel for the respondents-State in the reply stating that a misnomer has been used by the Executive Engineer but considering the Clause 24, 25 & 26, it is evident that it is a 'concession agreement'. Clause 24.3 is the toll tax authorization and by 24.3 a concession is given to the appellants-petitioners in case of completion of work earlier

than the stipulated period then additional days of authorisation for collection of toll was made. Similarly Clause 25 is a force majeure and is the security clause indemnifying the contractor by extending the toll collection for contingencies. When this read in conjunction or juxtaposition with Clause-22.1.1 then the tripartite security is evident since in case of termination of contract due to force majeure or otherwise the payments due and payable to the entrepreneur; would be paid by the Government and entrepreneur was also requested to open an ESCROW account and deposit all the revenue from the project into it. This variable satisfies the ingredients as put forth by the ratio laid down in the matter of *Jabalpur Corridor* (supra).

19. Finally considering Clause 26 of the impugned agreement which pertains to settlement of disputes and is of crucial importance to the substantive question raised in the petition as well as appeal, it categorically states that if the dispute regarding the breach or termination thereof exists between the parties and cannot be settled within 30 days, the dispute is referred to arbitration under the provisions of Arbitration and Conciliation Act, 1996 and that the arbitration panel decision shall be final and binding on the parties. However, the provision has been invoked by the petitioners-appellants stating that in Section (d) of Section 2 of Madhya Pradesh Madhyastham Adhikaran Adhiniyam 1983 is involved then the matter shall be regulated by the Act of 1983 and the Arbitration Tribunal shall be constituted under Section 3 of the said Act and it is this point which is a crucial important in the present petition.

20. Although the Counsel for the respondents has relied on *Smt. Kamini Malhotra* (supra) the said decision was passed on the fact that construction of Water Treatment Plant was 'a work' relating to construction for the government and, therefore, works contract. And in the matter of *M/s. Spedra Engineering Corporation* (supra) the Court has held that the M.P. Madhyastham Adhikaran Adhiniyam, 1983 was a special enactment providing for statutory arbitration arising out of disputes in respect of works contracts. The present is not a works contract as already held above and both the decisions are, therefore, not applicable to the dispute at hand. Similarly considering the fact that the factual matrix pertains to non-extension of the additional period conceded and not being granted which led to the filing of the application under Section 9, then we have no hesitation in holding that although the work pertains to construction of Road Dewas Bypass road starting from 159/4 of Bhopal – Ujjain Road (SH-18) and joining Km. 577/6 of Agra-Bombay Road (NH-3) intersecting NH-3 in Km. 567/8 and SH-18 in

Km. 151/8 (total length of 19.8 Kms.), yet the dispute pertains to the concession or concessional period given in terms of the concession right or concession area during the contract period. Hence we find that there is some substance put forth by the Counsel for the appellants-petitioners. The petition needs to be allowed and it is hereby allowed. The impugned order dated 16.02.2015 passed by the 1st Additional District Judge, Dewas in Arbitration Case No.1/2015 is hereby set aside. The petitioner is granted liberty to move appropriate application under the provision of Arbitration and Conciliation Act, 1996 before the lower Court.

With the aforesaid observations and directions, the appeal is allowed to the extent herein above indicated.

Cc as per rules.

Appeal allowed.

I.L.R. [2016] M.P., 2025
ARBITRATION APPEAL

Before Mr. Justice Alok Aradhe & Mr. Justice Vivek Agarwal

Arbitration Appeal No. 02/2009 (Gwalior) decided on 29 April, 2016

K.T. CONSTRUCTION (I) LTD. (M/s.) ...Appellant
Vs.
STATE OF M.P. & anr. ...Respondents

A. Arbitration and Conciliation Act (26 of 1996), Section 34 - Setting aside of Arbitral award - **When not permissible - Held - An award passed by the arbitrator which is not contrary to the fundamental policy of Indian Law, Justice or Morality, contrary to the statute or patent illegality does not warrant interference of the Trial Court exercising powers under Section 34 of the Act. (Para 18)**

क. माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 34 – माध्यस्थम अवार्ड का अपास्त किया जाना – कब अनुज्ञेय नहीं है – अभिनिर्धारित – मध्यस्थ द्वारा पारित अवार्ड जो कि भारतीय विधि की मूलभूत नीति, न्याय या नैतिकता के विरूद्ध नहीं है, और कानून के विरूद्ध नहीं है अथवा प्रकट रूप से अवैध नहीं है, में अधिनियम की धारा 34 के अंतर्गत शक्तियों का प्रयोग करते हुए विचारण न्यायालय के हस्तक्षेप की आवश्यकता नहीं।

B. Arbitration and Conciliation Act (26 of 1996), Section 34 - **In the facts of present case, the arbitrator on the basis of meticulous**

appreciation of the material evidence on record has assigned reasons and rejected the claims of the appellant and thus it cannot be said that the award has been passed in contravention of Section 31 of the Act - Trial Court has rightly rejected the objections of the appellant to the award - Appeal dismissed. (Paras 17 & 18)

ख. माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 34 – वर्तमान प्रकरण के तथ्यों में, मध्यस्थ ने अभिलेख पर उपलब्ध साक्ष्य के सूक्ष्म मूल्यांकन के आधार पर कारण दिए हैं और अपीलार्थी के दावों को अस्वीकार किया है तथा इस प्रकार, यह नहीं कहा जा सकता कि अधिनियम की धारा 31 के उल्लंघन में अवार्ड पारित किया गया है – विचारण न्यायालय ने अवार्ड के विरूद्ध अपीलार्थी के आक्षेपों को उचित रूप से अस्वीकार किया है – अपील खारिज।

Cases referred:

(2002) 6 SCC 201, (2009) 10 SCC 259, (2015) 5 SCC 682, AIR 2016 SC 1441, Arbitration Petition No. 1158/2012, decided on 12.02.2015 (High Court of Bombay), 2006 (2) MPLJ 299, 2013 (5) MPHT 323, (2015) 3 SCC 49, 2015 (12) SCALE 207, (2006) 11 SCC 181, 1994 Supp (1) SCC 644, (2003) 5 SCC 705, (2006) 11 SCC 245.

K.N. Gupta with *Pravin N. Surange & Harshwardhan Topre,* for the appellant.

Arvind Dudawat, Addl. A.G. with Amit Bansal, Dy. G.A. for the respondent /State.

JUDGMENT

The Judgment of the Court was delivered by :

ALOK ARADHE, J. :- In this appeal under Section 37 of the Arbitration and Conciliation Act 1996 (hereinafter referred to "the Act"), the appellant has assailed the validity of the order dated 15.9.2008 passed by the trial court by which objections preferred by the appellant under Section 34 of the Act, have been rejected. In order to appreciate the appellant's challenge to the impugned order, few facts need mention which are stated infra.

2. The respondent No.2 had issued Notice Inviting Tenders (NIT) in respect of the work "Replacement and construction of culvert, strengthening and maintenance of Shivpuri Circular Road Km. 3/6 to 8/6 complete in all respects including construction of Toll Tax Barrier and booths at tenderer's capital and resources with authorisation to collect Toll under Build-operate

Transfer Scheme along with toll plaza and toll barrier and to collect toll tax from vehicles passing through the utility at the rate specified for the agreed period. The bid of the appellant was accepted and an agreement dated 19.5.1999 was executed between the parties. Under the agreement, the appellant was supposed to carry out the work as per drawings and specifications which were to be provided by the respondent No.2 herein. Admittedly under the contract, the appellant had to construct the road utilising his own capital and resources and in lieu thereof the appellant was authorised to collect the toll tax at the specified rates and conditions from the date thirty days after completion of the whole work or from such date as may be notified for the purpose. Clause 17 of the agreement deals with settlement of the dispute and provides that the provisions of the Act shall apply.

3. The appellant was allowed to collect the toll tax w.e.f. 3.2.2000 as per the authority given by the appellants. The respondent No.1 had raised certain claims vide letter dated 15.6.2001, which were rejected by the Executive Engineer vide letter dated 22.1.2004 except one claim for 43 days as bonus days. The appellant did not directly raise any claim before the Chief Engineer but approached him for appointment of an arbitrator. However, the aforesaid request was turned down by the Chief Engineer vide communication dated 9.2.2004. The appellant filed an application under Section 11(6) of the Act before the District Judge, Shivpuri, which was rejected by order dated 15.3.2004. The appellant thereupon approached this Court by filing an application under Section 11(6) of the Act, which was registered as Misc.Civil Case No. 57/2004 and learned Single Judge by order dated 29.11.2004 appointed Mr. Justice R.B.Dixit, a retired Judge of this Court as an arbitrator. The appellant filed its statement of claims before the arbitrator in which various claims under 13 heads were made. The respondents herein also filed their statement of claims in which specific objection was raised that since the contract in question is a works contract, therefore, the arbitrator has no jurisdiction to deal with the dispute referred to him as the same has to be tried by a Tribunal constituted under the provisions of Madhya Pradesh Madhyastham Adhikaran Adhiniyam, 1983 (hereinafter referred to as the "1983 Act"). The claims made on behalf of the appellant in various heads were denied.

4. The arbitrator passed an award on 5.11.2005 and inter alia held that the contract in question is not a works contract as the same is not of ascertained money value and, therefore, falls outside the purview of the dispute as

contemplated under Section 2(d) of the 1983 Act. The arbitrator out of 13 claims decreed 8 claims of the appellant and held that the appellant is entitled to benefit of collection of toll tax for additional 208 days or in lieu thereof a sum of Rs.79,18,560/-. The arbitrator by placing reliance on Executive Engineer's report with regard to the extra work carried out by the appellant, i.e. claim No.3, has awarded 36 additional days for collection of toll tax. The arbitrator has further held that the rate of toll tax was enhanced by notification dated 27.1.2000 issued by the State Government and it was clearly provided that the aforesaid rate would not apply in respect of the agreements prior to issuance of the notification and since the contract in favour of the appellant was executed on 19.5.1999, therefore, the appellant was not entitled to collect the toll tax at the enhanced rate under the notification dated 27.1.2000 and the amount of excess toll tax recovered by the petitioner has rightly been adjusted from the amount of earnest money. It has further been held that the communication dated 18.3.1999 was part of the contract and the appellant was bound by it.

5. Being aggrieved, the appellant as well as respondents filed objections under Section 34 of the Act. In the objections preferred by the appellant, the appellant assailed the award in so far as it pertains to rejection of his claims, whereas in the objections filed by the respondents, it was stated that the award passed by the arbitrator is per se without jurisdiction as the contract in question is a works contract. The trial court vide order dated 15.9.2008 rejected the objection preferred by the appellant as well as respondents. The trial court while dealing with the claim of the appellant for additional work has held that the appellant has not placed on record any written permission of the Chief Engineer to carry out the extra work. It has further been held that the amount of toll tax unauthorisedly collected by the appellant at the enhanced rate under the notification dated 27.1.2000 has rightly been adjusted from the security deposit. It has further been held that the appellant is not entitled to interest. Being aggrieved, the respondents have filed Arbitration Appeal No. 5/2009 which was decided by this Court vide judgment dated 27.4.2016 and the award has been modified in so far as it directs that in lieu of 208 days remaining period of toll tax the respondent would be entitled to sum of Rs.79,18,560/-. In the aforesaid background, the appellant has approached this Court.

6. Learned senior counsel for the appellant submitted that the appellant in the statement of claim filed before the arbitrator had made different claims

under 13 heads. However, the grievance in this appeal is confined only in respect of Claims No.3,5,6,8,11 and 12, i.e., (i) claim for additional period for collection of toll in lieu of the additional work for 363 days; (ii) claim for leakage of traffic for 72 days; (iii) claim for 604 days for collection of toll in view of the fact that the appellant was not permitted to collect the toll during night between the hours 9 pm to 7 am in the morning; (iv) claim for collection of toll for 440 days in view of the fact that the rate for collection of toll was increased; (v) claim for refund of security deposit of Rs.11.00 Lacs; (vi) claim with regard to costs of the proceeding to the tune of Rs.7.00 lacs.

7. Learned senior counsel for the appellant in support of claim No.3 has urged that the claim No.3 made by the appellant for recovery of toll tax for a period of 363 days on account of additional work ought to have been computed in terms of clause 25.7 of the agreement executed between the parties. It is further submitted that in paragraph 3 of the statement of claim, the appellant had submitted that it had incurred an amount of Rs.44,43,539/- and the aforesaid fact was not denied by the respondents in their statement of claim and, therefore, there was no reason to restrict the claim of the appellant for a period of 36 days. Learned senior counsel has also invited our attention to the communication dated 22.9.2001, sent by Executive Engineer, Public Works Department, Shivpuri to Chief Engineer, Public Works Department, Gwalior and has pointed out that the Executive Engineer has quantified the additional work done by the appellant at Rs.13,70,429/- without any basis and the claim of the petitioner to the extent of additional 36 days has been recommended by the Executive Engineer de hors the clause 25.7 of the agreement. Learned senior counsel has also invited the attention of this Court to the award passed by the arbitrator and has stated that the arbitrator has failed to assign any reason for rejecting the claim of the appellant in respect of 363 days, which tantamounts to violation of Section 31(3) of the Act.

8. In respect of claim of the appellant for collection of toll of additional 19 and 72 days respectively on account of diversion of traffic and leakage of traffic, it is argued that under the terms and conditions of the agreement the appellant was entitled to collect the toll in respect of the vehicles using the road. However, on account of communication dated 18.3.1999 sent by Engineer-in-Chief to the Chief Engineer, Public Works Department, Gwalior, which was issued even prior to execution of agreement, the appellant sustained losses. The aforesaid communication is de hors the terms and conditions of

the agreement executed between the parties. However, the aforesaid aspect of the matter has not been appreciated by the arbitrator. In respect to claim No.6, it is submitted that under the terms and conditions of the agreement the appellant was entitled to collect the toll for a period of 24 hours. However, vide the aforesaid communication dated 18.3.1999 the right of the appellant to collect toll for a period of 10 hours, i.e., 9 pm in the evening to 7 am in the morning, was curtailed. The aforesaid communication was sent by the Engineer-in-Chief unilaterally prior to execution of the agreement between the parties, does not bind the appellant due to which the appellant has sustained loss and is entitled to extension for a period of 604 days for collection of toll.

9. In respect of appellant's claim for collection of toll for additional 440 days due to increase of rate of toll, it is submitted by learned senior counsel for the appellant that the Executive Engineer by an order dated 26.2.2001, permitted the appellant to collect the toll tax w.e.f. 1.3.2001 and directed the appellant to deposit the difference of the amount of toll tax collected by the appellant at the increased rate. It is urged by the learned senior counsel for the appellant that the aforesaid order passed by Executive Engineer, is de hors the terms and conditions of the agreement and has no sanctity in the eye of law. Therefore, the appellant is entitled to collection of additional toll tax for a period of 440 days and refund of security deposit of Rs.11.00 lacs.

10. It is further submitted by learned senior counsel for the appellant that the appellant was compelled to deposit the amount as demanded by the Executive Engineer on account of excess collection of toll tax, otherwise the same would have been recovered from the appellant along with the interest. Therefore, the appellant deposited the amount under coercion and duress exercised by the authority. Lastly, it is urged that in the absence of any prohibition in the agreement with regard to grant of interest, the appellant is entitled to grant of interest/damages. In support of submissions, learned senior counsel for the appellant has placed reliance on the decisions of the Supreme Court in the cases of *Shyama Charan Agarwala & Sons vs. Union of India* [(2002) 6 scc 201]; *Som Datt Builders Limited vs. State of Kerala* [(2009) 10 SCC 259]; *Bharat Heavy Electricals Limited vs. Tata Projects Limited* [(2015) 5 SCC 682]; *Union of India vs. M/s. Ambica Construction* (AIR 2016 SC 1441); and a decision of High Court of Bombay in Arbitration Petition No. 1158/2012, decided on 12.2.2015 in the case of *Atlanta Limited and others vs. Executive Engineer, Road Development Division and*

others.

11. On the other hand, Shri Arvind Dudawat, learned Additional Advocate General has invited our attention to expression "contract" as used in 1.1 of the agreement and has submitted that in view of clause 1.1 of the agreement, the communication dated 18.3.1999 is a part of contract and the same was communicated to the appellant on 8.4.1999 and thereafter without lodging any protest the appellant executed the agreement with the respondents on 19.5.1999. Therefore, the claim of the appellant on account of leakage of traffic and diversion of traffic is misconceived. It is further submitted that in the reply to the statement of claim, the respondents have stated that the appellant has not executed any extra work and has not produced any authority of the Chief Engineer, Public Works Department, Gwalior permitting him to carry out the extra work, therefore, the appellant is not entitled to any amount under the head of extra work. With respect to claims No.8 and 11, it is submitted that the appellant was required to collect the toll at the rate specified by the State Government. The rates of the toll were specified in Schedule-7 by the State Government therefore notification dated 27.1.2000 in which it is clearly specified that the rates specified therein shall not apply to the contract which has already been executed prior to 27.1.2000 will not create any right in favour of the appellant. It is also pointed out that the contract in question was executed with the appellant on 19.5.1999 and, therefore, the appellant was not entitled to collect the rates of toll which were mentioned in the notification dated 27.1.2000. It is also submitted that no relief in terms of money can be granted to the appellant in view of bar contained in clause 17.2 of the agreement, therefore, prayer for refund of earnest money is misconceived and the amount of excess toll recovered by the appellant was rightly adjusted from the earnest money of the appellant. It is also submitted that the scope of interference with the award passed by the arbitrator is extremely limited and concurrent findings have been recorded by the arbitrator as well as trial court do not call for any interference. It is also urged that the appellant did not raise any claim before the Chief Engineer and, therefore, he could not have made the claims before the arbitrator. In support of aforesaid submissions, learned Additional Advocate General for the respondents has placed reliance on decisions in the cases of *Ravi Kant Bansal, Engineers and Contractors vs. M.P. Audyogik Kendra Vikas Nigam,* 2006 (2) MPLJ 299; *M/s. Mahalinga Shetty & Company vs. M.P. Electricity Board,* 2013 (5) MPHT 323; *Associate Builders vs. Delhi Development Authority,* (2015)

3 SCC 49; Chebrolu Enterprises rep. by its Properietor *Smt. Ch. Lakshmi Sesha Kumari vs. Andhra Pradesh Backward Class Cooperative Finance Corporation Ltd.,* 2015 (12) SCALE 207.

12. By way of rejoinder reply, learned senior counsel for the appellant has submitted that the contention of the respondents that the appellant did not approach the Chief Engineer is misconceived. In this connection, learned senior counsel has invited our attention to the letter dated 15.6.2001 which though was addressed to the Executive Engineer but the copy of the same was forwarded to the Chief Engineer as well and pursuant to which the Chief Engineer has initiated the proceeding. It is also submitted that once again the appellant on 26.11.2003 has raised the claim which was forwarded through Executive Engineer to the Chief Engineer. It is further submitted that the appellant had only accepted the common conditions, which is evident from the communication dated 10.7.1998 and the appellant is entitled to cost of the proceeding of Rs.7.00 lacs instead of Rs.2.5 lacs.

13. We have considered the rival submissions made at the bar. Before proceeding further, it is apposite to notice relevant extract of Section 34 of the Act, which reads as under:-

> *"Section 34- Application for setting aside arbitral award.-(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub/section (2) and sub-section (3).*
>
> *(2) An arbitral award may be set aside by the Court only if-*
>
> *(a) the party making the application furnishes proof that-*
>
> *(i) a party was under some incapacity, or*
>
> *(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or*
>
> *(iii) the party making the application was not*

given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may beset aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the Court finds that-

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being if force, or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation- Without prejudice to the generality of sub-clause (ii) it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81."

14. The scope of Section 34 of the Act is delineated by catena of decisions of the Supreme Court. The Supreme Court in *McDermott International Inc. v. Burn Standard Co. Ltd,* (2006) 11 SCC 181 while taking note of the decision rendered by it in *Renusagar Power Co. Ltd. v. General Electric Co.* , 1994 Supp (1) SCC 644 wherein it was held that an arbitral award can be set aside if it is contrary to fundamental policy of Indian law; the interests of India; or justice or morality, held that public policy is a matter dependent upon the nature of transaction and the nature of statute. However, subsequently, in the case of *ONGC Ltd. v. Saw Pipes Ltd.*, (2003) 5 SCC 705, the Supreme Court added another ground for exercise of courts' jurisdiction for setting aside the award i.e. if it is patently arbitrary. In *Centrotrade Minerals & Metals Inc. v. Hindustan Copper Ltd.*, (2006) 11 SCC 245 it was held by the Supreme Court that if an award suffers from patent illegality, which goes to the root of the matter, the court can interfere with the award passed by the arbitrator. In a recent decision, in the case of *Associate Builders v. Delhi Development Authority,* (2015) 3 SCC 49, the Supreme Court after taking note of various previous judgments rendered by it with regard to scope of interference with the arbitral award held that none of the grounds contained in Section 34 (2) (a) of the Act deals with the merits of the decision rendered by an arbitrator. It is only when the award is in conflict with the public policy of India as prescribed in Section 34 (2) (b) (ii) of the Act that the merits of an arbitral award are to be looked into under certain specified circumstances. It was further held that the Court would interfere with an award passed by an arbitrator if it is in violation of statute, interest of India, justice or morality, patent illegality, contravention of the Act or terms of the contract. It was also held that the court hearing an appeal does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus, an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score.

15. In the backdrop of aforesaid well settled legal position, the facts of the case at hand may be seen. Admittedly, the parties have only filed affidavits before the arbitrator and the persons whose affidavits have been filed have not been cross-examined by the parties. We shall deal with the claims raised on behalf of the appellant adseriatum.

(i) Claim No.3 with regard to 363 days for additional work performed by the appellant.

It is the case of the appellant that he has performed additional work to the tune of Rs.46,43,539.66 and, therefore under clause 25.7 of the agreement, is entitled to additional work of 363 days. The appellant has pleaded the claim for extra work in paragraph 3 of the statement of claim before the arbitrator. In paragraph 2.6.1 of the statement of claim filed on behalf of the respondent, we find that the aforesaid claim of the appellant has been emphatically denied by the respondents. In paragraph 3.5.1 of the statement of claim, the respondents have clearly stated that the appellant has only executed the work as provided in the agreement and has not executed any extra work as claimed by him. It is also pertinent to mention here that when a query was put by us to learned senior counsel for the appellant whether the appellant had placed any material on record before the arbitrator to substantiate his claim that he had incurred the expenditure of Rs. 46,43,539.66, learned senior counsel was unable to point out from the record any documentary evidence in this regard but only referred to the Schedule appended to the Statement of Claim. Therefore, the contention made by learned senior counsel for the appellant that the fact that the appellant has incurred expenditure of Rs. 46,43,539.66 on account of extra work has been admitted by the respondents cannot be accepted. It is also pertinent to mention here that under clause 5 of the agreement, the contractor is required to carry out the extra work after obtaining the approval of the Chief Engineer. In the instant case, the appellant has failed to produce any permission from the Chief Engineer which authorised him to carry out the extra work. It is noteworthy that the appellant himself by letter dated 15.6.2001 had claimed additional 122 days whereas in the statement of claim, the claim for 363 days has been made by the appellant for which apparently no explanation has been offered. Therefore, the findings recorded by the arbitrator as well as trial court for negativing the claim of the appellant, by any stretch of imagination, can be termed

as perverse. Therefore, we do not find any ground to interfere with the impugned award as well as the order of the trial court pertaining to rejection of claim No.3 of the appellant.

(ii) Claims No.5 and 6 for grant of additional days in so far as it pertains to leakage of traffic and on account of diversion of traffic.

Admittedly, in the instant case the NIT was issued on 25.3.1998. The bid of the appellant was accepted by Engineer-in-Chief by communication dated 18.3.1999, subject to terms and conditions mentioned therein. The relevant extract of the letter dated 18.3.1999 is reproduced below for the facility of reference :-

1. प्रस्तावित सर्कुलर रोड के कि.मी. 4/6 एवं 8/2 पर टोल टैक्स बैरियर लगाने की अनुमति दी जायेगी।

2. यात्री बसें एवं अन्य छोटे वाहन जो वर्तमान में सीधे रा.रा. 3 से गुजरते हैं वे यथावत गुजरते रहेंगे इसके लिये ठेकेदार को कोई आपत्ति नहीं होगी।

3. ठेकेदार को स्वयं के व्यय से दूसरी ओर के सर्कुलर रोड पर छतरी रोड मार्ग के पास फिक्स बैरियर स्थापित करने एवं इसे मेन्टेन करने की अनुमति दी जायेगी जिससे ठेकेदार को कोई पथकर वसूली का अधिकार नहीं होगा साथ ही यदि किसी प्रकार की वैधानिक अथवा अन्य अड़चन उत्पन्न होने के कारण इस फिक्स बैरियर को लगाना संभव नहीं होता है तो ठेकेदार को इसके लिये कोई क्षतिपूर्ति नहीं दी जायेगी।

4. रात्रि 9:00 बजे से प्रातः 7:00 बजे तक सभी वाहन रा.रा.3 से जायेंगे जिस पर ठेकेदार को कोई आपत्ति नहीं होगी।

The Executive Engineer by letter dated 8.4.1999 informed the appellant that bid of the appellant has been accepted subject to the conditions mentioned in the letter dated 18.3.1999 issued by Engineer-in-Chief. Thus, the appellant was aware about the terms and conditions mentioned in the letter dated 18.3.1999. However, the appellant did not raise any objection and enter into an agreement on 19.5.1999. Clause 1.1 of the agreement defines the expression "contract", which reads as under:-

"(1.1) The 'Contract' means the documents, forming the Notice Inviting the Tenders and the Tender document submitted by the tenderer and the acceptance thereof including the formal agreement executed between the Government of Madhya Pradesh and to the contractor."

Thus, if the communications dated 18.3.1999 and 8.4.1999 are read in conjunction with clause 1.1 of the conditions of the contract, it is evident that the communication dated 18.3.1999 forms part of the contract. In other words, the appellant is bound by the terms and conditions contained in the communication dated 18.3.1999, by which the bid of the appellant was accepted by the Engineer-in-Chief on behalf of the Government. Therefore, the arbitrator as well as the trial court has not committed any illegality in rejecting the claims of the appellant in so far as it pertains to claims No.5 and 6.

(iii) Claims No.8 and 11, i.e., the claim of 440 days on account of increase in toll tax and for refund of the earnest money of Rs.11.00 lacs .

It is pertinent to mention here that the rate of toll tax was increased by State Government by a notification dated 27.1.2000. The aforesaid notification clearly provides that the rates of toll mentioned in the notification shall not apply to the contract executed prior to the issuance of the date of notification. The contract with the appellant was executed on 19.5.1999, i.e., prior to the issuance of the notification. Despite non-applicability of the notification dated 27.1.2000, the appellant without any authority continued to collect the toll tax at the enhanced rate under the notification dated 27.1.2000. Therefore, the appellant was asked to refund the extra amount of toll collection vide letters dated 22.2.2002, 15.4.2002, 9.5.2002, 10.6.2002, 14.6.2002, 19.9.2002, 29.8.2002, 1.10.2002, 12.12.2002, 6.3.2002, 17.4.2005 and 5.4.2002. However, the appellant despite the receipt of aforesaid notices only deposited a sum of Rs. 38,29,623/-. Therefore, the remaining amount was adjusted by the respondents from the

earnest money. Hence, the arbitrator as well as the trial court have rightly found that the appellant is not entitled to any amount under the claims No.8 and 11. Even otherwise, the claim No.11 with regard to refund of earnest money cannot be granted in view of express bar contained in clause 17.2 of the agreement, which reads as under:-

"17.2 Since there is no money transaction between the parties and the money has only notional value for the purpose of this agreement the effect of the arbitration award shall be translated into either extension of the agreement period or its reduction as the case may be."

(iv) Claim No.12 with regard to cost of the proceeding.

It is stated on behalf of the appellant that though the appellant has incurred an amount of Rs.7.00 lacs towards the cost of the arbitration proceeding, yet the arbitrator has awarded a sum of Rs.2.5 lacs by way of cost of the proceeding of the arbitration to the appellant. The trial court has upheld the same. We do not find any infirmity in the same warranting interference.

16. At this stage, we may advert to the submissions made by learned senior counsel on behalf of the appellant. At the cost of repetition, we may state that the claim for extra work performed by the appellant has not been admitted by the respondents in their statement of claim and, therefore, the contention that since the claim for extra work performed by the appellant has been admitted by the respondent therefore the same ought to have been decreed, cannot be accepted. Similarly the contention that communication dated 18.3.1999 sent by Engineer-in-Chief to the Chief Engineer is de hors the terms and conditions of the agreement, also cannot be accepted as the same forms part of the contract for the reasons already assigned by us while dealing with the claims No.5 and 6 of the appellant. The contention that the order dated 26.2.2001 passed by the Executive Engineer is de hors the terms and conditions of the contract cannot be accepted as the appellant was not entitled to collect the toll tax at the enhanced rate in view of the specific stipulation contained in the notification dated 27.1.2000 that the same would not apply to the agreement

executed prior to the date of issuance of the notification. The claim for grant of interest also cannot be entertained in view of specific prohibition contained in clause 17.2 of the agreement.

17. The arbitrator on the basis of meticulous appreciation of the material evidence on record has assigned reasons and has rejected the claims of the appellant. Therefore, it cannot be said that the award has been passed in contravention of Section 31 of the Act inasmuch as it contains detailed reasons for the findings recorded by the arbitrator. The trial court has rightly rejected the objections preferred by the appellant to the award passed by the arbitrator.

18. In view of the preceding analysis, the award passed by the arbitrator cannot be said to be contrary to the fundamental policy of Indian Law Justice or Morality, contrary to statute, or patent illegality, warranting interference of the trial court in exercise of power under Section 34 of the Act, therefore, the trial court has rightly rejected the objections preferred by the appellant under section 34 of the Act. Therefore, we do not find any merit in the appeal.

19. In the result, the appeal fails and is hereby dismissed. The parties shall bear their own costs.

Appeal dismissed.

I.L.R. [2016] M.P., 2039
CIVIL REVISION
Before Mr. Justice Sujoy Paul
C.R.No. 195/2015 (Jabalpur) decided on 11 February, 2016

SUNIL SINGH ...Applicant
Vs.
SMT. MEENAKSHI NEMA ...Non-applicant

***A. Accommodation Control Act, M.P. (41 of 1961), Section 23-A* - Revision against order of eviction and to pay arrears of rent - Held - Under Section 23-A eviction can be sought on the ground of bonafide requirement - Neither the non-payment of rent nor recovery of rent can be subjected under Chapter III-A of the Act. (Para 11)**

क. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 23–ए – किराये के बकाया के भुगतान तथा बेदखली के आदेश के विरूद्ध पुनरीक्षण – अभिनिर्धारित– धारा 23–ए के अंतर्गत वास्तविक आवश्यकता के आधार पर बेदखली

चाही जा सकती है – न तो किराये के असंदाय और न ही किराये की वसूली को अधिनियम के अध्याय III-ए के अध्यधीन माना जा सकता है।

***B. Accommodation Control Act, M.P. (41 of 1961), Section 23-J* - Non-applicant being widow is a landlord within the purview of Section 23-J of the Act - Hence she is entitled under Section 23-J to file suit on the ground of bonafide requirement. (Para 13)**

ख. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 23–जे – अनावेदिका एक विधवा होकर अधिनियम की धारा 23–जे की परिधि के अंतर्गत मकान मालिक है – अतः वह वास्तविक आवश्यकता के आधार पर वाद प्रस्तुत करने हेतु धारा 23–जे के अंतर्गत हकदार है।

***C. Accommodation Control Act, M.P. (41 of 1961), Sections 23-A & 23-J - Authority of RCA - Maintainability* - Under Chapter III-A of the Act for the purpose of eviction on the ground of bonafide need RCA is a competent authority - Wrong quoting of provision by itself would not denude the power of the authority. (Para 15)**

ग. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धाराएँ 23–ए व 23–जे – भाड़ा नियंत्रक प्राधिकारी का प्राधिकार – पोषणीयता – अधिनियम के अध्याय III-ए के अंतर्गत वास्तविक आवश्यकता के आधार पर बेदखली के प्रयोजन हेतु भाड़ा नियंत्रक प्राधिकारी एक सक्षम प्राधिकारी है – उपबंध का गलत उद्धरण स्वतः प्राधिकारी की शक्ति का हरण नहीं करेगा।

***D. Objection about Non-registration of Adoption deed* - Since the objection was not raised before RCA he was not required to examine the same. (Para 16)**

घ. दत्तक विलेख के अपंजीयन संबंधित आपत्ति – चूंकि भाड़ा नियंत्रक प्राधिकारी के समक्ष आपत्ति नहीं उठाई गई थी, इसलिए उसके द्वारा आपत्ति का परीक्षण किया जाना अपेक्षित नहीं था।

***E. Issuance of improper summons* - Issue not raised in the petition can not be permitted to be raised in arguments. (Para 17)**

ङ. अनुचित समन जारी किया जाना – याचिका में जो प्रश्न नहीं उठाया गया था, उसे बहस के दौरान उठाने की अनुमति नहीं दी जा सकती।

Cases referred:

(2008) 15 SCC 538, (2008) 3 SCC 299, (2011) 5 SCC 532, (2013)

2 MPLJ 237, 1998 (1) MPLJ 110, AIR 1977 SC 854, (1994) 2 SCC 558, (2001) 2 SCC 482, (2003) 4 SCC 712, (2003) 6 SCC 545, (2004) 1 SCC 453, (2006) 3 SCC 167, (2006) 5 SC 789, (2010)11 SCC 433, (2002) 9 SCC 458, (2007) 3 MPHT 309, (2008) 4 MPLJ 536.

Akhilesh Jain, for the applicant.
Shreyas Dubey, for the non-applicant.

ORDER

SUJOY PAUL, J. :- This civil revision filed under Section 23-E of the M.P. Accommodation Control Act, 1961 (hereinafter referred to as the Act) challenges the legality, propriety and correctness of the order passed by the Prescribed/Rent Control Authority (R.C.A.) dated 08-05-2015.

2. Brief facts necessary for adjudication of this matter are that the non-applicant filed an application under Section 18 and 20 of the M.P. Parisar Kirayedari Adhiniyam, 2012 (hereinafter referred to as the Adhiniyam) before the Rent Controlling Authority, Satna for eviction of the applicant and for recovery of arrears of rent. This is not in dispute between the parties that a tenancy agreement dated 06-07-2000 was executed between the husband of non-applicant and the applicant. Accordingly, a shop was allotted to the applicant for an amount of Rs.2,500/- per month. The applicant is running the shop in the name of Parul Agency from the said rented shop.

3. The applicant filed written statement and controverted the allegations of application filed under Section 18 and 20 of the Adhiniyam. The Court below after hearing the parties allowed the application of non-applicant and directed the applicant to vacate the accommodation in question and hand over the possession to non-applicant within one month. It is further directed that arrears of rent be adjusted from the security amount of Rs. 1,00,000/-. If anything is remaining after adjustment of arrears of rent, the said amount be paid to the other side.

4. Shri Akhilesh Jain, learned counsel for the applicant assailed the impugned order by contending that the Adhiniyam although got assent of Hon'ble President but as per Section 1 (3) of the Adhiniyam it has not been published in the official gazette. Hence, the Adhiniyam has not been enforced till date. The application of non-applicant before the R.C.A. was not maintainable because it was filed under the Adhiniyam, which is not enforcible

till date. Thus, the Authority below has acted with material irregularity and in excess to jurisdiction. It is further submitted that the Authority below had no jurisdiction to pass the decree for arrears of rent. For the purpose of recovery of arrears of rent, non-applicant should have filed civil suit and the application before R.C.A. was not maintainable.

5. It is further urged by Shri Jain that the accommodation in question was sought to be vacated by showing the alleged bonafide need of non-applicant's son Nitinraj Nema. It is submitted that non-applicant allegedly adopted Nitinraj Nema but failed to prove custom of adoption. The adoption was against the provisions of Hindu Adoption and Maintenance Act, 1956. On this score alone, the order of Court below needs to be interfered with. It is argued that the unregistered adoption deed was also inadmissible in evidence. Thus, the learned R.C.A. should have dismissed the application for eviction.

6. Shri Jain by placing reliance on the judgment of Supreme Court reported in (2008) 15 SCC 538 *Sulochana vs Rajinder Singh,* urged that the non-applicant's case is not covered under Section 23-J of the Act. It is submitted that the non-applicant cannot be treated to be a 'landlord' within the meaning of the said Act.

7. Shri Jain has taken pain to contend that the summons issued by R.C.A. were not in the prescribed form and proceedings based on such summons are liable to be interfered with.

8. Shri Shreyas Dubey, learned counsel for the respondent supported the impugned order. He submitted that the non-applicant is a landlord as per Chapter III-A of the Act. He submitted that the Court below has not committed any error of law while allowing the application of non-applicant. In support of his contention, he relied on *Pradeep Kumar vs Hajari Lal* (2008) 3 SCC 299, *Booz Allen and Hamilton Inc. vs SBI Home Finance Limited and others* (2011) 5 SCC 532, *Praveen Kumar vs Raghunath s/o Jagannath Ghorse and another* (2013) 2 M.P.L.J. 237. No other point is raised by the parties.

9. I have heard the parties at length and perused the record.

10. Before dealing with rival contentions, it is apposite to refer certain provisions of the Act. Chapter III-A of the Act deals with the eviction of tenants on the ground of 'bonafide requirement'. Section 23-A is a special provision and the said chapter prescribes a summary proceedings.

11. A simple reading of Chapter III-A of the Act and more particularly Section 23-A of the Act makes it clear that the eviction can be sought for on the ground of 'bonafide requirement'. I find force in the arguments of Shri Akhilesh Jain that non payment of rent or recovery of rent cannot be subject matter of adjudication under Chapter III-A. To this extent the applicant has made out a case.

12. The core issue in relation to eviction is whether the non- applicant is a 'landlord' and whether she was able to establish bonafide requirement of accommodation before the Authority below. It is apt to quote Section 23-J of the Act which reads as under:-

> **23-J. Definition of landlord for the purposes of Chapter III-A-**
>
> For the purposes of this Chapter 'landlord' means a landlord who is-
>
> (i) a retired servant of any Government including a retired member of Defence Services; or
>
> (ii) a retired servant of a company owned or controlled either by the Central or State Government; or
>
> (iii) a widow or a divorced wife; or
>
> (iv) physically handicapped person; or
>
> (v) a servant of any Government including a member of defence services who, according to his service conditions, is not entitled to Government accommodation on his posting to a place where he owns a house or is entitled to such accommodation only on payment of a penal rent on his posting to such a place.
>
> ***(emphasis supplied)***

13. The reliance was placed by the applicant on the judgment of the Apex Court in the case of *Sulochana* (supra). In the said case, the Apex Court held that recourse to summary procedure under Chapter III-A of the Act can be taken only by specified landlord within the meaning of Section 23-J of the Act, which includes 'widow or divorced wife'. Only a landlord who comes within the purview of the said definition is entitled to file suit on the ground of bonafide requirement. In *Sulochana* (supra), the Apex Court opined that the

appellant purchased the property in question on 23-03-1996. She was already a widow at that time. In the present case, admittedly the tenancy agreement was entered into between the non-applicant's husband and present applicant. The husband died later on. The non-applicant herein was not a widow at that time. The widow thereafter filed an application for eviction. This Court in 1998 (1) M.P.L.J. 110 *Kailash, Chandra and others vs Dr. Kamla w/o Chintaman Chaudhary* held that the law nowhere says that a woman would be entitled to the benefit under Section 23-J read with section 23-A if the premises were let out when she was not a widow and the need arose only after she became a widow. The concession is shown to the persons and the cause of action would accrue in favour of such landlord only when they need the premises. The cause of action for eviction would not accrue on the date when the tenancy was created.

14. For the foregoing reasons, I am unable to hold that non-applicant is not a landlord within the meaning of Section 23-J of the Act. The judgment of *Sulochana* (supra) for the reasons stated above cannot be pressed in service in the present case.

15. The applicant contended that Adhiniyam of 2012 has no application, hence the application filed under the said Adhiniyam should have been dismissed by R.C.A. It is seen that R.C.A. opined that the reliance on Adhiniyam is based on wrong quoting of provision. He otherwise has authority to deal with the question. In my view, it is trite that omission or error in mentioning the correct provision of law by itself would not denude the power of the authority to take it so long as source of power is traceable from enabling provision. [See A.I.R. 1977 SC 854 *P.R. Naidu vs Govt. of A.P.,* (1994) 2 SCC 558 *State of Karnataka vs Krishnaji Srinivas Kulkarni and others,* (2001) 2 SCC 482 *B.S.E. Brokers Forum, Bombay and others vs Securities and Exchange Board of India and others,* (2003) 4 SCC 712 *High Court of Gujarat and another vs Gujarat Kishan Mazdoor Panchayat and others,* (2003) 6 SCC 545 *Chandra Singh and others vs State of Rajasthan and another,* (2004) 1 SCC 453 *Challamane Huchha Gowda vs M.R. Tirumala and another,* (2006) 3 SCC 167 *Union of India and another vs S.C. Parasher and* (2006) 5 SCC 789 *K.K. Parmar vs H.C. of Gujarat].* Chapter III-A of the Act makes it clear that for the purpose of eviction on the ground of bonafide need, R.C.A. is a competent authority. Hence, I am unable to hold that for the purpose of eviction, R.C.A. has acted beyond his authority.

The applicant is entitled to succeed only on the aspect of recovery of rent.

16. The applicant has also raised doubt about adoption of Nitinraj Nema by the non-applicant. In the written statement filed before the R.C.A., the applicant has raised a bald objection. In Para 6, it is averred that the applicant has filed an unproved and misleading adoption deed. The applicant did not raise objection before the Court below relating to non-registration of adoption deed. In view of the aforesaid, R.C.A. was not required to examine the question whether Nitinraj Nema was adopted son or not. If the applicant had any doubt about the same, the burden was on the applicant to putforth his defence in a proper manner. Similarly, it was for the present applicant to show before the R.C.A. that Nitinraj Nema cannot be treated as son of the non-applicant. The applicant has failed to discharge said burden.

17. The last contention of Shri Jain was relating to issuance of improper summons. It is seen that there is no pleading in the present civil revision relating to the said contention. The applicant has not raised any ground relating to infirmity in the procedure of issuance of summons or relating to form of the summons. This is trite law that an issue not raised in the petition cannot be permitted to be raised in arguments. [See (2010) 11 SCC 433 *Avinash Gaikwad and others vs State of Maharashtra and others,* (2002) 9 SCC 458 *State of Rajasthan and another vs D.D. Sood and another,* (2007) 3 M.P.H.T. 309 *Nagda Municipality vs ITC Limited* and (2008) 4 M.P.L.J. 536 *Gomti Bai Tamrakar and others vs State of M.P and others*]

18. As analyzed above, the applicant is entitled to succeed partly. The applicant is able to establish that the R.C.A. has committed an error in passing the order relating to rent/arrears of rent. Under Section 23-J of the Act, learned R.C.A. was competent to pass orders only in relation to eviction based on 'bonafide requirement'. The impugned order to the extent relates to rent is liable to be interfered with.

19. Resultantly, the petition is partly allowed. The impugned order to the extent it relates to payment/recovery of rent is set aside. Liberty is reserved to the non-applicant to avail the remedy relating to recovery of rent by filing appropriate proceeding before the Court of competent jurisdiction. Rest of the order which relates to eviction is affirmed.

20. No order as to costs.

Revision partly allowed.

I.L.R. [2016] M.P., 2046
CIVIL REVISION
Before Mr. Justice Alok Aradhe
C.R. No. 142/2004 (Jabalpur) decided on 03 March, 2016

PARAMJEET KAUR BHAMBAH (SMT.) ...Applicant
Vs.
SMT. JASVEER KAUR WADHWA ...Non-applicant

A. Accommodation Control Act, M.P. (41 of 1961), Section 23-A(b) - Eviction suit - **Plaintiff widow - Bonafide need for non-residential purpose - Rent Controlling Authority dismissed the application u/S 23-A(b) of the Act of 1961, on the ground that applicant failed to prove the ownership and bonafide need - Held - The ownership in eviction suit has to be proved vis-à-vis the tenant and not absolute ownership and no evidence in rebuttal has been adduced by the non-applicant on the point of bonafide need & even defence of the non-applicant against eviction has been struck out - Application u/S 23-A(b) of the Act of 1961 allowed - Revision allowed. (Paras 8 to 11)**

क. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 23–ए(बी) – बेदखली का वाद – वादी विधवा है – गैर आवासीय प्रयोजन हेतु वास्तविक आवश्यकता – भाड़ा नियंत्रक प्राधिकारी ने अधिनियम 1961 की धारा 23–ए(बी) के अंतर्गत प्रस्तुत आवेदन इस आधार पर खारिज किया कि आवेदिका अपना स्वामित्व एवं वास्तविक आवश्यकता साबित करने में असफल रही – अभिनिर्धारित – बेदखली के वाद में किरायेदार के मुकाबले में स्वामित्व को साबित करना पड़ता है न कि पूर्ण स्वामित्व को तथा वास्तविक आवश्यकता के बिंदु पर अनावेदिका द्वारा खंडन में कोई साक्ष्य प्रस्तुत नहीं की गई है एवं यहाँ तक कि बेदखली के विरूद्ध अनावेदिका का बचाव भी समाप्त कर दिया गया है – अधिनियम 1961 की धारा 23–ए(बी) के अंतर्गत प्रस्तुत आवेदन मंजूर – पुनरीक्षण मंजूर।

B. Accommodation Control Act, M.P. (41 of 1961), Section 23-A(b) - Eviction suit - Ground - **Bonafide need for non-residential purpose - Owner - Meaning - Held - The meaning of the term "owner" has to be understood vis-à-vis a tenant and not absolute ownership and it means that the owner should be something more than the tenant.**

(Para 8)

ख. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 23–ए(बी) – बेदखली का वाद – आधार – गैर आवासीय प्रयोजन हेतु वास्तविक आवश्यकता –

स्वामी – अर्थ – अभिनिर्धारित – शब्द "स्वामी" का अर्थ एक किरायेदार के मुकाबले में समझा जाना चाहिए न कि पूर्ण स्वामित्व के मुकाबले में एवं इसका अर्थ यह है कि एक किरायेदार की तुलना में स्वामी की हैसियत कुछ बढ़कर होना चाहिए।

C. Interpretation of statutes - Accommodation Control Act, M.P. (41 of 1961) Section 23-A(b)- Eviction suit - **It is well settled legal proposition that question of title to the property has to be examined incidentally and cannot be decided finally in the eviction suit. (Para 9)**

ग. कानूनों का निर्वचन – स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41) धारा–23–ए(बी)– बेदखली का वाद – यह एक सुस्थापित विधिक प्रतिपादन है कि बेदखली के वाद में संपत्ति के स्वत्व के प्रश्न का आनुषांगिक रूप से परीक्षण किया जाना चाहिए एवं इसे अंतिम रूप से विनिश्चित नहीं किया जा सकता।

Cases referred:

1970 MPLJ 674, 1990 MPLJ 112, 2003 (2) MPLJ 481, 2006(1) MPLJ 338, (1994) 4 SCC 250, (1989) 1 SCC 444, AIR (2014) SC 1394, (2002) 3 SCC 375, (2012) 2 MPLJ 460, 1986 JLJ 313, 1998 MPLJ 610, AIR 1956 SC 593, AIR 1966 SC 605, AIR 1960 SC 213, AIR 1976 SC 309, AIR 1989 SC 162, 2010(3) MPLJ 203, 2009(1) MPLJ 343, AIR 1987 SC 2028, (1995) 6 SCC 580, (2000) 8 SCC 123, (2006) 5 SCC 532, AIR 1960 SC 100, 1985 MPLJ 675.

Rajendra Tiwari with *Abhishek Tiwari,* for the applicant.
Pranay Verma, for the non-applicant.

ORDER

ALOK ARADHE, J. :- In this Revision under Section 23-E of M.P. Accomodation (sic:Accommodation) Control Act, 1961, the applicant has assailed the validity of order dated 19/01/2004 passed by the Rent Controlling Authority, Jabalpur. In order to appreciate the applicant's challenge to the impugned order, few facts need mention which are stated infra.

2. The applicant filed an application under Section 23-A(b) of M.P.Accomodation (sic:Accommodation) Control Act, 1961 (hereinafter referred to as 'Act') against the non-applicant. The claim in the application inter alia was based on the ground that accommodation in question, which is non-residential in nature, was let out to the non-applicant under an agreement dated 28/01/1992 by Late Sardar Kulwant Singh, who is husband of the

applicant. It was further pleaded that on 06/04/ 1998 the applicant's husband expired. Thereafter, the non-applicant started paying rent to the applicant and thus attorned to the ownership of the applicant. The eviction of the non-applicant from the accommodation in question was sought inter alia on the ground that applicant needs the accommodation bonafide for her son namely Gurjinder Singh who wants to open an ice cream parlour in the premises in question. The non-applicant filed an application under Section 23-C of the Act and was granted the leave to defend. Thereafter, the non-applicant filed the written statement and the Rent Controlling Authority recorded the evidence of the parties and by an order dated 19/01/2004 dismissed the application filed by the applicant inter alia on the ground that the applicant has failed to prove that she is the owner of the premises in question and the applicant has not approached the Court with clean hands as she has failed to disclose the alternative vacant accommodation in her possession. During the pendency of this revision, by an order dated 2.12.2004 passed by this Court, the defence of the non-applicant against eviction was struck out. On a reference being made by learned Single Judge vide order dated 11.11.2006, a Division Bench of this Court answered the reference by stating that after granting leave to defend the Rent Controlling Authority is not required to grant any opportunity to file the written statement.

3. Learned senior counsel for the applicant while inviting the attention of this Court to order dated 02/12/2004 passed by a Bench of this Court submitted that defence of the non-applicant to the proceeding for eviction has already been struck out. It is submitted that the non-applicant has implicitly admitted the title of the applicant in respect of the suit accommodation in the application for leave to defend and in view of Section 23-D(3) of the Act, the statutory presumption is attached to the bonafide need of the applicant. It is also submitted that non-applicant has failed to lead any evidence in rebuttal to dislodge the statutory presumption in respect of the bonafide need. It is also submitted that since the applicant is a widow, therefore, she belongs to category specified in Section 23-J of the Act and was competent to file the application for eviction under Chapter III-A of the Act and all other co-owners need not have joined her in the proceeding. In support of aforesaid submissions reliance has been placed on decisions in the case of *Onkar Prasad Patel V. Brijlal* 1965 MPLJ N63, *Smt. Krishnabai Vs. Smt. Laxmibai* 1970 MPLJ 674, *Harbans Singh Vs. Smt. Margrat G. Bhingardive* 1990 MPLJ 112, *Girish Kumar Shrivastava Vs. Punjab National Bank, Satna* 2003(2) MPLJ 481

and *Pandharinath S/o Ramchandra Rao Vs. Rukminibai wd/o Chotelal and other* 2006(1) MPLJ 338. It is urged that the plea that the applicant is not the owner of the accommodation in question, has not been taken in the application under Section 23-C of the Act and there is sufficient material on record to arrive at a finding that the applicant is the owner in respect of the accommodation in question. In support of aforesaid submission, learned senior counsel for the applicant has placed reliance on the decisions of Supreme Court in the case of *Smt. Anar Devi Vs. Nathu Ram* (1994) 4 SCC 250, *Pal Singh, Vs. Sunder Singh (Dead) by Lrs and Others* (1989) 1 SCC 444 and *Keshar Bai Vs. Chhunulal* A.I.R. (2014) SC 1394.

4. On the other hand, learned counsel for the non-applicant has invited the attention of this Court to the sale deed filed by the applicant before this Court as well as the date of dissolution of partnership and Will (Exhibit-P-15) dated 05/08/1974 to submit that from the aforesaid documents, the title of the applicant in respect of accommodation in question is not even remotely proved. It is further submitted that in a proceeding under Section 23-A(b) of the Act the applicant is required to prove the ownership. It is urged that the landlord can be said to be the owner if he has the right to evict the tenant and then to retain, control, hold and use the property for himself rather on some one's behalf and mere collection of rent would not make a person an owner. In support of aforesaid submissions, reliance has been placed on decisions of Supreme Court in *Sheela and Others Vs. Firm Prahlad Rai Prem Prakash,* (2002) 3 SCC 375, and of this Court in the cases of *Dayal Das (dead) through Lrs' Smt. Kamla Chenani and Others Vs. Rajendra Prasad Gautam* (2012) 2 MPLJ 460 and *Asif Ali Vs. Rahandomal*, 1986 JLJ 313. It is also argued that even if the defence is struck out, the defendant can still show that plaintiff is not the owner of the suit premises. In this connection, reference has been made to decision in the case of *Sahiba Masood Vs. Tahabbur Ali Khan*, 1998 MPLJ 610. It is also argued that the applicant is neither the owner nor a co-owner and has no semblance of title in respect of the accommodation in question.

5. It is also submitted that there is no admission in respect of title of the applicant in the application for leave to contest the prayer for eviction. It is further argued that statement made in the application under Section 23-C of the Act that Kulwant Singh is the owner of the property is factually incorrect, and an erroneous admission can always be explained. In support of aforesaid

submission, reference has been made to decision of Supreme Court in the case of *Nagubai Ammal and others Vs. B.Shama Rao and others* AIR 1956 SC 593. It is urged that mere admission is insufficient to confer title, which does not exist. In this connection, reliance has been placed on a decision of the Supreme Court in *Ambika Prasad Vs. Ram Ekbal Rai* AIR 1966 SC 605 and *Kedar Nath Motani and others Vs. Prahlad Rai and others,* AIR 1960 SC213. It is argued that even if the defence of the non-applicant to the proceeding for eviction is struck out, the non-applicant can submit that even on the basis of evidence adduced by the applicant, a decree cannot be passed. For this proposition, reliance has been placed to decisions of the Supreme Court in the cases of *M/s Paradise Industrial Corporation Vs. M/s Kiln Plastics Products*, AIR 1976 SC 309 and *Modula India Vs. Kamakshya Singh Deo,* AIR 1989 SC 162. It is further argued that the applicant has failed to plead the availability of an alternative accommodation and has further failed to prove as to how it is not suitable and, therefore, the bonafide need of the applicant has to be negatived. In this connection, reference has been made to the decisions in the case of *Gyasi Nayak Vs. Gyanchandra Jain,*2010(3) MPLJ 203 and *Raj Kumar Jain Vs. Smt. Usha Mukhariya,* 2009(1) MPLJ 343.

6. I have considered the respective submissions made by learned counsel for the parties and have perused the record. Before proceeding further, it is apposite to take note of the relevant provisions of the Act. The Act is enacted with a view to provide for regulation and control of letting and renting accommodation, expeditious trial of eviction cases on the ground of bonafide requirement of certain categories of landlord and generally to regulate and control eviction of tenants from the accommodations and for other matter connected therewith or incidental thereto. Chapter III-A of the M.P. Accommodation Control Act, was inserted by M.P. Act No.27 of 1983 w.e.f. 16.8.1983, which deals with eviction of tenants on the ground of bonafide requirement. Section 23-A of the Act makes a special provision for eviction of the tenant on the ground of bonafide requirement in respect of residential as well as non-residential accommodations. It also provides a forum of Rent Controlling Authority in place of civil Court for passing an order of eviction on the ground of bonafide need. The applicability of the Chapter is restricted to special category Relevant extract of Section 23-A of the Act, reads as under:-

"Special provision for eviction of tenant on ground of bona

fide requirement:-

(a) ....

(b) that the accommodation let for non-residential purpose 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 the owner thereof or for any person for whose benefit the accommodation is held and that the landlord or such person has no other reasonably suitable non-residential accommodation of his own in his occupation in the city or town concerned:

Provided that where a person who is a landlord has acquired any accommodation or any interest therein by transfer, no application for eviction of tenant of such accommodation shall be maintainable at the instance of such person unless a period of one year has elapsed from the date of such acquisition.

From perusal of Section 23-A(b) of the Act, it is evident that if the eviction is sought in respect of non-residential accommodation, the landlord is required to prove that he is the owner of the suit accommodation.

7. Relevant extract of Section 23-D of the Act, reads as follows:-

"Section 23-D: *Procedure to be followed by Rent Controlling Authority or grant of leave to tenant to contest:* -(3) In respect of an application by a landlord it shall be presumed, unless the contrary is proved, the requirement by the landlord with reference to clause (a) or clause (b), as the case may be of Section 23-A is bonafide".

8. The scope and ambit of the expression "ownership" in the context of the Rent Control Act is well settled. The Supreme Court in the case of *Smt. Shanti Sharma and others Vs. Smt. Vedprabha and others,* AIR 1987 SC 2028, while dealing with provisions of Delhi Rent Control Act, which is *Parimateria* with the Act, has held that - "the word "owner" has not been defined in the Act and has also not been defined in the Transfer of Property Act. Ordinarily, the concept of ownership may be absolute ownership, but in

the modern context where it is more or less admitted that all lands belong to the State, the persons who hold the properties will only be lessees or the persons holding the land on some term from the Govt. or the authorities constituted by the State, and in this view of the matter it could not be thought of that the Legislature when it used the term "owner" in the provision of S. 14(1)(e), it thought of ownership is absolute ownership. It must be presumed that the concept of ownership only will be as it is understood at present. It could not be doubted that the term "owner" has to be understood in the context of the background of the law and what is contemplated in the scheme of the Act. The Act has been enacted for protection of the tenants. But, at the same time, it has provided that the landlord under certain circumstances will be entitled to seek eviction, and bona fide requirement is one of such grounds on the basis of which landlords have been permitted to have eviction of a tenant. In this context, the phrase, "owner" thereof has to be understood and it is clear that what is contemplated is that where the person builds up his property and lets out to the tenant and subsequently needs it for his own use, he should be entitled to an order or decree for eviction, the only things which are necessary for him are to prove his bona fide requirement and that he is the owner thereof. In this context, what appears to be the meaning of the term "owner" vis-a-vis the tenant, i.e. the owner should be something more than the tenant".

9. It is equally well settled legal proposition that question of title to the property has to be examined incidentally and cannot be decided finally in the eviction suit. *See: Dr. Ranbir Singh Vs. Asharfilal,* (1995) 6 SCC 580. Similar view has been taken by the Supreme Court in the case of *Shamim Akhtar Vs. Iqbal Ahmed and another,* (2000) 8 SCC 123 as well as in the case of *Bhogadi Kannababu and others Vs. Vuggina Pydamma and others,* (2006) 5 SCC 532.

10. It is trite law that an admission is the best piece of evidence - See: *Narayan Vs. Gopal,* A.I.R. 1960 SC 100. The scope and ambit of power under Section 23-E of the Act is well settled. It has been held by the Division Bench of this Court in *B. Johnson Vs. C.S. Naidu,* 1985 M.P.L.J. 675, that power is wider in revision, but is narrower in appeal. In the backdrop of aforesaid well settled legal proposition, the material on record may be examined. From close and conjoint scrutiny of sale deed dated 16.3.1961, deed of dissolution of partnership dated 30.6.1976 and will dated 5.8.1984

(Ex.P/15), it is not established that applicant is the owner of the accommodation in question. However, in the context of proposition of law laid down by the Supreme Court in the case of *Smt. Shanti Sharma* (supra) that owner should be something more than a tenant, the other material available on record may be looked into. From perusal of order dated 20.5.1999 (Ex.P/13) issued by the Chief Executive Officer of the Cantonment Board and the rent receipt (Ex.P/18), it is evident that the applicant is shown to be the owner of the house in the aforesaid documents. It is trite law that owner of the property makes payment of tax in respect of the property. From persual (sic:perusal) of Ex.P/14, it is evident that a demand notice was issued to the applicant for making payment of the property tax for the year 2001-02. In her evidence, the applicant has stated that after the death of Gurdeep Singh, an oral partition took place between Shivdev Singh and Inder Singh. Thus, from the material available on record, for the purposes of proceeding for eviction, it can safely be inferred that the applicant is something more than a tenant in respect of the accommodation in question as against the non-applicant who does not claim any title in respect of accommodation in question and is admittedly a tenant. It is also worth mentioning that non-applicant in the application under Section 23-C of the Act has not taken a plea that applicant is not the owner of the accommodation in question. It has further been stated by the applicant in her evidence that she requires the accommodation bonafide for the purposes of her son. No evidence in rebuttal has been adduced by the non-applicant. Even otherwise, the evidence of the non-applicant cannot be looked into, as the defence of the non-applicant to the proceeding for eviction has been struck out. There is a statutory presumption with regard to bonafide need of the applicant contained in Section 23-D(3) of the Act, which has been rebutted. Therefore, the bonafide need is held to be proved.

11. For the aforementioned reasons, the finding recorded by the Rent Controlling Authority that the applicant is not the owner of the accommodation in question and has failed to prove her bonafide need, cannot but be said to be perverse. Accordingly, it is quashed and the application for eviction filed by the applicant under Section 23-A(b) of the Act is allowed with costs.

12. Admittedly, the non-applicant has deposited an amount of Rs.2,25,000/- with the applicant. At the time of hearing, learned senior counsel for the applicant submitted that he would refund the remaining amount to the non-applicant after adjusting the same towards the arrears of rent, which may be due to the applicant.

13. Since the non-applicant is carrying on the business in the premises in question, I deem it appropriate to grant four months time to the non-applicant to vacate the premises, subject to fulfillment of the following conditions:-

"1. That the non-applicant shall furnish an undertaking that within a period of one month from today before the Rent Controlling Authority that he would not sub-let or part with the suit house and shall hand-over the vacant possession to the applicant on or before 10th July, 2016.

2. The non-applicant shall tender entire arrears of rent and shall deposit monthly rent up to 10th of every calender month before the Rent Controlling Authority for the period for which accommodation remains in possession of the non-applicant.

3. The order for eviction shall be kept in abeyance up to 10th July, 2016 subject to compliance with the aforesaid conditions. In case of violation of the terms and conditions aforementioned, it would be open for the applicant to execute the order.

4. The applicant shall deposit an amount of Rs.2.25 Lacs before the Rent Controlling Authority within one month from today which shall be payable to the non-applicant."

With the aforesaid directions, the revision stands disposed of.

Revision disposed of.

I.L.R. [2016] M.P., 2054
CIVIL REVISION
Before Mr. Justice Rohit Arya
C.R.No. 105/2015 (Gwalior) decided on 29 March, 2016

VIJAY SOOD ...Applicant
Vs.
KANAK DEVI & ors. ...Non-applicants

A. ***Civil Procedure Code (5 of 1908), Section 2(2) - Decree - Essentials thereof and distinction between Preliminary and Final Decree explained - A decree has following essentials - (i) Complete process of adjudication - (ii) Final determination of rights of the parties qua the matter in controversy - (iii) A formal declaration of such conclusive/determined rights so far as that court is concerned - In a preliminary decree certain***

rights are conclusively determined - Effect of not challenging Preliminary decree - Unless the Preliminary decree is challenged in appeal the rights so determined becomes final and conclusive and the same cannot be questioned in Final decree. (Paras 16 & 18)

क. सिविल प्रक्रिया संहिता (1908 का 5), धारा 2(2) – डिक्री – उसके आवश्यक तत्व तथा प्रारंभिक एवं अंतिम डिक्री में भिन्नता को स्पष्ट किया गया – एक डिक्री के अग्रलिखित आवश्यक तत्व होते हैं – (i) न्याय निर्णयन की संपूर्ण प्रक्रिया – (ii) विवादित मामले के संबंध में पक्षकारों के अधिकारों का अंतिम अवधारण – (iii) ऐसे निश्चायक/अवधारित अधिकारों की औपचारिक उद्घोषणा जहाँ तक उस न्यायालय का संबंध है – एक प्रारंभिक डिक्री में कतिपय अधिकारों को निश्चायक रूप से अवधारित किया जाता है – प्रारंभिक डिक्री को चुनौती न देने का प्रभाव – जब तक कि प्रारंभिक डिक्री को अपील में चुनौती नहीं दी जाती है, अवधारित अधिकार अंतिम एवं निश्चायक हो जाते हैं तथा अंतिम डिक्री में उन पर प्रश्न नहीं उठाया जा सकता है।

***B. Civil Procedure Code (5 of 1908), Order 21 Rule 26 r/w Section 151 & Order 26 Rule 13 & 14 r/w Section 151* - Decree directing partition by mentioning directions surrounding the suit house and determining share, whether executable without preparation of final decree - Held - No, as the nature of decree unambiguously requires division of shares between the parties by metes and bounds, Decree cannot be said to be final - Trial Court is first required to appoint a Commissioner under Order 26 Rule 13 and thereafter under Rule 14, the Court is required to decide the objections on commissioner report, if any, and to take a decision either to confirm or set aside or vary with the report - The decree passed thereafter would be a final decree and executable under Order 21 Rule 18 C.P.C. - Further held - Executing Court committed illegality in ordering execution of preliminary decree and further by proceeding to prepare a final decree - Revision allowed setting aside impugned order. (Paras 6, 12, 21 & 22)**

ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 21 नियम 26 सहपठित धारा 151 व आदेश 26 नियम 13 व 14 सहपठित धारा 151 – क्या अंतिम डिक्री तैयार किए बिना, वाद मकान की चौहद्दी की दिशायें उल्लिखित करने एवं अंश अवधारित करते हुए बंटवारे का निदेश देने वाली डिक्री निष्पादन योग्य है – अभिनिर्धारित – नहीं, चूंकि डिक्री की प्रकृति के अनुसार पक्षकारों के मध्य अंशो का बंटवारा, माप और सीमांकन सहित किया जाना स्पष्टतः अपेक्षित है, इसलिए डिक्री

को अंतिम होना नहीं माना जा सकता है – विचारण न्यायालय द्वारा आदेश 26 नियम 13 के अंतर्गत पहले कमिश्नर की नियुक्ति की जाना अपेक्षित है एवं तत्पश्चात् नियम 14 के अंतर्गत, न्यायालय द्वारा कमिश्नर रिपोर्ट पर आक्षेपों, यदि कोई हों तो, को विनिश्चित किया जाना एवं रिपोर्ट को पुष्ट अथवा अपास्त अथवा रिपोर्ट में फेरफार करते हुए निर्णय लिया जाना अपेक्षित है – तत्पश्चात् पारित डिक्री अंतिम डिक्री होगी जो कि आदेश 21 नियम 18 सि.प्र.सं. के अंतर्गत निष्पादन योग्य होगी – आगे यह भी अभिनिर्धारित – निष्पादन न्यायालय ने प्रारंभिक डिक्री के निष्पादन का आदेश देने में तथा अंतिम डिक्री तैयार करने हेतु कार्यवाही करने में अवैधता कारित की – आक्षेपित आदेश अपास्त करते हुए पुनरीक्षण मंजूर।

Cases referred:

2007(2) SCC 355, AIR 1987 Bombay 235, 1976 MPLJ SN 19, AIR 1998 SC 743, (1999) 1 SCC 558, AIR 1952 Travancore-Cochin 428, 1996 JLJ 357, 2008 (1) Civil Court Cases 172 (SC), (1995) 3 SCC 413.

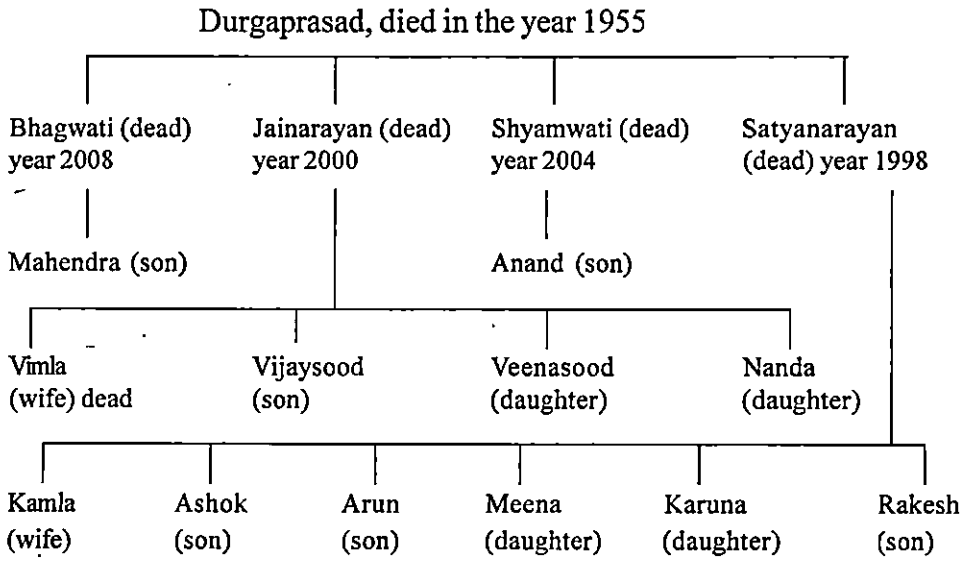
N.K. Gupta with *Sanjay Sharma,* for the applicant.
V.K. Bhardwaj with *Anoop Gupta*, for the non-applicant No. 1.

(Supplied: Paragraph numbers)

ORDER

Rohit Arya, J. :- This civil revision under section 115 CPC at the instance of the judgment-debtor, Vijay Sood s/o late J.N.Sood against the order dated 30/11/2015 whereby the trial Court has overruled the objections raised against execution of the decree dated 27/02/2015 in civil suit No.200A/2014 and has posted the case for further orders on application under Order XXVI rule 13 & 14 read with section 151 CPC filed by the decree-holder and Order XXI rule 26 read with section 151 CPC filed by the judgment-debtor No.2, on the next date of hearing mentioned thereunder.

2. The case in hand has a chequered history. Facts relevant and necessary for disposal of this writ petition are to the effect; suit house No.2/120 new No.23/61is situated in Chick Santer Morar, District Gwalior; is self acquired property of Late Durgaprasad. Genealogy of Durgaprasad is as follows:-



3. Jainarayan had filed suit for declaration and injunction vide civil suit No.36A/1991 that he is exclusive owner of the suit house; on the premise that there was a memorandum partition drawn by late Durgaprasad between Jainarayan and his brother Satyanarayan, on 25/02/1949. The trial Court dismissed the suit vide the judgment and decree dated 15/10/1992.

4. On appeal in F.A.No.6 of 1993 this Court vide judgment and decree dated 24/02/1999 affirmed the finding of the trial Court that plaintiff, Jainarayan was not the exclusive owner of the suit property. Further, held that after death of Durgaprasad, the suit property remained in joint possession of the plaintiff and defendant No.1. Plaintiff was held entitled for declaration that he has half share in the joint property. Defendant No.5 being purchaser of the joint family property from Satyanarayan was not held entitled to secure possession of the property unless a suit for partition and possession of the share is filed by him and his share is carved out. Consequently, the decree passed by the trial Court was modified as follows:

> *"13. The decree is modified to the extent that defendant no.5 shall deliver possession of the property to the plaintiff as the property is not yet divided and unless property is divided and share is determined, the purchaser being stranger to joint family cannot secure possession of the property. The decree of the trial Court to that extent is*

modified and it is directed that defendant no.5 shall deliver possession of the property possessed by her to the plaintiff."

5. The aforesaid judgment and decree passed in the first appeal No.6/1993 (supra) by this Court was subject-matter of Special Leave Petition No.5696/2007, later on converted into civil appeal No.6548/2014 *(Vijay Sood and others Vs. Kanak Devi and others)*. The Hon'ble Supreme Court dismissed the appeal on 15/07/2014.

6. Thereafter, civil suit No.200A/2014 was filed by Kanka Devi; subsequent purchaser (plaintiff – decree-holder; arrayed as respondent No.1 in this revision petition), for partition and possession and *inter alia* pleaded that Satyanarayan had executed an agreement to sell on 09/01/1982. At that time, vacant possession of 03 rooms was delivered but due to injunction suit filed by the predecessor-in-interest of defendant No.2, Jainarayan, the sale deed could not be executed. Therefore, upon vacation of the injunction order, sale deed was executed on 16/12/1985, i.e., half portion of the suit house marked with red ink. The suit was decreed by the trial Court vide judgment and decree dated 27/02/2015.

7. It is not out of place to mention that defendant No.2, Vijay Sood in the said suit had filed an application under Order VI rule 17 CPC seeking amendment for adding late Smt.Bhagwati and Smt. Shaymwati daughters of late Durgaprasad, as defendants. The application was dismissed by the trial Court. Being aggrieved thereby Writ Petition No.5309/2014 filed by defendant no.2 was withdrawn on 04/09/2014. Moreover, in the earlier suit the predecessor-in-interest of defendants no.1 to 4, Jainarayan had not contended that daughters of late Durgaprasad had any share in the suit property and was not made party, instead he claimed to be the exclusive owner of the suit property.

8. The efforts to scuttle progress of the suit did not stop here, and again abortive attempt was made by one Anand Sood having filed an application under Order I rule 10 CPC in the month of September, 2014 on the premise that he had come to know about pendency of the suit recently in some family function. He claimed to be the son of Shyamwati and grandson of late Durgaprasad, therefore, entitled for 1/4th of the suit property, hence, entitled to be arrayed as defendant. The application was rejected by the trial Court vide order dated 01/10/2014. Being aggrieved thereby, W.P.No.6477/2014

was filed before this Court. A coordinate Bench of this Court vide order dated 07/11/2014 had remanded the matter back to the trial Court for decision on the application afresh for the reasons recorded in the order. Accordingly, the trial Court reconsidered the application and rejected the same by order dated 27/11/2014. Being aggrieved, W.P.No.7624/2014 was filed and the same was dismissed by this Court by a detailed order passed on 06/02/2015. Thereafter the suit was decided vide judgment and decree dated 27/02/2015. The trial Court has passed the decree in paragraphs 38 and 39 to the following effect:

38. उपरोक्त वाद प्रश्न की विवेचना में यह भी निष्कर्षित हुआ है कि वादी ने जयनारायण व सत्यनारायण के मध्य बंटवारा हुए बगैर सत्यनारायण से विवादित मकान का आधे भी कम अंशभाग क्रय किया इस कारण वह विवादित मकान के जयनारायण व सत्यनारायण के उत्तराधिकारीयों के मध्य बंटवारा उपरांत सत्यनारायण के उत्तराधिकारियों को प्राप्त होने वाले भाग में से उसके द्वारा क्रय किये गये भाग की सीमा तक विवादित मकान का बंटवारा कराकर उसका आधिपत्य प्राप्त करने की अधिकारी है । इस स्थिति में यह भी न्यायोचित है कि जयनारायण और सत्यनारायण के उत्तराधिकारीयों के मध्य बंटवारा किये जाते समय किसी सत्यनारायण के उत्तराधिकारियों को विवादित मकान के पूर्व दिशा की ओर का भाग तथा जयनारायण के उत्तराधिकारीयों को पश्चिम दिशा का भाग दिया जाय। फलतः वाद आंशिक रूप से निम्नानुसार जयपत्रित किया जाता है –

1– वादपत्र के साथ संलग्न नक्शे में दर्शित चिक संतर मुरार ग्वालियर स्थित विवादित भवन कमांक–23/61 का जयनारायण के उत्तराधिकारीयों प्रतिवादी क.–1 लगायत 4 तथा सत्यनारायण के विधिक उत्तराधिकारीयों प्रतिवादी क.–5 लगायत 10 के मध्य 1/2–1/2 अंशभाग में विभाजन किया जाय।

2– विभाजन किये जाते समय सत्यनारायाण के विधिक उत्तराधिकारीयों को विवादित मकान का पूर्व दिशा की ओर का भाग दिया जाय।

3– उक्तानुसार विभाजन उपरांत वादी सत्यनारायण के विधिक उत्तराधिकारीयों को प्राप्त होने वाले भाग में से उसके द्वारा क्रय किये गये भाग की सीमा तक का आधिपत्य प्रतिवादीगण से प्राप्त करेगी।

4– वाद पत्र के साथ संलग्न नक्शा डिक्री का अंश होगा।

5– प्रतिवादी क.–2 अपना तथा वादी का वाद व्यय वहन

करेगा।

6– अधिवक्ता शुल्क प्रमाणित होने पर अथवा सूची अनुसार, जो भी कम हो, जोडा जावे।

39. तदनुसार प्रारंभिक आज्ञप्ति बनायी जाये।

9. Thereafter, decree-holder, Kanak Devi has filed an application under Order XXVI rule 13 & 14 read with section 151 CPC seeking partition of the suit property and apportionment of her share as detailed in the decree passed (supra).

10. The judgment-debtor/objector objected to the aforesaid application *inter alia* contending that decree prepared on 27/02/2015 is a preliminary decree, unless the preliminary decree is made a final decree, the same is unexecutable in law and, therefore, the same deserves to be dismissed. Reply thereto was filed by decree-holder inter alia contending that specific share and apportionment with directions have been finally determined. In fact, the decree so passed is not a preliminary decree, therefore, the same cannot be construed to be so for the purpose of Order XX rule 18 CPC and it is a final decree. In paragraph 10 of the application, the details of affected persons have been mentioned. Notices have also been issued and served. It is further contended that in the facts and circumstances of the case, there is no requirement of passing a final decree. It is not a case of partition of the suit property *inter se* between the parties; instead the trial Court has specifically ordered for carving out the area transferred to the decree-holder by notice of sale dated 16/12/1985 out of the share of the ownership of satyanarayan, on the eastern side of the suit property. Therefore, the decree was sought to be executed.

11. The trial Court vide its order dated 24/08/2015 rejected the objection raised by the judgment-debtor/defendant No.2, Vijay Sood.

12. Being aggrieved thereby, civil revision No.69/2015 was preferred. This Court vide order dated 16/9/2015 after addressing upon the factual matrix, did not consider it proper to record the finding whether the decree in question is a preliminary or final decree and left the same to be decided by the executing court after hearing the parties on objections raised. The executing court while rejecting the objections has concluded that as directions surrounding the suit house and determination of part of the house to be partitioned are contained

in the decree, therefore, though in the judgment it is stated to be a preliminary decree, but is liable for execution, therefore, called for the record for preparation of final decree and also consideration on objections under Order XXVI Rule 13 and 14 CPC by decree-holder and under Order XXI Rule 26 CPC by judgment-debtor.

13. Shri N.K. Gupta, learned senior counsel appearing for petitioner/ judgment-debtor while criticizing the impugned order has submitted that the trial court in para 39 of the judgment itself has clearly pronounced for preparation of preliminary decree, therefore, the preliminary decree passed in the suit for partition cannot be put to execution in execution proceedings and it is only after preparation of final decree, the same can be executed, as the preliminary decree in question has only declared rights of parties to be apportioned and as it is not a final decree, court is required to issue the commission to such person as it thinks fit to make the partition or separation according to the rights as declared in such decree as provided for under Order XXVI Rule 13 CPC and then the commissioner shall after such enquiry as he may deem fit and necessary divide the property into as many shares as indicated in and as per the preliminary decree by meets (sic:metes) and bounds, as provided for under Order XXVI Rule 14 CPC. Thereafter, such report shall be transmitted to the Court. The Court after hearing parties on objections shall confirm, vary or set aside the same, as provided for under Rule 14 (2) and thereafter the Court shall pass a decree in accordance with the same as confirmed or varied, as the case may be, or set aside the report and issue a new commission to make such order, as it thinks fit, as provided for under Order XXVI Rule 14 (3) CPC. The final decree, so passed, can be subject matter of execution proceedings under Order XXI Rule 18 CPC. Further learned counsel contends that the executing court cannot travel beyond the terms of the decree. The executing court has committed grave illegality having proceeded to execute the preliminary decree and further perpetuated the illegality by further directing for preparation of final decree. The whole exercise is *ultra vires* to the provisions as contained under Order XX Rule 18, Order XXVI Rule 14 and Order XXI Rule 18 CPC. Learned counsel refers to the judgments reported in *Hasham Abbas Sayyad vs. Usman Abbas Sayyad and others,* 2007 (2) SCC 355, *Bashiruddin Khwaja Mohiuddin v. Binraj Murlidhar Shop at Malkapur and others,* AIR 1987 Bombay 235, *Poonamchand v. Dhulibai,* 1976 MPLJ SN 19, *State of M.P. v. Mangilal Sharma,* AIR 1998 SC 743 and *Bhanwarlal Bhandari Vs. Universal Heavy*

Mechanical Lifting Enterprises, (1999) 1 SCC 558.

14. *Per contra*, Shri V.K. Bhardwaj, learned senior counsel appearing for respondent/decree-holder refers to the definition of "decree" as defined under Section 2 (2) CPC and contends that the term decree in its folds includes preliminary decree as well as final decree and it is the nature and tenor of the decree passed, which determines the character of a decree. If the Court conclusively determines the rights of the parties in the suit and the suit is completely disposed of, the same is final decree, however, if after determination of the rights of the parties further proceedings have to be taken before the suit can be completely disposed of by the court, it is a preliminary decree. In the instant case, the trial court has finally determined the shares of defendants no.1 to 4 LRs. of Jainarayan and defendants no.5 to 10 LRs. of Satyanarayan in the ratio of half-half. Half portion of the LRs. of Satyanarayan is to be carved out on the east side of the house and out of the said apportionment the area of house purchased by the decree-holder is to be further carved out and to that extent possession is to be delivered to the decree-holder. As such, not only the ratio of partition, but also direction of partition has also to have been specified, therefore, the court has conclusively determined the rights of the parties and in fact the suit stands disposed of. No further proceedings have to be taken before the Court. Hence, the executing court has not committed any illegality in passing the impugned order. Learned counsel relied upon the judgments reported in *Madhava Menon v. Esthapanose and another*, AIR 1952 Travancore-Cochin 428, *Hansraj v. Gomti and others*, 1996 JLJ 357 to bolster his submissions. Learned counsel further contends that the respondent/ decree-holder has purchased the suit property by a sale deed dated 16/12/1985. More than 30 years' period has passed by, till date he is unable to get the possession of the property. Labyrinth of adversarial prolonged process of coiled litigation has in fact and in effect frustrated all efforts so far made by him for procuring the possession of the property purchased as a bonafide purchaser. It is submitted that the present proceedings are only intended to delay in execution of the decree having declared crystallized rights of the respondent for delivery of possession. The executing court has not committed any illegality and, therefore, no interference is warranted and the revision deserves to be dismissed.

15. Heard counsel for the parties.

16. The entire controversy revolves around the word "decree" as defined

under Section 2 (2) CPC and, therefore, it is considered apposite to quote section 2 CPC:-

> *(2) "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within 2[* * *] section 144, but shall not include-*
>
> *(a) any adjudication from which an appeal lies as an appeal from an order, or*
>
> *(b) any order of dismissal for default.*
>
> *Explanation-A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit, it may be partly preliminary and partly final;*

It is evident from a careful reading of the definition that "decree" has the following essential elements:-

(i) Complete process of adjudication.

(ii) Final determination of the rights of the parties qua the matter in controversy.

(iii) A formal declaration of such conclusive /determined rights so far as that Court is concerned.

17. The Hon'ble Supreme Court in the case of *Parayya Allayya Hittalamani v. Sri Parayya Gurulingayya Poojari,* 2008 (1) Civil Court Cases 172 (SC) has observed as under:-

> *"A decree is defined in section 2 (2) of the Code of Civil Procedure to mean the formal expression of an adjudication which, so far as regards, the Court expressing it, conclusively determines the rights of the parties with*

regard to all or any of the matter in controversy in the suit. It may either be preliminary or final. It may be partly preliminary and partly be final. The Court with a view to determine whether an order passed by it is a decree or not must take into consideration the pleadings of the parties and the proceedings leading up to the passing of an order. The circumstances under which an order has been made would also be relevant."

18. The definition between the preliminary decree and final decree is also well known and settled by catena of decisions. In a preliminary decree, certain rights are conclusively determined and unless the preliminary decree is challenged in appeal the rights so determined becomes final and conclusive. As such, the same cannot be questioned in final decree. But, such declaration of rights and liabilities of the parties by way of preliminary decree becomes final if no further proceedings are required to be taken up by the court to work out the actual results, but when there is a scope for further enquiry to be conducted pursuant to the preliminary decree, the rights of the parties are finally determined upon such enquiry and a decree is passed in accordance with such final determination known as final decree. Both the decrees are in the same suit.

19. The Hon'ble Supreme Court in the case of *Shankar Balwanti Lokhande (Dead) By Lrs Vs. Chandrakant Shankar Lokhande and another* (1995) 3 SCC 413 while dealing with the scope of Order XX Rule 18 CPC in the matter of executability of a decree for partition has lucidly dealt with the nature of preliminary and final decree and the scope of jurisdiction of the executing court thereunder. Relevant paras thereof are reproduced below:-

"3. .....A preliminary decree is one which declares the rights and liabilities of the parties leaving the actual result to be worked out in further proceedings. Then, as a result of the further inquiries conducted pursuant to the preliminary decree, the rights of the parties are fully determined and a decree is passed in accordance with such determination which is final. Both the decrees are in the same suit. Final decree may be said to become final in two ways : (I) (sic:(i)) when the time for appeal has expired without any appeal being filed against the preliminary

decree or the matter has been decided by the highest Court; (ii) when, as regards the court passing the decree, the same stands completely disposed of. It is in the latter sense the word 'decree' is used in Section 2(2) of CPC. The appealability of the decree will, therefore, not affect its character as final decree. The final decree merely carries into fulfillment the preliminary decree.

8. It has been seen that after passing of preliminary decree for partition, the decree cannot be made effective without a final decree. The final decree made in favour of the first respondent is only partial to the extent of his 1/6th right without any demarcation or division of the properties. Until the rights in the final decree proceedings are worked out qua all and till a final decree in that behalf is made, there is no formal expression of the adjudication conclusively determining the rights of the parties with regard to the properties for partition in terms of the declaration of 1/6th and 5/6th shares of the first respondent and the appellants so as to entitle the party to make an application for execution of the final decree.

10. As found earlier, no executable final decree has been drawn working out the rights of the parties dividing the properties in terms of the shares declared in the preliminary decree. The preliminary decree had only declared the shares of the parties and properties were liable to be partitioned in accordance with those shares by a Commissioner to be appointed in this behalf. Admittedly, no Commissioner was appointed and no final decree had been passed relating to all."

20. The aforesaid judgment has been again followed by the Hon'ble Supreme Court in the case of *Bhanwarlal Bhandari Vs. Universal Heavy Mechanical Lifting Enterprises* (1999) 1 SCC 558 and *Hasham Abbas Sayyad vs. Usman Abbas Sayyad and others*, (2007) 2 SCC 355.

21. In the backdrop of aforesaid preposition of law, this Court examines factual matrix of the case to test the justifiability of the order impugned passed

by the executing court. The suit for partition and possession vide civil suit No.200A/2014 was filed in the light of the observations of the coordinate Bench of this Court while deciding F.A. No.6/1993 on 24/2/1999. In the context of the nature of the suit and the relief claimed therein, the property was to be divided and shares were to be determined between brothers viz. Jainarayan and Satyanarayan. Thereafter, out of the share of Satyanarayan the area stated and defined in the sale deed dated 16/12/1985 was required to be apportioned in favour of the respondent/plaintiff-stranger. The terms of the decree quoted above clearly stipulate for division of property between heirs of Late Jainarayan and heirs of Late Satyanarayan in the ratio of half-half. The area falling on the east side shall be apportioned in favour of heirs of Satyanarayan and the area in the sale deed dated 16/12/1985 is to be separated and possession is to be delivered in favour of the plaintiff. Therefore, the trial court in para 39 has pronounced for preparation of preliminary decree. In the considered opinion of this Court, the trial court is justified having ordered so, as the nature of the decree passed unambiguously requires division of shares between the parties by meets (sic:metes) and bounds and, therefore, the suit cannot be said to have been completely disposed of and the decree so passed can be said to be a formal expression of adjudication conclusively determining the rights of the parties leaving no scope for any controversy in the suit. Instead to give effect to the directives issued in the decree in question, the trial court is first required to appoint a commissioner, as provided for under Order XXVI Rule 13 CPC for division of shares of parties and apportionment of the area mentioned in the sale deed dated 16/1/1985 out of the share of LRs. of Late Satyanarayan by meets (sic:metes) and bounds. It is only after completion of such exercise by the commissioner and preparation of a report thereon under Order XXVI Rule 14 CPC the Court is required to decide the objections of the parties on such report, if any, and take a decision either to confirm or vary with the report or set aside the same after consideration of the contentions so raised. Thereafter, the decree so passed by the trial court shall be the formal expression of adjudication of the rights of the parties conclusively determining their rights. Such final decree, so prepared, in the opinion of this Court, can be put to execution by taking recourse to Order XXI Rule 18 CPC.

22. The executing court has committed an illegality having ordered for execution of the preliminary decree in partition suit and further aggravated the illegality by proceeding to prepare a final decree, which is wholly without jurisdiction. Consequently, the impugned order is set aside.

23. However, considering the fact that litigation between the parties is going on for last 23 years and to secure the ends of justice it is directed that both the parties shall appear before the trial court on 11th April, 2016 and the decree-holder shall be free to file an application for appointment of commissioner on the same day. Thereafter, the trial court shall pass necessary orders for appointment of commissioner calling for the report of the commissioner within fifteen days. Thereafter, upon decision on the objections, if any, the trial court shall pass a final decree within next two weeks.

Order accordingly.

I.L.R. [2016] M.P., 2067
CRIMINAL REVISION

Before Mr. Justice Sushil Kumar Gupta

Cr.R. No. 940/2014 (Gwalior) decided on 14 January, 2015

VINOD SINGH BHAGEL ...Applicant

Vs.

STATE OF M.P. ...Non-applicant

Penal Code (45 of 1860), Sections 498-A & 306 **- Wife of applicant committed suicide - Father of the deceased stated in his Marg Statement and statement u/S 161 of Cr.P.C. that applicant used to beat and quarrel with the deceased for demand of dowry - Held - From the statement of the parents of the deceased, there is no act of instigation to commit suicide on behalf of the applicant, so prima facie, no case made out for offence u/S 306 of I.P.C. - Charge u/S 306 of I.P.C. quashed - So far as the charge u/S 498-A of I.P.C. is concerned, sufficient prima facie evidence available in statement of father of deceased - Trial Court directed to proceed against the applicant for remaining charge u/S 498-A of I.P.C. - Revision partly allowed. (Paras 6 to 13)**

दण्ड संहिता (1860 का 45), धाराएँ 498–ए व 306 – आवेदक की पत्नी ने आत्महत्या कारित की – मृतिका के पिता ने अपने मर्ग कथन एवं धारा 161 दं.प्र.सं. के कथन में कहा कि आवेदक दहेज की मांग हेतु मृतिका से मारपीट एवं उससे झगड़ा किया करता था – अभिनिर्धारित – मृतिका के माता–पिता के कथनों से, आवेदक के विरूद्ध आत्महत्या करने हेतु उकसाने का कोई कृत्य प्रकट नहीं, इसलिए, प्रथम दृष्ट्या, भा.दं.सं. की धारा 306 के अंतर्गत कोई अपराध नहीं बनता है – आरोप अंतर्गत भा.दं.सं. की धारा 306 अभिखण्डित – जहाँ तक भा.दं.सं. की धारा 498–ए के अंतर्गत आरोप का संबंध है, मृतिका के पिता के कथन में पर्याप्त

प्रथम दृष्ट्या साक्ष्य उपलब्ध है – भा.दं.सं. की धारा 498–ए के अंतर्गत शेष आरोप के लिए आवेदक के विरूद्ध कार्यवाही करने हेतु विचारण न्यायालय को निदेशित किया गया – पुनरीक्षण अंशतः मंजूर।

Case referred:

(2002) 5 SCC 371.

D.S. Kushwah, for the applicant.
Prabal Solanki, P.P. for the non-applicant/State.

ORDER

SUSHIL KUMAR GUPTA, J. :- The petitioner has challenged the order dated 27.10.2014 passed by First Additional Sessions Judge of First Additional Sessions Judge in S.T.No.74/2014 whereby the charges of offence punishable under Sections 498-A and 306 of Indian Penal Code (in short "the Code") were framed against the petitioner.

2. The prosecution case, in short, is that on 04.01.2014 a *Merg* was registered on the death of Seema Bhagel. During Merg enquiry, statement of father, mother and uncle of the deceased, and other witnesses were recorded. Parents of the deceased stated in their statement that petitioner used to beat and quarrel with the deceased on demand of dowry. Father of the deceased also stated in his statement that petitioner demanded Rs.20,000/- on 27.12.2013 by telephone but he refused to give. After completion of *Merg* enquiry, it was found that petitioner/accused used to commit cruelty with the deceased for not meeting the demand of dowry and because of this she committed suicide by hanging. Thereafter, offence under Section 498-A and 306 of the Code has been registered against the petitioner/accused and after investigation charge-sheet has been filed. After receiving the case on committal, Trial Court framed the charges against the petitioner/accused under Section 498-A and 306 of the Code.

3. Learned counsel appearing for the petitioner vehemently submitted that the ingredients of the offence under Section 306 and 498-A of the Code are not fulfilled and no *iota* of evidence is available on record to implicate the petitioner. He further submitted that nothing has been stated by the parents of the deceased against the petitioner. It is further submitted that allegations of demand of Rs.20,000/- as a dowry has been made by the father of the deceased on 27.01.2014 after the death of the deceased on 04.01.2014. It is

also submitted that only on the basis of the statement of the petitioner/accused case under Section 306 and 498-A of the Code has been registered. Although in the *Merg* enquiry report, nothing has been found in the statement of the parents of the deceased about beating and cruel behavior with the deceased for demand of dowry.

4. Learned PP for the respondent/State has fully supported the impugned order passed by the Lower Court and submitted that there is *prima facie* evidence available on record against the petitioner for framing the charges under Section 498-A and 306 of the Code.

5. It is well settled principal (sic:principle) of law that at the time of framing of the charge no rebuttal evidence and defence can be seen. Only on the evidence collected by the prosecution, in absence of any rebuttal, if any accused can be convicted for any particular offence, then charges of that offence shall be framed. Moreover it is clear that at the time of framing charges the gravity of evidence can not be looked into.

6. Before considering the factual aspect of the case, it would be proper to have a look on the provision of Section 306, 107 and 109 of IPC.

Section 306 - Abetment of suicide Code reads as under :

> If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Section 107 - Abetment of a thing reads as under :

> A person abets the doing of a thing, who—
>
> First.--Instigates any person to do that thing; or
>
> Secondly.—Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission lakes (sic:takes) place in pursuance of that conspiracy, and in order to the doing of that thing; or
>
> Thirdly.--Intentionally aids, by any act or illegal

omission, the doing of that thing.

Explanation 1.—A person who by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.

Section 109 - Punishment of abetment if the act abetted is committed in consequence, and where no express provision is made for its punishment reads as under :

Whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence.

Explanation.--An act or offence is said to be committed in consequence of abetment, when it is committed in consequence of the instigation, or in pursuance of the conspiracy, or with the aid which constitutes the abetment.

7. As section 306 of IPC makes abetment of commission of suicide punishable, therefore, making liable for an offence punishable under Section 306 of IPC, it is the duty of prosecution to establish that such person has abeted the commission of suicide and for the purpose of determining the act of the accused, it is necessary to see that his act must fall within the purview in any of the three categories as enumerated under Section 107 of the Code and, therefore, it is necessary to prove that the said accused has instigated the person to commit suicide.

8. When I considered the facts of the present case in the light of the above Principal (sic:principle) of law, it becomes candidly clear that there is no abetment and instigation caused by the petitioner/accused to drove her to commit suicide. Although there were a oral quarrel took place between petitioner and the deceased on the issue of children. After that deceased committed suicide but that not amounts to abetment or instigation within the purview of Section 107 of IPC.

9. Our High Court and Hon'ble Supreme Court has considered the scope of Sections 107 and 306 of the Code in many cases. In *Sanju Vs. State of M.P.* (2002) 5 SCC 371 the Hon'ble Apex Cout in paragraphs 9 to 12 observed as under :

> "Para 9. *In Swamy Prahaladdas Vs. State of M.P. And another,* 1995 Supp (3) SCC 438, the appellant was charged for an offence under Section 306 of IPC on the ground that the appellant during the quarrel is said to have remarked the deceased "to go and die". This Court was of the view that mere words uttered the accused to the deceased "to go and die" were not even prima facie enough to instigate the deceased to commit suicide.
>
> 10. In *Mahendra Singh Vs. State of M.P.* 1995 Supp (3) SCC 731, the appellant was charged for an offence under Section 306 of IPC basically based upon the dying declaration of the deceased, which reads as under :.
>
> My mother-in-law and husband and sister-in-law (husband's elder brother's wife) harassed me. They beat me abused me. My husband Mahendra wants to marry a second time. He has illicit connections with my sister-in-law. Because of those reasons and being harassed I want to die by burning.
>
> 11. This Court, considering the definition of 'abetment' under Section 107, of the Code, found that the charge and conviction of the appellant for an offence under Section 306 is not sustainable merely on the allegation of harassment to the deceased. This Court further held that neither of the ingredients of abetment are attracted on the statement of the deceased.
>
> 12. In *Ramesh Kumar Vs. State of Chhattisgarh,* (2001) 9 SCC 618, this Court while considering the charge framed and the conviction for an offence under Section 306 of the Code on the basis of dying declaration recorded by an Executive Magistrate, which she had stated that previously there had been quarrel between the deceased and her husband and on the day of occurrence she had a quarrel with her husband who had said that she could go wherever she wanted to go

and that thereafter she had poured kerosene on herself and had set fire. Acquitting the accused this Court said :

> *A word uttered in a fit of anger or emotion without intending the consequences to actually follow cannot be said to be instigation. If it transpires to the Court that a victim committing suicide was hypersensitive to ordinary petulance, discord and difference in domestice life quite common to the society to which the victim belonged and such petulance discord the difference were not expected to induce a similarly circumstanced individual in a given society to commit suicide, the conscience of the Court should not be satisfied for basing a finding that the accused charged for abeting the offence of suicide should be found guilty."*

10. In the present case also evidence collected by the prosecution indicates that there is no overtact fall within the purview of Sections 107 and 109 of the Code and therefore, *prima facie* no offence punishable under Section 306 of the Code is made out against the petitioner/accused. For the forgoing reasons, I am of the opinion that the impugned order framing charge under Section 306 of the Code of the petitioner/accused deserves to be set aside. The petitioner/ accused is discharged from the charge of offence punishable under Section 306 of the Code.

11. So far as charge under Section 498-A of the Code is concerned there is *prima facie* sufficient evidence available on record for demand of dowry. Father of the deceased specifically stated in his statement in Merg enquiry on dated 04.01.2014 as well as under Section 161 of Cr.P.C. on dated 27.01.2014 that petitioner/accused used to beat and quarrel with the deceased for demand of dowry and also stated that the petitioner demanded Rs.20,000/-.

12. In the facts and circumstances of the case, for the forgoing reasons, I am of the considered opinion that impugned order framing charge against the petitioner under Section 306 of the Code is hereby set aside. However the learned Trial Court is directed to proceed the trial against the petitioner for

remaining charge under Section 498-A of the Code according to law.

13. Accordingly, this revision petition is partly allowed as aforesaid.

14. Copy of this order be sent to the concerning Court for necessary compliance.

Revision partly allowed.

I.L.R. [2016] M.P., 2073
CRIMINAL REVISION
Before Mr. Justice Sushil Kumar Gupta
Cr.R. No. 795/2014 (Gwalior) decided on 20 January, 2015

GAJENDRA SINGH ...Applicant
Vs.
STATE OF M.P. ...Non-applicant

Penal Code (45 of 1860), Section 306 - Abetment of suicide - **Applicant took the jewellery of the deceased and did not return it even after asking, thereafter, deceased committed suicide - Held - In the available facts and circumstances of the case, it is very much clear that no instigation has been caused by the applicant, so it will not amount to abetment within the purview of Section 107 of IPC - No offence under Section 306 of IPC made out - Order framing charge under Section 306 of IPC is hereby quashed - Applicant discharged - Revision allowed.** **(Paras 5 to 13)**

दण्ड संहिता (1860 का 45), धारा 306 – आत्महत्या का दुष्प्रेरण – आवेदक मृतिका के आभूषण ले गया तथा मांगने के बावजूद उसने आभूषण नहीं लौटाए, तत्पश्चात् मृतिका ने आत्महत्या कारित की – अभिनिर्धारित – प्रकरण में उपलब्ध तथ्यों एवं परिस्थितियों से यह सुस्पष्ट है कि आवेदक द्वारा कोई उकसाहट कारित नहीं की गई, इसलिए यह भा.दं.सं. की धारा 107 की परिधि के अंतर्गत दुष्प्रेरण की कोटि में नहीं आएगा – भा.दं.सं. की धारा 306 का अपराध नहीं बनता है – भा.दं.सं. की धारा 306 के अंतर्गत आरोप विरचित करने का आदेश एतद्द्वारा अभिखण्डित – आवेदक को आरोपमुक्त किया गया – पुनरीक्षण मंजूर।

Cases referred:

2007 (1) MPLJ 195, 2004 (3) MPHT 57 (CG), (2002) 5 SCC 371, 2000 (3) MPHT 164=2000 (1) JLJ 142, (1990) 4 SCC 76.

J.P. Mishra, for the applicant.
Nutan Saxena, P.P. for the non-applicant/State.

ORDER

SUSHIL KUMAR GUPTA, J. :- The petitioner has challenged the order dated 07.03.2014 passed by Additional Sessions Judge Gohad in S.T.No.17/2012 whereby the charges of offence punishable under Section 306 of Indian Penal Code (in short "the Code") was framed against the petitioner.

2. The prosecution case, in short, is that on 21.05.2011 at 8 o'clock Gandharv Singh-husband of the deceased informed at Police Station Gohad that his wife Anita got unconscious after consuming poisonous substance and she was admitted in KDJ Hospital Morar. She has died today at 1:30 o'clock at night. On this information, a *Merg* was registered. During *Merg* enquiry, it is found that deceased Anita has died due to consuming poisonous substance after being harassed by the act of the petitioner as he took her jewelery but did not return even after asking by the deceased. Thereafter, offence under Section 306 of the Code has been registered against the petitioner and after investigation charge-sheet has been filed. After receiving the case on committal, Trial Court framed the charge against the petitioner under Section 306 of the Code.

3. Learned counsel appearing for the petitioner vehemently submitted that the ingredients of the offence under Section 306 of the Code are not fulfilled and no *iota* of evidence is available on record to implicate the petitioner. He further submitted that learned Trial Court has erred in law in framing charge against the petitioner for the offence punishable under Section 306 of the Code while no material evidence available on record to prove the fact that the petitioner has abated the deceased to commit suicide. To Bolster his submissions counsel relied on the judgment of *Hariom Vs. State of MP* reported in 2007(1) MPLJ 195 and *Santosh Vishwakarma and another Vs. State of MP* (Now CG) reported in 2004 (3) MPHT 57 (CG).

4. Learned PP for the respondent/State has fully supported the impugned order passed by the Lower Court and submitted that there is *prima facie* evidence available on record against the petitioner for framing the charges under Section 306 of the Code. He further submit that Govind and Narayan Singh, Jamuna Devi, Gandharv Singh respectively brothers, mother and

husband of the deceased had categorically stated in their statement that the deceased was depressed as petitioner took the jewelery but did not return even after asking. Hence, learned PP prayed for dismissal the petition.

5. Before considering the factual aspect of the case, it would be proper to have a look on the provision of Section 306, 107 and 109 of IPC.

Section 306 - Abetment of suicide Code reads as under :

> If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Section 107 - Abetment of a thing reads as under :

> A person abets the doing of a thing, who—
>
> First.--Instigates any person to do that thing; or
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> Secondly.—Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission lakes (sic:takes) place in pursuance of that conspiracy, and in order to the doing of that thing; or
>
> Thirdly.--Intentionally aids, by any act or illegal omission, the doing of that thing.
>
> Explanation 1.—A person who by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.

Section 109 - Punishment of abetment if the act abetted is committed in consequence, and where no express provision is made for its punishment reads as under :

> Whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no

express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence.

Explanation.--An act or offence is said to be committed in consequence of abetment, when it is committed in consequence of the instigation, or in pursuance of the conspiracy, or with the aid which constitutes the abetment.

6. As section 306 of IPC makes abetment of commission of suicide punishable, therefore, making liable for an offence punishable under Section 306 of IPC, it is the duty of prosecution to establish that such person has abated the commission of suicide and for the purpose of determining the act of the accused, it is necessary to see that his act must fall within the purview in any of the three categories as enumerated under Section 107 of the Code and, therefore, it is necessary to prove that the said accused has instigated the person to commit suicide.

7. When I considered the facts of the present case in the light of the above Principal (sic:principle) of law, it becomes candidly clear that there is no abetment and instigation caused by the petitioner to drove her to commit suicide. Although witness stated that petitioner took the jewelery of the deceased and did not return even after asking, due to which she was depressed. After that deceased committed suicide but that not amounts to abetment or instigation within the purview of Section 107 of IPC.

8. Our High Court and Hon'ble Supreme Court has considered the scope of Sections 107 and 306 of the Code in many cases. In *Sanju Vs. State of M.P.* (2002) 5 SCC 371 the Hon'ble Apex Court in paragraphs 9 to 12 observed as under :

"Para 9. In *Swamy Prahaladdas Vs. State of M.P. And another,* 1995 Supp (3) SCC 438, the appellant was charged for an offence under Section 306 of IPC on the ground that the appellant during the quarrel is said to have remarked the deceased "to go and die". This Court was of the view that mere words uttered the accused to the deceased "to go and die" were not even prima facie enough to instigate the deceased to commit suicide.

10. In *Mahendra Singh Vs. State of M.P.* 1995 Supp (3) SCC 731, the appellant was charged for an offence under Section 306 of IPC basically based upon the dying declaration of the deceased, which reads as under :

> *My mother-in-law and husband and sister-in-law (husband's elder brother's wife) harassed me. They beat me abused me. My husband Mahendra wants to marry a second time. He has illicit connections with my sister-in-law. Because of those reasons and being harassed I want to die by burning.*

11. This Court, considering the definition of 'abetment' under Section 107, of the Code, found that the charge and conviction of the appellant for an offence under Section 306 is not sustainable merely on the allegation of harassment to the deceased. This Court further held that neither of the ingredients of abetment are attracted on the statement of the deceased.

12. In *Ramesh Kumar Vs. State of Chhattisgarh*, (2001) 9 SCC 618, this Court while considering the charge framed and the conviction for an offence under Section 306 of the Code on the basis of dying declaration recorded by an Executive Magistrate, which she had stated that previously there had been quarrel between the deceased and her husband and on the day of occurrence she had a quarrel with her husband who had said that she could go wherever she wanted to go and that thereafter she had poured kerosene on herself and had set fire. Acquitting the accused this Court said :

> *A word uttered in a fit of anger or emotion without intending the consequences to actually follow cannot be said to be instigation. If it transpires to the Court that a victim committing suicide was hypersensitive to ordinary petulance, discord and difference in domestice life quite common to the society to which the victim belonged and such petulance discord*

> *the difference were not expected to induce a similarly circumstanced individual in a given society to commit suicide, the conscience of the Court should not be satisfied for basing a finding that the accused charged for abeting the offence of suicide should be found guilty."*

9. For framing of charge the Hon'ble Apex Court in the matter of *State of MP Vs. S.B. Johari and others* reported in 2000 (3) MPHT 164 = 2000 (1) JLJ 142 has been held 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. The charge can be quashed in the evidence which the prosecutor proposes to adduce to prove the guilt of the accused, even if fully accepted before it is challenged by cross-examination or rebutted by defence evidence, if any, can not show that accused committed the particular offence. In such case, there would be no sufficient ground for proceeding with the trial."*

10. In the matter of *Niranjan Singh Karam Singh Punjabi etc. Vs. Jitendra Bhimraj Bijjayya and others,* etc., reported in (1990) 4 SCC 76, the Hon'ble Apex Court has held that :-

> *"At the stage of framing the charge inquiry must necessarily be limited to deciding if the facts emerging from such materials constitute the offence with which the*

accused could be charged. The Court may peruse the records for the limited purpose, but it is not required to marshal it with a view to decide the reliability thereof."

11. In the present case also evidence collected by the prosecution indicates that there is no overtact fall within the purview of Sections 107 and 109 of the Code and therefore, *prima facie* no offence punishable under Section 306 of the Code is made out against the petitioner. For the forgoing reasons, I am of the opinion that the impugned order framing charge under Section 306 of the Code of the petitioner/accused deserves to be set aside.

12. In the facts and circumstances of the case, for the forgoing reasons, I am of the considered opinion that impugned order framing charge against the petitioner under Section 306 of the Code is hereby set aside. The petitioner is discharged from the charge of offence punishable under Section 306 of the Code.

13. Accordingly, this revision petition is hereby allowed as aforesaid.

14. Copy of this order be sent to the concerning Court for necessary compliance.

Revision allowed.

I.L.R. [2016] M.P., 2079
CRIMINAL REVISION
Before Mr. Justice Alok Verma
Cr.R. No. 561/2013 (Indore) decided on 9 February, 2015

NARESH VASWANI ...Applicant
Vs.
STATE OF M.P. & ors. ...Non-applicants

Criminal Procedure Code, 1973 (2 of 1974), Sections 397, 401 & 319 - Revision **- Second application u/S 319 - First application was withdrawn - Held - Second application on the basis of evidence recorded by the Court and based on additional material available to the Court is tenable - No illegality and irregularity committed by the trial Judge while allowing the application u/S 319 Cr.P.C. filed by the prosecution - Revision dismissed. (Paras 9 & 10)**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 397, 401 व 319 – पुनरीक्षण – धारा 319 के अंतर्गत द्वितीय आवेदन – प्रथम आवेदन वापस लिया गया था – अभिनिर्धारित – न्यायालय द्वारा अभिलिखित साक्ष्य के आधार पर एवं न्यायालय को उपलब्ध अतिरिक्त सामग्री पर आधारित द्वितीय आवेदन मान्य है – अभियोजन द्वारा दं.प्र.सं. की धारा 319 के अंतर्गत प्रस्तुत आवेदन को मंजूर करने में विचारण न्यायाधीश द्वारा कोई अवैधता एवं अनियमितता कारित नहीं की गई – पुनरीक्षण खारिज।

S.K. Vyas with *Sudha Shrivastava*, for the applicant.
R.S. Parmar, P.L. for the non-applicant No. 1/State.

ORDER

ALOK VERMA, J. :- This criminal revision is directed against the order passed by the learned VII Additional Sessions Judge, Ujjain in Session Trial No.236/2010 dated 17.09.2012 by which the learned Sessions Judge allowed an application filed on behalf of prosecutrix under section 319 Cr.P.C. and summoned the present applicant along with respondent No.5 as an accused in the aforesaid Session Trial.

2. The facts relevant for disposal of this revision are that complainant Santosh Rajput lodged an FIR in Police Station Neelganga, District Ujjain on 08.03.2010 at 11:30 am in respect of an incident which took place about 15 minutes back at 11:15 am. According to the averments in the FIR, the complainant who was working as property broker and builder raised a construction on a piece of land situated near Khanna Opticals. Due to this construction some dispute was going on between him and Mohanlal Vasvani, father of the present applicant, due to which prior to the present incident also the said Mohanlal Vasvani sent some persons to beat the complainant. On the date of incident i.e. on 08.03.2010 at about 11:15 am. He was going towards Begum Baag on motorcycle bearing registration No.MP13- MB-0418 and Omprakash Choubey was sitting on the motorcycle as pillion rider and when they were under the Hari Phatak overbridge, the present applicant along with respondent Sonu Baba came there. The present applicant it is stated that he was driving motorcycle while the respondent No.5 Sonu Baba was sitting on pillion of that motorcycle. They chased them and then respondent No.5 fired a gun shot which hit him on his right shin. Due to the incident, he suffered gun shot injury. After firing one single gun shot, they fled away on the same motorcycle.

3. On this information being received at the Police Station, Police registered Crime No.188/2010 and the investigation began. During the investigation, the complainant was medically examined and gun shot injury was found on his right shin. His statement under section 164 Cr.P.C. was also recorded and in this statement also he narrated the same story as narrated by him at the time of lodging the FIR.

4. However, during the investigation, the investigating officer found that the present applicant along with respondent No.5 were not present at the seen on incident as locations of their mobile phones and tower were found about 2 km. away in their shop at the time when the alleged incident took place and after investigation, he filed charge-sheet against three accused persons who are respondent No.2 to 4 before this Court, that is, Nana @ Rajesh S/o Mangilal, Inder @ Inder Singh S/o Ambaram and Shammi @ Govind S/o Kishanlal. In the charge-sheet according to the prosecution story, the respondent No.4 Shammi entered into conspiracy with other two respondents to commit murder of the complainant while respondent No.4 was found under custody in a jail. Charges were framed against the respondents No.2 to 3 by the trial Judge and thereafter on 18.04.2011, the complainant Santosh Rajput filed an application under section 319 Cr.P.C. praying therein that the present applicant along with respondent No.5 be arraigned as accused in the case. However, on 13.09.2011 another application was filed supported by affidavit stating therein that the complainant had no dispute whatsoever with present applicant Naresh Vaswani and, therefore, he wants to withdraw the application. The learned trial Judge by order dated 13.09.2011 dismissed the application under section 319 Cr.P.C. as withdrawn.

5. Subsequent to this, the prosecution witness who was stated to be the pillion rider on the motorcycle being driven by the complainant was examined as PW-1, the complainant was examined as PW-3 and investigating officer examined as PW-4. In their statement, the complainant Santosh Kumar Rajpur and Omprakash Choubey again stated the same story which they stated in the FIR and said that it was Naresh Vaswani, the present applicant who was driving the motorcycle while respondent No.5 was sitting on pillion and they fired gun shot injury on them. After recording the statement of these 4 prosecution witnesses, the prosecutrix filed a fresh application under section 319 Cr.P.C. which was disposed of by the impugned order and this application was allowed and present applicant along with respondent No.5 summoned

as accused in the case.

6. Against this order, this criminal revision is filed on the grounds, inter-alia, namely :-

(i) After withdrawal of earlier application under section 319 Cr.P.C., a fresh application filed on behalf of prosecution is not maintainable. The application on behalf of the complainant that he had no dispute with the present applicant also bars consideration of second application.

(ii) There was no common intention between the present applicant and respondent No.5 Sonu Baba. There was no evidence available to infer that they have prior meeting of mind and that the present applicant knew that Sonu Baba was carrying a revolver and would fire a gun shot on the complainant.

(iii) The gun shot was fired at low angle and hit on right shin of the complainant, accordingly, the facts would only constitute offence under section 324 and no offence under section 307 IPC shall be constituted.

(iv) Under section 323 Cr.P.C. the persons may be charged and tried together only when offences are committed in the course of some transaction and different offences are committed in the course of some transaction. However, the applicant in the present case had committed no such act which can be called committal under the same transaction with the persons who were already charge sheeted by the police in the present case and charged by the trial Judge.

(v) Charges were framed merely on suspicion that the present applicant was driving the motorcycle, however course cannot take place of proof. For this, the present applicant places reliance on judgments of Hon'ble Supreme Court in *Gian Mehtani vs. State of Maharashtra,* AIR 1971 SC 1898, *Gambhir vs. State of Maharashtra* AIR 1982 SC 1157 and *Bhugdomal Gangaram vs. State of Gujrat* AIR 1983 SC 906.

7. I have gone through the copies of charge-sheet available on record. So far, the arguments of the counsel for the applicant in respect of provisions of sections 223 and 228 Cr.P.C. are concerned, the arguments are not acceptable as offence is same and there is no doubt that offence was committed, as the matter was reported only within 15 days after the incident and immediately, after the incident the applicant was found with a gun shot injury and, therefore, when offence is committed only question to be decided is as to who committed the offence. In this regard, there are two sets of persons and, therefore, it would be decided by the Court as to who out of them are responsible for commission of offence.

8. So far as, the contention that the gun shot was fired at low angle which hit right shin of the complainant and, therefore, there was no intention to hit the complainant is also not acceptable as firing a gun shot pointing the gun towards complainant, itself shows intention of the complainant. No further comments are required in this regard. Also the argument of the counsel for the complainant that there was no prior meeting of mind is also not be acceptable as the averments in the FIR itself shows that on seeing complainant, the present applicant along with respondent No.5 chased the complainant on another motorcycle and then fired the gun shot injury. Prior meeting of mind in this regard can be assumed. This apart in the present case there was clear ocular evidence available against the present applicant along with respondent No.5. This ocular evidence cannot be substituted by other evidence like location of mobile phone and mobile phone tower as this is possible by leaving the mobile phone to another place. Clear ocular evidence in respect of a particular person who was known to the applicant cannot be replaced by such other auxiliary evidence. So far as, respondents No.2 to 4 are concerned, they did not challenge the order framing charges against them and, therefore, no comments can be offered so far their case is concerned in this revision petition.

9. The learned counsel for the applicant also argues that the second application under section 319 is not maintainable however, in the present case first application was filed when the evidence of prosecution witnesses was not recorded. The complainant stated in the second application supported by affidavit that he had no dispute with the present applicant however, in his statement before the Court he again reiterated his avements in the FIR. Under these conditions the second application on the basis of evidence recorded by the Court and based on additional material available to the Court, to my mind,

is tenable.

10. Accordingly, no illegality and irregularity was committed by the trial Judge while allowing the application under section 319 Cr.P.C. filed by the prosecution. The revision is devoid of merit and liable to be dismissed and dismissed accordingly.

Revision dismissed.

I.L.R. [2016] M.P., 2084
CRIMINAL REVISION
Before Mr. Justice Sheel Nagu
Cr.R. 100/2015 (Gwalior) decided on 1 April, 2015

BALVEER JATAV & ors. ...Applicants
Vs.
STATE OF M.P. & ors. ...Non-applicants

A. Criminal Procedure Code, 1973 (2 of 1974), Section 439(2) - Cancellation of bail - **The power to cancel the bail order is not vested with the Subordinate Court - If the bail order is passed by the Superior Court, then the Subordinate Court will not have the power to cancel the bail order until or unless the Superior Court expressly empowers/grants liberty to the Subordinate Court to cancel the bail on arising of certain eventuality. (Para 6)**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 439(2) – जमानत का निरस्त किया जाना – जमानत के आदेश को निरस्त करने की शक्ति अधीनस्थ न्यायालय में निहित नहीं है – यदि जमानत का आदेश वरिष्ठ न्यायालय द्वारा पारित किया गया है, तब अधीनस्थ न्यायालय को उस ज़मानत के आदेश को निरस्त करने की शक्ति नहीं होगी यदि अथवा जब तक कि वरिष्ठ न्यायालय ने कतिपय संभाव्यता के घटित होने पर अधीनस्थ न्यायालय को जमानत निरस्त करने हेतु साफ तौर पर शक्ति/स्वतंत्रता प्रदान न की हो।

B. Criminal Procedure Code, 1973 (2 of 1974), Section 439(2) - **Cancellation of bail - Breach of condition - Merely registration of the subsequent offence is not enough to be ground of cancellation of bail unless the said offence crystallizes into framing of charge. (Para 14)**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 439(2) – जमानत का निरस्त किया जाना – शर्त भंग होना – मात्र पश्चात्वर्ती अपराध दर्ज किया

जाना जमानत निरस्त करने हेतु पर्याप्त आधार नहीं है जब तक कि उक्त अपराध पर से आरोप की विरचना सुनिश्चित न हो जाए।

Cases referred:

1992 JLJ 229, 2005(4) Crimes 184 SC, AIR 2011 SC 1945.

Vivek Mishra, for the applicants.
Vijay Sundaram, P.L. for the non-applicant No. 1/State.
Atul Gupta, for the non-applicant No. 2.

ORDER

SHEEL NAGU, J. :- Present criminal revision filed under Section 397 read Section 401 of the Cr.P.C. assails the order dated 14.01.2015 passed by the Second Additional Sessions Judge, Morena cancelling the bail orders granted earlier in favour of the petitioners no.1 & 2 by this Court vide order dated 2.8.2013 in M.Cr.C. No. 5676/2013 and dated 7.10. 2013 in M.Cr.C. No. 8093/2013 respectively, and bail order dated 20.08.2013, 29.08.2013 & 29.08.2013 granted by the trial court in favour of petitioners No.3 to 6.

2. Learned counsel for the rival parties are heard on the question of admission.

3. The principal contention of the learned counsel for the petitioners is two fold.

1. Impugned order so far as it relates to the petitioner No.1 Balveer and petitioner No.2 Ranveer is bad in law as the bail granted in favour of the petitioner by the High court has been cancelled by Subordinate Court (Second Additional Judge to the Court of Session Judge, Morena).

2. That qua all petitioners, subsequent offence bearing Crime No.552/2014 at Police Station Civil Line, Morena has been registered against all the six petitioners which is raised as ground for cancellation of bail, but the said subsequent offence has not resulted into framing of charges and therefore, in terms of judgment of Rajasthan High Court State of Rajasthan v. Mubin reported in 2011 Cr.L.J. 3850 it can not be said that the petitioners have committed another offence to mature the cause for breach of any of the conditions of bail

order granted earlier by the High Court.

4. Learned counsel for the petitioners has placed reliance on the decision of the Apex Court in the case of *Vikramjit Singh v. State of MP* reported in 1992 J.L.J 229.

5. On the other hand, learned counsel for the respondents placed reliance on the decision of the Apex court in the case of *P.K.Shaji v. State of Kerala* reported in 2005(4) Crimes 184 SC to contend that the bail granted by the superior Court with liberty to the subordinate court to recall the same in case of breach of any of the conditions subject to which bail was granted can very well be cancelled u/S.439(2), Cr.P.C. by the subordinate court to whom the liberty is granted. Reliance is further placed by the learned counsel for the respondent/State as well as the victim upon the decisions of the Apex Court in the cases of *Prakash Kadam & etc v. Ramprasad Vishwanath Gupta and Anr.* reported in AIR 2011 SC 1945.

6. As regards the first ground (Supra), it is indisputable from the reading of Section 439(2) Cr.P.C. that the power of cancellation of the bail granted under Section 439(1) Cr.P.C. is vested with the High Court and as well as the Sessions Court. This statutory provision is silent as to the aspect that the power of cancellation of bail u/S. 439(2) Cr.P.C. can be exercised only by the same Court which granted the bail under Section 439(1) Cr.P.C.. This Court is of the considered view that this silence can not be deemed to imply that an order of bail passed by superior court can be cancelled by a Subordinate Court. Unless the superior Court while passing the order of bail expressly empowers/grants liberty to the Subordinate Court to cancel the bail on arising of certain eventuality, the trial court cannot invoke Sec.439(2) Cr.P.C. to recall/cancell bail granted by superior court u/S. 439(1) Cr.P.C..

7. Admittedly, the order of grant of bail in favour of the petitioners No.1 Balveer and 2 Ranveer in shape of M.Cr.C.No.5676/2013 *(Balveer vs. State of M.P.)* and M.Cr.C.No.8093/2013 *(Ranveer v. State of M.P.)* was passed by the High Court.

8. It is further not disputed that the registration of subsequent offence bearing Crime No.552/2014 under Sections 307, 147, 148, 149, 294 and 506 of IPC against all the petitioners, amounts to breach of one of the terms and conditions subject to which bail was granted by the High Court, has been made the sole basis for passing the impugned order for cancellation of bail.

9. Considering the first ground, this Court is of the view that reason may have existed giving rise to breach of any of the terms and conditions subject to which the High Court granted bail to the petitioners, but that by itself can not vest the subordinate court with the authority to cancel the bail granted by the High Court expressly empowered by the High Court in that regard.

10. A bare perusal of the order of grant of bail by this Court in favour of the petitioners No.1 and 2 passed in M.Cr.C.No.5676/2013 on 02.08.2013 and M.Cr.C.No. 8093/2013 on 07.10.2013 discloses absence of express empowerment in favour of the Subordinate Courts to cancel the bail on breach of one of the conditions.

11. Another reason for taking this view is that if a Sub- Ordinate Court is permitted to cancel orders passed by the High Court then it would lead to disturbance in the judicial discipline which is necessary to be maintained the hierarchical set up of Courts established by law. Anarchy would be let loose, if the court of superior jurisdiction finds it's orders nullified by a Court of inferior jurisdiction.

12. However, the only exception to this rule is the expressed vesting of power by the superior Court to the inferior Court to unset the orders passed by the High Court by arising of certain eventuality.

13. Thus, this Court has no hesitation to hold that so far as petitioners' no. 1 and 2 are concerned their orders of bail passed by this Court in MCrC No. 5476/2013 and in M.Cr.C No. 8093/2013 could not have been canceled by the impugned order. Thus to that extent impugned order is unsustainable.

14. Taking up the ground no. 2, it is seen from the decision of the Division Bench of Rajasthan High Court in case of *State of Rajasthan* (supra) that while interpreting the term "committing of an offence" for deciding as to whether bailed out accused on commission of subsequent offence has rendered himself liable for cancellation of bail or not on commission of subsequent offense, the Rajasthan High Court held that for the purpose of maturing of a cause for successfully invoking of power of cancellation of bail u/S. 439 (2) mere registration of offence subsequent to the grant of bail is not enough unless the said offence crystallizes into framing of charges. The relevant extract of para 9 and 10 of the said decision of the Rajasthan High Court are profitably reproduced below:-

An accused can be said to have committed an offence only when Court, after considering the material before it and hearing the parties, forms an opinion to that effect, at the time of framing of charge. It is only after judicious consideration by a Court and an opinion is formed by it for presuming the commission of an offence that an accused can be said to have committed an offence. Therefore, an offence can be said to have been committed only at the stage of framing of charge when the concerning Court forms an opinion for presuming that the accused has committed the offence and not at any earlier point of time.

In such view of the matter, merely on filing of first information reports against accused applicants, it cannot be said that they had committed any offence during period of bail. Consequently, they did not breach conditions so imposed by Court while granting order of bail. Thus, issuance of warrant of arrest against accused persons on ground of breach of conditions and order for taking accused persons, in custody, not proper. Accused held entitled to bail.

(Paras 9, 10)

15. From the above it is evident that unless charges are framed in an offence committed by a person after he has been bailed out in an earlier offence, ground for successfully invoking Sec.439(2) of Cr.P.C. are not made out.

16. In the instant case, it is admitted by rival parties that when the impugned order was passed, the subsequent offence i.e. Crime No. 552/2014 registered on 25.10. 2014 had not matured into framing of charge against any of the petitioners. Thus this court is of the considered view that mere registration of an offence without framing of charge against the petitioners could not have lead to cancellation of bail granted earlier. Thus impugned order is further vitiated on this count also.

17. The decision of the Apex Court in the case of *Vikram Jit Singh* (supra) lays down that the bail granted by a judge cannot be canceled by another bench of the same High Court and therefore is of no avail to the respondents in the attending facts and circumstances of this case. Moreso the decision of

Prakash Kadam (supra) of the Apex Court is also of no assistance to the respondents since it lays down scope, ambit and extent of the power of cancellation of bail u/S. 439 (2) without touching upon the issue involved herein.

18. Consequently, this criminal revision having merit is allowed in the following terms;

1. Impugned order dated 14.1.2015 is setaside to the extent it cancels the bail granted to the petitioners no. 1 and 2 by this court and also to the extent it cancels bail of the petitioners no. 3 to 6 by the trial court;

2. Bail orders granted in favour of the petitioners by this court on 2.8.2013 in M.Cr.C. No. 5676/2013 and M.Cr.C. No. 8093/2013 on 7.10.2013 shall continue to be in operation;

3. Bail orders granted by the trial court in favour of petitioners no. 3 to 6 are restored;

4. This order shall not come in way of the State and victim to seek cancellation of bail of the petitioners before the appropriate forum as and when charges are framed, in crime No. 552/2014 or any other subsequent offence.

5. No cost.

Revision allowed.

I.L.R. [2016] M.P., 2089
CRIMINAL REVISION
Before Mr. Justice Jarat Kumar Jain
Cr. R. No. 942/2015 (Indore) decided on 8 September, 2015

ASHWINI PANDYA ...Applicant
Vs.
STATE OF M.P. ...Non-applicant

***Limitation Act (36 of 1963), Article 114 & Section 5 - Condonation of delay* - It is not mandatory that such an application should be filed along with memo of appeal itself - Even if the application for condonation of delay is filed subsequent to filing of appeal, such an**

application cannot be rejected only on the ground that it was not filed along with the appeal. (Para 12)

परिसीमा अधिनियम (1963 का 36), अनुच्छेद 114 व धारा 5 – विलम्ब के लिए माफी – यह आज्ञापक नहीं है कि अपील के ज्ञापन के साथ ही उक्त आवेदन प्रस्तुत किया जाना चाहिए – यहाँ तक कि यदि विलंब के लिए माफी के आवेदन को अपील प्रस्तुत करने के पश्चात् प्रस्तुत किया जाता है, तब भी उक्त आवेदन को केवल इस आधार पर अस्वीकार नहीं किया जा सकता कि उसे अपील के साथ प्रस्तुत नहीं किया गया था।

ORDER

J.K. JAIN, J. :- This revision u/s. 397/401 of the Cr.P.C. is filed against the order dated 29.6.2015 passed by Second Additional Sessions Judge (ASJ), Ujjain in Cr. Appeal No.320/2011.

2. An offence u/s. 419, 420, 471, 120-B of the I.P.C. registered at Police Station Kotwali, Ujjain at Crime No.28/2006. After investigation, final report has been filed against the applicant and some other accused persons, which is registered as Cr. Case No. 4555/2006.

3. Learned Judicial Magistrate, First Class (JMFC), Ujjain acquitted the applicant along with other accused persons vide judgment dated 19.3.2011. Against the said judgment of acquittal, State has filed the appeal u/s. 378(1)(a) of the Cr.P.C. before the Court of Sessions.

4. The appeal was filed on 8.8.2011 and as such, the appeal was barred by limitation, therefore, the applicant took the objection. Thereupon, non-applicant filed an application u/s. 5 of the Limitation Act for condonation of delay. After hearing the parties, learned ASJ by the impugned order allowed the application and condoned the delay. Being aggrieved by this, applicant has filed the present revision.

5. Learned counsel for the applicant submits that the appeal against acquittal, as per amended provisions, is filed before the Sessions Court. For filing the appeal, the limitation prescribed is 30 days, whereas learned ASJ assuming the limitation of 90 days condoned the delay. It is submitted that no application for condonation of delay was filed along with memo of appeal, but when the applicant took the objection, non-applicant filed the application for condonation of delay after eighteen months of filing of appeal. Learned ASJ overlooked the illegalities and allowed the application and condoned the delay.

The order passed by learned ASJ is erroneous and, therefore, deserves to be set aside.

6. On the other hand, learned Dy. Govt. Advocate submits that as per provision of Article 114 of Limitation Act, the limitation for filing an appeal against the order of acquittal is 90 days. In the Limitation Act, it is not provided that appeal against acquittal when filed before the Sessions Court, the limitation shall be computed as 30 days. Learned Dy. Govt. Advocate submits that applicant's counsel misconstrued the provisions. He further submits that it is not mandatory that the appeal should be accompanied with application for condonation of delay. Even if after filing of appeal, such an application can be filed and the Court can consider it. Learned ASJ has not committed any error of law. Thus, he prays for dismissal of the revision.

7. After hearing learned counsel for the parties, perused the record.

8. Article 114 of Limitation Act of 1963 provides a period of ninety days limitation for appeals under sub-sections (1) and (2) of Section 417 of Code of 1898 (corresponding to sub-sections (1) and (2) of present Code) and a period of thirty days in case of appeal under sub-section (3) of Section 417 of that Code (corresponding to sub-section (4) of Section 378 of present Code). The Legislature, however, appears to have omitted to make corresponding amendments in Article 114 of Limitation Act, 1963 in spite of fact that no change in the period of limitation was thought necessary. (See Law Commission 41st Report para 31.20).

9. By virtue of Section 8 of General Clauses Act, 1897 references to sub-sections (1) and (2) of Section 417 of repealed Code in Article 114 of Limitation Act, 1963 have to be construed as references to sub-sections (1) and (2) of the corresponding Section 378 of Code of 1973 and, therefore, period of limitation for filing an appeal against an acquittal on behalf of the State Government or Central Government in a case instituted otherwise than on complaint still remains 90 days from order of acquittal.

10. As per Section 32 of the Cr.P.C. (Amendment) Act, 2005 w.e.f. 23.6.2006, a new Section 378(1)(a) and (b) is substituted. As per provision u/s. 378(1)(a), District Magistrate may direct the public prosecutor to present an appeal to the Court of Sessions against an order of acquittal passed by the Magistrate in respect of cognizable and non-bailable offence. After this amendment in Article 114 of Limitation Act, it seems that no change in the

period of limitation was though necessary by the Legislature. Thus, it is clear that the period of limitation for filing an appeal under Section 378(1)(a) against an order of acquittal before Court of Sessions is 90 days as per Article 114 of the Limitation Act.

11. Learned counsel for applicant has been unable to point out that the limitation prescribed for filing the appeal against acquittal before the Court of Sessions is thirty days. Therefore, I am of the considered view that the learned ASJ has rightly held that the appeal shall govern by Article 114 of the Limitation Act and for filing such an appeal, the period of limitation is ninety days.

12. Admittedly, the non-applicant has not filed the application for condonation of delay along with memo of appeal. After taking the objection by applicant, non-applicant filed the application for condonation of delay. It is settled law that it is not mandatory that such an application should be filed along with memo of appeal itself. Even if the application for condonation of delay is filed subsequent to filing of appeal, such an application cannot be rejected only on the ground that it was not filed along with the appeal.

13. With the aforesaid discussion, I am of the considered view that there is no illegality or irregularity or impropriety in the impugned order. Accordingly, this revision fails and is hereby dismissed. The trial Court be informed accordingly. Trial Court is also directed to make all endeavors to decide the appeal at the earliest as this criminal appeal is pending since August, 2011.

Revision dismissed.

I.L.R. [2016] M.P., 2092
CRIMINAL REVISION
Before Mr. Justice C.V. Sirpurkar
Cr.R. No. 60/2016 (Jabalpur) decided on 8 February, 2016

NAFEES & ors. ...Applicants
Vs.

STATE OF M.P. & anr. ...Non-applicant

***Maintenance and Welfare of Parents and Senior Citizens Act (56 of 2007), Section 24 - Abandonment of Senior Citizen* - Victim who is alleged to have been abandoned is aged about 50 years - Section 2(h) - Meaning - Any person being a citizen of India, who has attained the age of sixty years or above - As the victim is aged about 50 years therefore,**

charge framed against applicants is not sustainable in eyes of law - Applicants are entitled to be discharged - Revision allowed.

(Paras 6 to 12)

माता पिता एवं वरिष्ठ नागरिकों का भरण पोषण एवं कल्याण अधिनियम (2007 का 56), धारा 24 – वरिष्ठ नागरिक का परित्यजन – पीड़ित, जिसका अभिकथित रूप से परित्याग किया गया है, की आयु 50 वर्ष है – धारा 2(एच) – अर्थात् – कोई व्यक्ति जो भारत का नागरिक होकर 60 वर्ष या अधिक की आयु पूर्ण कर चुका हो – चूंकि पीड़ित की आयु लगभग 50 वर्ष है, अतः आवेदकगण के विरूद्ध विरचित आरोप विधि की दृष्टि में कायम रखे जाने योग्य नहीं है – आवेदकगण आरोप मुक्त किये जाने के हकदार हैं – पुनरीक्षण मंजूर।

Umesh Trivedi, for the applicant.
A.K. Singh, P.L. for the non-applicant/State.

ORDER

C.V. SIRPURKAR, J. :- This criminal revision is directed against order dated 14.12.2015 passed by the Court of Chief Judicial Magistrate, Balaghat, in criminal case no. 2080/2014, whereby a charge under Section 24 of the Maintenance and Welfare of Parents and Senior Citizens Act, 2007, (hereinafter referred to in this order as "the Act"), was framed.

2. As per prosecution case, victim Shamsunnisa is step mother of petitioner no.1 Nafees and petitioner no. 3 Tausif. Petitioner no. 2 Tahsin is wife of petitioner no.1 Nafees. The victim had married Mohid Khan, father of petitioner no.1 and 3, in the year 1998. Petitioner nos. 1 and 3 are sons of Mohid Khan from his first wife. Asif, son of victim Shamsunnisa is deaf and dumb. After the marriage of petitioner no. 1 Nafees with petitioner no.2 Tahsin, the petitioners started to harass Shamsunnisa. About three months before lodging of the FIR, the victim was beaten up and turned out of the house. Ever since, she has been staying with her relatives and is dependent upon begging for her survival. Petitioners are refusing to maintain her.

3. The order framing charge has been assailed on behalf of the petitioners/ accused persons on the sole ground that even as per prosecution case, the age of the victim Shamsunnisa is 50 years; therefore, the offence under Section 24 of the Act, is not made out.

4. Learned Panel Lawyer for the respondent/State on the other hand, has supported the impugned order.

5. Section 24 of the Act reads as section hereunder:

"24. Exposure and abandonment of senior citizen:- Whoever, having the care or protection of senior citizen, leaves such senior citizen in any place with the intention of wholly abandoning such senior citizen, shall be punishable with imprisonment of either description for a term which may extend to three months or fine which may extend to five thousand rupees or with both."

6. Thus, it may be seen that following ingredients are essential to constitute the offence punishable under Section 24 of the Act.

(1) The accused must have care or protection of the senior citizen.

(2) He must leave such senior citizen in any place.

(3) Such 'leaving' must be with the intention of holly (sic:wholly) abandoning such senior citizen.

7. Section 24 leaves no scope for doubt that the offence is capable of being committed only against a senior citizen.

8. Term 'Senior Citizen' has been defined in Section 2 (h) of the Act, which is herein below reproduced:-

"senior citzen (sic:citizen)" means any person being a citizen of India, who has attained the age of sixty years or above.

9. Thus it is clear that only a person who has attained the age of 60 years, can be called a senior citizen for the purposes of the Act.

10. Reverting back to the facts of the case, it may be seen that the case was instituted on a written report filed by alleged victim Shamsumnisa on 3.9.2014. In the written report signed by the victim, her age has been given as 50 years. The same age has been entered in the First Information Report. In the statement of victim Shamsunnisa recorded by the police station under Section 161 of the Code of Criminal Procedure also, she has given her age as 50 years. There is no other material filed along with the charge-sheet, to suggest that she has actually attained the age of 60 years.

11. In aforesaid circumstances, even if all allegations made in the charge-sheet and the material filed therewith is taken at its face-value and is presumed

to be true, the essential ingredient of the offence that the victim should be a senior citizen, would be missing. As such, the offence punishable under Section 24 of the Act is not constituted. Aforesaid aspect of the matter seems to have completely escaped the attention of learned Chief Judicial Magistrate while framing charge under Section 24 of the Act.

12. In these circumstances, there is no sufficient ground to proceed against petitioners under Section 24 of the Act and the charge framed against them is not sustainable in the eyes of law. As such, they are entitled to be discharged in respect of aforesaid offence.

13. In the result, this criminal revision succeeds. Petitioners/accused persons Nafees, Tahseen and Tausif are discharged in respect of offence under Section 24 of the Maintenance and Welfare of Parents and Senior Citizens Act, 2007.

Certified copy as per rules.

Revision allowed.

I.L.R. [2016] M.P., 2095
CRIMINAL REVISION
Before Mr. Justice Subhash Kakade
Cr.R. No. 2180/2014 (Jabalpur) decided on 28 March, 2016

GOPI V. VARTI ...Applicant
Vs.
MAHESH PRASAD & anr. ...Non-applicants

Criminal Procedure Code, 1973 (2 of 1974), Sections 397, 401 & 439(2) - Cancellation of Bail **- Sought on the ground that the respondent no. 1 violated the terms and conditions of bail, tried to alter the evidence and threatened the witness - Held - As cancellation of bail jeopardizes the personal liberty of the individual, power of cancellation should be exercised with care and in proper case - Impugned order does not indicate any adversity - There is no violation of terms and conditions of order granting bail - Cancellation of the same is not justified - Revision is dismissed. (Paras 8 & 15)**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 397, 401 व 439(2) – जमानत का निरस्त किया जाना – इस आधार पर चाहा गया कि प्रत्यर्थी क्र. 1 ने

जमानत की निबंधनों एवं शर्तों का उल्लंघन किया, साक्ष्य को परिवर्तित करने का प्रयास किया तथा साक्षी को धमकी दी – अभिनिर्धारित – चूंकि जमानत का निरस्त किया जाना किसी व्यक्ति की व्यक्तिगत स्वतंत्रता को संकट में डालता है, इसलिए निरस्त करने की शक्ति का प्रयोग, सावधानीपूर्वक एवं उचित मामले में करना चाहिए – आक्षेपित आदेश कोई प्रतिकूलता नहीं दर्शाता – जमानत प्रदान करने के आदेश की निबंधनों एवं शर्तों का कोई उल्लंघन नहीं हुआ है – उसका निरस्त किया जाना न्यायोचित नहीं है – पुनरीक्षण खारिज।

S.N. Saraf, for the applicant.
Monesh Sahu, for the non-applicant No. 1.
Anubhav Jain, P.L. for the non-applicant No. 2/ State.

ORDER

SUBHASH KAKADE, J. :- In a case arising out of Crime No.04/2014 registered at Police Station AJJAK, District Harda for the offences punishable under Section 294 & 323/34 of IPC and Section 3(1)(X) of SC/ST (Prevention of Atrocities) Act, 1989 under the provisions of Section 439 of the Code of Criminal Procedure, 1973, hereinafter in short 'the Code', the trial Court granted bail to respondent No.1 Mahesh Prasad vide order dated 04.03.2014 passed in M.Cr.C. No.10/2014 and directed that respondent No.1 be released on bail on furnishing a personal bond to the tune of Rs.25,000/- (Twenty Thousand only) with a solvent surety in the like amount to the satisfaction Judicial Magistrate, First Class, Harda. Being aggrieved by the same, the applicant/complainant filed an application for cancellation of bail granted to respondent No.1, which was also rejected by learned trial Court by the impugned order, hence this Criminal Revision by the applicant/ complainant.

2. Shri S.N. Saraf, learned counsel for the applicant submitted that the respondent No.1 had violated the terms and conditions of bail granted vide order dated 04.03.2014 and tried to altered the evidence of the prosecution and also threatened to witness Narayan Saini. A written complaint in this regard has also been lodged before the Superintendent of Police, Harda. Hence, the impugned order be set aside and the bail order dated 04.3.2014 by the trial Court be cancelled.

3. Per contra Shri Monesh Sahu, learned counsel for the respondent No.1 has submitted that the respondent No.1 did not try to impress the witnesses of the prosecution and the Superintendent of Police (AJJAK),

Bhopal had submitted a report on 21.5.2014 that the FIR lodged by wife of the applicant being false and frivolous, the proceedings arising out of the FIR can be closed.

4. Having heard learned counsel appearing on behalf of the parties and after perusal of the record and below mentioned legal proposition in this regard, I find that there is no scope for cancellation of bail order granted to the respondent No.1.

5. The power of cancellation of bail vested in the High Court can be invoked by the State or by any aggrieved party. The power can be exercised *suo motu* by the High Court. Any person of the public who has a concern in the matter can also move to the High Court for the cancellation of bail. Even an informant can move petition for cancellation of bail. A *de facto* complainant can also file petition for cancellation of bail.

6. The order for cancellation of bail may be passed mainly on the following grounds:

1. When the accused is found tampering with the evidence either during the investigation or during the trial.

2. When the person on bail commits similar offences or any heinous offence during the period of bail.

3. When the accused has absconded and trial of the case gets delayed on that account.

4. When the offence so committed by the accused had created serious law and order problem in the society and accused had become a hazard on the peaceful living of the people.

5. If the High Court finds that the lower Court granting bail has exercised its judicial power wrongly.

6. If the High Court or Sessions Courts find that the accused has misused the privilege of bail.

7. If the life of the accused itself be in danger.

7. It is well settled that the consideration applicable to the grant of bail and consideration applicable for cancellation of such an order is independent and do not overlap each other.

8. The cancellation of bail necessarily involves the review of a decision already made and can by and large be permitted only if, by reason of supervening circumstances, it would be no longer conducive to a fair trial to allow the accused to retain his freedom during the trial. Rejection of bail stands on one footing and cancellation of bail stands on a different footing and is a harsh order because it takes away the liberty of an individual granted and is not to be lightly resorted to. The power of cancellation of bail should exercised with care and circumspection and only in proper cases, as cancellation of bail jeopardize the personal liberty of the individual.

9. Very cogent and overwhelming circumstances are necessary for an order directing the cancellation of the bail already granted.

10. The cancellation of bail should not be done in a routine manner. Bail once granted to an accused should not be cancelled in a mechanical manner.

11. It is easier to refuse an application for bail in a non-bailable case than to cancel a bail already granted by a Court. Certain circumstances should exist in order to take this step. Grounds for cancellation of bail should be those which arose after the grant to bail and should be referable to the conduct of the accused while on bail. While considering an application for cancellation of bail the Court ordinarily looks for some supervening circumstances which would reflect that the liberty granted to the accused has been misused.

12. Accused's conduct subsequent to the grant of bail application and supervening circumstances alone are mainly relevant. If a bail has been granted illegally or improperly by erroneous and arbitrary exercise of discretion, the same is liable to be cancelled even if there is absence of supervening circumstances.

13. It is admitted position that the FIR lodged by Smt. Ratana Varti, wife of complainant/applicant Gopi V. Varti being found false and frivolous, hence after investigation, the Superintendent of Police (AJJAK Bhopal) submitted his report on dated 21.05.2014 before the appropriate Court to take steps under the provisions of Section 169 of the Code for acceptance of the final report.

14. Section 169 of the Code relates to case in which it is found that if there is no sufficient provision for forwarding an accused to a Magistrate, the final report can be submitted before the Magistrate.

15. Grounds mentioned in memo and raised elaborately at the time of arguments by learned counsel for the applicant for cancellation of bail order do not indicate any adversity regarding subsequent misconduct of respondent No.1. Where there is no violation of terms of order granting anticipatory bail, the cancellation of the same is not justified.

16. Any other fact of violation of grant of anticipatory bail order is not pointed out by the learned counsel for the applicant.

17. Hence, no case is made out for cancellation of anticipatory bail granted to respondent No.1 Mahesh Prasad vide order dated 04.3.2014 by the trial Court. This Criminal Revision having no merit deserves to be and is hereby dismissed.

Revision dimissed.

I.L.R. [2016] M.P., 2099
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice Alok Verma
M.Cr.C. No. 176/2015 (Indore) decided on 27 January, 2015

KALU ...Applicant
Vs.
STATE OF M.P. ...Non-applicant

A. ***Criminal Procedure Code, 1973 (2 of 1974), Section 482 - Sentence on offender already sentenced for another offence*** **- Appellant already convicted in another trial and appeal was partly allowed by High Court by reducing the sentence - Appellant thereafter convicted in another case and appeal is pending - Whether in the facts of the case the High Court has inherent jurisdiction to invoke provision of Section 427 of Cr.P.C. by way of separate application when provision u/S 427 of Cr.P.C. was neither invoked in original case nor in appeal - Held - When provision of Section 427 of Cr.P.C. was not invoked in the original case or appeals, then the High Court could not have exercised inherent jurisdiction in a case of this nature - Petition dismissed. (Paras 3 to 7)**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – अन्य अपराध में पूर्व से दण्डादिष्ट किए गए अपराधी पर दण्डादेश – अपीलार्थी को पूर्व में एक अन्य विचारण में दोषसिद्ध किया गया था तथा उच्च न्यायालय द्वारा दण्डादेश को कम करते हुए अपील अंशतः मंजूर की गई थी – तद्पश्चात् अपीलार्थी को एक अन्य

प्रकरण में दोषसिद्ध किया गया था एवं उसकी अपील लंबित है – जब दं.प्र.सं. की धारा 427 के उपबंध का अवलंब न तो मूल प्रकरण में एवं न ही अपील में लिया गया हो तब प्रकरण के तथ्यों में क्या पृथक् आवेदन के माध्यम से दं.प्र.सं. की धारा 427 के उपबंध का अवलंब लेने हेतु उच्च न्यायालय को अंतर्निहित अधिकारिता है – अभिनिर्धारित – जब दं.प्र.सं. की धारा 427 के उपबंध का अवलंब मूल प्रकरण अथवा अपील में नहीं लिया गया था, तब इस प्रकृति के मामले में उच्च न्यायालय अंतर्निहित अधिकारिता का प्रयोग नहीं कर सकता – याचिका खारिज।

***B. Criminal Procedure Code, 1973 (2 of 1974), Section 427* - Whether the provision of Section 427 of Cr.P.C. can be invoked in two separate and independent criminal proceedings - Held - No.**

(Paras 7 & 8)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 427 – क्या दो पृथक एवं स्वतंत्र दाण्डिक कार्यवाहियों में दं.प्र.सं. की धारा 427 के उपबंध का अवलंब लिया जा सकता है – अभिनिर्धारित – नहीं।

Cases referred:

1989 Cri.L.J. 632, (2007) 2 SCC 772.

Harshvardhan Singh Rathore, for the applicant.
Manish Joshi, P.L. for the non-applicant/State.

ORDER

ALOK VERMA, J. :- This application under section 482 read with section 427 of Cr.P.C. is filed by the applicant – Kalu for seeking a direction to the effect that subsequent sentence awarded to him may run concurrently with the previous sentence that was awarded to him in a different case.

2. Brief facts of the case are that the present applicant sentenced to undergo 5 years rigorous imprisonment with fine of Rs.500/- under section 394 of IPC by learned First Additional Sessions Judge, Dhar in Sessions Case No.327/2009. The applicant filed an appeal before this Court, which was registered as criminal appeal bearing No.327/2009 and was disposed of by order dated 12.04.2010. The appeal was partly allowed and while maintaining the conviction under section 394 of IPC, the sentence was reduced to the period already undergone. The applicant was also facing trial under section 394 and 397 of IPC in ST No.311/2009. He was again convicted by the Special Judge and Additional Sessions Judge, Dhar in judgment dated

31.07.2010 and he was sentenced to rigorous imprisonment for 7 years under section 394 read with section 397 of IPC. Present applicant preferred appeal against this conviction and sentence, which is pending before this Court as Criminal Appeal No.944/2010.

3. Admittedly, none of the courts below exercised power under section 427 of Cr.P.C. and, therefore, sentence awarded to him would run consequtively one after the other. By the present application, the applicant prays that a direction may be issued now that sentence awarded to him in two above mentioned cases, should run concurrently, exercising the extra ordinary power conferred to this Court under section 482 of Cr.P.C.

4. Learned counsel for the applicant cited judgment of Full Bench of this Court in the case of *Shersingh Vs. State of MP* reported in 1989 Cri.L.J. 632. In this case, benefit of provisions of section 427 of Cr.P.C. was not extended to the accused and question arose whether such direction can be issued by the High Court under section 482 of Cr.P.C. The Full Bench while dealing with the legal questions referred to it by the learned Single Judge of the Court, formed following questions for consideration:

> (i) .....
>
> (ii)Whether the High Court can entertain application under section 427 of Cr.P.C.

5. It may be observed here that in this question, there appears to be typographical error and instead of section 427 of Cr.P.C. there should have been section 482 of Cr.P.C. The Full Bench answered the question in the following terms:

> (7)---------- ----------
>
> (ii)The High Court has power in appropriate cases to entertain an application under section 482 of the Code by invoking its inherent powers at any time subsequent to the decision in a given case even if the trial court or the appellate or revisional court has failed to exercise its discretion under section 427(I) of the Code. The case be now placed before the Single Bench for decision on merits.

6. By citing the above judgment, learned counsel for the applicant submits

that this Court has ample power to exercise the jurisdiction conferred to it under section 482 of Cr.P.C. and issue a direction as sought for.

7. He however, cites judgment of Hon'ble the Supreme Court in the case of *M.R. Kudva Vs. State of A.P.* reported in (2007) 2 SCC 772. In this judgment, Hon'ble the Supreme Court laid down the principle that when the provision of section 427 of Cr.P.C. was not invoked in the original case or appeals, a separate application filed before the High Court after the dismissal of the SLPs, was not maintainable. The High Court could not have exercised its inherent jurisdiction in a case of this nature. It may be mentioned here that any case before the Supreme Court, both the appeal were decided by the High Court were dismissed. The Supreme Court further held that where two proceedings are separate and independent, the provisions of section 427 of Cr.P.C. do not apply. The relevant paragraph 12 of this judgment may be quoted below:

> However, in this case the provision of Section 427 of the Code was not invoked in the original cases or in the appeals. A separate application was filed before the High Court after the special leave petitions were dismissed. Such an application, in our opinion, was not maintainable. The High Court could not have exercised its inherent jurisdiction in a case of this nature as it had not exercised such jurisdiction while passing the judgments in appeal. Section 482 of the Code was, therefore, not an appropriate remedy having regard to the fact that neither the Trial Judge, nor the High Court while passing the judgments of conviction and sentence indicated that the sentences passed against the appellant in both the cases shall run concurrently or Section 427 would be attracted. The said provision, therefore, could not be applied in a separate and independent proceeding by the High Court. The appeal being devoid of any merit is dismissed.

8. Thus, as per the principle laid down in *M.R. Kudva* (supra) case, this Court has no jurisdiction where the provisions of section 427 of Cr.P.C. were not resorted to while deciding the appeals by the High Court also where the cases arise out of separate and independent proceedings, power under section 427 of Cr.P.C. cannot be exercised.

9. In this case, however, the applicant is in disadvantageous position

because second appeal is still pending before this Court where he would get an opportunity to raise the prayer before the Court to exercise power conferred under section 427 of Cr.P.C. and issue appropriate direction.

10. In this view of the matter, no case is made out for exercising the extra ordinary jurisdiction granted under section 482 of Cr.P.C. to this Court and, therefore, the application is devoid of any merit and liable to be dismissed and is hereby dismissed.

C.c. as per rules.

Application dismissed.

I.L.R. [2016] M.P., 2103
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice S.K. Palo
M.Cr.C. No. 1146/2015 (Gwalior) decided on 12 March, 2015

MAMTA ...Applicant
Vs.
STATE OF M.P. ...Non-applicant

A. Criminal Procedure Code, 1973 (2 of 1974), Sections 162 & 174 and Evidence Act (1 of 1872), Section 145 - **Further cross-examination of prosecution witness, sought by accused to take contradictions and omissions in the statements recorded during the inquest and police statements u/S 161 - Allowed with limitations.**
(Paras 6, 7 & 8)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 162 व 174 एवं साक्ष्य अधिनियम (1872 का 1), धारा 145 – धारा 161 के अंतर्गत अभिलिखित पुलिस कथन तथा मृत्यु समीक्षा के दौरान अभिलिखित कथनों में विरोधाभास एवं लोप प्राप्त करने हेतु अभियुक्त द्वारा अभियोजन साक्षी का अतिरिक्त प्रतिपरीक्षण चाहा गया – शर्तों के साथ मंजूर।

B. Criminal Procedure Code, 1973 (2 of 1974), Section 174 - **Inquest report - Purpose - To indicate the injuries found on the body of deceased.**
(Para 7)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 174 – मृत्यु समीक्षा प्रतिवेदन – प्रयोजन – मृतक के शरीर पर पाई गई चोटों को दर्शाना।

C. Criminal Procedure Code, 1973 (2 of 1974), Section 174

- Statement recorded u/S 174 can not be used as a substantive piece of evidence - Can be used to corroborate or contradict the person making it. (Para 6)

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 174 – धारा 174 के अंतर्गत अभिलिखित कथन को साक्ष्य के सारभूत अंश के रूप में प्रयोग नहीं किया जा सकता – कथन करने वाले व्यक्ति से इसकी संपुष्टि अथवा खंडन कराने हेतु इसे प्रयोग किया जा सकता है।

Cases referred:

A.I.R. 1959 SC 1012, (1996) 8 SCC 699, 1991(4) SCC 341.

T.C. Narwariya, for the applicant.

(Supplied: Paragraph numbers)

ORDER

S.K. PALO, J. :- This petition under Section 482 of Cr.P.C. has been filed by the accused persons of S.T. No. 816/2014 pending in the Court of 14 ASJ,Gwalior to quash the order dated 12.01.2015 by which the learned trial Court refused to allow the accused person to take contradictions and omissions from the earlier statements recorded during the course of inquest and police statements recorded under Section 161 of Cr.P.C.

2. Briefly, stated the facts arising to file this petition are Session Trial No. 816/2014 is pending before the learned 4th ASJ, Gwalior in which the petitioners stand trial u/S 306/34 of IPC in connection with crime No. 376/14 registered at police station Gwalior. During the course of evidence the petitioners filed an application on 12.01.2015 requesting the Court to further cross-examine Mohan PW/1 on the ground that there are many contradiction and omission in his earlier statements recorded during the inquest and police statement recorded u/S 161 of Cr.P.C. Learned trial Court by the impugned order dated 12.01.2015 observed that these statements are stuck by Section162 of Cr.P.C. read with Section 145 of Indian Evidence Act, hence, cannot be used for contradictions and omissions in the evidence and dismissed the application.

3. The petitioners filed this petition u/S 482 of Cr.P.C. on the ground that earlier statement u/S 161 of Cr.P.C. and statement recorded during the inquest can be used for contradictions and omissions. The learned trial Court erred in passing the order which is not correct in the eyes of law. Section 162 of

Cr.P.C. turns the Court to use in such part of statements for any purpose. If proved, may be used by the accused with the permission of the Court to contradict.

4. It is also prayed that the petition be allowed and the statements during the inquest and report and made statements u/S 161 of Cr.P.C. may be allowed for contradictions and omissions.

5. The proviso of Section 162 of Cr.P.C. reads as follows:-

> ***"Provided** that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution, to contradict such witness in the manner provided by section 145 of the Indian Evidence Act, 1872 (1 of 1872); and when any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination."*

6. While it is true that the receipt and registration of an FIR is not the sine qua non to the setting in motion of the machinery of criminal investigation, the investigating officer must follow the procedure laid down in Part V, Ch. XIV. Section 162 in that Chapter provides inter-alia that no statement of any person, if recorded, by a police-officer in the course of investigation, shall be signed by the person making it. Even a statement of a witness recorded by the investigators during the inquest under Section 174 would be within the inhibition of Section 162. Behind this provision is a wholesome rule of public policy that witnesses at the trial should be free to tell the truth unhampered by anything they might have been made to say to the police. The statement under Section 174 of Cr.P.C. cannot be used as a substantive piece of evidence.

> *In Tahsildar Singh Vs. State of U.P. AIR 1959 SC 1012 it is observed that "At the most, it can be used only as a previous statement to corroborate or contradict the person making it, at the trial."*

> *In the case of Babusingh Vs. State of Punjab*

reported in (1996)8 SCC 699 it is observed that the statements made to the Investigating Officer while conducting the inquest is hit by Section 162 of Cr.P.C. and such statements can only be utilized for contradicting the witness in the manner provided in under Section 145 of the Evidence Act.

In case of Malkiyat Singh Vs. State of Punjab reported in 1991(4) SCC 341 the supreme Court has propounded that "Section 162 was conceived to protect an accused creating an absolute bar against the previous statement made before the police officer being used for any purpose whatsoever. The obvious reason is that the previous statement under the circumstances was not made inspiring confidence. It enables the accused to rely thereon only to contradict the witnesses in the manner provided by Section 145 drawing attention of the witness to that part of the statement intended to be used for contradiction. It cannot be used for corroboration of a prosecution or defence witness or even a court witness, nor can it be used for contradicting a defence or a court witness. The investigating officer is enjoined to forward the inquest report to the Magistrate along with the statement recorded at the inquest, so that the court would see the record, at the earliest of the circumstances leading to the cause of the death of the deceased and the witness examined during the inquest. Therefore, the statement of PW recorded during inquest is not evidence. It is a previous statement reduced to writing under Section 162 of the Code and enclosed with the inquest report and cannot be used by the prosecution for any purpose including to show the names of the accused except to contradict the maker thereof, or to explain the same by prosecution."

7. However, it is to be kept in mind while analyzing the evidence, the purpose of inquest report is to indicate the injuries which the Investigating Officer has found on the body of the deceased person. It can be witnessed by one or two persons but it is not at all necessary for the Investigating Officer to

record the statements of witnesses or to get the statements of witnesses signed on the inquest report and incorporate the same in it which introduced an aliment of chaos and confusion and demanding an explanation from the prosecution recording the statement made therein. Therefore, at the time of allowing the contradictions and omissions, this fact has to be born (sic:borne) in mind that the purpose of the statements at the time of inquest report is very limited.

8. With this observation, the petition is allowed, the impugned order is set aside and the petitioners are allowed to take contradictions and omissions as those statements are previous statements of witness Mohan Prajapati PW/1 subjected to the above limitations.

Petition allowed.

I.L.R. [2016] M.P., 2107
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice S.C. Sharma
M.Cr.C. No. 2759/2014 (Indore) decided on 21 September, 2015

LALIT KAVDIA (DR.) ...Applicant
Vs.
STATE OF M.P. ...Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Section 482 and Penal Code (45 of 1860), Section 304-A **– Criminal Proceedings are maintainable only if there is *prima facie* gross negligence, as opined by the independent doctor (preferably Government Doctor) – In present case there is a categoric report submitted by the Dean, Mahatma Gandhi Medical College, which is government hospital that the anaesthesia administered to the child was administered keeping in view the weight of the child – Therefore, the Anaesthetist is certainly not at all guilty of gross negligence – Therefore, charge-sheet filed by the State for offence u/S 304-A quashed. (Para 10)**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 एवं दण्ड संहिता (1860 का 45), धारा 304–ए – दाण्डिक कार्यवाहियाँ केवल तभी पोषणीय है जब प्रथम दृष्ट्या घोर उपेक्षा का मामला हो, जैसी कि स्वतंत्र चिकित्सक (अधिमानतः शासकीय चिकित्सक) द्वारा राय दी गई है – वर्तमान प्रकरण में महात्मा गांधी चिकित्सा महाविद्यालय, जो कि शासकीय चिकित्सालय है, के संकाय–अध्यक्ष द्वारा स्पष्ट प्रतिवेदन प्रस्तुत किया गया है कि बच्चे को दिया गया निश्चेतक उसके वजन को

ध्यान में रखते हुए दिया गया था – अतएव, निश्चेतना चिकित्सक निश्चित रूप से घोर उपेक्षा का बिल्कुल भी दोषी नहीं है – अतः राज्य द्वारा धारा 304–ए के अंतर्गत अपराध हेतु प्रस्तुत आरोप पत्र अभिखण्डित।

Cases referred:

(2013) 10 SCC 741, 2005 (6) SCC, Page-1.

Parties through their counsel.

(Supplied: Paragraph numbers)

ORDER

S.C. SHARMA, J. :- Petitioner before this Court has filed this present petition for quashment of the order dated 04.01.2014 passed by the Judicial Magistrate FirstClass, Indore in Criminal Case No.205/2014, who has taken cognigence (sic:cognizance) pursuant to the charge-sheet filed by the State of M.P. for offence under Section 304-A of IPC.

2. Facts of the case reveal that the petitioner is a doctor and working as an anesthetist at Choithram Netralaya, a hospital under the Choithram Trust. The petitioner is practicing as an anesthetist for the last 13 years and holds post graduate degree. On 06.08.2012, the child was brought to Choithram Netralaya with some eye problem and one Dr. Ritu Verma diagnosed the deceased as 'Limbal Dermoid with Lateral Canthus both sides Dermoid" and a child was recommended for transplantation of cornea. The child was referred to Dr. Bhagyesh Pore, Oculoplastic Surgeon. Dr. Bhagyesh Pore diagnosed the patient with "Goldenhar's Syndrome" - congenital anomalies. The patient was also suffering from Mild Coloboma i.e. incomplete development of the eye lid. On the same day i.e. on 06.08.2012, Dr. Ritu Verma directed for examination of the patient for Pre-Anesthetic Evaluation and the patient was looked by Dr. K.J. Keshwani, a Pediatrician on 06.8.2012 and after conducting the investigation required she was declared fit for General Anesthesia. The patient was called on 08.03.2013 and again called for general surgery on 09.04.2013 and she was taken for surgery. She was given intracath for intravenous patency and she was also 'given 100% oxygen, however, patient expired on the table.

3. Report was lodged on 09.04.2013 at crime No.400/13, for the offence under Section 304-A of IPC.

4. In the present case, investigation was also carried out by the Dean, Mahatma Gandhi Medical College (Government College). Dean of Mahatma Gandhi Medical College has given report with the dose investigation keeping in view the weight of the patient and medicines were given in proper quantity.

5. Learned counsel has placed reliance upon a judgment delivered by the Apex Court in case of *A.V.S. Narayanan, Rao Vs. Ratnamala and another* reported in (2013) 10 SCC 741 and his contention is that in light of the aforesaid judgment criminal proceedings deserve to be quashed.

6. Ms. Preeta Moita, learned government advocate submits that she does not have file with her and declines to argue the matter.

7. Shri Harish Tripathi, learned counsel appearing for the applicant has stated before this Court that he has filed Vakalatnama and prays that he may be permitted to argue the matter on behalf of the complainant. He has vehemently argued before this Court that proper dose was not given to the patient and the doctor has administered the anesthesia negligently resulting death of four year child. As the child was given over dose by the anesthetist, the case has rightly been registered against him.

8. It is not in dispute in the present case that the death of the child was on account of cardiac respiratory arrest and the report submitted in the matter by the Dean, Mahatma Gandhi Medical College is also on record dated 17.12.2013. There is a report dated 17.12.2013 on record (Annexure P-2) which reflects that the medicines given to the child were as per weight of the child which is reflected from the case-sheet.

9. This Court has heard the learned counsel for the parties at length and has carefully gone through the record and also the judgment delivered by the Apex Court in the case of *A.V.S. Narayanan Rao* (supra). Paragraph Nos. 10 to 15 of the aforesaid order read as under:

> "10. This Court further opined that though doctors are not immune from legal proceedings in the event of their negligence in discharging their professional duties, in the interest of the society, it is necessary to protect doctors from frivolous and unjust prosecution. It was further pointed out the need to frame either statutory rules or administrative instructions incorporating guidelines for 5 prosecuting doctors on charges of criminal

negligence.

This Court therefore, ordered that until such guidelines are laid down, the following procedure is required to be followed:

> "52. ...we propose to lay down certain guidelines for the future which should govern the prosecution of doctors for offences of which criminal rashness or criminal negligence is an ingredient. A private complaint may not be entertained unless the complainant has produced prima facie evidence before the court in the form of a credible opinion given by another competent doctor to support the charge of rashness or negligence on the part of the accused doctor. The investigating officer should, before proceeding against the doctor accused of rash or negligent act or omission, obtain an independent and competent medical opinion preferably from a doctor in government service, qualified in that branch of medical practice who can normally be expected to give an impartial and unbiased opinion applying the Bolam test to the facts collected in the investigation. A doctor accused of rashness or negligence, may not be arrested in a routine manner (simply because a charge has been levelled against him). Unless his arrest is necessary for furthering the investigation or for collecting evidence or unless the investigating officer feels satisfied that the doctor proceeded against would not make himself available to face the prosecution unless arrested, the arrest may be withheld." .

11. From the final report submitted by the police in the instant case, it can be gathered that the records pertaining to the treatment given to the deceased were forwarded to the Andhra Pradesh Medical Council and also the Medical Council of India which opined that the "doctors seem to have made an attempt to do their best as per records".

12. However, the High Court thought it fit to continue the prosecution of the appellant for two reasons (1) that the appellant chose to conduct the angioplasty without having a surgical standby unit and such failure resulted in delay of 5 hours in conducting by-pass after the angioplasty failed; and (2) that the appellant did not consult a Cardio Anesthesian before conducting an

angioplasty. According to the High Court, both the above-mentioned 'lapses' on the part of the appellant "clearly show the negligence" of the appellant.

13. The basis for such conclusion though not apparent from the judgment, we are told by the learned counsel for the first respondent, is to be found in the evidence of Dr. Surajit Dan given before the A.P. State Consumer Redressal Commission in C.D. No. 38 of 2004. It may also be mentioned here that apart from initiating criminal proceedings against the appellant and others, the first respondent also raised a consumer dispute against the appellant and others. It is in the said proceedings, the above-mentioned Dr. Dan's evidence was recorded wherein Dr. Dan in his cross-examination stated as follows:"...

> " ..... Whenever Cardiologist performs an angioplasty, he requests for the surgical team to be ready as standby. I was not put on standby in the instant case...."

He further stated;

> "..... The failure of angioplasty put the heart in a compromised position of poor coronary perfusion that incrçases the risk of the emergency surgery after that. In a planned coronary surgery, the risk is less than in an emergency surgery...."

However, the same doctor also stated;

> "....The time gap between the angioplasty failure and the surgery is not THE FACTOR for the death of the patient. The time gap may or may not be a factor for the enhancement of the risk."

14. Unfortunately, the last of the above extracted statements of Dr. Surajit Dan is not taken into account by the High Court which statement according to us is most crucial in the context of criminal prosecution of the appellant.

15. The High Court unfortunately overlooked this factor. We, therefore, are of the opinion that the prosecution of the appellant is uncalled for as pointed out by this Court in *Jacob Mathew* case that the negligence, if any, on the part of the appellant cannot be said to be "gross". We, therefore, set aside

the judgment under appeal and also the proceedings of the trial court dated 11-12-2006."

10. In the aforesaid case, it has been held that criminal proceedings are maintainable only if there is a prima facie gross negligence as opined by the independent doctor (preferably government doctor).

11. The Apex Court in the case of *Jacob-Mathew Vs. State of Punjab and another* reported 2005 (6) SCC, page-1 in paragraph Nos.50,51 and 52 has held as under:

"50. As we have noticed hereinabove that the cases of doctors (surgeons and physicians) being subjected to criminal prosecution are on an increase. Sometimes such prosecutions are filed by private complainants and sometimes by police on an FIR being lodged and cognizance taken. The investigating officer and the private complainant cannot always be supposed to have knowledge of medical science so as to determine whether the act of the accused medical professional amounts to rash or negligent act within the domain of criminal law under Section 304-A of IPC. The criminal process once initiated subjects the medical professional to serious embarrassment and sometimes harassment. He has to seek bail to escape arrest, which may or may not be granted to him. At the end he may be exonerated by acquittal or discharge but the loss which he has suffered in his reputation cannot be compensated by any standards.

51. We may not be understood as holding that doctors can never be prosecuted for an offence of which rashness or negligence is an essential ingredient. All that we are doing is to emphasize the need for care and caution in the interest of society; for, the service which the medical profession renders to human beings is probably the noblest of all, and hence there is a need for protecting doctors from frivolous or unjust prosecutions. Many a complainant prefers recourse to criminal process as a tool for pressurizing the medical professional for extracting uncalled for or unjust compensation. Such malicious proceedings have to be guarded against.

52. Statutory Rules or Executive Instructions incorporating certain guidelines need to be framed and issued by the Government of India and/or the State Governments in consultation with the Medical Council of India. So long as it is not done, we propose to lay down certain guidelines for the future which should govern the prosecution of doctors for offences of which criminal rashness or criminal negligence is an ingredient. A private complaint may not be entertained unless the complainant has produced prima facie evidence before the Court in the form of a credible opinion given by another competent doctor to support the charge of rashness or negligence on the part of the accused doctor. The investigating officer should, before proceeding against the doctor accused of rash or negligent act or omission, obtain an independent and competent medical opinion preferably from a doctor in government service qualified in that branch of medical practice who can normally be expected to give an impartial and unbiased opinion applying Bolam's test to the facts collected in the investigation. A doctor accused of rashness or negligence, may not be arrested in a routine manner (simply because a charge has been levelled against him). Unless his arrest is necessary for furthering the investigation or for collecting evidence or unless the investigation officer feels satisfied that the doctor proceeded against would not make himself available to face the prosecution unless arrested, the arrest may be withheld."

12. This Court keeping in view the judgments, as there is a categoric report submitted by the Dean, Mahatma Gandhi Medical College, which is a government hospital that the anesthesia administered to the child was administered keeping in view the weight of the child and, therefore, the anesthetist is certainly not at all guilty of gross negligence. Present case is a case where the anesthesia was administered to a child and the child aged 4 years expired on account of cardiac respiratory arrest.

13. Keeping in view the aforesaid, this Court is of the considered opinion that present petition preferred under Section 482 of Cr.P.C. deserves to be allowed. The order dated 04.01.2014 passed in Criminal Case No.205/2014 (State of Madhya Pradesh Vs. Dr. Lalit Kavdia) is hereby quashed.

14. No any other material has been brought to the notice of this Court either by the learned government advocate or by Shri Harish Tripathi, learned counsel for the objector in support of the averments that the petitioner was negligent while administering the dose of anesthesia.

15. With the aforesaid, the petition stands allowed.

Petition allowed.

I.L.R. [2016] M.P., 2114
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice Sheel Nagu
M.Cr.C. No. 9166/2013 (Gwalior) decided on 7 October, 2015

ASHISH @ BITTU SHARMA ...Applicant
Vs.
STATE OF M.P. & ors. ...Non-applicants

Criminal Procedure Code, 1973 (2 of 1974), Section 482, Dakaiti Aur Vyapharan Prabhavit Kshetra Adhiniyam, M.P. (36 of 1981), Section 11/13 and Penal Code (45 of 1860), Section 392 **- A case of day light highway robbery sends ripples of shock disturbing the peace and tranquility of the area concerned and therefore does not remain in the domain of an offence against an individual but assumes menacing overtones affecting the entire society - If the offence committed against the society the same cannot be compounded even though the parties have come to term with each other - Petition dismissed. (Paras 29 & 30)**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482, डकैती और व्यपहरण प्रभावित क्षेत्र अधिनियम, म.प्र. (1981 का 36), धारा 11/13 एवं दण्ड संहिता (1860 का 45), धारा 392 – दिनदहाड़े राजमार्ग पर लूट का मामला संबंधित क्षेत्र की शांति एवं प्रशांति में विघ्न डालते हुए दहशत की लहरें उत्पन्न करता है एवं इसलिए यह मात्र एक व्यक्ति विशेष के विरूद्ध अपराध की परिधि में नहीं रहता, बल्कि यह संपूर्ण समाज को प्रभावित करने वाले एक खतरनाक संकेत का रूप धारण कर लेता है – यदि अपराध समाज के विरूद्ध कारित किया गया है तो पक्षकारों के मध्य एक दूसरे से समझौता हो जाने के बावजूद अपराध का शमन नहीं किया जा सकता – याचिका खारिज।

Cases referred:

(2011)10 SCC 705, (2008) 9 SCC 677, (2012) 10 SCC 303, (2014)

6 SCC 466, (2003) 4 SCC 675, (2008) 16 SCC 1.

Rajmani Bansal, for the applicant.
Md. Irshad, G.A. for the non-applicant No. 1/State.
P.D.S. Rathor, for the non-applicant No. 2.

ORDER

SHEEL NAGU, J. :- In this petition filed under section 482 Cr.P.C. invoking inherent powers of this Court, application bearing I.A. No. 10154/2013 is moved for compounding the offence punishable u/S. 392 IPC r/w Section 11/13 Madhya Pradesh Dakaiti Aur Vyapharan Prabhavit Kshetra Adhiniyam, 1981 ("for brevity Act of 1981") which is non-compoundable offence as per Section 320 Cr.P.C.

2. The application seeking compounding of non-compoundable offence has been filed on the ground that rival parties do not wish to pursue the present piece of prosecution at this initial stage of trial where only charge-sheet has been filed u/S. 299 Cr.P.C. in the absence of accused petitioner.

3. Learned counsel for the petitioner places reliance on the decision of the Co-ordinate Bench of this Court rendered on 17.11.2014 in shape of M.Cr.C. No.3632/2014 in the case of *Banti@Punti Yadav@Rajesh v. State of M.P.* and further relies upon the decisions of the Apex Court in the cases of *Shiji v. Radhika* reported in (2011) 10 SCC 705, *Nikhil Merchant v. CBI* reported in (2008) 9 SCC 677 and the recent decisions of Apex Court in the case of *Gian Singh v. State of Punjab* reported in (2012) 10 SCC 303 and lastly on the case of *Narinder Singh v. State of Punjab* reported in (2014) 6 SCC 466.

4. Learned counsel for the petitioner submits that the factual background giving rise to this petition, is that petitioner who is one of the accused in Crime No.31/2007 PS Gwalior, District Gwalior was an agent of the bank for recovering loan, which the complainant Ragvendra Sharma had allegedly borrowed from the bank for purchasing vehicle.

5. It is further contended that for the purpose of recovery of said loan the petitioner in due discharge of his duty as a loan recovery agent of the bank took possession of the vehicle. It is submitted that the present piece of prosecution launched by complainant is an act of retaliation and revenge.

6. The first decision of the Apex Court relied upon by the petitioner in case of *Nikhil Merchant* (supra) relates to the offence of cheating and forgery where the accused was a former Managing Director of the Company alongwith other co-accused who were employees of Andhra Bank. Civil disputes in shape of suit for recovery filed by the bank lay in the foundation of that case. The criminal prosecution in Nikhil's case was regarding offences of cheating and forgery. The Apex Court while exercising it's power under Article 142 of the Constitution of India quashed the criminal proceedings where the offences punishable u/S. 120-B, 420, 467, 468 and 471 of IPC r/w section 5(2) and 5(1)(d) alongwith section 13(2) and 13(1)(d) of the Prevention of Corruption Act, 1947 were alleged. The criminal prosecution which was sought to be compounded was ultimately quashed by the Apex Court as it had civil overtures and since compromise was arrived at between the parties.

7. The other case of *Shiji* (supra) relates to the offence of cheating where compounding of non-compoundable offence u/S 394 was allowed as it was based on the factual background that alongwith offence punishable u/S. 394, offence punishable u/S. 354 IPC was also alleged which being compoundable in the State concerned had already been compounded by the parties before the Trial Court and only the offence u/S. 394 IPC was left to be considered by the Apex Court.

7.1. The Apex Court while allowing compounding of offence u/S. 394, found that the dispute between the rival parties basically arose out of some dispute of two plots situated adjacent to each other. The Apex Court further found that it was not a case of day light robbery for gain and thus the Apex Court was of the considered view that in this changed situation, continuance of prosecution will lead to persecution and lông drawn ordeal of trial.

8. Learned counsel for the petitioner has also placed reliance on the decision of the Co-ordinate Bench of this Court in the case of *Banti* (supra) wherein relying on the decision of *Shiji* (supra) of the Apex Court, prosecution u/S.394 r/w Section 11/13 of MPDVPK Act was quashed.

9. In a recent decision in the case of *Gian Singh* (supra) the Apex Court answered the reference made to it on account of doubt expressed to the correctness of the decisions in the cases of *B.S. Joshi v. State of Haryana* reported in (2003) 4 SCC 675, *Nikhil Merchant* (supra) and *Manoj Sharma v. State* reported in (2008) 16 SCC 1, laying down the law regarding

compounding of non-compoundable offences while exercising powers u/S. 482 Cr.P.C.

10. The other case decided by the Apex Court is of *Narinder Singh* (supra) which is the most recent one on the point, laying down certain guidelines for exercising inherent powers u/S.482 Cr.P.C. for compounding of a non-compoundable offence.

10.1. The case of *Narinder Singh* (supra) dealt with factual matrix of a prosecution u/s.307 where sharp edged weapons were used causing four injuries which were initially found simple in nature but later on conduction of X-ray, one of the injuries was detected to be a fracture leading to addition of Section 307 IPC. The prosecution in that case was at trial stage when the intention of compromise was expressed by the rival parties.

10.2. The Apex Court in the case of *Narinder Singh* (supra) laid down certain illustrative guidelines regulating exercise of inherent powers by the Court u/S.482 Cr.P.C. for compounding of non-compoundable offences. The relevant paragraphs of said decision are reproduced below for convenience and ready reference:

> "**29.** In view of the aforesaid discussion, we sum up and lay down the following principles by which the High Court would be guided in giving adequate treatment to the settlement between the parties and exercising its power under Section 482 of the Code while accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings:
>
> **29.1.** Power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under Section 320 of the Code. No doubt, under Section 482 of the Code, the High Court has inherent power to quash the criminal proceedings even in those cases which are not compoundable, where the parties have settled the matter between themselves. However, this power is to be exercised sparingly and with caution.
>
> **29.2.** When the parties have reached the settlement and on that basis petition for quashing the criminal proceedings is filed,

the guiding factor in such cases would be to secure:

(i) ends of justice, or

(ii) to prevent abuse of the process of any court.

While exercising the power the High Court is to form an opinion on either of the aforesaid two objectives.

29.3. Such a power is not to be exercised in those prosecutions which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Similarly, for the offences alleged to have been committed under special statute like the Prevention of Corruption Act or the offences committed by public servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender.

294. On the other hand, those criminal cases having overwhelmingly and predominantly civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes should be quashed when the parties have resolved their entire disputes among themselves.

29.5. While exercising its powers, the High Court is to examine as to whether the possibility of conviction is remote and bleak and continuation of criminal cases would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal cases.

29.6. Offences under Section 307 IPC would fall in the category of heinous and serious offences and therefore are to be generally treated as crime against the society and not against the individual alone. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether

incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to proving the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delegate parts of the body, nature of weapons used, etc. Medical report in respect of injuries suffered by the victim can generally be the guiding factor. On the basis of this prima facie analysis, the High Court can examine as to whether there is a strong possibility of conviction or the chances of conviction are remote and bleak. In the former case it can refuse to accept the settlement and quash the criminal proceedings whereas in the latter case it would be permissible for the High Court to accept the plea compounding the offence based on complete settlement between the parties. At this stage, the Court can also be swayed by the fact that the settlement between the parties is going to result in harmony between them which may improve their future relationship.

29.7. While deciding whether to exercise its power under Section 482 of the Code or not, timings of settlement play a crucial role. Those cases where the settlement is arrived at immediately after the alleged commission of offence and the matter is still under investigation, the High Court may be liberal in accepting the settlement to quash the criminal proceedings/ investigation. It is because of the reason that at this stage the investigation is still on and even the charge-sheet has not been filed. Likewise, those cases where the charge is framed but the evidence is yet to start or the evidence is still at infancy stage, the High Court can show benevolence in exercising its powers favourably, but after prima facie assessment of the circumstances/material mentioned above. On the other hand, where the prosecution evidence is almost complete or after the conclusion of the evidence the matter is at the stage of argument, normally the High Court should refrain from exercising its power under Section 482 of the Code, as in such cases the trial court would be in a position to decide the case finally on merits and to come to a conclusion as to whether

> the offence under Section 307 IPC is committed or not. Similarly, in those cases where the conviction is already recorded by the trial court and the matter is at the appellate stage before the High Court, mere compromise between the parties would not be a ground to accept the same resulting in acquittal of the offender who has already been convicted by the trial court. Here charge is proved under Section 307 IPC and conviction is already recorded of a heinous crime and, therefore, there is no question of sparing a convict found guilty of such a crime. ..." *(emphasis suppiled)*

11. It is noticeable in the case of the *Narinder Singh* (supra) that in the guidelines contained in para 29.3, the Apex Court held that the offences which fall within the purview of 'special statutes' should not be quashed u/S. 482 Cr.P.C. merely because the parties have come to terms and compromise is reached between the accused and victim.

12. The usage of the term 'special statue' obviously relates to statutes which have been promulgated by the legislature in regard to certain kind of offences which are though covered by the sweep of the Indian Penal Code but on account of changing social and economic set up have become more menacing thereby requiring specialized forums, procedures and punishments to be dealt with.

13. The. Act of 1981 is one such special enactment which has been framed to achieve the following objectives.

> "As amended subsequently by M.P. Act 29 of 1982, w.e.f. 27.8.1982(from the date of Ord. 11 of 1982).
>
> An Act to make provision for specifying certain offences in the dacoity and kidnapping affected areas of Madhya Pradesh and in respect of punishments therefore and speedy trial thereof in order to curb effectively the commission of such specified offences and to make provision for the attachment of properties acquired through the commission of specified offences and for matters connected therewith or incidental thereto.
>
> Whereas for curbing the menace of organised and unorganised gangs of dacoits affectively it is essential to break the chain of

vested interests assisting, or associate with such gangs and to curb and control them effectively;

And, whereas, it is essential to provide for more stringent punishments for certain specified offences in the. areas affected by dacoity and kidnapping.

And, whereas, it is necessary to provide for attachment and confiscation of huge properties which have been acquired through the commission of specified offences and are being held in the name of relatives, associates and confidants of the dacoits."

14. The district of Gwalior within which the instant offence has been committed is declared as a "dacoity and kidnapping affected area" by the notification dated 16.10.200 1 u/S. 3 of the 1981 Act.

15. The same Act u/S.2(f)(iii) *inter alia* categorizes the offence of robbery u/S.392 as a "specified offence". The said special statute i.e. Act of 1981 under section 6 provides for constitution of Special Courts to be headed by a Session or Additional Session Judge as defined under the Code of Criminal Procedure.

16. The offence u/S.392 IPC which prescribes punishment for robbery and is triable by the Magistrate of First Class as per Schedule appended to the Code of Criminal Procedure, has become triable by Additional Sessions Judge or Sessions Judge for being a "specified offence" as defined in section 2(f)(iii) of the Act of 1981.

17. The IPC since the very beginning provides for punishment for an offence of robbery u/S. 392 prescribing maximum punishment of 10 years, while the Cr.P.C. classifies the said offence as non-compoundable and triable by a Magistrate of First Class. However the special statute of Act of 1981 though prescribes for the same maximum punishment for robbery but makes it more stringent by mandating of three(3) years of imprisonment u/S. 13 as minimum sentence.

18. In the instant case, the allegations contained in the FIR filed as A-1 with this petition u/S.482 Cr.P.C., indicate that in the afternoon at about 2.40 PM six unknown persons came on a motorcycle and stopped the Mini Truck

of the petitioner bearing registration No. MP 30 G 0255 and took forceable possession of the said vehicle and drove it towards Shivpuri leaving behind the complainant. The report was lodged on the same day i.e. on 17.07.2007 which led to registration of offence u/S.392 of IPC r/w Section 11/13 of Act of 1981 bearing Crime no.31/2007 in which challan has been filed in absence of the petitioner(accused) who has not been arrested and the trial is at initial stage and is not proceeding due to the absence of the petitioner.

19. From the above, it is evident that offence of robbery u/S.392 prima facie appears to have been committed in broad day light on a highway. The offence assumes aggravated form when viewed from the angle that the same has been committed in a "dacoity and kidnapping affected area" as notified under the Act of 1981 which is a special statute.

20. In view of above, this Court is of the considered view that the exception laid down in the para 29.3 of the *Narinder Singh* (supra) excluding offences committed under the special statutes would cover the present offence of robbery committed in "dacoity and kidnapping affected area" of Gwalior under the special statute i.e. Act of 1981.

21. The decision of the Co-ordinate Bench of this Court in the case of *Banti* (supra) relates to similar case where offence u/S. 394 IPC was lodged which is an aggravated form of robbery and where compounding of non-compoundable offence u/S. 394 IPC was allowed needs to be considered. Pertinently, the said decision of the Coordinate Bench of this Court had though placed reliance upon the decision of the Apex Court in the case of *Shiji* (supra) but did not consider the subsequent decision of the Apex Court in the case of *Narinder Singh* (supra).

22. Undisputedly, the decision of *Shiji* (supra) was considered in the case of *Narinder Singh* (supra), however, the decision of *Gian Singh* (supra) was taken into account at length by the Apex Court while rendering the decision of *Narinder Singh* (supra). The decision in the case of *Gian Singh* (supra) was rendered by a three judge bench decision in which similar exceptions were laid down in para 61 which is reproduced below for convenience and ready reference:-

> **"61.** The position that emerges from the above discussion can be summarised thus: the power of the High Court in

quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz: *(i)* to secure the ends of justice, or *(ii)* to prevent abuse of the process of any court. In what cases power to quash the criminal proceeding or complaint or FIR may be exercised where the offender and the victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have a serious impact on society. Similarly, any compromise between the victim and the offender in relation to the offences under special statutes like the Prevention of Corruption Act or the offences committed by public servants while working in that capacity, etc.; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and predominatingly civil flavour stand on a different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, the High Court may quash the criminal proceedings if in its view, because of the compromise between the offender and the victim, the possibility of conviction is remote and bleak and continuation of the criminal case would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words,

> the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and the wrongdoer and whether to secure the ends of justice, it is appropriate that the criminal case is put to an end and if the answer to the above question(s) is in the affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding. ..."
>
> *(emphasis supplied)*

22.1. The exceptions laid down by the *Gian Singh* (supra) for compounding of non-compoundable offences *inter alia* relate to offences under special statutes on the nature of the Act of 1981.

23. Since the coordinate Bench of this Court in the case of *Banti* (supra) has not taken into account the decision in the case of *Gian Singh* (supra) and *Narinder Singh* (supra) this Court is of the considered view with utmost humility at it's command that the decision in the case of *Banti* (supra) is per incurium the decisions of the Apex Court in the cases of *Gian Singh* (supra) and *Narinder Singh* (supra).

24. Learned counsel for the petitioner further made a submission by placing reliance upon the guidelines contained in para 29.5 of the *Narinder Singh* (supra).

24.1 Undoubtedly, the Apex Court in the case of *Narinder Singh* (supra) while laying down the guidelines which can safely be termed as illustrative rather than exhaustive has also held that if the possibility of conviction is remote and bleak and where continuation of criminal case would lead to injustice the inherent powers of this Court u/S.482 Cr.P.C. can very well be exercised to truncate the impugned prosecution for preventing perpetration of injustice. It is submitted that in the instant case, the parties do not wish to pursue the prosecution and, therefore even though the trial is held, it would not result into conviction, since acquittal in the changed circumstances is a *fate accompli.*

25. True, it is that in the instant case, parties have buried the hatchet by entering into compromise which is evident from the application filed for the compounding in shape of I.A. No.10154/2013 which under consideration

herein.

26. However, the fact remains that since the present offence relates to a special statue (sic:statute) the same gets excluded from the purview of the inherent powers of this Court u/S.482 of Cr.P.C. to be exercised for compounding of non-compoundable offences.

27. The guidelines laid down in the case of *Narinder Singh* (supra) specially the one contained in para 29.3 exclude the offences committed under special statutes from being compounded by invoking the inherent powers of this Court u/S.482 Cr.P.C.

28. The aspect which deserves attention of this Court is that the present is a case of day light robbery where vehicle of the complainant was snatched away by force in an area which is "dacoity and kidnapping affected area" under the special statute.

29. A day light highway robbery of the kind committed in the present case sends ripples of shock disturbing the peace and tranquility of the area concerned and therefore does not remain in the domain of an offence against an individual but assumes menacing overtones affecting the entire society.

30. By it's very nature and modus operandi adopted for committing the offence, it is an offencee (sic:offence) against the society and therefore, the same cannot be compounded even though the parties have come to terms with each other.

31. In view of above, I.A. No.10154/2013 for compounding of non-compoundable offence u/S.392 IPC r/w 11/13 MPDVPK Act (special enactment) is considered and rejected.

32. Since this petition u/S.482 Cr.P.C. is solely based on the factum of parties have entered into a settlement which has been declined by this order by rejection of I.A. No. 10154/2013, the present petition u/S. 482 Cr.P.C. also paves the way of extinction and thus stands dismissed.

33. Any findings recorded in this order shall not prejudice either the rights of the petitioner to defend himself during trial or that of the prosecution.

34. No cost.

Application dismissed.

I.L.R. [2016] M.P., 2126
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice M.C. Garg
M.Cr.C. No. 17417/2015.(Jabalpur) decided on 26 October, 2015

AMIT THAPAR ...Applicant
Vs.
RAJENDRA PRASAD GUPTA ...Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Section 91 and Negotiable Instruments Act (26 of 1881), Section 138(b) - Postal receipt of sending notice **- Not filed alongwith complaint due to inadvertence - On record it is available that notice was sent and receipt is available - Infirmity - Can be cured at the time of leading evidence - Document permitted to be taken on record. (Para 4)**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 91 एवं परक्राम्य लिखत अधिनियम (1881 का 26), धारा 138(बी) – नोटिस प्रेषित करने की डाक रसीद – अनवधानता परिवाद के साथ प्रस्तुत नहीं की गई – अभिलेख पर यह उपलब्ध है कि नोटिस प्रेषित किया गया था तथा रसीद मौजूद है – कमियां – साक्ष्य प्रस्तुत करते समय सुधारी जा सकती है – दस्तावेज को अभिलेख पर लिये जाने की अनुमति दी गई।

Case referred:

2006 (4) MPLJ 545.

Sankalp Kochar, for the applicant.

(Supplied: Paragraph numbers)

ORDER

M.C. GARG, J. :- This petition has been filed by the petitioner aggrieved of the order passed by the revisional Court in a revision filed by him under Section 397 of the Cr.P.C. vide judgment dated 14/8/2015, whereby while disposing off the revision petition the revisional Court has taken note of the factum of a receipt available with the respondent about sending of the notice on 25/1/2010 to the petitioner regarding dishonour of the cheque in question for which a complaint under Section 138 of Negotiable Instrument Act has been filed.

2. The petitioner has come before this Court with a grievance that such

observation made by the revisional Court is contrary to the scheme of the provisions of Section 138 of Negotiable Instrument Act. He submits that the very fact that there is no mention of the receipt in the complaint itself, this takes away the basis of filing of the complaint and therefore, permitting such receipts to be now taken on record would be permitting to filling in lacuna and making out a case for the respondent even there was no such case about dishonour of the cheque or issuance of notice with regard to such dishonour. He relies upon a judgment of this Court delivered in the case of *N.K. Sabarwal vs. Rauf Khan* reported in 2006(4)M.P.L.J. 545, wherein it has been observed in para 5, 6 and 8 as under:-

> "5. Having heard learned counsel for the applicant, I have gone through the record and I have not found any postal receipt for sending the demand notice to the respondent. So in the absence of such receipt no presumption can be drawn in favour of the applicant for sending the said notice through registered post either under Section 3(c) of Post Office Act, 1898 or under Section 114(c) of the Evidence Act or under Section 27 of the General Clauses Act, 1897. It was the duty of the applicant to prove by reliable evidence that notice was sent through registered post and this would have been proved only by submitting postal receipt or by calling the record of Post office but no evidence was led by the applicant in this regard.
>
> 6. Coming to the acknowledgment due receipt (Ex.P-5), it is apparent that no registered letter number or postal receipt number have been mentioned in it. It does not having any seal of the post office either at the time of sending to the addressee or at the time of returning to sender(applicant). It appears to be a post card in which at the address side the name of Narendra Chouhan, learned counsel for the applicant is mentioned and other side the address of the respondent is mentioned but no connecting information is mentioned on which it could be connected with registered notice. Hence, mere on the basis of deposition of the applicant/complainant it cannot be said that (Ex.P-5) is a acknowledgment due receipt of the registered notice. Even the concerning advocate Shri Narendra

Chouhan was not examined to prove the fact that it was received by him. Therefore, in the absence of said postal receipt for sending the notice alongwith the aforesaid circumstances and also non-examination of said Shri Narendra Chouhan Advocate, aforesaid Ex.P-5 could not be treated as acknowledgment due receipt of registered notice. In view of this mere on the basis of copy of notice (Ex.P-4) it could not be assumed that the provisions of section 138(b) of the Act was complied with by the applicant.

7. xxxx

8. In view of the aforesaid discussion the evidence of the trial Court regarding non-compliance of the provisions of Section 138-B of the Act for sending the demand notice is proper and it does not require any interference at this stage. Hence, I do not find any ground to grant special leave to appeal. Resultantly, this petition deserves to be and is hereby dismissed at the stage of motion hearing."

3. This judgment with respect to the learned counsel for petitioner may not help for the reason, that in the legal notice and in the complaint itself filed by the respondent there is a mention about sending of a notice to the petitioner regarding dishonour of the cheque in para 8. In that paragraph it has also been very specifically stated that the notice was duly received by the petitioner, but he has neither made the payment nor responded to the same.

4. As such, the only lacuna insofar as the filing of the complaint is concerned was that the complainant did not file the receipt alongwith the complaint. Such infirmity can certainly be cured at the time of leading of the evidence. For the reason, once it has come on record that a notice dated 25/1/2010 was sent and there is a receipt available, though by inadvertence not filed in the Court, the document can be brought on record. It will be for the petitioner to show that no such receipt was received and that why he did not reply to the same. All this is a matter of evidence. The complaint is also at the stage of evidence, therefore, I do not find any reason to interfere in the matter. Nothing stated by us will cause any aspersion on the merits of the case. The trial Court will be at liberty to dispose off the matter in accordance with law.

Order accordingly.

I.L.R. [2016] M.P., 2129
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice M.C. Garg
M.Cr.C. No. 1030/2007 (Jabalpur) decided on 27 October, 2015

PRAMOD KUMAR ...Applicant
Vs.
STATE OF M.P. ...Non-applicant

A. ***Criminal Procedure Code, 1973 (2 of 1974), Section 199 and Penal Code (45 of 1860), Sections 465 & 501*** **- Cognizance for defamation - Can only be taken on complaint u/S 190(2) and in exercise of powers u/S 199 - And not on the basis of FIR. (Para 5)**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 199 एवं दण्ड संहिता (1860 का 45), धाराएँ 465 व 501 – मानहानि हेतु संज्ञान – केवल धारा 190(2) के अंतर्गत परिवाद पर तथा धारा 199 के अंतर्गत शक्तियों के प्रयोग द्वारा ही लिया जा सकता है – एवं न कि प्रथम सूचना प्रतिवेदन के आधार पर।

B. ***Criminal Procedure Code, 1973 (2 of 1974), Section 482*** **- Prosecution for defamation on FIR - Proceedings and FIR quashed. (Para 6)**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – प्रथम सूचना प्रतिवेदन पर मानहानि हेतु अभियोजन–कार्यवाहियाँ एवं प्रथम सूचना प्रतिवेदन अभिखण्डित।

Priyank Khandelwal, for the applicant.
D.K. Parouha, P.L. for the non-applicant/State.

(Supplied: Paragraph numbers)

ORDER

M.C. Garg, J. :- This petition under Section 482 of the Cr.P.C. arising out of an order passed by the Additional Session Judge having dismissed the Revision against framing of the charge.

2. According to the petitioner for the prosecution of an offence that defamation, no F.I.R. can be registered. The cognizance can only be taken on the basis of the complaint under Section 190 of the Cr.P.C. This can be led upon on the basis of provision contained in under Section 199 of the Cr.P.C.

3. Thus, it is submitted that registration of F.I.R and the order framing of

charges as well as order of the District Sessions Judge are nullity. Therefore, entire proceedings need to be quashed.

4. The matter has been heard on merits with the consent of the parties at this juncture itself. Considering the allegaions (sic:allegations) made in the complaint wherein allegations have been made by the respondent-complainant against the petitionr (sic:petitioner) under Section 465 and 501 of the I.P.C, it is apparent that no F.I.R can be registered for an offence of defamation wherein in the present case F.I.R has been registered vide crime No. 108/2005 which is illegal.

5. As for the prosecution of offence that defamation cognizance can only be taken against Section 190 of the Cr.P.C. Those provisions are reproduced hereunder:-

190. Cognizance of offences by Magistrates

1. Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub-section (2), may take cognizance of any offence-

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer or upon his own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub-section (1) of such offences as are within his competence to inquire into or try.

199. Prosecution for defamation

1. No Court shall take cognizance of an offence punishable under Chapter XXI of the Indian Penal Code (45 of 1860), except upon a complaint made by some person aggrieved by the offence :

Provided that where such person is under the age of eighteen years, or is an idiot or a lunatic or is from sickness or infirmity unable to make a complaint, or is a woman who, according to the local customs and manners, ought not to be compelled to appear in public, some other person may, with the leave of the Court, make a complaint on his or her behalf.

2. Notwithstanding anything contained in this Code, when any

offence falling under Chapter XXI of the Indian Penal Code (45 of 1860) is alleged to have been committed against a person who, at the time of such commission, is the President of India, the Vice- President of India, the Governor of a State, the Administrator of a Union Territory, or a Minister of the Union or of a State, or any other public servant employed in connection with the affairs of the Union or of a State in respect of his conduct in the discharge of his public functions a Court of Session may take cognizance of such offence, without the case being committed to it, upon a complaint in writing made by the Public Prosecutor.

3. Every complaint referred to in sub-section (2) shall set forth the facts which constitute the offence alleged, the nature of such offence and such other particulars as are reasonably sufficient to give notice to the accused of the offence alleged to have been committed by him.

(4) No complaint under sub-section (2) shall be made by the Public Prosecutor except with the previous sanction

(a) of the State Government, in the case of a person who is or has been the Governor of that State or a Minister of that Government;

(b) of the State Government, in the case of any other public servant employed in connection with the affairs of the State;

(c) of the Central Government, in any other case.

(5) No Court of Session shall take cognizance of an offence under sub-section (2) unless the complaint is made within six months from the date on which the offence is alleged to have been committed.

(6) Nothing in this section shall affect the right of the person against whom the offence is alleged to have been committed, to make a complaint in respect of that offence before a Magistrate having jurisdiction or the power of such Magistrate to take cognizance of the offence upon such complaint.

6. As such of the proceedings in this case including F.I.R are quashed however, with liberty to respondent to file complaint for offence under Section 200 of the Cr.P.C.

7. The bail bond taken in this case are discharged.

Order accordingly.

I.L.R. [2016] M.P., 2132
MISCELLANEOUS CRIMINAL CASE
Before Mrs. Justice S.R. Waghmare
M.Cr.C. No. 78/2015 (Indore) decided on 28 January, 2016

PREETI ...Applicant
Vs.
NEHA ...Non-applicant

Penal Code (45 of 1860), Sections 498-A & 506/34, Dowry Prohibition Act (28 of 1961), Section 4 and Protection of Women from Domestic Violence Act (43 of 2005), Sections 2(F), 2(S), 3 & 12 - Issuance of notice to the petitioner - Female relatives - Registering the complaint against petitioner - Shared household - **Respondent wife is living separately with her parents for quite sometime - Petitioner may be a female relative of the respondent but it cannot be said that she was a member of shared household - Petitioner married sister-in-law of respondent wife is living her life separately with her husband - She cannot be included in the term to be "a relative" - Since allowing the prosecution is likely to cause a rift in the matrimonial life and happiness of the petitioner which is totally uncalled for - Therefore, domestic violence case against petitioner is quashed.** **(Para 5)**

दण्ड संहिता (1860 का 45), धाराएँ 498–ए व 506/34, दहेज प्रतिषेध अधिनियम (1961 का 28), धारा 4 एवं घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम (2005 का 43), धाराएँ 2(एफ), 2(एस), 3 व 12 – याची को नोटिस जारी किया जाना – महिला नातेदार – याची के विरूद्ध परिवाद दर्ज किया जाना – साझा गृहस्थी – अनावेदिका पत्नी कुछ समय से पृथक् रूप से अपने माता–पिता के साथ निवास कर रही है – याची भले ही अनावेदिका की महिला नातेदार हो, परंतु यह नहीं कहा जा सकता कि वह साझा गृहस्थी की सदस्या थी – याची, जो कि अनावेदिका पत्नी की विवाहित ननद है, अपने पति के साथ पृथक् रूप से अपना जीवन व्यतीत कर रही है – उसे शब्द 'नातेदार' के अंतर्गत सम्मिलित नहीं किया जा सकता – अभियोजन को मंजूरी दिया जाना याची के वैवाहिक जीवन एवं खुशी में दरार उत्पन्न कर सकता है, जो कि पूर्णतः अनावश्यक है – अतएव्, याची के विरूद्ध घरेलू हिंसा का प्रकरण अभिखण्डित।

Cases referred :

II (2011) DMC 131, II (2010) DMC 202, II (2013) DMC 649 (Del.), (2011) CrLJ SC 1687.

Aanand Soni, for the applicant.
A.S. Rathore, for the non-applicant.

ORDER

S.R. WAGHMARE, J. :- By this application under Section 482 of Cr.P.C., petitioner Preeti Badoniya is aggrieved by the complaint registered against her by respondent Neha Ujjaini.

2. Briefly stated the prosecution case are that petitioner Preeti's younger brother Rohit was married to respondent Neha on 24.02.2012 and for a period of two years and two months couple lived happily together. In the month of April 2014 respondent Neha left the house of her husband and all attempts to take her back was futile. There is an application u/S.9 of Hindu Marriage Act before the Principal Judge, Family Court, Indore filed by her husband pending consideration, despite which respondent wife filed false complaint against her husband, mother-in-law and sister-in-law. Initially the complaint was filed against mother-in-law and husband for offence under Section 498-A/506/34 of IPC and 4 of Dowry Prohibition Act. However, consequently the complaint was filed before the Court of JMFC, Indore, against the present petitioner and her husband also; along with other relatives under Section 12 of the Protection of Women from Domestic Violence Act, 2005 and the respondent wife also prayed for grant of interim maintenance under Section 23 of the Protection of Women from Domestic Violence Act. The report was called for Protection Officer and on 25.09.2014 notices were issued to the present petitioner also.

3. Counsel for the petitioner has vehemently urged the facts that the trial Court had erred in issuance of notice to the petitioner; primarily because the petitioner has never been in domestic relationship with the respondent Neha. He submitted that the petitioner had married with Manoj Badoniya prior to the marriage of the respondent i.e. in the year 2007 and she lived with her husband in a different locality in Indore. The question of the petitioner causing mental and physical injury to the respondent Neha do not arise and the ingredients are not fulfilled as per Sec.2 (f) of the Protection of Women from Domestic Violence Act, 2005. The section mandates that the parties must have lived together, which is not the present case. The trial Court Judge erred in registering the complaint against the petitioner and not a single domestic incident has been alleged against the petitioner and in the present case only

general and omnibus statements have been made. The case has been filed only to harass the petitioner Preeti with offence for demands of dowry and to put the brother of the present petitioner to social embarrassment because the case has been filed against her sister. To bolster his submissions, Counsel relied on *Rohini Devanathan vs. K. Narasimhan* II (2011) DMC 131, whereby the High Court of Karnataka while considering the definition 'shared household' of Sections 2(f), 2(s), 3, 12 of the Act has held that the petitioner and the respondent were not living together under the same shelter as per complaint itself and making allegations against the respondent by itself would not amount to domestic violence in absence of ingredient of shared household. There was also no proof of petitioner and respondent living together at any point of time, therefore, to issue proceedings against the petitioner due to the complaint filed by respondent would amount to abuse of process of Court. Counsel further relied on *Harbans Lal Malik & ors. vs. Payal Malik* II (2010) DMC 202 and *Hima Chugh vs. Pritam Ashok Sadaphule & ors.* II (2013) DMC 649 (Del.), whereby, the Court of Delhi had considered that the domestic relationship of the father-in-law, brother-in-law and other near relations of husband were not in domestic relationship with petitioner. Counsel prayed that the impugned order taking cognizance against the present petitioner be quashed and to quash the Domestic Violence Case No.426/2014 pending before the JMFC, Indore.

4. **Per contra,** Counsel for the respondent has drawn attention to the fact that Nehru Nagar is quite close to L.I.G. Colony at Indore and the present petitioner was a frequent visitor to her mother's house and the petitioner used to harass the respondent by instigating her mother and brother, besides there are demands of dowry made by present petitioner also. Counsel fully supported the judgment passed by lower Court taking cognizance for offence under Section 2 of the Domestic Violence Act, moreover allegation of cruelty also made against the present petitioner. Counsel submitted that it was a matter of evidence and complaint cannot be quashed regarding the present petitioner also. He placed reliance in the matter of *Sou. Sandhya Manoj Wankhade vs. Manoj Bhimrao Wankhade and others* (2011) CrilJ SC 1687 to indicate that the Apex Court had considered the ambit of Section 2 (q) of Prevention of Women from Domestic Violence Act 2005 and it held that the legislation never intended to exclude female relatives of husband or male partner from ambit of complaint that can be made under provisions of Domestic

Violence Act 2005 and no restrictive meaning has been given to expression "relative", nor has said expression been specifically defined in Domestic Violence Act, 2005 to make it specific to males only. Counsel prayed that the trial Court has allowed to proceed with the case against the present petitioner also.

5. Considering the above submissions, I find that the issue pertains to married sister-in-law Preeti having her own children; living, with her husband separately; and 'shared household' cannot be a term addressed to the petitioner since she cannot be held to be in a domestic relationship; with the aggrieved respondent wife Neha nor can be included in the term to be "a relative", who was in shared household. In the present case, it has been admitted that respondent wife is also already living separately with her parents for quite some time. Now considering the entire document, I find in the matter of *Sandhya Manoj Wankhade* (supra) that the Court to consider with expression respondent not covering 'female' in Section 2 (q) of the Domestic Violation Act 2005, however, the terms relatives has been held to exclude females also but in this light undoubtedly the petitioner may be a female relative of the respondent but it cannot be said that she was a member of shared household; that would be stretching the definition too far; also, again she may visited the brother's house. It would not be proper to implicate the petitioner when she is living her life separately with her husband and did not live with shared household any point of time then the shared household of the husband and wife of the respondent Neha cannot said to be of shared household of petitioner Preeti, even though she may be relative and happens to visit her brother and mother's house. In these circumstances, I find that the petition needs to be allowed and it is hereby allowed since allowing the prosecution is likely to cause a rift in the matrimonial life and happiness of the petitioner, which is totally under called for. Consequently the Domestic Violence Case No.426/2014 pending before the JMFC, Indore was far it is relates to the present petitioner Preeti is hereby quashed.

With the aforesaid observations and direction, the petition is allowed to the extent herein above indicated.

Certified copy as per rules.

Application allowed.

I.L.R. [2016] M.P., 2136
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice C.V. Sirpurkar
M.Cr.C. No. 12556/2014 (Jabalpur) decided on 9 February, 2016

CHITRAKOOTRAM & ors. ...Applicants
Vs.
STATE OF M.P. ...Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Section 321 - Withdrawal from prosecution **- Public Prosecutor filed application for permission to withdraw from prosecution on the ground that the matter is pending from 2009 and there has been no progress in the case - Trial Court rejected the application on the ground that in all seven prosecution witnesses have been examined therefore, it cannot be said that there is no progress in the matter - Held - Trial Court was justified in rejecting the application - Application dismissed. (Paras 3 to 14)**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 321 – अभियोजन वापस लिया जाना – लोक अभियोजक ने अभियोजन वापस लिये जाने हेतु आवेदन इस आधार पर प्रस्तुत किया कि प्रकरण वर्ष 2009 से लंबित है एवं प्रकरण में कोई प्रगति नहीं हुई है – विचारण न्यायालय ने आवेदन इस आधार पर नामंजूर किया कि कुल सात अभियोजन साक्षीगण का परीक्षण किया जा चुका है, इसलिए यह नहीं कहा जा सकता कि प्रकरण में कोई प्रगति नहीं हुई है – अभिनिर्धारित – विचारण न्यायालय का आवेदन नामंजूर करना न्यायोचित था – आवेदन खारिज।

Cases referred :

AIR 1980 Supreme Court 1510, 1996 Cr.L.J. 2872 (S.C.), 1972 Cr.L.J. 301.

B.K. Vaisya with *Ghanshayam Sharma*, for the applicants.
Yadvendra Dwivedi, P.L. for the non-applicant/State.

ORDER

C.V. SIRPURKAR, J. :- This miscellaneous criminal case is directed against order dated 07.04.2014 passed by the Court of 1st Additional Sessions Judge, Singrauli in Criminal Revision No.03/20 14, whereby order dated 16.12.2013 passed by the Court of JMFC, Waidhan in Criminal Case No.609/2009, dismissing the application under Section 321 of the Cr.P.C.,

has been upheld.

2. The facts necessary for disposal of this miscellaneous criminal case may briefly be stated thus: Applicants Chitrakootram, Sunil Kumar, Pappu @ Shivendra and Babloo @ Avinash were prosecuted under Sections 294, 323 and 506 read with Section 34 of the IPC. On the recommendation of a Committee headed by District Magistrate, Singrauli and pursuant to the memo number Home (C-Section) Department Ministry, Bhopal, number-F-3 5-279/ 2004/2/C-2 Bhopal, dated 04.10.2013, the Assistant Prosecution Officer, Singrauli, moved the application dated 30.11.2013 under Section 321 of the Cr.P.C for permission to withdraw from prosecution, in criminal case no. 609 of 2009, pending before JMFC, Waidhhan. It was stated in the application that there has been no progress in the case since the year 2009; therefore, the application under Section 321 of the Cr.P.C be allowed and the prosecutor be allowed to withdraw from the prosecution.

3. On due consideration of the facts and circumstances of the case, learned trial Court observed that the case has been pending since the year 2009. In all seven prosecution witnesses have been examined; as such, it cannot be said that the progress of the case has been tardy. As per the first information report, injuries with the knife were inflicted. In the MLC report, numerous injuries were found on the person of the victims; as such, it would not be in the interest of justice to permit the Prosecutor to withdraw from prosecution; as such, the application under Section 321 of the Cr.P.C was dismissed.

4. The order dated 16.12.2013 was challenged by the applicants/accused persons before the Additional Sessions Judge in criminal revision, which was dismissed by the impugned order.

5. It has been argued on behalf of the petitioners/accused persons that the Courts below failed to exercise the jurisdiction vested in them by section 321 of Cr.P.C.; therefore the impugned order is not sustainable.

6. Leaned (sic:Learned) Panel lawyer for respondent state on the other hand has supported the impugned order.

7. Before considering the factual aspect of the matter it would be appropriate to consider the legal position with regard to section 321 of the Code of Criminal Procedure. The apex Court laid down following guidelines

for the trial Court in the case of *Rajendra Kumar Jain vs. State,* AIR 1980 Supreme Court 1510, that:

"(1) Under the scheme of the code prosecution of an offender for a serious offence is primarily the responsibility of the executive.

(2) Withdrawal from prosecution is an executive function of the public prosecutor.

(3) The discretion to withdraw from the prosecution is that of the public prosecutor and none else, and so, he cannot surrender the discretion to someone else.

(4) The government may suggest the public prosecutor that he may withdraw from prosecution. None can compel him to do so.

(5) The public prosecutor may withdraw from prosecution not merely on the ground of paucity of evidence but on the other relevant grounds as well in order to further the broad ends of public justice, public order and peace. The broad ends of public justice will certainly include appropriate social and economic, and, we add, political purposes sans Tammary Hall enterprises.

(6) The public prosecutor is an officer of the court and responsible to the court.

(7) The court performs a supervisory function in granting its consent to the withdrawal.

(8) The court's duty is not to re-appreciate that which led the public prosecutor to request withdrawal from the prosecution but to consider whether public prosecutor applied his mind as a free agent, uninfluenced by the irrelevant and extraneous considerations. The court has a special duty in this regard and it is ultimate repository of the legislative confidence in granting or withholding its consent to withdrawal from the prosecution."

8. The apex Court observed in the case of *Sheonandan Paswan* (Supra) that:

"The Public Prosecutor cannot file an application u/s. 321 of the Code on his own, without any instruction from the Government. However before

an application is made u/s 321 the Prosecutor has to apply his mind to facts of the case, independently, without being subject to any outside influence. The government may suggest to the Public Prosecutor a case may not be proceeded with but nobody can compel him to do so."

9. It is further laid down in the case of *R.N. Tiwari vs. State,* 1996 Cr. L.J. 2872 (S.C.), that:

"the public prosecutor has to satisfy himself in each case that the case it fit for the withdrawal. He cannot act mechanically on the recommendations of a high-powered committee. Where the public prosecutor without fully appreciating the requirements of section 321 applied for withdrawal on the basis of recommendation of a committee for the review, without satisfying himself that it was a fit case for withdrawal the withdrawal was improper."

10. In the instant case, learned Asst. District Prosecution Officer has stated in the application that on minute scrutiny of the case, it is found that it is fit to be withdrawn in compliance with aforesaid memo of the State Government, wherein the State Government has recommended withdrawal of cases involving minor offences in public interest and in the interest of public justice. In the opinion of this Court, this kind of recommendation could have been made by the State Government but the question arises whether the Asst. District Prosecution Officer applied his mind in the instant case before applying for withdrawal from prosecution? A cursory look at application reveals that the application has been prepared by filling a printed form. Thus, the Court may safely assume that a common application was printed for all the cases that fitted the description. It betrays lack of application of mind on the part of Asst. District Prosecution Officer. Further, his observation that there appears to be no progress worth mentioning in the case, was ill-founded as 7 witnesses had already been examined. Moreover, the case involved use of knife resulting in multiple injuries to the victims. Thus, it is clear that in the instant case the Asst. District Prosecution Officer was not a free agent and was merely acting as a rubber stamp and was echoing the policy laid down by the State Government.

11. So far as, role of the Court in granting the permission is concerned, the apex Court in the case of *M.N. Shankar Nair vs.P.V. Balakrishnan,* 1972 Cr.L.J. 301, has observed that:

"It is the duty of the court also to see in furtherance of justice that the permission is not sought on the grounds extraneous to the interest of justice or that offences which are offences against the state go unpunished merely because the government as a matter of general policy or expediency unconnected with its duty to prosecute offenders under the law, directs the public prosecutor to withdraw from the prosecution and the public prosecutor merely does so at its behest."

12. In the circumstances, it appears that the Government of the day considered it expedient to withdraw from prosecution in minor offences. The policy was communicated to the Asst. District Prosecution Officer, who, in his turn merely acted as a rubber stamp and moved common applications in all the cases that fell within the prescribed category, including the case at hand. However, learned trial Magistrate, alive to the situation, diligently applied its mind to the matter and refused the Prosecutor to withdraw from the prosecution.

13. In view of the aforesaid authoritative pronouncements of the Supreme Court, learned trial Court was perfectly justified in refusing to permit the Prosecutor to withdraw from prosecution.

14. Thus, the orders passed by learned Courts below do not suffer from any illegality or infirmity. As such, this is not a case where interference under the extraordinary powers of the Court reserved under Section 482 of the Cr.P.C. is necessary to secure ends of justice.

15. Consequently, this miscellaneous criminal case deserves to be and is accordingly **dismissed in *limine*.**

Application dismissed.