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हिन्दू विवाह अधिनियम (1955 का 25), धाराएँ 13 (1)(iए) व 13 (1)(iबी) – क्रूरता एवं अभित्यजन – पति द्वारा क्रूरता एवं अभित्यजन के आधार पर अधिनियम 1955 की धारा 13 के अंतर्गत आवेदन किया गया – विचारण न्यायालय ने वाद डिक्रीत किया – इस आधार पर अपील कि पति ने विवाह–विच्छेद याचिका प्रस्तुत किये जाने के ठीक पूर्ववर्ती दो वर्ष के भीतर सहवास किया था – अभिनिर्धारित – चूंकि विवाह–विच्छेद याचिका प्रस्तुत किये जाने के ठीक पूर्ववर्ती दो वर्ष के भीतर सहवास करने के तथ्य से पति द्वारा इंकार किया गया है तथा पक्षकारगण विगत 15 वर्षों से पृथक् निवास कर रहे हैं, अतः पत्नी का आचरण क्रूरता की कोटि में आता है – अधिनियम 1955 की धारा 13(1)(i ए) एवं धारा 13(1)(i बी) के अंतर्गत पारित आक्षेपित निर्णय एवं डिक्री में हस्तक्षेप की आवश्यकता नहीं – अपील एतद्द्वारा खारिज। (किरण चौरसिया (श्रीमती) वि. श्री मनोज चौरसिया) (DB)...1772

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Service Law – Compassionate Appointment – **Employee died on 09.06.2004 – Application claimed to be submitted on 09.10.2004 – Subsequent representation dated 18.11.2005 making reference of application dated 09.10.2004 – Bank rejecting the application being not submitted within one year of death as per prevailing scheme & treating representation dated 18.11.2005 as first application – Single Judge allowed the petition and directed the appellant bank to consider the proposal for appointment on compassionate ground – Held – Factum of receipt of application dated 09.10.2004 rebutted by appellant, so onus shifted on petitioner to substantiate the factum of dispatch or receipt thereof by the bank – Petitioner failed to do that and as per clause 23 of application dated 09.10.2004, petitioner relied on document issued on 08.06.2005, which in itself establishes that petitioner is trying to create a false circumstance to further her cause – Petitioner not approached the court with clean hands – Appeal allowed – Impugned judgment set aside – Writ petition dismissed. [Chief General Manager Vs. Smt. Mamta Bai Soni]** **(DB)...1621**

सेवा विधि – अनुकंपा नियुक्ति – कर्मचारी की मृत्यु दिनांक 09.06.2004 को हुई – आवेदन दिनांक 09.10.2004 को प्रस्तुत करने का दावा किया गया – आवेदन दिनांक 09.10.2004 का संदर्भ लेते हुए पश्चात्वर्ती अभ्यावेदन दिनांक 18.11.2005 को प्रस्तुत किया गया – प्रचलित स्कीम के अनुसार, मृत्यु से एक वर्ष की अवधि के भीतर आवेदन पत्र प्रस्तुत न किये जाने से बैंक ने आवेदन पत्र खारिज कर दिया एवं अभ्यावेदन दिनांक 18.11.2005 को प्रथम आवेदन पत्र माना – एकल न्यायाधीश ने याचिका मंजूर की एवं अनुकंपा आधार पर नियुक्ति के प्रस्ताव पर विचार करने हेतु अपीलार्थी बैंक को निदेशित किया – अभिनिर्धारित – आवेदन दिनांक 09.10.2004 की अभिप्राप्ति के कथ्य का अपीलार्थी द्वारा खण्डन किया गया, अतः संप्रेषण अथवा बैंक द्वारा उसकी अभिप्राप्ति के कथ्य को सिद्ध करने का भार याची पर अंतरित हो गया – याची ऐसा करने में असफल रही एवं आवेदन दिनांक 09.10.2004 के खण्ड 23 के अनुसार, याची ने दिनांक 08.06.2005 को जारी किए गए दस्तावेज पर विश्वास प्रकट किया है, जो स्वयमेव यह स्थापित करता है कि याची अपने मामले को आगे चलाने के लिए एक असत्य परिस्थिति निर्मित करने का प्रयास कर रही है – याची स्वच्छ अंतःकरण से न्यायालय के समक्ष नहीं आई है – अपील मंजूर – आक्षेपित निर्णय अपास्त – रिट याचिका खारिज। (चीफ जनरल मेनेजर वि. श्रीमती ममता बाई सोनी) **(DB)...1621**

Service Law – Compassionate appointment – Policy – **It is the policy prevalent on the date of consideration of the application which is relevant and the subsequent amendment or modification therein**

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THE INDIAN LAW REPORTS M.P. SERIES, 2016

(VOL-2)

JOURNAL SECTION

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

RIGHT TO FAIR COMPENSATION AND TRANSPARENCY IN LAND ACQUISITION, REHABILITATION AND RESETTLEMENT (COMPENSATION, REHABILITATION AND RESETTLEMENT AND DEVELOPMENT PLAN) RULES, 2015

[Ministry of Rural Development Notification No. G.S.R. 985(E) dated the 18th December, 2015, published in the Gazette of India (Extraordinary) Part II, Section 3, Sub-section (i) dated 18.12.2015, Page no. 16-33].

In exercise of the powers conferred by sub-section (1) and clauses (b), (e), (f), (g), (h), (i) ,(j), (k), (l), (m), (o), (p), (r), (s), (t) and (u) of sub-section (2) of section 109 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (30 of 2013), the Central Government hereby makes the following rules, namely:—

CHAPTER - I

General

1. Short title, applicability and commencement.– (1) These rules may be called the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement (Compensation, Rehabilitation and Resettlement and Development Plan) Rules, 2015.

(2) They shall be applicable in cases of land acquisition where the Central Government is the appropriate Government as per the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and

Resettlement Act, 2013 (30 of 2013).

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

2. Definitions.– In these rules, unless the context otherwise requires,-

(a) "Aadhaar number" means a 12-digit unique identification number generated and issued to an individual by the Unique Identification Authority of India (UIDAI) after de-duplication of demographic and biometric information pertaining to that individual;

(b) "Act" means the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (30 of 2013);

(c) "consent-based Aadhaar authentication service" means electronic authentication carried out by Unique Identification Authority of India (UIDAI), or agencies appointed by it, after matching the biometric information of an individual at his request or with his consent, with the information maintained by UIDAI in its own central servers, and includes a 'Yes/No' response, or a response containing the demographic information and photograph of that individual;

(d) "section" means section of the Act;

(e) words and expressions used but not defined in these rules and defined in the Act, shall have the meanings respectively assigned to them in the Act.

CHAPTER II

Request for Land Acquisition

3. Request for acquisition of land.– (1) After completion of Social Impact Assessment, wherever applicable and receipt of the recommendations of the Expert Group, if it appears to the appropriate Government that land in any area is required or likely to be required for any public purpose, the Requiring Body or its authorised representative, for whom land is to be acquired shall file the request to the concerned Collector in FORM-I along with the following documents, namely:-

(i) detailed project report;

(ii) sanction letter of project;

(iii) three copies of Record of Rights and revenue maps of the affected areas;

(iv) information about the classification of land that is, irrigated multi-cropped, single cropped, wasteland, etc;

(v) any other information required by the Collector.

(2) A copy of the request filed with the Collector under sub-rule (1) shall be submitted to the Commissioner.

(3) Where the Requiring Body is the Government, the request shall be filed by the Secretary of the concerned Department and in case of Public Sector Undertaking, by Secretary of the Department dealing with such undertaking.

4. Action by Collector on receiving request.– (1) (a) The Collector, on receiving the request under sub-rule (1) of rule 3, shall constitute a committee of officers consisting of officers from Revenue Department, Agriculture Department, Forest Department, Water Resources Department, Building Department or any other Department as the Collector deems necessary to make a field visit along with the representatives of the Requiring Body to make a preliminary enquiry regarding –

(i) availability of waste or arid land;

(ii) correctness of the particulars furnished in the request under sub-rule (1) of rule 3;

(iii) bare minimum land required for the project;

(iv) whether the request is consistent with the provisions of the Act, and submit a report to the Collector.

(b) The report of the committee referred to in clause (a) shall include the following, namely:—

(i) that the proposed acquisition of land serves public purpose;

(ii) that the extent of land proposed for acquisition is the absolute bare-minimum needed for the project;

(iii) that the acquisition of land at an alternate place has been considered and found not feasible;

(iv) that there is no unutilised land which has been previously acquired in the area;

(v) that the land, if any, acquired earlier and remained unutilised, may be used for such public purpose;

(vi) the recommendations of the committee.

(2) (a) If the Collector, on the basis of the report of the committee referred to in sub-rule (1), other information available with him and instructions issued by the Central Government in this regard, is satisfied that the request is consistent with the provisions of the Act, he shall make a preliminary estimate of the cost of the acquisition as defined in clause (i) of section 3.

(b) The administrative cost under item (A) of sub-clause (vi) of clause (i) of section 3 shall be at the rate of five percent of the cost of compensation as provided in sub-clause (i) of clause (i) of section 3 subject to a maximum of five crore rupees.

(c) The Collector shall inform the Requiring Body to deposit the estimated cost of acquisition or part thereof as specified by the Collector in the designated account of the office of the Collector before the publication of declaration under sub-section (2) of section 19 within such period as may be specified by him and the Requiring Body shall deposit the same within the said period.

(3) The Requiring Body shall deposit the balance cost of acquisition after final estimation is prepared by the Collector and in cases where excess amount is awarded by the Authority or Court, the same shall be deposited as and when so required.

CHAPTER III

Preliminary Notification for Land Acquisition and Rehabilitation and Resettlement Scheme

5. Publication of preliminary notification.– (1) The preliminary notification referred to in section 11 shall be published in FORM II.

(2) A copy of the preliminary notification mentioned in section 11 shall be affixed at conspicuous places in the affected areas and shall also be informed to the public by beat of drum.

(3) After publication of the preliminary notification under section 11, the Collector shall ensure completion of the exercise of updating land records as specified here under: –

(a) delete the names of deceased persons;

(b) enter the names of the legal heirs of the deceased persons;

(c) enter the registered transactions of the rights in land such as sale, gift, partition, etc.;

(d) make all entries of the mortgages in the land records;

(e) delete the entries of mortgages in case the lending agency issues letter towards full payment of loans taken through registered reconveyance of mortgaged property deeds;

(f) make necessary entries in respect of all prevalent forest laws;

(g) make necessary entries in case of the Government land;

(h) make necessary entries in respect of assets on the land like buildings, trees, wells, etc.;

(i) make necessary entries of share-croppers in the land;

(j) make necessary entries of crops grown or sown and the area of such crops; and

(k) any other relevant entries.

6. Hearing of objections.- (1) The Collector shall issue a notice for inviting objections in FORM III and after hearing all objections and making enquiry as provided under sub-section (2) of section 15 shall submit a report along with his recommendations on the objections to the appropriate Government for decision.

(2) The report of the Collector shall include the following:-

(a) assessment as to whether the proposed acquisition serves public purpose;

(b) whether the extent of land proposed for acquisition is the absolute bare-minimum extent needed for the project;

(c) whether land acquisition at an alternate place has been considered

and found not feasible;

(d) there is no unutilised land which has been previously acquired in the area;

(e) the land, if any, acquired earlier and remained unutilised, is used for such public purpose and recommendations in respect thereof;

(f) recommendations on the objections;

(g) record of proceedings;

(h) approximate cost of land acquisition in cases where Social Impact Assessment has been exempted.

7. Preparation of Rehabilitation and Resettlement Scheme and public hearing.– (1) Upon publication of the preliminary notification under sub-section (1) of section 11, the Administrator shall conduct a survey and undertake a census of the affected families within a period of two months from the date of publication of such preliminary notification.

(2) For the purpose of the survey to be conducted and the census of the affected families to be undertaken by the Administrator, he shall take into account –

(a) the Social Impact Assessment report;

(b) the records of the Panchayat, Municipality or Municipal Corporation, as the case may be, and other Government records.

(3) The Administrator shall get the data verified by door to door visit of the affected families and by site visits in case of infrastructure projects in the affected area.

(4) The draft Rehabilitation and Resettlement Scheme prepared by the Administrator shall, in addition to the particulars mentioned in the sub-section (2) of section 16, contain the following, namely:–

(a) list of affected families with Aadhaar number of its members, if available;

(b) list of displaced families with Aadhaar number of its members, if available;

(c) list of infrastructure in the affected area;

(d) list of land holdings in the affected area;

(e) list of trees, buildings, other immovable property or assets attached to the land or building which are to be acquired;

(f) list of trades or businesses in the affected area;

(g) list of persons belonging to the Scheduled Castes or the Scheduled Tribes, the handicapped or physically challenged persons in the affected area:

Provided that in case a person does not have an Aadhaar number, efforts may be made to get him so enrolled, provided he gives his consent for such enrolment and the claims of the affected families may be facilitated by carrying out consent-based Aadhaar authentication service.

(5) The Administrator shall give wide publicity to the draft Rehabilitation and Resettlement Scheme in the affected area through publication in the following manner, namely:-

(a) in the Official Gazette;

(b) in two daily newspapers being circulated in the locality of such area of which one shall be in the regional language:

Provided that in a place where such media is not available, then this clause shall not apply;

(c) in the local language in the Panchayat, Municipality or Municipal Corporation, as the case may be, and in the offices of the District Collector, the Sub-Divisional Magistrate and the Tehsil, Taluk, Sub-division or Block, as the case may be;

(d) uploaded on the website of the appropriate Government..

(6) The Administrator or an officer authorised by him shall conduct a public hearing in the affected areas by issuing advance notice of three weeks on the date, time and venue mentioned in the said notice in accordance with the provisions of rule 8 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement (Social Impact Assessment and Consent) Rules, 2014, dated the 8th August, 2014.

8. Publication of the approved Rehabilitation and Resettlement Scheme.– The Commissioner shall publish the approved Rehabilitation and

Resettlement Scheme by affixing it in conspicuous places in the affected area.

9. Development Plan for Scheduled Castes or Scheduled Tribes families.– The Development Plan, in cases of a project involving land acquisition on behalf of a Requiring Body which involves involuntary displacement of the Scheduled Castes or Scheduled Tribes families, referred to in section 41 shall be prepared in FORM IV.

CHAPTER IV

Declaration and Award

10. Publication of declaration for acquisition.– The declaration referred to in sub-section (1) of section 19 shall be published by affixing a copy thereof in local language at conspicuous places in the affected areas in FORM V.

11. Land acquisition award.– The land acquisition award referred to in section 23 shall be made in FORM VI and FORM VII.

12. Fishing rights of affected families.– The fishing rights referred to in column (3) against serial number 9 of the Second Schedule to the Act, shall be allowed by the Fisheries Department in consultation with the Irrigation Department, Revenue Department or any other concerned Department of the Government.

13. Recovery of excess amount.– In the case of any default or refusal to pay the excess amount as referred to in sub-section (3) of section 33, the same shall be recovered as arrears of land revenue under the provisions of the Revenue Recovery Act, 1890 (1 of 1890) and such recovery proceedings shall be initiated within a period of three years from the date on which the excess amount is found to have been paid.

14. Recovery of rehabilitation and resettlement benefit.– Any rehabilitation and resettlement benefit availed of by making a false claim or through fraudulent means shall be recovered as arrears of land revenue under the provisions of the Revenue Recovery Act, 1890 (1 of 1890).

15. Limits of extent of land under sub-section (3) of section 2.– The limits of extent of land referred to in clause (a) of sub-section (3) of section 2 shall be twenty hectares in urban areas and forty hectares in rural areas.

CHAPTER V

Administrator, Rehabilitation and Resettlement Committee and National Monitoring Committee

16. Powers, duties and responsibilities of Administrator.– The Administrator shall have the following powers, duties and responsibilities, namely:-

(a) to conduct a survey and undertake a census of the affected families and details of livestock possessed by each affected family in accordance with rule 7;

(b) to prepare a draft Rehabilitation and Resettlement Scheme (hereinafter referred to as the draft Scheme);

(c) to give wide publicity to the draft Scheme in accordance with sub-rule (5) of rule 7 in the affected areas;

(d) to make the draft Scheme available to the concerned persons and authorities;

(e) to organise and conduct public hearings on the draft Scheme;

(f) to submit the draft Scheme to the Collector;

(g) to execute and monitor the Rehabilitation and Resettlement scheme;

(h) to assist the Commissioner in post-implementation social audit of Rehabilitation and Resettlement Scheme; and

(i) any other work required to be done for Rehabilitation and Resettlement.

17. Rehabilitation and Resettlement Committee at Project Level.– (1) The Rehabilitation and Resettlement Committee constituted under section 45 shall follow the following procedures:–

(a) the Committee shall have its first meeting when a draft Scheme has been prepared by the Administrator;

(b) the Committee shall discuss the draft Scheme and make suggestions and recommendations and thereafter, the Committee shall meet to review and monitor the progress of rehabilitation and resettlement once in a month till the process of rehabilitation and resettlement is completed;

(c) for the purpose of carrying out the post-implementation social audits, the Committee shall meet once in three months;

(d) the Committee may visit the affected area and discuss with the affected families if it so requires and also visit the resettlement area to monitor the resettlement process.

(2) The Member-Convener of the Committee shall be assisted by subordinate officers and staff provided by the appropriate Government.

(3) The non-official members of the Committee shall be entitled to travelling and daily allowance at the rate admissible to the Group 'A' Officers of the Central Government.

18. Salaries, allowances, etc. of Presiding Officer, Registrar and other officers and employees of Authority.– (1) The salary and allowances payable to and the other terms and conditions of service (including pension, gratuity and other retirement benefits) and procedure for the investigation of misbehavior or incapacity of the Presiding Officer of Authority shall be the same as applicable to a District Judge.

(2) The salary and allowances payable to and the other terms and conditions of service (including pension, gratuity and other retirement benefits) of the Registrar of the Authority shall be the same as applicable to an officer of the rank of Deputy Secretary in the Central Government.

(3) The salary and allowances payable to and the other terms and conditions of service (including pension, gratuity and other retirement benefits) of the officers and employees of the Authority shall be the same as applicable to the officers of the Central Government of equivalent rank.

19. Procedure of National Monitoring Committee.– (1) The National Monitoring Committee constituted under section 48 shall review and monitor the implementation of the rehabilitation and resettlement schemes for the projects within two months of the publication of the approved schemes by the Commissioner under section 18 and thereafter, the meetings of the Committee shall be held once in three months to review and monitor the implementation of the rehabilitation and resettlement schemes.

(2) For the purposes of sub-rule (1), the Committee may –

(a) call for records and information of rehabilitation and

resettlement schemes;

(b) call the Requiring Body for discussion as and when required;

(c) ask for report about implementation of its decision.

(3) The non-official experts associated with the National Monitoring Committee shall be paid travelling and daily allowance at the rate admissible to an officer of the rank of Joint Secretary in the Central Government.

CHAPTER VI

Miscellaneous

20. Manner of return of unutilised land.– (1) When any land acquired under the Act remains unutilised for a period of five years as referred to in section 101, the same shall be returned to the original owner or owners or their legal heirs, as the case may be, or to the Land Bank by issuing a notice to the Requiring Body for whom the land was acquired and by giving an opportunity of being heard and by passing necessary order in writing by the Collector in this behalf for this purpose.

(2) After passing the order by Collector under sub-rule (1), the Collector shall take the possession of the acquired land for the purpose of returning the same to the original owner or owners or their legal heirs, as the case may be, or to the Land Bank.

(3) If the land is being returned to the original owner or owners or their legal heirs, as the case may be, the compensation paid to them excluding solatium shall be returned and deposited by them in the designated account of the office of the Collector as specified by him before taking possession of the land and the amount so refunded shall be used towards development of culturable wastelands.

(4) If the Requiring Body does not handover possession of the said land to Collector, the Collector shall be competent to take the help of the concerned Executive Magistrate and police force to take the possession after giving prior notice to the Requiring Body.

FORM-I

[See rule 3(1)]

Request for Acquisition of Land

From:

Name

and/or Designation of the Requiring Body

To:

1. The Collector

District_____

2. Commissioner, Rehabilitation and Resettlement,

_____

It is requested to acquire _____hectare(s) of land for which_____project/ purpose and the details are furnished in Annexures I, II and III along with three copies of Combined Sketch (to scale) showing the lands to be acquired.

The gestation period of the project will be _____years and_____ months (applicable only if gestation period is more than five years.)

Requisite cost of acquisition including cost of social impact assessment study (SIA) is available and will be deposited in your office, as provided under provisions of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 as and when required by you. All further necessary information and assistance will be provided on the date/time appointed/stipulated by you.

Yours faithfully

Requiring Body

Annexure -I

Name of the project:-

(1) Name of the village-

(2) Name of the Taluk/Sub-division/Tehsil/Block (as applicable)-

(3) Name of the Municipality/Municipal Corporation-

(4) Name of the District-

(5) Survey Nos. to be acquired-

(6) Total area under request (in hectares /sq. metres)

(7) Boundaries of the area to be acquired-

East-

West-

North –

South-

(8) Area of the agricultural and irrigated multi-cropped land

(9) Reasons for inclusion of agricultural and irrigated multi-cropped land

_____

_____

_____

(10) Details of buildings and other structures, tanks, wells, trees, etc.,

(11) Reasons for the inclusion of religious building, graveyard or tomb etc. for acquisition, if any.

Requiring Body

Annexure -II

Name of the project:-

1. Department or Government or Company, Local Authority, Institution:
2. Official designation of the Requiring Body:-
3. Purpose of acquisition (in detail) :-
4. Whether the request is filed u/s 2(1) of the Act by the Government or Department for its own use hold and control :-
5. Whether the request is filed u/s 2(1)(a) to 2(1) (f) of the Act:-
6. Whether the request is filed u/s 2(2) (a) or (b) of the Act :-
7. How many families are affected as described u/s 3(c)(i) to (vi) of the Act:-
8. Whether the request is filed u/s 40 of the Act :-
9. If so, on what ground?
10. Has the land for the project been partially purchased from the owners by private negotiation?
11. If so, on what date and on what terms (please state the terms of negotiation in short and attach the copy of it)
12. Date of issue of administrative approval for the project (copy to be attached) in case of Government or Department or local authority.
13. Reasons for delay in filing request, if request is filed after six weeks from the date of administrative approval of the project in case of Government or Department or local authority.
14. By what time possession of the land is required.

Requiring Body

Annexure -III

Certificate to be furnished along with the request for acquisition of land by the Requiring Body

Name of the project:-

1) Certified that the project for which the land is sought to be acquired has been administratively approved vide Department letter No: _____, dated _____ for acquisition under the Act (Copy of letter attached). (if applicable)

2) The estimated cost of the project is of Rs._____ and necessary budget was sanctioned and funds are available towards cost of acquisition.

3) The Requiring Body undertakes to pay the full amount in case of decree by the Land Acquisition, Rehabilitation and Resettlement Authority / High Court / Supreme Court as and when asked to do so by the Collector.

Requiring Body

FORM II

[See rule 5(1)]

Preliminary Notification

No._____ Dated_____

Whereas it appears to the appropriate Government that a total of_____ hectares land is required in the_____ Village_____ Taluk/Sub-division/Tehsil/Block (as applicable)_____ District for public purpose, namely,_____ Social Impact Assessment Study was carried out by Social Impact Assessment (SIA) Unit and a report submitted / preliminary investigation was conducted by a team constituted by Collector as laid down under rule 4.

The summary of the Social Impact Assessment Report/ preliminary investigation is as follows (Attach copy of SIA report):

_____

A total of _____(no.) families are likely to be displaced due to the land acquisition. The reason necessitating such displacement is given below.

_____ is appointed as Administrator for the purpose of rehabilitation and resettlement of the affected families. Therefore it is notified that for the above said project in the _____ Village of _____ Taluk/Sub-division/Tehsil/Block (as applicable) _____ District a piece of land measuring, _____ hectares viz; _____ hectare of standard measurement, whose detail description is as following, is under acquisition:

Sl. No.	Survey No.	Type of title	Type of land	Area under acquisition (in hectare)	Name and address of person interested	Boundaries			
						N.	S.	E.	W.

Trees	
Variety	*Number*

Structures	
Type	*Plinth area*

This notification is made under the provisions of section 11(1) of the Right to Fair Compensation and Transparency in Land acquisition, Rehabilitation and Resettlement Act, 2013 (30 of 2013), to all whom it may concern.

A plan of the land may be inspected in the office of the Collector and _____ _____ on any working day during the working hours.

The Government is pleased to authorise Officer _____ and his staff _____ to enter upon and survey land, take levels of any land, dig or bore into the sub-soil and do all other acts required for the proper execution of their work as provided and specified in section 12 of the said Act.

Under section 11(4) of the Act, no person shall make any transaction or cause any transaction of land i.e. sale/purchase, etc., or create any encumbrances on such land from the date of publication of such notification without prior approval of the Collector.

Objections to the acquisition, if any, may be filed by the person

interested within 60 (sixty days) from the date of publication of this notification as provided under section 15 of the Act before Collector.

Since the land is urgently required for the project falling within the purview of section 40(2) and the same has approval of the Parliament, it has been decided not to carry out the Social Impact Assessment Study, vide G.O. No._____,_____, dated_____. (Strike if not applicable)

Encl: As above

Place:

Date:

Collector

Form No. III

[See rule 6]

NOTICE BY COLLECTOR

No. ———————— Dt. ————————

Notice is hereby given that the land specified in the Schedule below and situated in the village of ———————— in the Taluk/Sub-division/ Tehsil/Block (as applicable)———————— in the District of———— ———— is needed or is likely to be needed in accordance with the notification under section-11(1) of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (30 of 2013) published by the Collector at page ———————— of part I of the (name of State/UT) Gazette, dated ————————. All persons interested in the land are accordingly required to file their objections before ———————————————— within sixty (60) days from the date of publication of the above preliminary notification, a statement in writing of their objection, if any, to the acquisition of the said land.

Any objection statement which is received after the due date or which does not clearly explain the nature of the senders interest in the lands is liable to be

summarily rejected.

Objections received within the due date, if any, will be enquired into on —— ———————— at ———————— when the objectors will be at liberty to appear in person or by Advocate and to adduce any oral or documentary evidence in support of their objections.

Schedule

Sl.No.	Survey No.	Total area in hectares	Area in hectares under acquisition	Name and address of the person interested	Boundaries N.S.E.W	Details of trees, structures etc., if any
(1)	(2)	(3)	(4)	(5)	(6)	(7)

Place :

Date : **Collector**

FORM IV

[See rule 9]

Format for Development Plan under Rehabilitation and Resettlement scheme for Scheduled Castes/Scheduled Tribes families displaced due to land acquisition

Sl.No.	Name of claimant / family head	Permanent address	Entitlements (See section 31, 41 and Second Schedule to the Act)	Remarks
			1. Land up to 0.4 Hectare for agricultural, horticultural, cattle grazing field per family shall be provided. 2. Provision of dwelling housing unit per family, drinking water facility, toilet etc.,	

			3. One time financial assistance of one lakh fifty thousand rupees per family shall be given. 4. For landless laborers employment shall be provided under Mahatma Gandhi National Rural Employment Guarantee Scheme or/ and any other job providing Scheme of the Government, 5. Skill development through different training programs for the youth of affected family. 6. Subsistence grant for displaced family equivalent to three thousand rupees per month for a year from the date of award. 7. For cattle shed and petty shop, minimum twenty five thousand rupees. 8. Alternative fuel, fodder and non-timber forest produce resources on no-forest land, for affected members of Scheduled Castes. 9. Fishing Rights.	

(a) Details of Land rights due, but not settled :

(b) Details of actions for restoring titles of the Scheduled Tribes as well as the Scheduled Castes on the alienated land by undertaking a special drive,

(c) Programme for development of alternate fuel, fodder and non-timber forest produce resources on non-forest lands within a period of five years, sufficient to meet the requirements of tribal communities as well as the Scheduled Castes under section 41(5) of the Act.

FORM V

[See rule 10]

Declaration by Secretary, Revenue Department

No:_____ Dated_____.

Whereas it appears to the Government that a total of _____hectares land is required in the Village_____Taluk/Sub-division/Tehsil/Block (as applicable)_____District _____for public purpose, namely, _____

Therefore declaration is made that a piece of land measuring ..... hectares is under acquisition for the above said project in the Village ..... Taluk/Sub-division/Tehsil/Block (as applicable) ..... District———————whose detailed description is as following:

Sl. No.	Survey No.	Type of title	Type of land	Area under acquisition (in hectare)	Name and address of person interested	Boundaries			
						N.	S.	E.	W.

Trees	
Variety	Number

Structures	
Type	Plinth area

This declaration is made after hearing of objections of persons interested and due enquiry as provided u/s 15 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (30 of 2013). The number of families likely to be resettled due to land acquisition is _____ for whom resettlement area has been identified, whose brief description is as following:-

Village_____ Taluk/Sub-division/Tehsil/Block (as applicable) _____
District_____Area _____(in hectares).

Mines of coal, iron-stone, slate or other minerals lying under the said land or any particular portion of the said land, except such parts of the mines and minerals which may be required to be dug or removed or used during the construction phase of the project for the purpose of which the land is being acquired, are not needed.

A plan of the land may be inspected in the office of the Land Acquisition Officer and _____on any working day.

A summary of the Rehabilitation and Resettlement Scheme is appended.

Encl : As above

Secretary, Revenue Department

FORM VI

[See rule 11]

Land Acquisition Award

Land Acquisition case No:

	Name of the Project -
	Number and date of declaration under which the land is to be acquired
	Situation and extent of the land in hectares, the number of field plots on the survey map, the village in which situated with the number of mile plan if any.
	Description of the land, i.e., whether fallow, cultivated, homestead,

	etc. If cultivated, how cultivated? Source of irrigation
	Names of persons interested in the land and the nature of their respective interests.
	Aadhaar No. of such persons
	Amount allowed for the land itself, without trees, buildings etc., if any
	Amount allowed out of such sum as compensation for the tenants interested in the land.
	Basis of calculation:
	Amount allowed for trees, houses or any other immovable property
	Amount allowed for crops.
	Additional compensation on the market value under section 30(3)
	Damages under section 28 of Act 30 of 2013
	Solatium u/s 30(1)
	Total of amounts
	Particulars of abatement of Government Revenue, or of the capitalised value paid, the date from which the abatement takes effect.

	Apportionment of the amount of compensation.	Serial No.	Name of claimants	Aadhaar No.	Amount payable to each	Bank A/c No.*	Remarks
	Area (in hectares)						
	Date on which possession was taken u/s. 38(1) and 40(1) of Act 30 of 2013.						

If under section 40(1) the number and date of the order of Government giving authority to do so.

Date: **Signature**

* Bank account details to be collected in all cases where Aadhaar number is not available or Aadhaar is not seeded in the bank account of the claimant.

FORM VII

[See rule 11]

Award for Rehabilitation and Resettlement

Land Acquisition case No:

1.	Name of the project -								
2.	Number and date of declaration under which the land is to be acquired.								
3.	Situation and extent of the land in hectares, the number of field plots on the survey map, the village in which situated with the number of mile plan if any.								
4.	Description of the housing units, transportation cost, housing allowances, annuity, employment subsistence grant, cattle shed, petty shop, one time resettlement allowances etc.								
5.	Name/ Names of persons interested in the land and the nature of their respective claim for rehabilitation and resettlement.								
6.	Apportionment of the amount of compensation Area (in hectares)	Sl. No.	Name of claimants/ affected family	Aadh-aar No.	Rehabilitation and Resettlement entitlements	Bank A/c No.	Amount payable to	Non monetary entitlement	Remarks
					(i) House to be allotted (ii) Land to be allotted (iii) Offer for Developed Land (iv) Annuity/ Employment (v) Subsistence grant (vi) ransportation cost,Housing allowances (vii) Cattle shed, Petty shop (viii) One time grant to artisan, small traders and				

					certain others (ix) Fishing rights (x) One time resettlement allowances (xi) Stamp duty and registration fee				
7.	Date on which Rehabilitation and Resettlement entitlements given to the affected family.								
8.	Basis of calculation:								
9.	Amount allowed for trees, houses or any other immovable things.								
10.	Amount allowed for crops.								
11.	Additional compensation on the market value under section 30(3)								
12.	Damages under section 28 of Act 30 of 2013								
13.	Solatium u/s 30(1)								
14.	Total of amounts								
15.	Particulars of abatement of Government Revenue, or of the capitalised value paid, the date from which the abatement takes effect.								
	Apportionment of the amount of compensation.	**Serial No.**	**Name of claimants**	**Aadhaar No.**	**Amount payable to each**	**Bank A/c No.***	**Remarks**		
	Area (in hectares)								
16.	Date on which possession was taken under section 38(1) and 40(1) of Act of 30/2013.								

If under section 40(1), the number and date of the order of Government giving authority to do so.

Date: **Signature**

* Bank account details to be collected in all cases where Aadhaar number is not available or Aadhaar is not seeded in the bank account of the claimant.

[F.No. 13011/01/2015- LRD]

HUKUM SINGH MEENA, Jt. Secy.

J/89

[Published in the Gazette of India (Extraordinary) Part II, Section 3, Sub-section (ii) dated 13.01.2016]

MINISTRY OF WOMEN AND CHILD DEVELOPMENT
NOTIFICATION

New Delhi, the 12th January, 2016

S.O. 110(E).—In exercise of the powers conferred by sub-section (3) of section 1 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (2 of 2016), the Central Government hereby appoints the 15th day of January, 2016 as the date on which the said Act shall come into force.

[No. CW-II-11/4/2015-CW.II]
RASHMI SAXENA SAHNI, Jt. Secy.

[Published in the Gazette of India (Extraordinary) Part II, Section 3, Sub-section (ii) dated 18.01.2016]

MINISTRY OF SOCIAL JUSTICE AND EMPOWERMENT

(Department of Social Justice and Empowerment)

NOTIFICATION

New Delhi, the 18th January, 2016

S.O. 152(E).—In exercise of the powers conferred by sub-section (2) of section 1 of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2015 (1 of 2016), the Central Government hereby appoints the 26th day of January, 2016 as the date on which the provisions of the said Act shall come into force.

[No. 11012/1/2002-PCR (Desk)]
AINDRI ANURAG, Jt. Secy.

I.L.R. [2016] M.P., 1621
WRIT APPEAL

Before Mr. Justice A.M. Khanwilkar, Chief Justice &
Mr. Justice Sanjay Yadav

W.A. No. 800/2008 (Jabalpur) decided on 20 November, 2015

CHIEF GENERAL MANAGER ...Appellant
Vs.
SMT. MAMTA BAI SONI ...Respondent

Service Law - Compassionate Appointment **- Employee died on 09.06.2004 - Application claimed to be submitted on 09.10.2004 - Subsequent representation dated 18.11.2005 making reference of application dated 09.10.2004 - Bank rejecting the application being not submitted within one year of death as per prevailing scheme & treating representation dated 18.11.2005 as first application - Single Judge allowed the petition and directed the appellant bank to consider the proposal for appointment on compassionate ground - Held - Factum of receipt of application dated 09.10.2004 rebutted by appellant, so onus shifted on petitioner to substantiate the factum of dispatch or receipt thereof by the bank - Petitioner failed to do that and as per clause 23 of application dated 09.10.2004, petitioner relied on document issued on 08.06.2005, which in itself establishes that petitioner is trying to create a false circumstance to further her cause - Petitioner not approached the court with clean hands - Appeal allowed - Impugned judgment set aside - Writ petition dismissed.** **(Paras 7 to 11)**

सेवा विधि – अनुकंपा नियुक्ति – कर्मचारी की मृत्यु दिनांक 09.06.2004 को हुई – आवेदन दिनांक 09.10.2004 को प्रस्तुत करने का दावा किया गया – आवेदन दिनांक 09.10.2004 का संदर्भ लेते हुए पश्चात्वर्ती अभ्यावेदन दिनांक 18.11.2005 को प्रस्तुत किया गया – प्रचलित स्कीम के अनुसार, मृत्यु से एक वर्ष की अवधि के भीतर आवेदन पत्र प्रस्तुत न किये जाने से बैंक ने आवेदन पत्र खारिज कर दिया एवं अभ्यावेदन दिनांक 18.11.2005 को प्रथम आवेदन पत्र माना – एकल न्यायाधीश ने याचिका मंजूर की एवं अनुकंपा आधार पर नियुक्ति के प्रस्ताव पर विचार करने हेतु अपीलार्थी बैंक को निदेशित किया–अभिनिर्धारित–आवेदन दिनांक 09.10.2004 की अभिप्राप्ति के कथ्य का अपीलार्थी द्वारा खण्डन किया गया, अतः संप्रेषण अथवा बैंक द्वारा उसकी अभिप्राप्ति के कथ्य को सिद्ध करने का भार याची पर अंतरित हो गया – याची ऐसा करने में असफल रही एवं आवेदन दिनांक 09.10.2004 के खण्ड 23 के अनुसार, याची ने दिनांक 08.06.2005 को जारी किए गए दस्तावेज पर

विश्वास प्रकट किया है, जो स्वयमेव यह स्थापित करता है कि याची अपने मामले को आगे चलाने के लिए एक असत्य परिस्थिति निर्मित करने का प्रयास कर रही है – याची स्वच्छ अंतःकरण से न्यायालय के समक्ष नहीं आई है – अपील मंजूर – आक्षेपित निर्णय अपास्त – रिट याचिका खारिज।

Ashish Shroti, for the appellant.
None for the respondent though served.

JUDGMENT

The Judgment of the Court was delivered by : **A.M. KHANWILKAR, C.J. :-** This intra-court appeal takes exception to the decision of the learned Single Judge dated 19.06.2008 in W.P. No.4733/2006(S).

2. The learned Single Judge allowed the writ petition preferred by the respondent and has directed the appellant-Bank to consider the proposal of the respondent for appointment on compassionate ground; and take a final decision on merits in accordance with the relevant Scheme within two months from the date of receipt of the order.

3. The learned Single Judge accepted the plea of the writ petitioner/respondent that she had submitted an application for appointment on compassionate ground within one year time stipulated, as per the prevailing scheme. In that, the predecessor of the respondent, who was employed in the appellant-Bank died on 9.6.2004; and the application was submitted by the respondent on 9.10.2004 for appointment on compassionate ground.

4. The respondent, however, did not submit any acknowledgment of dispatch/service of that application, but relied on the fact so stated in her subsequent representation dated 18.11.2005. The Appropriate Authority had considered this contention of the respondent, as was directed by this Court in terms of order passed on 25.11.2005 in W.P. No.14938/2005(S); and opined that no evidence was produced by the respondent to establish the factum of delivery/dispatch of the application dated 9.10.2004 to the Bank. On that basis, the Appropriate Authority rejected the application, as it was not submitted within one year from the date of death of the Bank employee in harness; and also because under the new Scheme only the pending valid applications could be processed further.

5. The learned Single Judge, however, accepted the stand of the

respondent on this factual aspect and has noted as follows :-

> "According to the petitioner after death of her husband on 9-6-2004, General Secretary of the State Bank of India, Workmen Union, Bhopal Circle, Bhopal vide Annexure P-11 dated 10-06-2004 intimated to the petitioner his condolence and also enlightened her about the rights available to the petitioner and forwarded the prescribed form on which application can be submitted seeking compassionate appointment. In pursuance to the same the petitioner is said to have submitted the application in the prescribed proforma vide Annexure P-5, supported by an affidavit sworn before the Notary, Jabalpur as contained in Annexure-P-8. A perusal of the application Annexure P-5 and the affidavit (Annexure P-8) indicates that they are dated 9-10-2004, even though there is no acknowledgment in the application (Annexure P-5) but in the application (Annexure P-6) the petitioner has categorically referred to the application submitted by her on 9-10-2004 and has reminded the Bank to consider her application submitted on 9-10-2004 and take action. The Bank has considered this application (Annexure P-6) submitted on 18-11-2005 to be the first application and by holding that it is submitted after a period of one year has rejected the application. The documents available on record if read, in its totality, indicates that the petitioner did not file an application on 9-10-2004 before Bank, even though there is no acknowledgment of the same. A complete analysis of the documents; namely the communication made by the Union vide Annexure P-11, the application dated 9-10-2004 (Annexure P-5) and the affidavit (Annexure P-8) sworn before the Notary on 9-10-2004 compels this court to draw a conclusion in favour of the petitioner to the effect that she did file the application on 9-10-2004 but the Bank by taking a very hyper technical view of matter has rejected the application on the ground of delay."
>
> *(emphasis supplied)*

6. This finding has been reached by the learned Single Judge notwithstanding the specific plea taken by the appellant on affidavit with reference to the finding in the enquiry conducted by the Appropriate Authority.

In paragraph 2 of the reply-affidavit, it was stated on behalf of the appellant/ Bank, as follows :

> "2. ....While considering the application, the Competent Authority of the Bank found that the husband of the petitioner died on 9.6.2004 and as per the provisions of the Bank's Scheme for grant of appointment on compassionate ground, the petitioner was required to make a request for compassionate appointment within one year from the date of death i.e. by 9.6.2005. It was found that the petitioner did not make any offer within the stipulated time as for the first time, the representation was filed on 18.11.2005. In the earlier Writ Petition, the petitioner contended that the application for compassionate appointment was submitted by her on 9.10.2004. However, the said application was not received by the Bank. No evidence was filed by the petitioner to establish that the application dated 9.10.2004 was delivered/ sent to the Bank. It was stated by the petitioner in the earlier Writ Petition that the recommendations of the Branch Manager dated 9.10.2004 is Annexure P/1 to the petition which on verification was found that as per the Bank's record neither the application dated 9.10.2004 was received nor the recommendation of the Branch Manager was sent. In view of the fact that the representation dated 18.11.2005 was received by the Bank after the period stipulated in the scheme, the same was not considered."
>
> *(emphasis supplied)*

7. We are in agreement with the submission of the appellant/Bank that the learned Single Judge completely misconstrued, if not glossed over the above factual position asserted by the appellant. In that, as the factum of receipt of application sent by the respondent was rebutted by the appellant on oath, the appellant could not have produced negative evidence to substantiate that fact. Instead, the onus had shifted on the writ-petitioner to substantiate the factum of dispatch of the said application or the receipt thereof by the appellant-Bank. The respondent having failed to do that, no inference could be drawn of the relevant fact in favour of the respondent.

8. Further, in the facts of the present case, inference of the fact asserted

by the respondent could not have been drawn in favour of the respondent also on account of the factual position emerging from the stated Application - Annexure P/5 (allegedly submitted by the respondent to the appellant-Bank dated 9.10.2004). Against Clause 23 of the said application (photostat copy whereof has been relied by the respondent and appended to the writ petition as Annexure P/5), the factual position stated by the respondent in the said application belies her claim. It reads thus :

"23	Copies of testimonials (Atleast three of which one must be from the Principal/Head Master of the School/College in which you have last studied	i) xxx ii) Indra Primary School, Sarafa Miloniganj, Jabalpur. iii) T.C. Dtd. 8.6.2005"

(emphasis suplied)

9. It is unfathomable that the respondent could rely on a document issued on 8.6.2005, which has been produced with the application dated 9.10.2004 made in earlier point of time. This fact, by itself, leaves no manner of doubt that the appellant-Bank is justified in contending that the application dated 9.10.2004 was never submitted to the respondent-Bank, but the respondent has been ill-advised to rely on that fact by making reference to the existence of such document in the communication /representation sent to the appellant Bank on 18.11.2005. That was done to create a false circumstance to further the cause of the respondent and nothing more.

10. Understood thus, it would necessarily follow that the respondent has not approached the Court with clean hands knowing that the Scheme under which she was claiming appointment on compassionate ground, was already abandoned by the appellant-Bank on 5.8.2005. The respondent had not submitted any application to the appellant Bank for such request till that date.

11. Accordingly, this appeal must succeed. The impugned judgment is quashed and set aside; and instead the writ petition is dismissed with no order as to costs.

Order accordingly.

I.L.R. [2016] M.P., 1626
WRIT PETITION
Before Mr. Justice Sujoy Paul
W.P. No. 4217/2013 (Gwalior) decided on 31 October, 2014

DIVYA GOYAL ...Petitioner
Vs.
STATE OF M.P. & anr. ...Respondents

Service Law - Selection - Qualification **- Petitioner is eligible for the post of Registration Clerk as per rules, she cannot be deprived on the basis of advertisement - Advertisement does not have any statutory force - Whether or not petitioner has challenged the advertisement, her right as per the rules cannot be taken away - Rejection order set aside - Petitioner eligible for the post of Registration Clerk - Petition allowed. (Paras 8 to 10)**

सेवा विधि – चयन – अर्हता – नियमों के अनुसार, याची रजिस्ट्रीकरण लिपिक के पद हेतु पात्र है तथा विज्ञापन के आधार पर उसे वंचित नहीं किया जा सकता – विज्ञापन को कोई कानूनी बल प्राप्त नहीं है – चाहे याची ने विज्ञापन को चुनौती दी हो अथवा नहीं, नियमानुसार उसका अधिकार छीना नहीं जा सकता – अस्वीकृति आदेश अपास्त – याची रजिस्ट्रीकरण लिपिक के पद हेतु पात्र है – याचिका मंजूर।

Cases referred :

(1986) 1 SCC 675, (2006) 9 SCC 507.

Pawan Dwivedi, for the petitioner.
B.Raj Pandey, G.A. for the respondent/State.

ORDER

SUJOY PAUL, J. :- The question to be decided in this matter is whether petitioner can be treated as ineligible for the post of Registration Clerk when she possess the qualification as per the Statutory Recruitment Rules but does not possess the qualification as per the advertisement.

2. The facts necessary for adjudication of this matter are that petitioner is MA in Hindi Literature and PGDCA from Makhanlal Chaturvedi University. The certificates are filed as Annexure P-1. The respondents issued advertisement (Annexure P-2) for the posts of Assistant Grade-III, L.D.C.

and Registration Clerk. The petitioner submitted her candidature for the post of Registration Clerk pursuant to said advertisement. She appeared in the written examination. However, by Annexure P-8 dated 10.12.2012, she was informed that petitioner hast (sic:has) not produced the typing certificate and, therefore, she could not be treated as eligible. Assailing this order, Shri Pawan Dwivedi submits that the service conditions of the posts in question is governed by statutory recruitment rules made under proviso to Rule 309 of the Constitution. The rules are called as Madhya Pradesh Registration and Stamp Class-III (Ministerial) Service Recruitment Rules, 2007. By taking this Court to Schedule III, it is submitted that the petitioner do possess the essential qualification as per the rules and, therefore, she cannot be deprived from the fruits of her selection. It is submitted that the advertisement relates to three posts. The respondents should have prescribed the qualification post wise as per the rules separately. They have clumsily mixed all the qualifications and, therefore, this problem has arisen.

3. Per contra, Shri B.Raj Pandey, learned G.A. submits that petitioner is required to possess the qualification as per the advertisement Annexure P-2. In absence of possessing qualification or in absence of challenging the advertisement, petitioner has no case.

4. I have bestowed my anxious consideration on the rival contentions of the parties and perused the record.

5. At the cost of repetition, the singular question to be decided is whether the petitioner can be treated as ineligible on the basis of advertisement, if she is eligible on the basis of recruitment rules? The educational qualification prescribed in the rules reads as under:-

> 1. Should have passed the Higher Secondary examination conducted by Board of Secondary Education M.P. or recognized institution or High School Examination under 10+2 education system.
>
> 2. Minimum One year's diploma/certificate in computer course from an institute/University recognized by Central Government/State Government or a competent authority constituted by the Central Government/State Government.

6. The petitioner has specifically pleaded in the petition that she possess

the qualification as per rules and the same stand is reiterated in the rejoinder. The respondents have not produced any rules to show that the said contention is incorrect or the petitioner do not possess the qualification as per the rules.

7. So far the advertisement is concerned, I find force in the argument of Shri Pawan Dwivedi that respondents have mixed all the posts and then prescribed the qualification in one go. In all fairness, the respondents should have prescribed qualification separately against different posts. As per the qualification shown above, it is clear that petitioner is eligible for the post of Registration Clerk. In the recruitment rules, there is no requirement to pass the typing test. This condition is mentioned in the advertisement. The petitioner cannot be deprived from the right of fair consideration which is a fundamental right flowing from Article 14 and 16 of the Constitution of India.

8. The Supreme Court in (1986) 1 SCC 675 *(Union of India and others Vs. Arun Kumar Roy)* held that in the event of conflict in the rules and executive instructions/advertisement, it is the rule which will prevail. Once it is held that petitioner is eligible as per rules, she cannot be deprived on the basis of advertisement. Advertisement does not have any statutory force. Whether or not petitioner has challenged the advertisement, her right as per the rules cannot be taken away. Para 16 of said judgment reads as under:-

> "16. A notification has no statutory force. It cannot override rules statutorily made governing the conditions of service of the employees. The notification is dated August, 26, 1967. Rule 5(1)(b) was amended in 1971 with retrospective effect from May1, 1965. The rule has necessarily to govern the service conditions and not the notification."
>
> (Emphasis supplied)

9. In (2006) 9 SCC 507 *(Malik Mazhar Sultan and Another Vs. U.P. Public Service Commission and others)*, the Apex Court opined that the recruitment to the service can only be made in accordance with the rules and the error, if any, in advertisement cannot override the rules and create any right in favour of the candidate, if otherwise not eligible according to the rules. In the said case, the claimant was eligible as per advertisement but was not eligible as per the rules. In the said factual backdrop, it was made clear by the Apex Court that it is the Rule which will decide the eligibility of a candidate.

10. Considering the aforesaid, the rejection order Annexure P-8 is set aside. The petitioner is held to be eligible for the post of Registration Clerk. The respondents are directed to proceed further by treating the petitioner as eligible as per the rules. The outcome of the selection be informed to the petitioner within 30 days from the date of communication of this order.

11. Petition stands allowed. No costs.

Petition allowed.

I.L.R. [2016] M.P., 1629
WRIT PETITION
Before Mr. Justice Sujoy Paul
W.P. No. 6087/2014 (Gwalior) decided on 13 November, 2014

J.K. TYRE BANMORE KAMGAR SANGH ...Petitioner
Vs.
REGISTRAR, TRADE UNION/
REPRESENTATIVE UNION ...Respondent

Industrial Relations Act, M.P. (27 of 1960), Section 17, Industrial Relations Rules, M.P. 1961, Rule 16 & 17 - Status of representative union **- Petitioner union was enjoying the status of representative union - Respondent's application seeking status in place of petitioner union allowed by Registrar Trade Union - In appeal Industrial Court set aside the order but directed the Registrar to obtain appropriate application under Section 17 read with Rule 17 from the respondent No. 2 and to pass order after hearing and physical verification of the members - Held - Industrial Court was not obliged to direct the Registrar to obtain fresh application as per Section 17 of the Act - Thus, Industrial Court travelled beyond the statute - Direction of Industrial Court is set aside - However, liberty is reserved to the respondent No. 2 to prefer appropriate application in accordance with law - Petition is allowed. (Paras 10 & 11)**

औद्योगिक संबंध अधिनियम, म.प्र. (1960 का 27), धारा 17, औद्योगिक संबंध नियम, म.प्र. 1961, नियम 16 व 17 – प्रतिनिधिक संघ की प्रास्थिति – याची संघ प्रतिनिधिक संघ की प्रास्थिति का उपभोग कर रहा था – याची संघ के स्थान पर प्रास्थित किये जाने हेतु प्रत्यर्थी का आवेदन रजिस्ट्रार, व्यापार संघ द्वारा मंजूर – अपील में औद्योगिक न्यायालय द्वारा आदेश अपास्त किया गया, परंतु रजिस्ट्रार को धारा 17 सहपठित नियम 17 के अंतर्गत प्रत्यर्थी क्र. 2 से उचित आवेदन प्राप्त

करने तथा सदस्यों के भौतिक सत्यापन एवं सुनवाई उपरांत आदेश पारित करने हेतु निदेशित किया गया – अभिनिर्धारित – अधिनियम की धारा 17 के अनुसार औद्योगिक न्यायालय रजिस्ट्रार को नवीन आवेदन प्राप्त करने के लिए निदेशित करने हेतु बाध्य नहीं है – अतः औद्योगिक न्यायालय ने कानून के परे गमन किया – औद्योगिक न्यायालय का निदेश अपास्त – तथापि, प्रत्यर्थी क्र. 2 की विधि अनुसार उचित आवेदन पत्र प्रस्तुत करने की स्वतंत्रता आरक्षित है – याचिका मंजूर।

Cases referred:

96 L Ed 113 (1951), AIR 1962 SC 753, 2004 (8) SCC 524, AIR 1961 SC 619, AIR 1961 SC 1191, AIR 1963 SC 64, AIR 1968 SC 647, 2003(2) SCC 111.

Alok Sharma, for the petitioner.
N.S. Kirar, P.L. for the respondent No. 1.
Ravi Jain, for the respondent No. 2.
Devendra Sharma, for the respondent No. 3.

ORDER

SUJOY PAUL, J. :- Two registered trade unions i.e. petitioner and respondent No.2 are in loggerhead on the question of status of representative union as per M.P. Industrial Relations Act, 1960 (MPIR Act). The petitioner is already enjoying the status of representative union under the MPIR Act since 1995. The respondent No.2 union preferred an application for recognition of union dated 26th October, 2013. The present petitioner was noticed on this application by Registrar Trade Union by communication dated 22.4.2014 (Annexure P/4). In turn, the petitioner submitted his reply / objection (Annexure P/5) dated 21.05.2014. The respondent No.1 / Registrar passed the order dated 23rd May, 2014 whereby in place of petitioner union the respondent No.2 union is declared as representative union under the Act. Petitioner feeling aggrieved by this order dated 23rd May, 2014 challenged the same by preferring an appeal under Section 22 of the Act before the Industrial Court. Industrial Court after hearing both the parties, passed the order dated 22.08.2014 (Annexure P/1). The appeal of the petitioner is allowed and impugned order of Registrar was set aside. Up to para 6 and to the extent impugned order of Registrar is set aside by the Industrial Court, the petitioners have no objection. They have assailed the ultimate direction of the Industrial Court whereby the Registrar was directed to obtain appropriate application under Section 17 Rule 17 with relevant form from the respondent

No.2 and after hearing both the unions, make physical verification of members by fixing a date. The Industrial Court further ordered that appropriate order be passed according to the merits of the matter.

2. Assailing this order, Shri Alok Sharma, learned counsel for the petitioner, submits that Section 13 of the Act deals with application which is preferred for the first time seeking representative status. For this purpose, there is a statutory form namely FORM (B). Under the Act, rules are made which are known as M.P. Industrial Relations Rules, 1961. By taking this Court to Rule 11, it is contended that for a fresh application preferred under Section 13 the requisite fees is Rs. 5/- which needs to be paid in cash. He submits that admittedly the respondent No.2 has paid Rs. 5/- in cash. By taking this Court to the application dated 26th October, 2013, it is submitted that it is not in consonance with the statutory requirement of the Act and the Rules made thereunder. It is submitted that it is not a case of fresh application for the purpose of getting status of representative union rather it was a case where respondent No.2 was seeking his replacement in place of the petitioner. Thus, application was required to be filed in consonance with the requirement of Section 17 read with relevant rules namely Rule 16 & 17.

3. Shri Alok Sharma heavily relied on the statutory FORM-E and the annexure appended to the said form. It is submitted that unless the information needs to be furnished are supplied, the application cannot be entertained. Putting it differently, it is submitted that whenever a union desires the representative status in lieu of existing representative union, it needs to furnish following information:-

> 1. Date of application. 2. Name of the Union applying for the recognition in place of an already recognized representative Union. 3. Address of Head Office. 4. Address of Local Office. 5. Name and addresses of the office bearers. 6. Whether the Union had applied for recognition to the Registrar at any time if so, the result of the application. 7. Name of the representative union in whose place the recognition is applied for ..... 8. The address of the Head Office or local office of the representative union .....9.The total number of members of the Union applying for recognition on the date shown in clause I above.

It is further contended that there must be an Annexure to Form- E

which should contain following information:-

ANNEXURE OF FORM E

(1). S. No. (2). Name of the undertaking. (3) Shift. (4) Department or occupation. (5) Name of the member (6) Father's name (7) Age of the member. (8) Whether membership subscription paid for the preceding months. (9) Whether membership subscription paid for the month next to the preceding month. (10) Receipt No. for membership subscription mentioned in column Nos. (8) and (9) (11) The date of subscription (12) Remarks.

4. He submits that it is necessary so that the other union gets information about the status of the applicant union and put forth his defence. It is submitted that the application dated 26th October, 2013 is not pregnant with minimum necessary details and therefore, it could not have been processed. He submits that when application was not containing minimum details, the Registrar has erred in treating it to be an application preferred under Section 17 of the Act. Criticizing his order, it is submitted that Registrar has acted in undue haste while passing the order dated 23rd May, 2014. He gave exparte hearing to respondent No.2 without fixing any date and without putting other party to the notice passed the order dated 23.05.2014. He submits that the Industrial Court has rightly set aside the order to that extent. He submits that once it is held by the Industrial Court that the said application preferred by the respondent No.2 was not in consonance with Section 17 and Rule 17 of the Act and it was infact an application as per Section 13 of the Act, it should have set aside the order in toto and at best liberty could have been reserved to the respondent No.2 to prefer appropriate application under relevant provision of the Act. He submits that Industrial Court was under no obligation to direct the Registrar to undertake the exercise as mentioned in para 7 of the order.

5. Per Contra, Shri Ravi Jain, learned counsel for the respondent No.2, submits that although the respondent No.2 has not challenged the order dated 22.08.2014 passed by the Industrial Court, the ultimate direction given by the Industrial Court is not liable to be interfered with. He heavily relied on Section 22(3) of the Act. He submits that as per said provision, the Industrial Court is empowered to confirm, modify or rescind any order passed by the Registrar. In addition, the Industrial Court may pass such consequential order as it may deem fit. It is strenuously argued that if Industrial Court deemed it fit to direct

the Registrar to obtain application from respondent No.2, no interference is warranted. He relied on unreported judgment passed by this Court in WP No. 3867/2010 *(Cadbury Workers Association Vs. State of M.P. & Ors.)*. By relying on para 14(ii) of the said order, he submits that this Court directed the Registrar to fix a fresh date for physical verification. It is therefore argued that no interference is warranted.

6. Shri Devendra Sharma, learned counsel for the respondent No.3, advanced singular contention. He submitted that as per Section 17 (2) of the Act, the information was required to be given to the Labour Officer which was not admittedly given and therefore, the order of Registrar was rightly interfered with by the Industrial Court.

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

8. Since the order of Industrial Court to the extent Registrar's order is set aside, is not put to test by the other side, I find no reason to interfere or disturb the said finding. However order of the Industrial Court makes it crystal clear that decision making process adopted by the Registrar was grossly vitiated and therefore, interference was rightly made by the Industrial Court.

9. The argument of Shri Jain is based on Section 22(3) of the Act which employs the words " as it may deem fit". The question is whether this provision gives any unfettered power to the Industrial Court to pass any kind of order. In this regard, it is apt to remember that U.S. Supreme Court in its unique words opined that "Law has reached its finest moment when it has freed man from the unlimited discretion" *United State vs. Wunderlich,* 96 L Ed 113 (1951). The Apex court in various cases considered the words conveying discretion by implying the word "as he deems fit". Sakar J observed that "Section 29(3) only confers power to make the order in terms of the statute, order which would give effect to and read with the Act elsewhere conferred. The word " as he deems fit" do not bestow the power to make any order on consideration de hors the statute which the authorities consider best according to their notions of justice [See: AIR 1962 SC 753 *(R.M. Paranjype Vs. A.M. Mali and Ors.)*]. The Apex Court opined that wide discretion conferred by these words has to be exercised keeping in view the purpose for which it is conferred [See 2004(8) SCC 524) *(Chariant International Ltd. Vs. Securities and Exchange Board of India)*]. Similarly, the words " Shall take such action thereon as it may think fit" do not give discretion to take action

outside the statute [See: AIR 1961 SC 619 *(Akshaibar Lal (Dr.) Vs. Vice Chancellor, BHU)*. In AIR 1961 SC 1191 *(A. St. Arunachalam Pillai Vs. Southern Roadways Ltd.)* and AIR 1963 SC 64 *(Abdul Mateen Vs. Ram Kailah Pandey)* the Apex Court opined that when a power is conferred on Tribunal in similar words, the Tribunal cannot pass any and every order but can only pass such orders which the subordinate authorities could have not passed in that particular case.

10. If the aforesaid litmus test laid down by the Supreme Court is applied in the present case, it will be clear that Industrial Court in its ultimate direction travelled beyond the statute. Industrial Court was not obliged to direct the Registrar to take action of obtaining a fresh application from respondent No.2. As per Section 17 of the Act, it is voluntary act on the part of the union claiming representative capacity. Registrar is under no obligation to undertake the aforesaid exercise. In other words, Registrar being a statutory authority was not obliged to invite such application from respondent No.2. The Judgment in *Cadbury* (Supra) has no application in the facts and circumstances of the present case. This is trite that a judgment is precedent for a point which has been specifically decided and not on a logic which can be reduced from the same (See: AIR 1968 SC 647*(State of Orissa Vs. Sudhansu Sekhar Misra and others)*. In 2003 (2) SCC 111*(Bhavnagar University Vs. Palitana Sugar Mill (P) Ltd. And Ors.)* the Apex Court opined that a decision is an authority for which it is decided and not what can logically be deduced therefrom. A little difference in facts or additional facts may make lot of difference in the precedential value of decision (Para 59). In the light of aforesaid, said judgment in *Cadbury* (Surpa) is of no assistance to Shri Jain.

11. Resultantly, the ultimate direction of Industrial Court mentioned in para 7 is set aside. Liberty is reserved to the respondent No.2 to prefer appropriate application in accordance with law. Since the act in no uncertain terms prescribes the methodology to decide the question of representative status, it is premature for the courts to direct the authorities to act in a particular manner. Act contains sufficient guidelines for the Registrar to deal with such application. Resultantly, the said portion of para 7 of Industrial Court is set aside.

12. Petition is allowed. It is made clear that this court has not expressed any opinion on the merits. No costs.

Petition allowed.

I.L.R. [2016] M.P., 1635
WRIT PETITION
Before Mr. Justice K.K. Trivedi
W.P. 8308/2013(Jabalpur) decided on 18 March, 2015

VEENITA BAI(SMT.) ...Petitioner
Vs.
DINESH KUMAR ...Respondent

Hindu Marriage Act (25 of 1955), Section 13 - Epilepsy **- Divorce application by husband on the ground that wife suffering from epilepsy - Application for examination of wife for mental disorder allowed by the Court below - Held - Plaintiff has to prove that ailment was in existence before solemnization of marriage and was deliberately suppressed by family members of wife - It is nowhere stated in the divorce application and no prima facie evidence of epilepsy found - Order of Trial Court set aside as it will amount to collection or creation of evidence - Writ Petition allowed. (Paras 5 to 11)**

हिन्दू विवाह अधिनियम (1955 का 25), धारा 13 – मिर्गी – पत्नी के मिर्गी रोग से पीड़ित होने के आधार पर पति द्वारा विवाह–विच्छेद हेतु आवेदन प्रस्तुत किया गया – पत्नी के मानसिक विकार के परीक्षण हेतु आवेदन को निचले न्यायालय द्वारा मंजूर किया गया – अभिनिर्धारित – वादी को यह सिद्ध करना होगा कि विवाह संपन्न होने के पूर्व से ही व्याधि मौजूद थी एवं पत्नी के परिवार के सदस्यों द्वारा जानबूझकर उसे छिपाया गया – विवाह–विच्छेद आवेदन में ऐसा कहीं उल्लिखित नहीं है तथा मिर्गी के रोग के संबंध में कोई प्रथम दृष्ट्या साक्ष्य नहीं पाया गया – विचारण न्यायालय का आदेश अपास्त, क्योंकि यह साक्ष्य एकत्र करने या साक्ष्य निर्मित करने की कोटि में आता है – रिट याचिका मंजूर।

Cases referred:

1993 ILR 230, 2010(5) MPHT 88(CG), AIR 2007 SC 1426, (2003) 4 SCC 493.

Brahmendra Pathak, for the petitioner.
Rakesh Kumar Chourasia, for the respondent.

ORDER

K.K. Trivedi, J. :- By this writ petition under Article 227 of the Constitution of India, the petitioner who is non-applicant before the Court of

District Judge, Harda, in a divorce petition filed by the respondent, has come before this Court against the impugned order dated 07.03.2013 by which on an application made by the respondent/husband, the petitioner has been directed to go to the Medical College, Indore, for the purpose of getting the medical examination of the petitioner done to ascertain whether she is suffering from any mental disorder or not. It is contended that the respondent herein filed the suit for grant of divorce under Section 13 of the Hindu Marriage Act, 1955 against the petitioner on various allegations specifically alleging that the petitioner is suffering from epilepsy. For the said purpose and proof of the said allegations, certain documents have been placed on record by the respondent/ husband. These allegations made by the respondent have been specifically denied by the petitioner by filing a written statement alleging that in fact respondent has deserted the petitioner/wife in the month of August, 2011 and since even after making efforts, the respondent has not permitted the petitioner to enter the matrimonial home and in fact was not willing to admit the petitioner as his legally married wife. On a false allegation that the petitioner is suffering from such mental disorder, the suit for divorce has been filed. It is very categorically contended in the special pleadings that the petitioner was not suffering from such mental disorder. On the other hand, for creating the evidence when petitioner was taken to the hospital by the respondent himself, all medical reports were given in favour of the petitioner.

2. The respondent though has produced certain documents before the Trial Court but allegedly just to create an evidence, moved an application before the Court asking permission to send the petitioner herein for medical examination at Indore and to get the expert opinion on the said medical examination. Such a prayer made by the respondent was opposed by the petitioner on the ground that she was taken to the expert, certain tests were conducted, the reports were sent to the District Medical Board and opinion was given that there were no signs that the petitioner was suffering from any such mental disorder. Only with a motive to get the evidence created to prove such a false allegation made in the suit, the respondent has moved the application, therefore, the same may be dismissed. Since the said application has been allowed by the Trial Court, the writ petition is required to be filed.

3. The respondent by filing an application for vacating the stay, has placed on record certain documents. The medical certificate and certain test reports have been filed. It is contended in the application that keeping in view the

reports submitted by the Medical Officers and the experts, it was necessary to get the petitioner medically examined thoroughly and to obtain reports in that respect. By placing reliance in certain documents, it is said that even before filing of the suit, a complaint in the police was made by the respondent and this indicates that in fact application made by the respondent was not an afterthought, rather to get the issue decided in appropriate manner such a prayer was made. It is contended that in terms of the various pronouncements of law, the petitioner is required to be put to medical examination and, therefore, application was not filed by the respondent with any ulterior motive to create evidence. It is, thus, contended that the Trial Court has rightly appreciated all these facts and has properly decided the application of the respondent, therefore, the writ petition is liable to be dismissed being misconceived.

4. Heard learned Counsel for the parties at length and perused the record.

5. It is not in dispute that the proceedings initiated by the respondent are to be tried as a civil suit. It is to be seen from the pleadings in the application for divorce that the allegations were made that the petitioner herein was suffering from epilepsy even before the marriage and this fact was disclosed by the petitioner herein to the respondent after the marriage. Certain incidents have been mentioned by the respondent and the allegation was made that petitioner was visiting her parents every month for the purposes of bringing the medicines for the said ailment. It is the allegation made in the application by the respondent that he took the petitioner herein to the doctors, get her examined and the doctors have opined that the petitioner was suffering from mental disorder. If that was the situation, the respondent was required to prove all those facts by adducing the evidence. Since it was stated that the respondent was not having good financial condition to get the petitioner treated, though he has tried his best, these aspects were required to be proved by the respondent himself. The burden of proving such allegation was on the respondent with full force because the petitioner herein has specifically denied all those allegations in her written statement filed before the Trial Court.

6. To what extent the evidence was made available in this respect by the respondent has to be examined. If the documents filed along with the application for vacating interim stay are looked into, it would be amply clear that the petitioner was taken to the Medical Board even after filing of the suit for divorce. The suit for divorce was filed in the month of November, 2011, the

petitioner was examined by the Medical Board on 19.11.2012 and from this it is clear that only this much was said that the petitioner can be referred to the Neuro Physician for the purposes of getting her medically examined. As alleged by the respondent, the EEG test of the petitioner was conducted on 28.02.2011 at Bhopal and in that report nothing was found, rather it was a note made in the said report that normal EEG does not exclude the epilepsy. This being so, the very object of writing a report on 19.11.2012 was not enough to hold that the petitioner was required to be put to such medical examination. Even otherwise it was the responsibility of the respondent to prove such fact and in the course of adducing evidence if it is found by the Trial Court that such medical examination of the petitioner is necessary, order in that respect could be passed. The respondent has not started his evidence and at that stage it was not to be held that medical examination of the petitioner was necessary.

7. In the case of *Rekha Ravindra Kumar vs. Ravindra Kumar Ramchandra,* 1993 I.L.R. 230, this Court while dealing with such circumstances has categorically held that the well settled law is that the alleged mental disorder must be proved to be existing on the date the suit was filed. If that mental disorder was not on the date when the claim was made, on that ground alone the decree of divorce cannot be granted. A Division Bench of the Chhattisgarh High Court in the case of *Khumesh Deshmukh vs. Smt. Padmini Deshmukh,* [2010 (5) MPHT 88 (CG)] , has held that the concept of proof beyond the shadow of doubt is to be applied only in the criminal trials and not to the civil matters and specially not to the matters to such delicate personal relationship, in terms of the law laid-down by the Apex Court in the case of *Smt. Mayadevi vs. Jagdish Prasad,* AIR 2007 SC 1426. If it was a case of a fraud, it was the duty on the part of the respondent to establish that such fact of mental disorder, though was in existence in the petitioner much before the solemnization of marriage, was deliberately suppressed by the family members of the petitioner to get her married with the respondent. These aspects if are taken into consideration, it would be clear that in case such allegations were made by the respondent, at least he was to establish the case to that extent that in fact a fraud was committed with him by the family members of the petitioner. For that he was not required to obtain a report of subsequent ailment which the petitioner has developed. In fact he was required to prove that right from very beginning the petitioner was suffering from such ailment and for that reason since the marriage is said to be fraudulent one, the same was liable to be declared as null and void or a decree of divorce was to be

granted to the respondent.

8. Nothing is stated in the application so filed by the respondent before the Court below nor such application is placed on record. Even when the Chief Medical and Health Officer, Harda was directed to give such medical report, prima facie it was said that there was no symptoms available in the petitioner to show that she was suffering from Neurological ailment or epilepsy. The Neuro Physician, who has examined the petitioner on earlier occasion, himself could not give a definite opinion about such ailment as is clear from the report placed on record with the I.A. for vacating stay filed by the respondent himself, therefore, it was not open to the Trial Court to direct sending of the petitioner for medical examination. Merely because the petitioner was sent to the medical examination before the Medical Board, for the purpose of creating evidence, the petitioner was not required to be referred to medical examination at Indore. This view has been expressed by the Apex Court in the case of *Sharda vs. Dharmpal,* (2003) 4 SCC 493, wherein it is held that the power of matrimonial Court is extended for issuance of such direction but that power is to be exercised only if prima facie case is made out and there is sufficient material before the Court, produced by the person claiming such medical examination.

9. In view of the aforesaid discussion, it is clear that the Court below has exceeded in exercise of jurisdiction in allowing the application of respondent by the impugned order. Therefore, the said order cannot be countenance.

10. Accordingly, the writ petition is allowed. The order dated 07.03.2013 directing sending of the petitioner for medical examination to Indore is hereby quashed. However, the respondent would be free to make appropriate application for such medical examination of the petitioner in case prima facie evidence about the mental disorder or ailment of the petitioner is produced by the respondent in course of adducing evidence. At that stage, if such an application is made, the Trial Court would be free to examine preliminary evidence available on record and decide such application of the respondent on its own merits without being influenced by this order.

11. The writ petition is allowed and disposed of accordingly. However, there shall be no order as to costs.

Petition allowed.

I.L.R. [2016] M.P., 1640
WRIT PETITION
Before Mr. Justice K.K. Trivedi
W.P. No. 15826/2014 (Jabalpur) decided on 31 March, 2015

COMMUNITY ACTION & ors. ...Petitioners
Vs.
STATE OF M.P. & ors. ...Respondents

A. ***Contract - Request for proposal*** **- A unified scheme for amalgamating medical schemes like Sanjeevani 108, Janani Express etc. with condition that applicant should have atleast 50 crores of average annual turnover - Held - Merely because individually the petitioners would not be eligible to take part in the scheme, it cannot be said that such policy by the state is not just or proper or is arbitrary, as it is for the benefit of public at large - Petition dismissed. (Paras 18 to 22)**

क. *संविदा – प्रस्ताव हेतु अनुरोध* – चिकित्सा योजनाओं जैसे कि संजीवनी 108, जननी एक्सप्रेस इत्यादि को समामेलित किये जाने हेतु एक संयुक्त योजना इस शर्त के साथ कि आवेदक का औसत वार्षिक आवर्तन कम से कम 50 करोड़ का होना चाहिए – अभिनिर्धारित – मात्र इसलिए कि याचीगण व्यक्तिगत रूप से योजना में भाग लेने हेतु पात्र नहीं होंगे, यह नहीं कहा जा सकता कि राज्य की उक्त नीति न्यायसंगत अथवा उचित नहीं है अथवा मनमानीपूर्ण है, जबकि यह जनसाधारण के लाभ के लिए है – याचिका खारिज।

B. ***Constitution - Article 226 - Policy decision - Judicial review*** **- It is well settled that the Courts do not ordinarily interfere with the policy decisions unless the decisions are based on mala fide, or are contrary to statutory provisions or unconstitutional or is abuse of power. (Paras 15 & 16)**

ख. *संविधान – अनुच्छेद 226 – नीतिगत निर्णय – न्यायिक पुनर्विलोकन* – यह सुस्थापित है कि नीतिगत निर्णयों में न्यायालय सामान्यतः हस्तक्षेप नहीं करते हैं जब तक कि ऐसे निर्णय असद्भावपूर्ण अथवा कानूनी उपबंधों के प्रतिकूल अथवा असंवैधानिक अथवा शक्ति के दुरूपयोग पर आधारित न हो।

Cases referred:

(2001) 3 SCC 635, (2013) 6 SCC 616, (2011) 6 SCC 597, (2010) 6 SCC 303, (2012) 8 SCC 216, AIR 1979 SC 1628, AIR 1980 SC 1992, AIR 1996 SC 51, AIR 1999 SC 393, (1997) 1 SCC 738.

Vipin Yadav, for the petitioners.

Ravish Agrawal, A.G. with *Deepak Awasthy,* G.A. for the respondent no.1.

R.N. Singh with *A.J. Pawar,* for the respondent no. 2.

Manish Dutt with *Nishant Dutt,* for the respondent no. 3.

ORDER

K.K. TRIVEDI, J. :- The petitioners, four in number, have called in question the Request For Proposal (herein after referred to as 'RFP') for integration, operation and management of life saving systems namely Sanjeevani 108, Janani Express, Medical Mobile Units (herein after referred to as 'MMU'), Health Helpline and Doctors Express Service in Madhya Pradesh, on the ground that with malafides such a policy is made to facilitate individual and to debar those, who are already operating in the aforesaid fields for last many years. More particularly the eligibility criterias indicated in the notice inviting proposal so issued by the respondents is called in question on various grounds. Mainly it is contended by the petitioners that they are engaged in providing the said service and are operating within the State of Madhya Pradesh right from the year 2006-2007. The scheme for providing the medical assistance is formulated in three groups namely Sanjeevani 108, which is the scheme for emergency medical ambulance service. The second scheme is known as Janni Express where the ambulance service is provided to the pregnant women. The other one is mobile medical unit under Deendayal Chalit Asptal Scheme. The petitioners No.1, 2 and 4 are engaged in running the MMU since 2007 and petitioner No.3 is running the MMU since 2006. The work orders were issued to them by the competent authority of the State.

2. It is alleged by the petitioners that since the respondent No.3 is engaged in Sanjeevani 108 Scheme, while the National Rural Health Mission Scheme was redesigned, with an ulterior motive such conditions were prescribed in the eligibility criteria that the persons like petitioners may not be able to take part in the said proceedings and ultimately the benefit would be extended to one particular company like respondent No.3. It is the case of the petitioners that with this ulterior motive the entire scheme has been formulated and circulated on 12.09.2014. It is the case of the petitioners that even when on earlier occasion proposals were invited, objections were raised by the persons like petitioners and it was pointed out that the scheme is not to be made in the manner to favour somebody and individual company or society. The

representations were so made by the petitioners on 03.02.2014 and 07.02.2014.

3. Instead of deciding the representations of the petitioners where they have already disclosed the facts that intention of the respondents was to amalgamate all the schemes and to make a unified scheme with an ulterior motive, yet by notification of expression of interest, proposal was indicated that the Government of Madhya Pradesh was willing to integrate all the existing schemes under one call center and one toll free number to provide service in health care services and patient transport through public private partnership. Certain conditions were prescribed in the said memorandum in reference to which raising the objections, representations were again filed by the petitioners on 14.03.2014 and detailed representations were made on 25.03.2014 and 15.05.2014. Instead of considering the said representations in rightful manner, the RFP was circulated on 12.09.2014. Prior to this since the bids of the petitioners were already received by the respondents, they were aware of the financial status of the petitioners and to facilitate only one, they have prescribed such conditions of eligibility in the said proposal that now the petitioners cannot take part in the tender proceedings. Even they cannot extend their offer. The very object of making such scheme is to facilitate the respondent No.3 and, therefore, present writ petition is required to be filed calling in question the validity of such scheme. It is, thus, contended that in fact such scheme is bad in law and is liable to be quashed. The reliefs to the effect are that request for the proposal dated 12.09.2014 issued by respondent No.2 be quashed and any other relief may be granted to the petitioners.

4. While entertaining this writ petition on 15.10.2014, an interim stay was granted by this Court to the effect that offers if received, be opened but shall not be finalized.

5. By filing the return the respondent No.1 has very categorically contended that the allegations of malafides alleged against the respondents are not acceptable as are not founded on any evidence or supporting material. In fact the return of respondent No.1 is nothing but the return of respondent No.2 as the return of respondent No.2 has been adopted by the respondent No.1-State. In the return of respondent No.2 while denying all such claim made by the petitioners, it is contended that when the scheme was floated on earlier occasion, work was assigned to different units, complaints were received that the work was not satisfactory. It is specifically contended that in particular

districts of Mandla, Dindori, Shahdol, Sidhi and Umariya, out of 123 MMUs, on enquiry the District Collectors have found that 23 MMUs were not discharging proper duties and they were closed after conducting detailed investigation. The policy decision by the respondents was taken in this respect for providing integrated health service after taking into consideration the past experience in providing such service. The scheme is so made that there is a central monitoring, better coordination amongst the doctors, health care workers and the service providers. There is an aspect of providing the health services at village level and for that purpose, schemes have been started providing the auxiliary nurse, midwife and Asha workers at the village level. To coordinate between such workers and the mobile health units with the aid of modern technology, complete organized mechanism is provided under the new scheme. With this object the scheme is made.

6. It is the contention of respondents that there are vast development changes in the old scheme than the new scheme and this being a policy decision of the State for the benefit of people at large, there is no arbitrariness in making such policy. It is the contention of the respondents that every care is taken to provide participation in the said scheme and there is no such condition prescribed in the scheme which debars the existing service providers to take part in the proceedings. The only aspect which is prescribed is that looking to the services, target to be achieved and the coverage, to ensure that such life saving services may continue properly, there are certain eligibility condition for participation of the service providers. The conditions so prescribed still make the scheme applicable for the service providers like petitioners as they may take part in the same in the manner indicated under the eligibility criteria. As it is specifically provided that an applicant may be a single entity, a joint venture company or consortium of entities formed for this purpose with a valid Memorandum of Understanding (MOU) duly executed, if the petitioners so wish, they may take part in the said proceedings. Instead they have not taken part in the said proceedings deliberately. Now therefore, the petitioners cannot challenge the validity of the scheme. The other conditions mentioned are not such that may not be achieved for large number of services to be provided by the service provider. Looking to the need of the day, the scheme was required to be improved and the same has been done by the respondents within their competence and as such challenge to the action taken by the respondents is misconceived and the writ petition is liable to be dismissed.

7. The respondent No.3 has filed an independent return contending inter alia that respondent No.3 is operating and providing ambulance services not only in one place but is operating in seven States of country successfully and has experience in providing such services. It is not that the respondent No.3 is to be favoured and, therefore, the policy has been made in this respect by the respondent-State. The inception of respondent No.3 has taken place in the year 2001 and for all these years the respondent No.3 is providing such services. It has the infrastructure and is in constant touch of latest technologies in the matter. In fact the respondent No.3 is the pioneer in the field of coordinated emergency response system in India. Thus, to say that respondent No.3 is being favoured by making such an arbitrary policy is incorrect. While replying to the allegations made by the petitioners, the respondent No.3 has very categorically contended that it is Not for Profit Society, registered under the relevant Act and is established for social welfare, rather commercial. It has more than 9000 ambulances in different States and as such it is wrong to say that to extend the helping hand to respondent No.3, the State has made such a policy and thus the respondents No.1 and 3 are playing hands in gloves. The rejoinder is filed by the petitioner but much or less the same situation has been explained. Except that it is alleged that the respondents have failed to explain the rational behind the impugned eligibility conditions contained in the RFP.

8. Heard learned Counsel for the parties at length and perused the record.

9. It is vehemently contended by learned counsel for the petitioners that when initially the scheme was made for providing such services, the requirements and eligibilities criteria were fixed by the respondent No.2. Since the petitioners were found eligible, work orders were issued to them in the year 2006 and 2007. Their work and performance has been appreciated by the authorities of respondents as is certified by them. There are no complaints against them from the public. All of a sudden what was the need of making such a policy where the eligibility criterias are provided in such a manner that the petitioners would not be in a position to take part in such tender proceedings and as virtually nobody in the entire State would meet out such criteria the work would be granted to an entrepreneur of other State. This being a calculated method of keeping the petitioners away from participation in the tender proceedings, in fact in arbitrary manner with malafide intention, the policy has been made, therefore, the same is bad in law.

10. The next submission of learned Counsel for the petitioners is that the job as was assigned to the petitioners is being done on a reasonable cost and expenses. Whereas, to oblige an outsider, the costs and expenses are so prescribed in the policy that a huge amount out of the public exchequer would be spent for the very same job which the petitioners are performing at a very low costs. This being so, the allegations of malafide are made out because no explanation to such allegations much less satisfactory one has been given by the respondents.

11. Lastly, it is submitted by learned Counsel for the petitioners that instead of areawise function of such scheme, the unified operation from one call center of all the scheme is neither viable nor has succeeded in past. Therefore, the impugned scheme is not in the interest of public at large. The element of public utility is completely overlooked by the respondents while making the unified scheme, that too allegedly in the public interest. As such the policy is liable to be quashed.

12. Per contra learned senior Counsel for the respondent No.2 has submitted that the scheme is purely in the public interest. The object of making scheme itself prescribes that it is only and only for the benefit of public at large. Earlier separate schemes were made and individually were being operated. Now a decision is taken to club them together and to bring under the control of one call center. The past experience was that the rural people were not aware of the necessary unit to provide them immediate medical assistance and sometime instead of calling the appropriate health service provider, they were contacting the other scheme provider, as a result sometime the appropriate health assistance could not be made available to them. Now under the new scheme there would be only one call center and after identifying the need, appropriate service provider would be sent to them.

13. It is submitted by learned senior Counsel that from the past experience the ground level difficulties have been identified and to strengthen the scheme and to make it more viable and fruitful, the unified mechanism is evolved. Since now all the schemes are unified, the costs and expenses increase is invariable and that too when more improved and modern technology is being used. Therefore, the allegation that the cost is increased to favour someone is baseless. It is also contended that for such a scheme if a service provider is to be engaged, naturally the financial status of such service provider matters a lot and, therefore, such criteria of financial eligibility are provided in the scheme.

The future expansion and the need of the coming days have to be taken note of as scheme is not made for one time but has to go long way as health care and medical assistance to citizen is the prime consideration of respondents. Therefore, no fault can be alleged in the scheme and as such the present petition is devoid of any merits.

14. Shri Ravish Agrawal, learned Advocate General has submitted that the State Government is alive of the need of the day for the health conditions of the citizens of State. After a thoughtful consideration and research taking into account the past experiences, the new scheme is made. While taking policy decision the State has taken care of existing service providers as well. It is not that such services have to be stopped immediately on executing new contract with the new service provider under the scheme. Though it was not necessary but such is the scope of scheme in clause 1.4 where it is provided that the new service provider has to submit a plan for implementing the scheme in phase manner. A detailed implementation plan to integrate and operate the five services through one call center across all the specified districts of the State, with their expansion if any, has to be prepared and furnished by the service provider. The service provider would be allowed six months' time to complete the integration, implementation and operation of entire project in all the districts. Operation of Sanjeevani Ambulance would not be discontinued but shall be taken over, in phased manner. Those who are already operating in fields can also participate in proceedings of new contract. Therefore, it is incorrect to say that policy of the State is arbitrary or is made in colourable exercise of powers and thus no case is made out to grant any relief to the petitioners, specially when they have not participated in the proceedings.

15. First of all it has to be examined under what circumstances a policy can be called in question in the Courts of law. The Apex Court in the case of *Ugar Sugar Works Ltd. vs. Delhi Administration and others,* (2001) 3 SCC 635, has held that a policy made by the State Government is not to be faulted only on the ground it hurts the business interest of a party unless it is established that the policy is based on malafides, unreasonableness, arbitrariness or unfairness etc., as has been held in paragraph 18, which read thus :

> "18. The challenge, thus, in effect, is to the executive policy regulating trade in liquor in Delhi. It is well settled that the courts in exercise of their power of judicial review, do not ordinarily interfere with the policy

decisions of the executive unless the policy can be faulted on grounds of mala fide, unreasonableness, arbitrariness or unfairness etc. Indeed, arbitrariness, irrationality, perversity and mala fide will render the policy unconstitutional. However, if the policy cannot be faulted on any of these grounds, the mere fact that it would hurt business interests of a party, does not justify invalidating the policy. In tax and economic regulation cases, there are good reasons for judicial restraint, if not judicial deference, to judgment of the executive. The Courts are not expected to express their opinion as to whether at a particular point of time or in a particular situation any such policy should have been adopted or not. It is best left to the discretion of the State."

16. On previous occasion also these aspects were looked into by the Apex Court and summarizing all those laws in the case of *Manohar Lal Sharma vs. Union of India and another,* (2013) 6 SCC 616, the Apex Court has categorically said that in all matters affecting policy the Court do not interfere unless the policy is unconstitutional or contrary to the statutory provisions or arbitrary or irrational or in abuse of power. In the case of *State of Himachal Pradesh and others vs. Himachal Pradesh Nizi Vyavsayik Prishikshan Kendra Sangh,* (2011) 6 SCC 597, though dealing with the policy relating to the courses in higher education of Technilogy (sic:Technology), it is held that policies are not to be interfered by the Courts as in absence of established malafides, if the Court interfere with such policy decision, it means to restrict the State's constitutional authority and power to frame the policy, specially in such vital areas. In the case of *Shimnit Utsch India Private Limited and another vs. West Bengal Transport Infrastructure Development Coorporation Limited and others*, (2010) 6 SCC 303, it is held that the Government policy can be changed with changing circumstances and only on the ground of change, the policy is not said to be vitiated. The Government has discretion to adopt different policies, alter or change previous policy to serve the public interest and make it more effective. It should be in conformity with Wednesbury reasonableness and free from arbitrariness, irrationality, bias and malice. Summarizing the law in respect of the interference with the policy, the extension of jurisdiction of the Court, the Apex Court summarized in paragraph 49 to 51, which reads thus :

"49. In the light of the aforenoticed legal position, we shall now examine whether judicial intervention is called for in NIT issued by

the State of West Bengal and the State of Orissa for manufacture and supply of HSRP. Insofar as the State of West Bengal is concerned, the first NIT was issued in the month of July 2003 fixing 6-8-2003 as the last date for submission of tender papers. Pursuant thereto, four bidders participated. The finalisation of the tender process could not take place because of interim order passed by this Court in Assn. of Registration Plates and other connected cases. These cases were decided by this Court on 30.11.2004.

50. Of the four bidders, who initially participated in the tender process, one withdrew and as regards Promuk, an objection was raised by Shimnit about their eligibility. Shimnit approached the Calcutta High Court and obtained an interim order from the Single Judge that tender process shall not be finalised. As a matter of fact, due to litigation no substantial progress took place for two years in finalisation of process for which NIT was issued in July 2003 and practically two bidders in the entire tender process remained in fray. In interregnum, considerable number of indigenous manufacturers obtained the requisite TAC from the approved institutions as per the provisions of the 1988 Act and thereby acquired capacity and ability to manufacture HSRP.

51. In the backdrop of these reasons, the State Government seemed to have formed an opinion that by increasing competition, greater public interest could be achieved and, accordingly, decided to cancel first NIT and issued second NIT doing away with conditions like experience in foreign countries and prescribed minimum turnover from that business. Whether the State Government could have changed terms of NIT despite the judgment of this Court in Assn. of Registration Plates ? Once a particular matter relating to conditions in NIT has been finally decided by the highest court, the State Government, which was party to the litigation, ought to have proceeded accordingly but, in a case such as the present one, where the circumstances changed in some material respects as aforenoticed, departure from the earlier policy cannot be held to be legally flawed, particularly when there is no challenge to the changed policy reflected in second NIT on the ground of Wednesbury reasonableness or principle of legitimate expectation or arbitrariness or irrationality. In considering whether there has been a change of circumstances sufficient to justify departure from

the previous stance, the Division Bench of the Calcutta High Court recorded a finding that reasons stated by the State Government for departure from the conditions in the first NIT did exist and accepted the contention of the State Government that by increasing the area of competition, greater public interest would be subserved because of financial implications."

Again in the case of *Michigan Rubber (India) Limited vs. State of Karnataka and others*, (2012) 8 SCC 216, the Apex Court considering the various aspects has discussed the scope of Court's interference in the matter of making policies in paragraph 35, which reads thus :

"35. As observed earlier, the Court would not normally interfere with the policy decision and in matters challenging the award of contract by the State or public authorities. In view of the above, the appellant has failed to establish that the same was contrary to public interest and beyond the pale of discrimination or unreasonableness. We are satisfied that to have the best of the equipment for the vehicles, which ply on road carrying passengers, the 2nd respondent thought it fit that the criteria for applying for tender for procuring tyres should be at a high standard and thought it fit that only those manufacturers who satisfy the eligibility criteria should be permitted to participate in the tender. As noted in various decisions, the Government and their undertakings must have a free hand in setting terms of the tender and only if it is arbitrary, discriminatory, mala fide or actuated by bias, the courts would interfere. The courts cannot interfere with the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical. In the case on hand, we have already noted that taking into account various aspects including the safety of the passengers and public interest, CMG consisting of experienced persons, revised the tender conditions. We are satisfied that the said Committee had discussed the subject in detail and for specifying these two conditions regarding prequalification criteria and the evaluation criteria. On perusal of all the materials, we are satisfied that the impugned conditions do not, in any way, could be classified as arbitrary, discriminatory or mala fide."

17. In reference to the above laws, now the laws relied by learned Counsel

for the petitioners are to be examined. Heavy reliance is placed on the case of *Ramana Dayaram Shetty vs. The International Airport Authority of India and others,* AIR 1979 SC 1628. This was a case of tenders for grant of licence to run a restaurant and shop in Airport. The law was discussed and imposition of eligibility condition was held to be proper by the Apex Court. In the case of *M/s Kasturi Lal Lakshmi Reddy etc. vs. The State of Jammu & Kashmir and another*, AIR 1980 SC 1992 much emphasis is put regarding the findings of Apex Court in that case. Since the important aspect was to examine the intention behind the Government action it was held that such an action of the State was in the public interest. Similarly, in the case of *Sterling Computers Ltd. vs. M/s M & N Publication Ltd. And others,* AIR 1996 SC 51, the grant without calling tenders by the State was called in question. The making of policy was not the scope of challenge. However, the fault of such action was accepted by the concerned and, therefore, such was not debated. In the case of *Raunaq International Ltd. vs. I.V.R. Construction Ltd. and others*, AIR 1999 SC 393, the grant was challenged by unsuccessful bidder and the same principles were laid-down that except the malafide, challenge to the grant was not available to such tenderer. In the case of *Asia Foundation & Construction Ltd. vs. Trafalgar House Construction (I) Ltd. and others.* (1997) 1 SCC 738, the law as was made on earlier occasions that every action of State should be founded on public interest, was reiterated.

18. Now in view of the aforesaid law, the submissions made by learned Counsel for the petitioners are to be tested. True it is that on earlier occasion a policy was made by the respondents according to which the petitioners were granted the contract to provide certain services. However, merely because the petitioners were on earlier occasion provided the service contracts, it cannot be said that no change in the policy could be made even when the past experience of the respondents and the need of the day, otherwise required. The previous criteria, which was provided in the proposal circulated on 04.03.2014 also was the same. The objection to this was raised by the petitioners by filing their objections. However, there was no restriction that persons like petitioners even by forming a consortium cannot take part in the proceedings. The formation of such consortium or a group is also prescribed in the definitions prescribed in the memorandum dated 12.09.2014. A bidding consortium or the consortium according to the said definition refer to a group of entities that have collectively submitted the response in accordance with

the provisions of the RFP. The eligibility criterias as are prescribed in Clause 1.2 refers to certain conditions, which specifically prescribes that applicant can either be a single party, a joint venture company or consortium of entities formed for this purpose. The other expression of eligibility criteria do not create any bar or hindrance in the way of the petitioners. However, since only in Clause (d) the annual turnover is provided, it appears that the petitioners are aggrieved by this prescription. For the purposes of appreciation, it would be necessary to reproduce the eligibility criteria, which reads thus :

"1.2 Eligibility Criteria

The applicant can either be a single entity, a joint venture company or consortium of entities formed for this purpose with a valid memorandum of understanding (MOU) duly executed. The applicant(s) can either be a Firm, Company, Society or a Trust fulfilling following conditions are only eligible to apply :

(a) Should have minimum one year of experience as on the last date of bid submission in successful operation and management of at least 25 seats call center based minimum 300 nos. Emergency Medical Ambulance Service, with computer telephony integration and ability to log calls with GIS based GPRS integrated vehicle monitoring system for any Government Service Provider. Operation of these 300 nos. emergency medical ambulance in a year may be cumulative of multiple sites/orders.

(b) Bidder should not have been convicted by any court of law for any criminal or civil offences either in the past or in the present. In case of a consortium, the members should not have been declared bankrupt in the past.

(c) Should not have been black listed in the past or in the present by any Central/State/Public Sector undertaking in India.

(d) Should have at least 50 crore of average annual turnover in the similar line of activities (i.e. excluding non-operating turnover) during last two completed financial years starting from financial year 2012-13. Bidder needs to submit audited turnover statements. If audited statement of FY year 2013-14

are not available, applicant should submit audited turnover statement of FY 2011-12 and turnover statement of FY 2013-14. While calculating 2 years average annual turnover, only audited statement shall be considered."

19. The RFP further prescribes the service target group and coverage. When such service is required in such large scale, a small company or even a consortium having no financial status as prescribed in Clause (d) of the eligibility criteria would not be in a position to discharge all those functions. It is also not a prescription created under the new policy that those who were not earlier associated with the assignee of the work would not be associated, even when they have the efficiency and eligibility to be associated in that work. Therefore, merely because individually the petitioners would not be eligible to take part in the proceedings, it cannot be said that such policy made by the State is not just or proper or is arbitrary in any manner.

20. As far as the situation, circumstances and requirement for making of the new scheme discussed herein above, it has to be held that the impugned scheme has been made by the State for the benefit of public at large. No evidence of malafide is placed on record by the petitioners and, therefore, such submissions are not worthy of consideration. Mere probability cannot be treated as evidence of malafide and, therefore, the impugned policy decision cannot be said to be arbitrary or a result of colourable exercise of power by the State.

21. It is contended by learned Advocate General and learned senior Counsel for respondent No.2 that the contract of the petitioners is to expire on 31st March, 2015. Therefore, in all these circumstances, proceedings of the respondents should not be held up. The scheme itself is for the purposes of benefit of the public at large and, therefore, it cannot be said to be arbitrary or malafide.

22. In view of the aforesaid discussion, there is no force in the writ petition, which fails and is hereby dismissed. However, there shall be no order as to costs.

Petition dismissed.

I.L.R. [2016] M.P., 1653
WRIT PETITION
Before Mr. Justice S.C. Sharma
W.P. No. 3415/2014(S) (Indore) decided on 10 April, 2015

SUNIL KUMAR DAYA ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

Service Law - Minimum pay scale as per recommendation of 6th Pay Commission **- Earlier Writ Petitions were filed which were allowed and respondents granted pay scale to the petitioners as prayed - Petitioner is identically placed person - Respondents cannot be permitted to discriminate the identically placed person - Petition allowed. (Paras 10 & 12)**

सेवा विधि – छठवें वेतन आयोग की अनुशंसा अनुसार न्यूनतम वेतनमान – पूर्व में, रिट याचिकाएं प्रस्तुत की गईं थीं जो कि मंजूर की गईं एवं प्रत्यर्थीगण द्वारा याचीगण को यथा निवेदित वेतनमान स्वीकृत किया गया था – याची समान रूप से स्थित व्यक्ति है – प्रत्यर्थीगण को समान रूप से स्थित व्यक्ति से विभेद करने की अनुमति नहीं दी जा सकती – याचिका मंजूर।

Case referred:

JT 2006(8) SC 595.

Anand Agrawal, for the petitioner.
Bhuwan Deshmukh, for the respondents/State.

(Supplied: Paragraph numbers)

ORDER

S.C. SHARMA, J. :- The petitioner before this court has filed this present petition for issuance of an appropriate writ, order or direction directing the respondents to pay the minimum of pay scale, as per the recommendation of the 6th Pay Commission.

2. In the present case, the petitioner's contention is that he was appointed as a dailywager on 11-01-1990 under the Narmada Valley Development Authority, which is an instrumentality of the State of Madhya Pradesh and since then he is continuously working with the respondents. Petitioner has further stated that in case of rest of the employees respondents have granted

them minimum of the pay scale, as per recommendation of the 5th and 6th Pay Commission and the petitioner has enclosed Annexure-P-3, which is on record dated 28-10-2010. The same reflects that as many as fourteen Writ Petitions were preferred before this court and they have been allowed and thereafter a contempt petitions were preferred and because of the contempt petitions, respondents have granted the pay scale as prayed by the petitioners, therein. Petitioner's contention is that he is an identically placed person like the petitioners, whose names have been mentioned in Annexure-P-3 dated 28-10-2010 and he is also entitled for the same relief.

3. On the other hand, learned counsel for the Respondent State has argued before this court that the petitioner is not entitled for the regular pay scale and, therefore, he has drawn the attention of this court towards the judgment delivered in the case of *State of Madhya Pradesh and other's Vs. Yogesh Chandra Dubey and others* reported in Judgment Today 2006(8) SC 595. He has also placed reliance upon a judgment delivered by the apex court in the case of *State of Punjab and others Vs. Surinder Singh and another* in Civil Appeal No. 5607-5608 of 2001. Respondents have also placed reliance upon a judgment delivered by the apex court in the case of *S.C. Chandra and others vs. State of Jharkhand and others* reported in AIR SC 3021 (Annexure-R-5). Respondents have also placed reliance upon a judgment delivered by the Principal seat of this court in the case of WP No. 1773/2006 *(Girwar Singh Morya Vs. State of M.P. and others)* and in the case of WP No. 21928/2011 *(Saiyad Naeem Ulhussain and others Vs. State of MP. and others)* and his contention is that the petitioners are not entitled for minimum of the pay scale, as prayed by them. It has been further stated that the judgment delivered in the case of *Girwar Singh Morya* is the case of Forest Department and the judgment delivered in the case of *Saiyad Naeem Ulhussain* is the case of N.V.D.A. In the case of *Girwar Singh Morya* (supra), the relief has not been granted. However in the case of *Saiyad Naeem Ulhussain* (supra) respondents therein have been directed to decide the claim of the petitioner, in accordance with law.

4. The contention of the learned counsel for the respondent is that the petitioner is not entitled for the minimum of the pay scale as claimed by him.

5. Heard learned counsel for the parties and perused the record. The matter is being disposed of with the consent of the parties at the admission stage itself.

6. This court after hearing the parties at length has carefully gone through various judgments delivered from time to time. In the case of *Kishori Lal Prajapati and others Vs. State of M. P. and others* in WP No. 5332/2010(s) in paragraphs 5 to 9, this court has held as under:-

> *"5. Now the only controversy which is to be examined whether the refusal to grant the minimum of the pay scale after revision of the pay of the post on which the petitioners are continuing for a long period is justified or not, and whether in view of the law laid down by the Apex Court in the case of Secretary, State of Karnataka and others Vs. Uma Devi (3,) and others [(2006) 4 SCC 1], it would be possible for this Court to grant such a relief to the petitioners, as has been considered by the Division Bench of this Court in the case of M.P. Urja 'Vikas Nigam Ltd. (supra). In the case in hand, the situation is totally different. At no point of time, it is contended or proved by the respondents that the petitioners were working as illegal appointees. The distinction between the two appointment, illegal appointment or irregular appointment has been drawn by the Apex Court in the case of Uma Devi (Supra). In case, in hand the work was available and obviously the same was available, the posts were created by the NVDA for appointment of drivers and others, but regular recruitment was not done, on the other hand, certain daily wages or fixed wages appointments were made by the NVDA. The respondents have not demonstrated that the appointment of petitioners were illegal in any manner. That being so, it cannot be said that the petitioners had no right to claim minimum of the pay scale of the post against which they were appointed. Secondly, when the matter went before the Tribunal, no plea was raised by the respondents that the persons like petitioners would not be entitled to benefit of minimum of the pay scale of the post against which they were working for a long time. On the other hand, when the order was passed by the Tribunal to this effect, the respondent-State has accepted the same happily and has carried out and complied with the said*

order by extending the benefit of the minimum of the pay scale of the post as was prevalent at that time, with the allowances. This being so, it is not open to the State now to say that the petitioners would not be entitled to any benefit of revised payment of wages in the minimum of the pay scale of the post on which they are working for a long time.

6. The principle of classification of an employee on a post, as is envisaged in the Industrial Law is very simple. If an employee is said to have remained working in one calender year for 240 days or more on one post, he is said to be entitled for classification on the said post. If the persons like petitioners are. continuing, it is very clear that the work is available. If the work is available and the posts are already sanctioned, the petitioners are said to be classified on the said post on account of their continuous long working for 20 or more years. Thus, the stand taken by the respondents that the petitioners would not be entitled to minimum of the pay scale of the post against which they are working, cannot be accepted. The factual aspect is distinguishable than that of the facts in the case of M.P. Urja Vikas Nigam Ltd. (supra). The very same principle would not be attracted in the present case.

7. If the persons like petitioners were granted the benefit of minimum of the pay scale with the allowances, applicable on the post on which they are working, how could it be said that they will not be entitled to the revision of the pay scale if the pay of the said post is revised by the State Government accepting the recommendation of the Sixth Pay Commission. The order of the Tribunal is clear. It nowhere says that the persons like petitioners would be entitled to only minimum of the pay scale as is prevalent on the date and they will never get benefit of revision of the pay scale. The only rider put by the Tribunal is that the petitioners would not get the increments of pay. This being so, the respondents are bound to extend the benefit of

revision of the pay, applicable to the post on which the petitioners are working. Consequently, the petitioners will get the benefit of minimum of the revised pay scale and allowances of the posts against which they are working, as has been accepted by the State Government on the basis of recommendation of the Sixth Pay Commission. The same would be applicable to the persons like petitioners from the date the revision of pay scale has been done. The admissible amount is to be calculated and is to be paid to the petitioners.

8. Resultantly, the writ petitions are allowed. The respondents are directed to grant benefit of revision of the pay scale on the recommendation of Sixth Pay Commission to the petitioners. The minimum of the pay scale as revised from time to time be paid to the petitioners along with the admissible allowances, from the date the said revision has been accepted by the State Government. The arrears of salary be calculated and be paid to the petitioners, within three months from the date of receipt of certified copy of the order passed today.

9. With the aforesaid directions, the writ petitions stand disposed of finally. There shall be no order as to costs."

7. Meaning thereby, in the case of *Kishorilal*, the benefit of revision of pay scale on the basis of the recommendation of the 6th Pay Commission has been granted to the petitioner, therein. Both the judgments delivered by the learned Single Judge in the case of *Kishorilal* were subjected to judicial scrutiny and the Division Bench vide order dated 09-07-2013 passed in Writ Appeal No. 1301/2012 held as under:

"Heard on I.A. No. 14448/2012, which is an application for condonation of delay.

There is a delay of 72 days in filling the appeal.

Prayer made in the application is not opposed by learned counsel for the respondents, hence it is allowed.

Delay in filing the appeal is condoned.

It is submitted by the appellant that in identical matters, learned Single Bench of this Court had dismissed the writ petition but the writ Court has not considered this aspect. In support of his contention, he has placed reliance on the judgments passed in the cases of Girwar Singh Mourya Vs. State of M.P and others, (W. P. No. 1773/2006 (S)]. Sayed Naeem Ul Hasan and others Vs. state of M.P. And another decided on 4.1.2012 (WP. No. 17928/2011) and Dinesh Shukla Vs. State of Madhya Pradesh and others (W.P. No. 18802 / 2003).

Shri Yadav learned counsel for the respondents submitted that identical matter has been considered by the Division Bench of this Court in WA. No. 53/2013 (State of M.P and others Vs. Bhagchand Patel decided on 23.1.2013), dismissed the writ appeal on merit. The aforesaid judgment is also applicable in the present case.

The aforesaid position and facts have not been disputed by Shri Ganguly. The Division Bench of this Court has considered the controversy and held as under:

> *"This appeal is directed against the order dated 10.10.2012 passed in W.P. No. 16930/ 2012 by which learned Single Judge of this Court directed the appellants herein to make payment of minimum revised pay scale as has been granted to others and to make payment of arrears also to the respondent.*
>
> *Learned counsel appearing for the appellant would submit that respondent being a daily wager was not entitled for the revised pay scale and the learned Single Judge erred in directing so.*
>
> *From perusal of the record, it is not in dispute that respondent was getting*

minimum of the pay scale since the year 2000. Thereafter the pay scale was revised from time to time. He was continued to be paid on the basis of minimum pay scale but no benefit was extended to the respondent in respect of revised pay scale from time to time. The question has been considered by the Division Bench of this Court in M.P. Urja Vikas Nigam Ltd.,. and others Vs. Rudra Prasad Mishra, 2008 (II) MPJR SN15 (WA. NO. 419/2007 decided in 2.5.2007). The Division Bench held thus:

"Once the pay scale has been revised the respondent has to get the benefit of the said pay scale in the lowest time scale of pay as directed by the Division Bench. We are inclined to think so as the earlier pay scale has become extinct. In the ultimate conclusion, the appellants are bound to compute at the said revised scale pay for the purpose of conferral of benefit of lowest time scale pay to the respondent and the same should be computed and paid within a period of one month."

As the question has been well settled by the Division Bench of this Court, and we do not find any reason to differ with the aforesaid order, we find that the Single Bench has rightly considered the aforesaid question which appears to be in consonance with the judgment passed by the Division Bench.

In view of the aforesaid we do not find any merit in this appeal and accordingly is dismissed at admission stage with no order as to costs."

As the controversy has already been decided in the case of Bhagchand (Supra), we find that this appeal is without merit and dismissed at admission state with no order as to costs.

C. C as per rules."

8. The aforesaid case of *Kishorilal* is arising out of the same Organization ie N.V.D.A. The State Government being aggrieved by the judgment delivered in the case of *Kishiorilal* has finally approached the apex court and the apex court in the case of *State of M.P. and others Vs. Kishorilal Prajapati and others* passed in SLP No. 28227/2013 dated 16-10-2013 has passed the following order:-

"The petitioners, who appear to have violated the provisions of Section 2 (ra) and (4) read with Fifth Schedule of the Industrial Disputes Act, 1947 by continuing the respondents as daily wage employees for more than two decades have filed this petition under Article 136 of the Constitution for setting aside the order passed by the Division bench of the high Court which, in our considered view is mot innocuous.

The respondents had filed an application before the State Administrative Tribunal for regularisation of their services and for payment of salary and allowances at par with regular employees.

At the hearing of the application, learned counsel appearing for the respondents gave up their claim for regularisation and pleaded that they will feel satisfied, a phenomena usually witnessed in the Court proceedings involving poor and down trodden, if they are paid minimum of the regular time scale.

The Tribunal accepted the submission of the learned counsel and passed order dated 15.12.2000, the relevant portion of which reads as under:

"So far as the claim of the applicants for the grant of minimum pay in the pay scale of the post on which they

are working are concerned such claims are fully covered by the earlier division bench decision of this tribunal rendered in the case of Bharat Darshan Shrivastava and others vs. State of M. P. And others 1998 M.P.S.I.R. 278. Hence by allowing the petition the respondents are directed to pay the wages to the applicants on the basis of minimum of the pay scale of the post against which the applicants are working along with all applicable allowances but without benefit of increments. This payment be made with effects from the date of filing of this petition. Payment of arrears shall be made within three months from the date of this order with the aforesaid order and direction this case is disposed off finally.

When the State Government accepted the recommendations of the 6th Pay Commission and framed Madhya Pradesh Salary Revision Rules, 2009, the respondents claimed revision of the minimum of the pay scale.

The Division Bench of the High Court adverted to the order passed by the Tribunal and held that the respondents are entitled to the benefits under the revised pay scale.

We have heard Shri S.K. Dubey, learned senior counsel for the petitioners and carefully scanned the record.

We are in complete agreement with the High Court that the respondents are entitled to the benefits of the 6th Pay Commission and the petitioners are bound to enhance their pay by fixing their salary at the minimum of the revised pay scale.

With the above observations, the special leave petition is dismissed.

The petitioners are directed to implement the order of the High Court within a period of three months failing

which they shall have to pay interest to the respondents at the rate of twelve per cent pay annum from the date of enforcement of the revised pay rules till the date of actual payment

The Registry is directed to send copies of this order to the respondents at the addresses mentioned in the memo of the special leave petition. If the petitioners fail to pay their dues in terms of the order of the High Court, then the respondents shall be free to initiate proceedings under the Contempt of Courts Act, 1971."

9. In light of the aforesaid order passed by the apex court, which has been passed in a case of an identically placed person, this court is of the considered opinion that respondents does not have any choice expect (sic:except) to obey the order passed by the Hon'ble Supreme Court. They cannot be permitted to discriminate between the identically placed persons. Not only this, this court has allowed as many as fourteen writ petitions and thereafter contempt petitions were preferred and because of the contempt petitions, respondents have granted the pay scale as prayed by the petitioners, therein.

10. Resultantly, the writ petition stands allowed. The order Annexures-P-1 and P-2 are hereby set-aside. The respondents are directed to grant the benefit of pay scale as well as arrears of pay scale to the petitioner, keeping in view the 5th Pay Commission as well as 6th Pay Commission as the same has been extended to the other identically placed employees serving the N.V.D.A.

11. The exercise of passing the necessary orders and granting the aforesaid benefit be concluded, within a period of ninety days, from the date of receipt of certified copy of this order. It is needless to mention that in case the judgment passed by this court is not been complied within a period of ninety days, from the date of receipt of certified copy of this order, the petitioner shall be entitled for interest @ 12% per annum from the date of entitlement till the amount is actually paid to the petitioner.

No order as to costs.

Certified copy as per rules.

Petition allowed.

I.L.R. [2016] M.P., 1663
WRIT PETITION
Before Mr. Justice S.C. Sharma
W.P. No. 2421/2015 (Indore) decided on 22 April, 2015

TANWAR SINGH ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

A. Minor Mineral Rules, M.P. 1996, Rule 30(26) - Conditions of quarry lease - Cancellation of lease - **Collector has recommended the matter to the Director Geology and Mining, Bhopal for cancellation of lease - Therefore, petitioner do have a remedy of appeal u/r 57 of the Rules in case an adverse order is passed in the matter by the competent authority - No final order has been passed by the Director, Mining - Petition is pre-mature and dismissed. (Paras 10 & 12)**

क. गौण खनिज नियम, म.प्र. 1996, नियम 30(26) – खदान पट्टे की शर्तें – पट्टे का निरस्तीकरण – कलेक्टर द्वारा पट्टे के निरस्तीकरण हेतु मामले की अनुशंसा संचालक, भू–विज्ञान एवं खनन, भोपाल को की गई – इसलिए, सक्षम पाधिकारी द्वारा मामले में प्रतिकूल आदेश पारित किये जाने की दशा में, याची को नियमों के नियम 57 के अंतर्गत अपील का उपचार उपलब्ध है – संचालक, खनन द्वारा कोई अंतिम आदेश पारित नहीं किया गया है – याचिका समयपूर्व होने से खारिज।

B. Minor Mineral Rules, M.P. 1996, Rule 57 - Appeal, Review and Revision - **An appeal is provided in case lease is cancelled by the competent authority. (Para 27)**

ख. गौण खनिज नियम, म.प्र. 1996, नियम 57 – अपील, पुनर्विलोकन एवं पुनरीक्षण – सक्षम प्राधिकारी द्वारा पट्टा निरस्त किये जाने की दशा में अपील का उपबंध है।

Cases referred:

AIR 2014 MP 49, 2014 (1) JLJ 386, (2014) 9 SCC 772, (2013) 8 SCC 418, (2013) 4 SCC 575, (2011) 12 SCC 491, (2009) 6 SCC 142, (2002) 12 SCC 118, (2002) 10 SCC 606.

Akash Rathi, for the petitioner.
C.S. Ujjainiya, for the respondents.

ORDER

S.C. SHARMA, J. :- The petitioner before this court has filed this present petition being aggrieved by the order dated 18-02-2015 passed by the Collector, Dewas in respect of Survey No. 836 area 10.926 hectare. By the aforesaid order, the Collector Dewas has recommended the matter to the Director Geology and Mining, Bhopal for cancellation of the lease, in exercise of powers conferred under the Madhya Pradesh Minor Mineral Rules, 1996 (hereinafter referred as ***'the Rules of 1996'***).

2. The petitioner's contention is that a show cause notice was issued on 26-02- 2014 directing the petitioner to show cause as to why the mining lease executed in his favour be cancelled or a fine be imposed upon him. The petitioner did submit a reply Anenxure-P-2 to the Collector (Mining) Dewas and thereafter the Collector (Mining) Dewas based upon the documents relating to the case has forwarded the matter by an order dated 18-02-2015 to the Director Geology and Mining, Bhopal.

3. The petitioner's contention is that certain grounds which were not reflected in the show cause notice have been made to be the basis by the Collector while recommending cancellation of the lease. It is also been argued that as per Rules of 1996, sixty days time should have been granted to cure the defect and the Collector without granting sixty days time has recommended the cancellation of lease. It is pertinent to note that the notice was issued to the petitioner on 26-02-2014 and the recommendation has been made by the Collector on 18-02-2015.

4. Learned counsel for the petitioner has also drawn the attention of this court towards the various report submitted by the various department and his contention is that the various department involved in the matter have not given any negative remark in respect of the petitioner's lease and, therefore, the order passed by the Collector is bad in law and by no stretch of imagination the Collector should have passed the impugned order.

5. The order passed by the Collector also reflects that the petitioner does not have any Environmental Clearance Certificate as required under the Air (Prevention and Control of Pollution) Act, 1981 read with section 25 and 26 of the Water (Prevention and Control of Pollution) Act, 1974 and a specific query was raised to the learned counsel while he was arguing the matter that whether the petitioner does have a certificate in respect of Environmental

Clearance Certificate, he has categorically stated that the petitioner does not have such a certificate and the petitioner has applied for the same, long back.

6. On the other hand, learned Government Advocate has argued before this court that the Collector has recommended the matter to the Director Geology and Mining, Bhopal for cancellation of the lease on account of order passed by the National Green Tribunal, Central Zone Bench at Bhopal. He has further stated that the National Green Tribunal, Bench at Bhopal by order dated 23-09-2014 has also permitted the lease holders/owners of crushing units, who are parties before the Tribunal to submit their reply.

7. Heard learned counsel for the parties and perused the record. The matter is being disposed of at the admission stage itself with the consent of the parties.

8. In the present case, it is an admitted fact that the petitioner who does not have an Environmental Clearance Certificate is carrying out mining activities, since 2010, which is really shocking. If the law requires for Environmental Clearance Certificate, the officers posted at Bhopal owes an explanation to this court as well as to the Public at large as to how the petitioner was continuing with mining activities in absence of the Environmental Clearance Certificate.

9. The petitioner was issued a proper show cause notice by the Collector on 26-02-2014 and the petitioner did submit a reply in the matter. The learned Collector in exercise of powers conferred under Rule 30 (26) has recommended the matter to the Director Geology and Mining, Bhopal for cancellation of the lease deed. The mining activities have already been stopped. This court in light of the fact that petitioner does not have the Environmental Clearance Certificate is of the considered opinion that the petitioner cannot be permitted to carry out the mining activities, in absence of fulfillment of the statutory requirement. Not only this, the Collector has forwarded the matter to the Director Geology and Mining, Bhopal for cancellation of lease. No final order has been passed by the Director Mining. The Madhya Pradesh Minor Mineral Rules, 1996 do provide for an appeal in case lease is cancelled by the competent authority. Section 57 of the Madhya Pradesh Minor Mineral Rules, 1996 reads as under –

"57. Appeal, Review and Revision :-

(1) ----------

(2) Where any power is exercisable by the Collector/ Additional Collector under these rules, in relation to any matter an appeal shall lie, from every order passed or deemed to have been passed under these rules to the Director.

(3) Where any power is exercisable by the Director under these rules, in relation to any matter an appeal shall lie from every order passed or deemed to have been passed under these rules to the State Government.

(4) Any person aggrieved by any order passed or deemed to have been passed by the State Government, in exercise of the powers conferred under these rules, may, within sixty days of the date of communication of the order to him, apply to the State Government for review of the order.

(5) The State Government may at its own motion review any order passed by itself and pass such order in reference thereto as it thinks fit."

10. In light of the aforesaid statutory provision of law, this court is of the considered opinion that the petitioner do have a remedy of appeal, in case an adverse order is passed in the matter by the competent authority. Till today, no final order has been passed by the competent authority and, therefore, in the opinion of this court the petition is certainly premature.

11. Learned counsel for the petitioner has placed reliance upon a judgment delivered in the case of *M/s Shreydeep Stone Crusher Vs. State of M.P. and another* reported in AIR 2014 MP 49 and his contention is that the Division Bench of this court in the aforesaid case had held that the National Green Tribunal at Bhopal does not have a jurisdiction in the matter of cancellation of the lease.

12. This court has carefully gone through the order passed by the Division Bench and the same is distinguishable on facts as in the present case the Collector has simply forwarded the matter to the competent authority for the cancellation of the lease. Such cancellation if any, is yet to be done, learned counsel for the petitioner has also drawn the attention of this court towards the head note-'B' of the same judgment and the head note-'B' reflects that an opportunity should be given to rectify the mistake, in accordance with the

provisions of Rule. In the present case as already stated above, no final order has been passed by the competent authority and, therefore, the petitioner shall be free to raise all possible grounds before the appellate authority. Hence, the judgment relied upon is distinguishable on facts.

13. Learned counsel for the petitioner has also placed reliance upon a judgment delivered again by the Division Bench of this court in the case of *M/s Aman Stone Crusher Vs. State of M.P. and another* reported in 2014(1) JLJ 386 and his contention is that the Mines and Minerals (Development and Regulation) Act, 1957 provides for curing the defect by Lease Holder and in the present case Lease Holder has not been granted time to cure the defect and, therefore, the report submitted by the Collector deserves to be set aside. In the present case no final order has been passed and at the same time the matters relating to illegal mining/mining of natural resources, are pending before the National Green Tribunal, at Bhopal, and therefore the petitioner is not entitled for any relief arising out of the judgment delivered in the case of *M/s Aman Stone Crusher* (supra).

14. The last judgment relied upon by the learned counsel for the petitioner is in the case of *Ram Niwas Sharma Vs. State of M.P. and another*, delivered by the Division Bench of this court in Writ Petition No. 8424/2013 (Gwalior) dated 05-02-2014 and the contention of the learned counsel for the petitioner is that again in the aforesaid case as time was not given to the Lease holder to rectify the defect, the cancellation of the lease was held to be bad in law.

15. This court has carefully gone through the aforesaid judgment. In the present case the facts are altogether different. A person who is carrying out the mining activities is not possessing the Environmental Clearance Certificate and the matter has been forwarded to the Director for taking a final decision in the matter. The Director/Competent authority has to take a final call in the matter and to decide the matter based upon the recommendation of the Collector.

16. Resultantly, the judgments relied upon by the learned counsel for the petitioner are of no help to the petitioner.

17. Other vital aspect of the case is that mining over various hillocks in the township of Dewas is being monitored by National Green Tribunal, Bhopal. Various orders have been passed by the National Green Tribunal at Bhopal and this court is not having an appellate jurisdiction nor jurisdiction under

article 227 of the Constitution of India to decide the validity/correctness of the order passed by the National Green Tribunal at Bhopal. In case an order passed by the National Green Tribunal, at Bhopal is affecting the mining activities of lease holder, the proper remedy for such lease holder is to approach the apex court or to approach the National Green Tribunal at Bhopal where the matter is pending ie OA No.140/2013.

18. It is also been brought to the notice of this court by the learned Government Advocate that large number of hillocks which are in the green belt in the Dewas township are being razed to ground either by the lease holders or by carrying out illegal mining activities. Damage which is being caused to the nature is an irreparable loss.

19. The apex court in the case of *State (NCT of Delhi) Vs. Sanjay* reported in (2014) 9 SCC 772 has held that the natural resources are public property and national assets. The doctrine of Public Trust extends to natural resources. There should be a balance between the conservation of natural resources and Urban Development. There cannot be any two opinion that natural resources are the assets of the nation and its citizen. It is the object of all concerned including the Central Government and State Government to conserve and not to waste such valuable resources.

20. The apex court in the case of *K. Guruprasad Rao Vs. State of Karnataka and others* reported in (2013) 8 SCC 418 in paragraph 95 held as under :-

> "95. The argument of learned counsel for the State and the private respondents that ban on mining operations/activities in the Core Zone would adversely impact iron ore supply and will also cause financial loss to the leaseholders as well as the State appears quite attractive but, keeping in view larger public interest and the interest of future generations, we do not think that this would be a very heavy price to be paid by some individuals and the State. This Court has often used the principle of sustainable development to balance the requirement of development and environmental protection and issued several directions for protection of natural resources including air, water, forest, flora and fauna as also wildlife. The Court has also recognized that the right to development includes the whole spectrum of civil, cultural, economic, political and social

process, for the improvement of peoples well being and realization of their full potential."

21. Similarly, in the case of *Sterlite Industries (India) Ltd., and others Vs. Union of India and others* reported in (2013) 4 SCC 575 in paragraphs 18 and 40 held as under :-

"18. Mr. Prakash next submitted that the main ground that was taken in the writ petitions before the High Court by National Trust For Clean Environment was that the Ministry of Environment and Forests, Government of India, and the TNPCB had not applied their mind to the nature of the industry as well as the pollution fall out of the industry of the appellants and the capacity of the unit of the appellants to handle the waste without causing adverse impact on the environment as well as on the people living in the vicinity of the plant. He submitted that this Court has already held that a right to clean environment is part of the right to life guaranteed under Article 21 of the Constitution and has explained the precautionary principle and the principle of sustainable development in *Vellore Citizens Welfare Forum v. Union of India & Ors.* [(1996) 5 SCC 647], *Tirupur Dyeing Factory Owners' Association v. Noyyal River Ayacutdars Protection Association* [(2009) 9 SCC 737] and *M.C. Mehta v. Union of India Ors.* [(2009) 6 SCC 142]. He submitted that these principles, therefore, have to be borne in mind by the authorities while granting environmental clearance and consent under the Water Act or the Air Act, but unfortunately both the Ministry of Environment and Forests, Government of India, and the TNPCB have ignored these principles and have gone ahead and hastily granted environmental clearance and the consent under the two Acts. He submitted that, in the present case, the appellants have relied on the Rapid EIA done by Tata Consultancy Service, but this Rapid EIA was based on the data which is less than the month's particulars and is inadequate for making a proper EIA which must address the issue of the nature of the manufacturing process, the capacity of the manufacturing facility and the quantum of production, the

quantum and nature of pollutants, air, liquid and solid and handling of the waste.

40. This takes us to the argument of Mr. Prakash that had the Ministry of Environment and Forests, Government of India, applied its mind fully before granting the environment clearance and had the TNPCB applied its mind fully to the consents under the Air Act and the Water Act and considered all possible environmental repercussions that the plant proposed to be set up by the appellants would have, the environmental problems now created by the plant of the appellants would have been prevented. As we have already held, it is for the administrative and statutory authorities empowered under the law to consider and grant environmental clearance and the consents to the appellants for setting up the plant and where no ground for interference with the decisions of the authorities on well recognized principles of judicial review is made out, the High Court could not interfere with the decisions of the authorities to grant the environmental clearance or the consents on the ground that had the authorities made a proper environmental assessment of the plant, the adverse environmental effects of the industry could have been prevented. If, however, after the environmental clearance under the Environment (Protection) Act, 1986, and the Rules and the notifications issued thereunder and after the consents granted under the Air Act and the Water Act, the industry continues to pollute the environment so as to effect the fundamental right to life under Article 21 of the Constitution, the High Court could still direct the closure of the industry by virtue of its powers under Article 21 of the Constitution if it came to the conclusion that there were no other remedial measures to ensure that the industry maintains the standards of emission and effluent as laid down by law for safe environment (see *M.C. Mehta v. Union of India and others* [(1987) 4 SCC 463] in which this Court directed closure of tanneries polluting the waters of Ganga river)."

22. The apex court in the case of *Government of Andhra Pradesh and others Vs. Obulapuram Mining Company Private Ltd., and others* reported

in (2011) 12 SCC 491 has directed suspension of mining operation, keeping in view the judgment delivered in the case of *M.C. Mehta Vs. Union of India* reported in 2009 (6) SCC 142.

23. The apex court in the case of *M.C. Mehta Vs. Union of India and others* reported in (2002) 12 SCC 118 in paragraphs 46 and 48 held as under :-

> "46. Further, by 42nd Constitutional Amendment, Article 48-A was inserted in the Constitution in Part IV stipulating that the State shall endeavour to protect and improve the environment and to safeguard the forest and wildlife of the country. Article 51A, inter alia, provides that it shall be the duty of every citizen of India to protect and improve the natural environment including forest, lakes, rivers and wildlife and to have compassion for living creatures. Article 47 which provides that it shall be the duty of the State to raise the level of nutrition and the standard of living and to improve public health is also relevant in this connection. The most vital necessities, namely, air, water and soil, having regard to right of life under Article 21 cannot be permitted to be misused and polluted so as to reduce the quality of life of others. Having regard to the right of the community at large it is permissible to encourage the participation of Amicus Curiae, the appointment of experts and the appointments of monitory committees. The approach of the Court has to be liberal towards ensuring social justice and protection of human rights. In *M.C. Mehta v. Union of India* [(1987) 4 SCC 463], this Court held that life, public health and ecology has priority over unemployment and loss of revenue. The definition of 'sustainable development' which Brundtland gave more than 3 decades back still holds good. The phrase covers the development that meets the needs of the present without compromising the ability of the future generation to meet their own needs. In *Narmada Bachao Andolan v. Union of India & Ors.* [(2000) 10 SCC 664], this Court observed that sustainable development means the type or extent of development that can take place and which can be sustained by nature/ecology with or without mitigation.

In these matters, the required standard now is that the risk of harm to the environment or to human health is to be decided in public interest, according to a "reasonable person's " test. [See Chairman Barton : The Status of the Precautionary Principle in Australia : (Vol. 22) (1998) (Harv. Envtt. Law Review, p. 509 at p.549-A) as in *AP Pollution Control Board vs. Prof. M.V. Nayuder (Retd) & Ors.* [(1999) 2 SCC 718].

48. The development and the protection of environments are not enemies. If without degrading the environment or minimising adverse effects thereupon by applying stringent safeguards, it is possible to carry on development activity applying the principles of sustainable development, in that eventuality, the development has to go on because one cannot lose sight of the need for development of industries, irrigation resources and power projects etc. including the need to improve employment opportunities and the generation of revenue. A balance has to be struck. We may note that to stall fast the depletion of forest, series of orders have been passed by this Court in *T.N. Godavarman's* case regulating the felling of trees in all the forests in the country. Principle 15 of Rio Conference of 1992 relating to the applicability of precautionary principle which stipulates that where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for proposing effective measures to prevent environmental degradation is also required to be kept in view. In such matters, many a times, the option to be adopted is not very easy or in a straight jacket. If an activity is allowed to go ahead, there may be irreparable damage to the environment and if it is stopped, there may be irreparable damage to economic interest. In case of doubt, however, protection of environment would have precedence over the economic interest. Precautionary principle requires anticipatory action to be taken to prevent harm. The harm can be prevented even on a reasonable suspicion. It is not always necessary that there should be direct evidence of harm to the environment. "

24. The apex court in the case of *T.N. Godavarman Thirumalpad Vs.*

Union of India and others reported in (2002) 10 SCC 606 in paragraphs-19, 20, 24, 31, 32, 34, 35, 40, 42 and 43 held as under :-

> "19. Environmental law is an instrument to protect and improve the environment and to control or prevent any act or omission polluting or likely to pollute the environment. In view of the enormous challenges thrown by the industrial revolution, the legislatures throughout the world are busy in this exercise. Many have enacted laws long back and they are busy in remodelling the environmental law. The others have moved their lawmaking machineries in this direction except the underdeveloped States who have yet to come in this wavelength. India was one of those few countries which paid attention right from the ancient times down to the present age and till date, the tailoring of the existing law to suit the changing conditions is going on. The problem of law-making and amending is a difficult task in this area. There are a variety of colours of this problem. For example, the industrial revolution and the evolution of certain cultural and moral values of humanity and the rural and urban area developments in agricultural technology, waste, barren or industrial belts; developed, developing and underdeveloped parts of the lands; the rich and poor Indians; the population explosion and the industrial implosion; the people's increasing awareness and the decreasing State exchequer; the promises in the political manifestos and the State's development action. In this whole gamut of problems the Tiwari Committee came out with the data that we have in India "nearly five hundred environmental laws" and the Committee pointed out that no systematic study had been undertaken to evaluate those legislative developments. Some legal controls and techniques have been adopted by the legislatures in the field of Indian environmental laws. Different legislative controls right from the ancient times, down to the modern period make interesting reading. Attention has to be paid to identify the areas of great concern to the legislature; the techniques adopted to solve those problems; the pollutants which require continuous exercises; the role of the legislature and people's participation outside. These are some of many

areas which attract the attention in the study of history of the Indian environmental law.

20. Since time immemorial, natural objects like rivers enjoyed a high position in the life of the society. They were considered as goddesses having not only purifying capacity but also self-purifying ability. Fouling of the water of a river was considered a sin and it attracted punishments of different grades which included penance, outcasting, fine etc. The earth or soil also equally had the same importance, and the ancient literature provided the means to purify the polluted soil. The above are some of the many illustrations to support the view that environmental pollution was controlled rigidly in the ancient times. It was not an affair limited to an individual or individuals but the society as a whole accepted its duty to protect the environment. The "dharma" of environment was to sustain and ensure progress and welfare of all. The inner urge of the individuals to follow the set norms of the society, motivated them to allow the natural objects to remain in the natural state. Apart from this motivation, there was the fear of punishment. There were efforts not just to punish the culprit but to balance the ecosystems. The noteworthy development in this period was that each individual knew his duty to protect the environment and he tried to act accordingly. Those aspects have been highlighted by a learned author C.M. Jariwala in his article *"Changing Dimensions of the Indian Environmental Law"* in the book Law and Environment by P. Leelakrishnan.

24. The tide of judicial considerations in environmental litigation in India symbolizes the anxiety of courts in finding out appropriate remedies for environmental maladies. At global level, the right to live is now recognized as a fundamental right to an environment adequate for health and well-being of human beings. [See World Commission on Environment and Development — *Our Common Future (1987).*] To commemorate the tenth anniversary of the Stockholm Conference, the world community of States assembled in Nairobi (May 10-18, 1982) to review the action taken on to

implement the Stockholm Declaration. It expressed serious concern about the state of environment worldwide and recognized the urgent need of intensifying the effort at the global, regional and national levels to protect and improve it.

31. *Academy Law Review,* at pp. 137-38 says that a recent survey reveals that every day millions of gallons of trade wastes and effluents are discharged into the rivers, streams, lakes and sea etc. Indiscriminate water pollution is a problem all over the world but is now acute in densely populated industrial cities. Our country is no exception to this. Air pollution has further added to the intensity and extent of the problem. Every year millions of tons of gaseous and particulate pollutants are injected into the atmosphere, both through natural processes and as a direct result of human activity. Scientists have pointed out that earth's atmosphere cannot absorb such unlimited amount of pollutant materials without undergoing changes which may be of an adverse nature with respect to human welfare. Man in order to survive in his planetary home will have to strike a harmonious balance with nature. There may be boundless progress scientifically which may ultimately lead to destruction of man's valued position in life. The Constitution has laid the foundation of Articles 48-A and 51-A for a jurisprudence of environmental protection. Today, the State and the citizen are under a fundamental obligation to protect and improve the environment, including forests, lakes, rivers, wildlife and to have compassion for living creatures.

32. A learned jurist has said, the *Rig Veda* praises the beauty of the dawn *(usha)* and worships nature in all its glory. And yet today a bath in the Yamuna and Ganga is a sin against bodily health, not a salvation for the soul — so polluted and noxious are these "holy" waters now.

"One hospital bed out of four in the world is occupied by a patient who is ill because of polluted water.... Provision of a safe and convenient water supply is the most important activity that could be undertaken to improve the health of people living in rural areas of the developing world." (WHO)

"Nature never did betray, the heart that loved her." (Wordsworth) The anxiety to save the environment manifested in the Constitution (Forty-second Amendment) Act, 1976 by the introduction of a specific provision for the first time to "protect and improve" the environment. Man is nature's best promise and worst enemy. If industry is necessity, pollution inevitable. Since progress and pollution go together, there can be no end of progress, and consequently, no escape from pollution. If industry is a necessary evil, pollution surest sufferance. Several enactments have been made to combat pollution. "Pollution" is a noun derived from the transitive verb "pollute" which means to make foul or unclean, dirty, to make impure or morally unclean. In *Halsbury's Laws of England* (4th Edn., Vol. 38, para 66) "pollution" means the direct or indirect discharge by man of substances or energy into the aquatic environment resulting in hazard to human health, harm to living resources and aquatic ecosystems, damage to amenities on interference with other legitimate uses of water.

34. The aesthetic use and the pristine glory cannot be permitted to be eroded for private, commercial or any other use unless the courts find it necessary, in good faith, for public good and in public interest to encroach upon the said resources.

35. It cannot be disputed that no development is possible without some adverse effect on the ecology and environment, and the projects of public utility cannot be abandoned and it is necessary to adjust the interest of the people as well as the necessity to maintain the environment. A balance has to be struck between the two interests. Where the commercial venture or enterprise would bring in results which are far more useful for the people, difficulty of a small number of people has to be bypassed. The comparative hardships have to be balanced and the convenience and benefit to a larger section of the people has to get primacy over comparatively lesser hardship.

40. Sustainable development is essentially a policy and strategy for continued economic and social development

without detriment to the environment and natural resources on the quality of which continued activity and further development depend. Therefore, while thinking of the developmental measures the needs of the present and the ability of the future to meet its own needs and requirements have to be kept in view. While thinking of the present, the future should not be forgotten. We owe a duty to future generations and for a bright today, a bleak tomorrow cannot be countenanced. We must learn from our experiences of the past to make both the present and the future brighter. We learn from our experiences, mistakes from the past, so that they can be rectified for a better present and the future. It cannot be lost sight of that while today is yesterday's tomorrow, it is tomorrow's yesterday.

42. The Union Government framed the National Forest Policy in 1988. Though the basic objectives are very laudable, it is sad to note that it has virtually been confined to the papers containing it, and not much has been done to translate them into reality. Nevertheless, it reflects the anxiety of the Union Government to protect and preserve natural forests with a vast variety of flora and fauna, representing biological diversity and genetic resources of the country.

43. Duty is cast upon the Government under Article 21 of the Constitution of India to protect the environment and the two salutary principles which govern the law of environment are: (i) the principles of sustainable development, and (ii) the precautionary principle. It needs to be highlighted that the Convention on Biological Diversity has been acceded to by our country and, therefore, it has to implement the same. As was observed by this Court in *Vishaka v. State of Rajasthan*13 in the absence of any inconsistency between the domestic law and the international conventions, the rule of judicial construction is that regard must be had to international conventions and norms even in construing the domestic law. It is, therefore, necessary for the Government to keep in view the international obligations while exercising discretionary

powers under the Conservation Act unless there are compelling reasons to depart therefrom. "

25. Keeping in view the aforesaid judgment delivered by the apex court from time to time illegal mining and un-controlled mining of natural resources cannot be permitted to be carried out in the State of Madhya Pradesh. As informed by learned Government Advocate, hillocks are being razed to ground by lease holders or by illegal mining and, therefore, this court is of the considered opinion that State/Director Mining should take a final decision in the matter that too by keeping in mind the various judgments delivered by the apex court, from time to time.

26. Learned Government Advocate has also stated that the National Green Tribunal is justified in restraining the mining activities in respect of various lease holders functioning in the township of Dewas as well as in the State of Madhya Pradesh. This court does not have a jurisdiction to stay the order passed by the National Green Tribunal, but the fact remains that by preserving and conserving environment we can make a healthy atmosphere to live in for the generation to come. This is because of the fact that mankind is encroaching onto the environment at such a rate that various wild landscapes are being given over to farming, industry, housing, tourism and other human developments. The future generation too have a right to enjoy the landscape like river, mountain, lakes, sea, hill, hillocks etc. This court is of the considered opinion that the petition is a premature petition and the writ petition deserves to be dismissed and it is accordingly dismissed.

27. It is further made clear that in case any adverse order is passed by the Director Mining/Competent Authority, the petitioner shall be free to prefer an appeal, in accordance with law. This court does not find any reason to interfere with the recommendation made by the Collector on 18-02-2015.

28. The admission is accordingly declined with a liberty to the petitioner to approach the National Green Tribunal to obtain the necessary clarificatory order and also with a liberty to file an appeal against the final order passed in the matter.

No order as to costs.

Certified copy as per rules.

Petition dismissed.

I.L.R. [2016] M.P., 1679
WRIT PETITION
Before Mr. Justice Sanjay Yadav
W.P. No. 5828/2015 (Jabalpur), decided on 23 April, 2015

KRISHAN CHANDRA SHARMA & ors. ...Petitioners
Vs.
STATE OF M.P. & anr. ...Respondents

Service Law - M.P. Public Works Department (Non-Gazetted) Class III Recruitment and Service Rules 1972 - Dying cadre - **Petitioners were initially engaged on daily wages between 1989-1993 without following any due process of recruitment - State took a policy decision to create 342 posts of Sub-Engineers on daily wages as dying cadre - Petitioners having accepted appointment and having become member of new service cannot resile and claim that they be given benefit from initial date of appointment - Earlier decisions passed without considering the aspect of new service are not precedent - Petition dismissed. (Paras 2 & 4)**

सेवा विधि – म.प्र. लोक निर्माण विभाग (अराजपत्रित) तृतीय श्रेणी भर्ती तथा सेवा नियम, 1972 – समाप्तवय काडर – याचीगण को प्रारंभतः दैनिक वेतन पर वर्ष 1989–1993 के मध्य भर्ती की सम्यक् प्रक्रिया अपनाए बिना नियुक्त किया गया था – राज्य ने समाप्तवय काडर के रूप में दैनिक वेतन पर उपयंत्री के 342 पदों के सृजन हेतु नीतिगत निर्णय लिया – नियुक्ति स्वीकार करने तथा नई सेवा के सदस्य बन जाने पर याचीगण पलटकर यह दावा नहीं कर सकते कि उन्हें नियुक्ति की प्रारंभिक तिथि से लाभ दिया जाए – नई सेवा के पहलू पर विचार किए बिना पारित किये गये पूर्ववर्ती निर्णय, पूर्व न्याय नहीं हैं – याचिका खारिज।

Jitendra Arya, for the petitioners.

(Supplied: Paragraph numbers)

ORDER

SANJAY YADAV, J. :- Heard on admission.

1. Petitioners, who are Sub-Engineer (Diploma) in Public Works Department, Madhya Pradesh, Bhopal, have filed this petition seeking direction to -

(i) accord benefit of regularization on the post of Sub-

Engineer from the date of their initial appointment and grant them all consequential benefits and count their initial services for the purposes of pensionary benefits.

(ii) to grant the pay scale of Rs.5000-8000 from initial date of appointment as has been granted to one Uma Shankar Tiwari.

2. Pleadings reveal that the petitioners were initially engaged on daily wages between the year 1989 to 1993 without following any due process of recruitment. There were many more like the petitioners working on daily wages and had approached Labour Court for permanent classification. In some cases, orders for permanent classification was passed. The State Government in order to have a uniform policy as is evident from the communication dated 16.7.1997 (Annexure P/3) took a policy decision to create 342 post of Sub-Engineer (Civil) as dying cadre to accommodate the Sub-Engineers on daily wagers by causing amendment in Madhya Pradesh Public Works Department (Non-Gazetted) Class III Recruitment and Service Rules, 1972.

3. Consequently, decision was taken on 13.10.2009 of appointing the petitioners and the like as Sub-Engineer (Civil) in Revised Pay Scale-PB-2-Rs.9000-34800 + Grade Pay Rs.3200.

The order reveals creation of new service. It says -

"दिनांक 14/5/2008 को मंत्रिपरिषद की बैठक में लिये गये निर्णय के परिपालन में आयोजित सीमित परीक्षा में लोक निर्माण विभाग के चयनित दैनिक वेतन भोगी उपयंत्रियों की मेरिट सूची मध्य प्रदेश शासन जल संसाधन विभाग मंत्रालय के पत्र क्रमांक–एफ–22–17/2008/पी–1/31, दिनांक 22/9/2008 द्वारा प्राप्त हुई। तदुपरांत मध्य प्रदेश शासन लोक निर्माण विभाग, मत्रालय, भोपाल के आदेश क्रमांक–एफ–1–19/2009/स्था/19, दिनांक 8/9/2009 द्वारा उक्त परीक्षा में चयनित उम्मीदवारों के नियमितीकरण हेतु लोक निर्माण विभाग में 342 प्रतिनियुक्ति रक्षित सांख्येत्तर पद निर्माण किये जाने की स्वीकृति प्राप्त हुई है, जिस पर मध्य प्रदेश शासन, वित्त विभाग के यू.ओ.क्रमांक–62/412/बी–9/चार, दिनांक 17/4/2009 द्वारा सहमति प्रदान की गयी है। प्राप्त स्वीकृति के परिपालन में लोक निर्माण विभाग में कार्यरत दैनिक वेतन भोगी डिप्लोमा/डिग्रीधारी (सिविल) को मध्यप्रदेश शासन लोक निर्माण विभाग अराजपत्रित तृतीय श्रेणी भरती तथा सेवा शर्तें नियम–1972 (संशोधन सहित) में प्रदत्त शक्तियों का उपयोग करते हुए विभाग में निम्न दैनिक वेतन भोगी यंत्री को उपयंत्री (सिविल) के पद पर अस्थायी रूप से

आगामी आदेश तक पुनरीक्षित वेतनमान–PB-2-Rs.9300-34800+Grade Pay Rs.3200/- में शासन द्वारा समय–समय पर स्वीकृत मंहगाई भत्तों सहित निम्न शर्तों के अधीन दो वर्ष की अवधि के लिये परिवीक्षा के लिये परिवीक्षा पर नियुक्त किया जाता है .."

The order also lays down terms and conditions.

4. The petitioners since accepted the appointment and having become the member of new service cannot now resile and claim that they be given benefit from initial date of appointment. Because initial appointment of the petitioner were not on any post or service as would create any right in them to claim a lien. The orders passed in W.P. No.17955/2012 (Thakur Prasad Dwivedi v State of M.P.) decided on 30.10.2012, W.P. No.16567/2014 (Rajesh Kumar Saxena v State of M.P.) decided on 5.11.2014, W.P. No.18051/2014 (Vipin Gupta v State of M.P.) decided on 24.11.2014 and W.P. No.12150/2009 decided on 23.4.2010, does not take into consideration the aspect of creation of new service vide order-dated 13.10.2009 and are thus not precedent as would entail any benefit to the petitioners.

Considered thus, since no relief can be granted to the petitioners, petition fails and is dismissed. No costs.

Petition dismissed.

I.L.R. [2016] M.P., 1681
WRIT PETITION
Before Mr. Justice Sanjay Yadav
W.P. No. 18294/2011 (Jabalpur) decided on 29 April, 2015

SUDHIR KAMAL ...Petitioner
Vs.
M.P. P.K.V.V.CO. LTD. & ors. ...Respondents

Civil Services (Classification, Control and Appeal) Rules, M.P. 1966, Rule 9 and Fundamental Rules, Rule 54 B - Suspension **- Petitioner was placed under suspension in contemplation of departmental enquiry - Departmental enquiry culminated in imposition of penalty of Censure - Period of suspension was directed to be treated in service for all purposes but the allowances were confined to suspension allowance - Suspension should have been held unjustified as the employee was inflicted with penalty of "Censure" and if suspension is treated to be justified, then such**

employee is subjected to loss of wages - Technically it may not be double jeopardy but certainly effects the wages of employee - Impugned order set aside. (Paras 12 & 13)

सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 9 एवं मूलभूत नियम, नियम 54 बी – निलंबन – विभागीय जांच के विचाराधीन रहने के दौरान याची को निलंबित किया गया – परिनिन्दा की शास्ति के अधिरोपण के साथ विभागीय जांच समाप्त हुई – निलंबन अवधि को समस्त प्रयोजनों के लिए सेवा अवधि माने जाने हेतु निदेशित किया गया, परंतु भत्तों को निलंबन अवधि के भत्ते तक ही सीमित रखा गया – निलंबन को अनुचित अभिनिर्धारित किया जाना चाहिए था, क्योंकि कर्मचारी पर "परिनिंदा" की शास्ति अधिरोपित की गई थी एवं यदि निलंबन को न्यायोचित होना माना जाए तब उक्त कर्मचारी को वेतन की हानि सहना पड़ेगी – तकनीकी रूप से भले ही यह दोहरा संकट न हो, परंतु निश्चित रूप से यह कर्मचारी के वेतन को प्रभावित करता है – आक्षेपित आदेश अपास्त।

Varun Kumar, for the petitioner.
Sankalp Kochar, for the respondents.

(Supplied: Paragraph numbers)

ORDER

SANJAY YADAV, J. :- Heard.

2. While challenging the order dated 22.02.2011 and 07.09.2011, petitioner has confined his challenge only to the decision whereby the suspension of the petitioner for the period from 29.03.2004 to 26.04.2007 as suspension.

3. Relevant fact briefly are that while working as Executive Engineer (TBPS), Madhya Pradesh Poorva Kshetra Vidyut Vitran Company Limited, petitioner, in contemplation of a departmental enquiry was placed under suspension on 29.03.2004. Charge sheet was issued on 26.07.2004. That, during pendency of departmental enquiry the suspension was revoked on 26.04.2007. The departmental enquiry culminated in punishment of "censure" vide order dated 29.01.2011. By separate order dated 22.02.2011, the period of suspension was treated as suspension - "श्री सुधीर कमल कार्यपालन यंत्री (टी.बी. पी.एस.) के निलंबन अवधि के नियमितीकरण के संबंध में विचारोपरान्त निर्णय लिया गया कि निलंबन अवधि को अन्य सभी प्रयोजन हेतु सेवाकाल माना जावेगा किन्तु निलंबन अवधि के वेतन भत्ते को निर्वहन भत्ते तक सीमित रखा जाना उचित होगा"। An appeal against this order met with a rejection order dated 07.09.2011.

4. The order has been questioned on the anvil of Fundamental Rules 54 B That the suspension proceeding with a departmental enquiry culminating in a minor penalty cannot be justified.

5. The respondents, however, justify the impugned order.

6. Considered the rival submissions.

7. Fundamental Rules 54 B. Sub-rules (1), (3) and (8) of FR 54 B are relevant in the context. These sub rules stipulate:

> "F.R. 54-B. (1) When a Government servant who has been suspended is re-instated or would have been so re-instated but for his retirement on superannuation while under suspension, the authority competent to order re-instatement shall consider and make specific order-
>
> (a) regarding the pay and allowances to be paid to the Government servant for the period of suspension ending with re-instatement or the date of his retirement on superannuation, as the case may be, and
>
> (b) whether or not the said period shall be treated as a period spent on duty.
>
> (3) Where the authority competent to order re-instatement is of the opinion that the suspension was wholly unjustified, the Government servant shall subject to the provisions of sub-rule (8), be paid the full pay and allowances to which he would have been entitled had he not been suspended:
>
> Provided that where such authority is of the opinion that the termination of the proceedings instituted against the Government servant had been delayed due to reason directly attributable to the Government servant it may, after giving him an opportunity to make his representation [within 60 days from the date on which the communication in this regard is served in him and after considering the representation, if any, submitted by him direct, for reasons to be recorded in writing that the Government servant shall be paid for the period of such delay only such amount (not being the whole) of such pay and

allowances as it may determine.

(8) The payment of allowances under sub- rule (2), sub-rule (3) or sub-rule (5), shall be subject to all other conditions under which such allowances are admissible.

8. Sub-Rule (1) obligates the competent authority in case where Government servant who was suspended is reinstated to make a specific order (i) regarding pay and allowances to be paid to Government servant for the period of suspension ending with reinstatement (ii) whether or not the said period shall be treated as a period spent on duty. The decision to be taken under sub-rule (1) is bridled with the decision required to be taken under sub-rule (3), i.e., where the suspension is held to be wholly unjustified, then the government servant is entitled for full pay and allowance subject to provisions of sub-rule (8). In other words even executive instructions issued to that effect will hold the field when it comes to payment of full pay and allowances. Whereas sub-rule (1) and sub-rule (3) makes a provision regarding pay and allowances to be paid in the events mentioned therein. Sub-rule 8 provides for payment of allowances contains under which such allowances are payable.

9. However, in a case where the suspension is held to be wholly justified, an employee will not be benefited of sub-rule (3) and sub-rule (8) of FR 54 B. In such circumstances, the petitioner is not benefited.

10. Sub-rule (3) of F.R. 54-B cast the discretion in the competent authority to form an opinion whether the suspension of a government servant is wholly unjustified.

11. Question is as to whether in the case at hand wherein the petitioner who having been inflicted with penalty of "censure", the suspension cannot be said to be justified. Indisputably, suspension of the petitioner is under Rule 9 of M.P. Civil Services (Classification, Control & Appeal) Rules, 1966 (for brevity 'the Rules of 1966') and is in the event of contemplated/pending departmental enquiry; wherein, a criminal offence is under investigation, inquiry or trial. It is also clear from the Rules that suspension is not a penalty under the Rules of 1966.

12. In the present case the petitioner has been placed under suspension in contemplation of a departmental enquiry and during pendency whereof his suspension has been revoked. The departmental enquiry initiated against the petitioner resulted in inflicting of penalty of "censure" which is a minor penalty.

Thus the charges were not grave enough which could have led to inflicting of any other penalty than "censure". In such circumstances incumbent it would have been upon the competent Authority to have hold that the suspension was not justified because in respect of an employee who is inflicted with a penalty of "censure", if the suspension is treated to be justified then such employee is subjected to loss of wages for the period he was under suspension. Though technically it may not be a dual jeopardy but it certainly effects the pay of the incumbent.

13. Considered thus and when the impugned order is tested on the anvil of the analysis above cannot be given the stamp of approval. In view whereof, the impugned order of treating the suspension period from 29.03.2004 to 26.04.2007 is quashed. Respondents are directed to treat the entire period as service period because in the case at hand the period of suspension was wholly unjustified. Let dues be settled within a period of three months from the date of communication of this order.

Petition is allowed to the extent above. There shall be no costs.

Order accordingly.

I.L.R. [2016] M.P., 1685
WRIT PETITION
Before Mr. Justice Prakash Shrivastava
W.P. No. 339/2015 (Indore) decided on 3 August, 2015

RUPINDER SINGH ANAND ...Petitioner
Vs.
SMT. GAJINDER PAL KAUR ANAND & ors. ....Respondents

***Succession Act, Indian (39 of 1925), Sections 57(b) & 213(1)* - Admissibility of Will/Codicil in evidence in Trial Court without obtaining the letter of administration/probate - Held - Trial Court is competent to consider the "Wills" in question in respect of the properties for which no probate or letter of administration is required. (Para 16)**

उत्तराधिकार अधिनियम, भारतीय (1925 का 39), धारा 57(बी) व 213 (1) – प्रशासन पत्र/प्रोबेट अभिप्राप्त किये बिना विचारण न्यायालय के समक्ष साक्ष्य में वसीयत/कोड पत्र की ग्राह्यता – अभिनिर्धारित – ऐसी सम्पत्तियाँ जिनके लिए कोई प्रोबेट अथवा प्रशासन पत्र अपेक्षित नहीं है, के संबंध में प्रश्नाधीन "वसीयतों" पर विचार करने हेतु विचारण न्यायालय सक्षम है।

Cases referred:

1999(I) MPJR 352, (2001) 4 SCC 325, O.S.A. Nos. 397 & 398 of 2010, decided on 12.1.2011 (Madras High Court), AIR 1927 Madras 1054 (Full Bench), AIR 2001 KERALA 184, 2011(1)MPLJ 646, 1929 Privy Council 283, (2007) 7 SCC 183, (2008) 7 SCC 695, (2010) 9 SCC 385.

S.R. Saraf with *Vinay Saraf,* for the petitioner.
B.L. Pavecha with *Nitin Phadke,* for the respondent No. 1.
M.L. Agrawal with *Ravi Shukla,* for the respondents No. 2 & 3.

ORDER

PRAKASH SHRIVASTAVA, J. :- This writ petition under Article 227 of the Constitution of India is at the instance of the plaintiff in the suit challenging the order of the trial Court dated 12.12.2014 whereby the petitioner's objection in respect of the admissibility of the will/codicil dated 28.6.2003 and 4.1.2008 has been rejected.

2. In brief, the petitioner has filed the suit for declaration and partition raising the plea that the petitioner's father Late Shri Jagjit Singh Ji Anand had died on 23.4.2008. the respondents No.1 to 3 had filed the written statements contending that Shri Jagjit Singh Ji Anand had executed the will dated 28.6.2003 and codicil dated 4.1.2008. At the stage of cross-examining the plaintiff, the will and codicil dated 28.6.2003 and 4.1.2008 respectively was sought to be produced by the respondents No.1 to 3. The objection was raised by the petitioner about admissibility of the will and codicil without obtaining the letter of administration/probate, and objection has been rejected by the trial Court by the impugned order.

3. Learned counsel appearing for the petitioner submits that since some of the properties mentioned in the will and codicil are situated in Mumbai, therefore, in terms of Section 57(b) and 213(1) of the Indian Succession Act, the letter of probate is necessary without which, the will and codicil cannot be admitted in evidence.

4. Learned counsel for the respondents have supported the impugned order and have submitted that except three, all other properties mentioned in the will/codicil are situated in Indore and Delhi and therefore, in respect of those properties no probate is required.

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

6. It is undisputed that the will dated 28.6.2003 and codicil dated 4.1.2008 were executed by Late Shri Jagjit Singh Anand at Indore. Some of the properties covered by the will/codicil are located at Mumbai whereas the other properties are located at Indore and Delhi. No probate or letter of administration has been obtained in respect of will/codicil by the parties. Section 57 of the Indian Succession Act, in the Part VI Testamentary Succession, provides for application of certain provisions of Part to a class of Wills made by Hindus and reads as under :-

> **"57. Application of certain provisions of Part to a class of Wills made by Hindus, etc.**- The provisions of this Part which are set out in Schedule III shall, subject to the restrictions and modifications specified therein, apply-
>
> (a) to all Wills and codicils made by any Hindu, Buddhist, Sikh or Jaina on or after the first day of September, 1870, within the territories which at the said date were subject to the Lieutenant-Governor of Bengal or within the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Madras and Bombay; and
>
> (b) to all such Wills and codicils made outside those territories and limits so far as relates to immovable property situate within those territories or limits; [and
>
> (c) to all Wills and codicils made by any Hindu, Buddhist, Sikh or Jain on or after the first day of January, 1927, to which those provisions are not applied by clauses (a) and (b):]
>
> Provided that marriage shall not revoke any such Will or codicil."

7. Section 213 of the Act relates to the establishment of the right as executor or legatee and provides as under :-

> **"213. Right as executor or legatee when established.**-(1) No right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction in [India] has granted probate of the Will or with a

copy of an authenticated copy of the Will annexed.

[(2) This section shall not apply in the case of Wills made by Muhammadans [or Indian Christians], and shall only apply-

(i) in the case of Wills made by any Hindu, Buddhist, Sikh or Jaina where such Wills are of the classes specified in clause (a) and (b) of Section 57; and

(ii) in the case of Wills made by any Parsi dying, after the commencement of the Indian Succession (Amendment) Act, 1962 (16 of 1962), where such Wills are made within the local limits of the [ordinary original civil jurisdiction] of the High Courts at Calcutta, Madras and Bombay, and where such Wills are made outside those limits, in so far as they relate to immovable property situated within those limits.]"

8. In terms of Section 213(2) the probate or letter of administration is required in case of wills made by Hindu, where such wills are covered by Section 57(a) and (b), meaning thereby probate is required if such a will is made at or property is situated within the territories subjected to lieutenant Governor of Bengal on the relevant date or within the local limits of original civil jurisdiction of Madras and Bombay High Court.

9. In the present case, undisputedly the will and codicil have been signed at Indore outside the local limits of High Court at Calcutta, Madras and Bombay. So far as the properties which are situated at Indore are concerned, in respect of those properties no probate or letter of administration is required. It is the settled position in law that if the will is not executed within the territory mentioned in clause (a) of Section 57 or will does not relate to the property situated within the territory mentioned in clause (a) of Section 57, the provision of sub-section 1 of Section 213 are not attracted and the probate or letter of administration is not required. [See: *Phool Singh and two others Vs. Smt. Kosa Bai and two others*, reported in 1999(I) MPJR 352]. The Supreme Court in the matter of *Clarence Pais and others Vs. Union of India*, reported in (2001) 4 SCC 325 has settled that a probate is not required to be obtained by a Hindu in respect of a will made outside the territories mentioned in Section 57 and 213 of the Act or regarding the immovable properties situated outside those territories. In this regard, the Supreme Court has held that :-

"6. The scope of Section 213(1) of the Act is that it prohibits recognition of rights as an executor or legatee under a will without production of probate and sets down a rule of evidence and forms really a part of procedural requirement of the law of forum. Section 213(2) of the Act indicates that its applicability is limited to cases of persons mentioned therein. Certain aspects will have to be borne in mind to understand the exact scope of this section. The bar that is imposed by this section is only in respect of the establishment of the right as an executor or legatee and not in respect of the establishment of the right in any other capacity. The section does not prohibit the will being looked into for purposes other than those mentioned in the section. The bar to the establishment of the right is only for its establishment in a court of justice and not its being referred to in other proceedings before administrative or other tribunals. The section is a bar to everyone claiming under a will, whether as a plaintiff or defendant, if no probate or letters of administration are granted. The effect of Section 213(2) of the Act is that the requirement of probate or other representation mentioned in subsection (1) for the purpose of establishing the right as an executor or legatee in a court is made inapplicable in case of a will made by Muhammadans and in the case of wills coming under Section 57(c) of the Act. Section 57(c) of the Act applies to all wills and codicils made by any Hindu, Budhhist, Sikh or Jaina, on or after the first day of January, 1927 which does not relate to immovable property situate within the territory formerly subject to the Lieutenant Governor of Bengal or within the local limits of the ordinary civil jurisdiction of the High Courts of Judicature at Madras and Bombay, or in respect of property within those territories. No probate is necessary in the case of wills by Muhammadans. Now by the Indian Succession (Amendment) Act, 1962, the section has been made applicable to wills by Parsis dying after the commencement of the 1962 Act. A combined reading of Sections 213 and 57 of the Act would show that where the parties to the will are Hindus or the properties in dispute are not in territories falling under Section 57(a) and (b), sub-section

(2) of Section 213 of the Act applies and subsection (1) has no application. As a consequence, a probate will not be required to be obtained by a Hindu in respect of a will made outside those territories or regarding the immovable properties situate outside those territories. The result is that the contention put forth on behalf of the petitioners that Section 213(1) of the Act is applicable only to Christians and not to any other religion is not correct."

10. The aforesaid judgment also makes it clear that not only in respect of the properties of Hindus for which a will is made outside the areas mentioned in Section 57 and 213 but also regarding the immovable properties situated outside those territories, no probate is required.

11. In the present case counsel for the respondents No.1 to 3 have categorically stated before this Court that on the basis of the will/codicil in question, the respondents want to establish their claim only in respect of property situated at Indore and Delhi for which no probate is required and not in respect of the property situated at Mumbai therefore, in terms of the aforesaid judgments also since the properties at Indore and Delhi for which the respondents are raising their claim the objection relating to obtaining the probate of the will in respect of those properties cannot be accepted.

12. Learned counsel for the petitioner has placed reliance upon the judgment of the Madras High Court dated 12.1.2011 passed in O.S.A. Nos.397 & 398 of 2010 in the matter of *G. Ganesan Vs. P. Sundari,* Full Bench judgment of the Madras High Court in the matter of *Ganshamdoss Narayandoss Vs. Gulab Bi Bai* reported in AIR 1927 Madras 1054 and the judgment of Kerala High Court in the matter of *Cherichi Vs. Ittianam and others* reported in AIR 2001 KERALA 184 but these judgment are distinguishable on their own facts since in those matters the wills and the properties were covered by Section 57 and 213 of the Act.

13. This very issue between the same parties in the present civil suit had come up before this Court at earlier occasion while deciding the appeal arising out out (sic:of) the order of temporary injunction passed by the court below and this Court in the matter of *Rupinder Singh Anand Vs. Gajinder Pal Kaur and others* reported in 2011(1) MPLJ 646 after examining the aforesaid issue, had held as under :-

"19. So far as legal question which has been raised by the appellant to the effect that no right can be claimed by the respondent Nos. 1 to 3 in the properties left by deceased Jagjit Singh Anand on the basis of Will and codicil as no probate has been obtained which is mandatory requirement of law is concerned, in all the cases cited hereinabove either the properties under the Will are situated in the ordinarily civil jurisdiction of the High Courts of Judicature at Madras and Bombay or in the jurisdiction of M.P. In none of the cases properties were situated at both the places. While in the case in hand most of the properties are situated in M.P. and only some of the properties are situated at Delhi and within the local limits of the ordinary original civil jurisdiction of High Court of judicature at Mumbai. Thus on facts all the case laws submitted are distinguishable. However, suffice to say that both the parties has placed reliance on a decision of Hon'ble Apex Court in the matter of *Clarence Pais* (supra) wherein Hon'ble Apex Court observed that a combined reading of section 213 and 57 of the Act would show that where the parties to the Will are Hindus or the properties in dispute are not in territories falling under section 57(a) and (b), sub-section (2) of Section 213 of the Act applies and sub-section (1) has no application. As a consequence, a probate will not be required to be obtained by a Hindu in respect of a Will made outside those territories or covering the immovable properties situated outside those territories. In view of this, prima facie it can safely be said that while deciding the application under Order XXXIX, Rule 1 and 2 of Civil Procedure Code the registered Will and codicil cannot be ignored only because it is unprobated."

14. At another occasion this very issue between the same parties in the same suit had come up before this Court in W.P. No.12474/2010 against the order of the trial Court rejecting the petitioner's application under Order 6 Rule 16 of the CPC in respect of the alleged will and codicil. This Court while dismissing the writ petition by order dated 20.5.2011 had held as under :-

"18. The decisions cited by Shri A.K. Sethi, learned

Senior Counsel are in relation to probate proceeding where either probate is to be granted or letter of administration are to be given to an applicant having an interest in the estate of the deceased. The circumstances in the present suit wherein a person dies intestate are, however, different. The learned trial Court has correctly indicated that the dispute between the parties relating to the title of the deceased in respect of his properties which are situated in M.P. and Delhi, can be gone into and that there is no bar to a Court determining the same and if in the later stage it is found that administrator has not been appointed in respect of the three properties which are situated at Bombay, then the question regarding striking out of the defence of the defendants can be considered is just and proper."

Therefore, at earlier occasion also this Court has held against the petitioner in regard to this issue.

15. It is also the settled position in law that the doctrine of severability applies to the wills. Section 87 of the Act provides that the testator's intention to be effectuated as far as possible and it is not to be set aside because it cannot be given effect to the full extent. This proposition is also supported by the judgment of the Privi Council in the matter of *Raghunath Prasad Singh and another Vs. Deputy Commissioner, Partabgarh and others* reported in 1929 Privy Council 283 judgment of the Supreme Court in the matter of *Bajrang Factory Ltd. and Another Vs. University of Calcutta and others* reported in (2007) 7 SCC 183 and in the matter of *Anil Kak Vs. Kumari Sharada Raje and others* reported in (2008) 7 SCC 695.

16. Thus, I am of the opinion that the trial Court is competent to consider the wills in question in respect of the properties which are situated at Indore and Delhi for which no probate or letter of administration is required. Hence the trial Court has not committed any patent illegality in rejecting the petitioner's objection in respect of the admissibility of the will.

17. Even otherwise, the Supreme Court in the matter of *Jai Singh and others Vs. Municipal Corporation of Delhi and Another* reported in 2010(9) SCC 385 while considering the scope of interference under Article 227 of the Constitution, has held that the jurisdiction under Article 227 cannot be

exercised to correct all errors of judgment of a court, or tribunal acting within the limits of its jurisdiction. Correctional jurisdiction can be exercised in cases where orders have been passed in grave dereliction of duty or in flagrant abuse of fundamental principles of law or justice.

18. The writ petition is accordingly dismissed.

Petition dismissed.

I.L.R. [2016] M.P., 1693
WRIT PETITION

Before Mr. Justice A.M. Khanwilkar Chief Justice &
Mr. Justice Sanjay Yadav

W.P. No. 4186/2004 (Jabalpur) decided on 14 October, 2015

CENTAUTO AUTOMOTIVES PRIVATE LIMITED (M/S) ...Petitioner
Vs.
UNION BANK OF INDIA & ors. ...Respondents

A. ***Constitution - Article 226 - Territorial Jurisdiction - Property situated at Raipur - Order under challenge is passed by D.R.T., Jabalpur - As part of cause of action arose within the jurisdiction of High Court of Madhya Pradesh, writ petition is maintainable. (Para 10)***

क. *संविधान – अनुच्छेद 226 – क्षेत्रीय अधिकारिता* – संपत्ति रायपुर में स्थित – चुनौती दिया गया आदेश ऋण वसूली अधिकरण, जबलपुर द्वारा पारित किया गया – चूंकि वाद हेतुक का अंश मध्यप्रदेश उच्च न्यायालय की अधिकारिता के अंतर्गत उत्पन्न हुआ है, रिट याचिका पोषणीय है।

B. ***Income Tax Act (43 of 1961) - Rule 53 of Schedule II - Contents of Proclamation - Reserve Price of Property put for auction - Hearing of debtor - There is no requirement of giving opportunity to the debtor before valuation is made and reserve price is fixed or to consider the alternate valuation filed at the instance of debtor. (Para 13)***

ख. *आयकर अधिनियम (1961 का 43) – अनुसूची II का नियम 53 – उदघोषणा की विषयवस्तु* – नीलामी हेतु रखी गई संपत्ति का आरक्षित मूल्य – ऋणी को सुना जाना – मूल्यांकन किये जाने एवं आरक्षित मूल्य निश्चित किए जाने के पूर्व ऋणी को अवसर दिया जाना अथवा ऋणी के अनुरोध पर प्रस्तुत वैकल्पिक मूल्यांकन पर विचार किया जाना अपेक्षित नहीं है।

Cases referred :

(2005) 10 SCC 134, AIR 2012 SC 2288.

Satish Agrawal, for the petitioner.
A.C. Thakur, for the respondent No. 1.
Anil Khare with *H.S. Chhabra,* for the respondent No. 5.
Sankalp Kochar, for the respondent No. 6.

JUDGMENT

The Judgment of the Court was delivered by : **A.M. KHANWILKAR, C.J. :-** This petition filed under Article 226 of the Constitution of India takes exception to the order passed by the Debts Recovery Appellate Tribunal (hereinafter referred to as "Appellate Tribunal") dated 08.10.2004 (Annexure-P/1), as also by the Debts Recovery Tribunal (hereinafter referred to "Tribunal") dated 12.03.2004 (Annexure-P/3) and of the Recovery Officer dated 12.01.2004 (Annexure-P/2). The petitioner by amending the petition has asked for further appropriate writ or direction in relation to the order dated 28.10.2004 passed by the Recovery Officer in O.A. Execution No.14/2002.

2. Briefly stated, the petitioner is a Certificated Debtor. For recovering the amount from the petitioner, the Recovery Officer issued a public auction notice dated 15.11.2003, which was published on 10.12.2003 in the local newspapers. The auction notice refers to four properties, which were ordered to be sold in auction. Out of that, only two properties are situated at Raipur (State of Chhattisgarh) and were made subject matter of objection filed by the petitioner regarding valuation thereof. From the objection filed by the petitioner, essentially, two points can be discerned. Firstly, that the properties were not properly valued and; secondly, the reserve price mentioned in the auction notice in respect of the said properties were based on valuation report of year 2002, which according to the petitioner, could not have been made the basis for determining the reserve price. This objection was considered by the Recovery Officer and has been answered as follows:-

> "प्रकरण में सभी पक्षों के तर्को को सुना गया एवं त्तसंबंधी विधिक प्रावधानों का अध्ययन किया गया। नीलामी शुदा संपत्तियों में किरायेदार होने अथवा नहीं होने से नीलामी की कार्यवाही रोके जाने को कोई विधिक औचित्य नहीं है, संपत्ति में किरायेदारी का दावा प्रस्तुत किया गया है जिसके दस्तावेजो की विस्तृत छानबीन

आवश्यक है जो नीलामी की कार्यवाही के पश्चात् भी विधिक प्रावधानें के अंतर्गत किया जावेगा एवं इस हेतु पृथक से आदेश पारित किया जावेगा।

निर्णित ऋणी ने नीलामी शुदा संपत्तियों की मूल्यांकन रिर्पोट मान्यता प्राप्त, मूल्यांनकर्ता से करवाकर प्रस्तुत की है साथ ही उप पंजीयक रायपुर का प्रमाण पत्र भी प्रस्तुत किया है जो यह प्रदर्शित करता है कि संपत्तियों का मूल्यांकन वादी बैंक द्वारा प्रस्तुत मूल्यांकन से काफी अधिक है साथ ही वादी बैंक की मूल्यांकन रिर्पोट एक वर्ष से अधिक पुरानी है अतः मूल्यांकन के संबंध में सूक्ष्मता से विचार किया जाना आवश्यक है, चूंकि नीलामी का दिनांक 13.01.04 पूर्वनिर्धारित है और न्यायधिकरण के पास उक्त विचारण हेतु समय नहीं है फलतः मैं उपरोक्त के आधार पर इस निष्कर्ष पर पहुंचा हूं कि दिनांक 13.01.2003 को प्रस्तावित नीलामी जो कि पूर्वघोषित है को रोकने का कोई विधिक औचित्य नहीं है, जारी रहेगी। निर्णित ऋणी को यह अवसर प्राप्त है कि वे उक्त नीलामी में अधिक मूल्य देने वाले क्रेताओं को प्रेरित कर सकते हैं।

संपत्ति के मूल्यांकन बाबत् नीलामी पश्चात इस न्यायधिकरण द्वारा सूक्ष्मता से जांच उपरांत ही विक्रय के विनिश्चियन संबंधी कार्यवाही की जावेगी।

प्रकरण दिनांक 22.01.04 को पेश हो।"

3. Against this decision, the petitioner carried the matter before the Debts Recovery Tribunal raising diverse pleas – firstly, that the valuation of the properties in question was not correct. Secondly, the same was based on valuation report of year 2002. Thirdly, the Recovery Officer was obliged to decide the objections taken by the petitioner, *inter alia*, non-compliance of Rule 53 of Schedule-II of the Income Tax Act, 1962 (for brevity "Income Tax Act") before proceeding with the auction process. Further, the Recovery Officer overlooked the formation of cartel by the participants during the auction. The Recovery Officer did not apply his mind and failed to stop the auction process in spite of such illegal activities and instead hastened the process within two minutes. The actual value of the properties was much more than the price offered during the auction. The Bank would be the looser - because of less amount recovered in the auction process. The petitioner made an offer before the Debts Recovery Tribunal that he would bear the expenditure incurred by the Bank for putting the properties to re-auction, if the sale was to be cancelled. The auction proceedings were in violation of principles of natural justice.

4. These contentions were refuted by the Bank firstly on the ground that

the remedy of appeal against the order of Recovery Officer was *pre mature*. In that, the objection taken by the petitioner about the valuation of the properties was still undecided and pending for adjudication before the Recovery Officer. That the petitioner would get opportunity to apply for setting aside the auction sale under Rule 60 of Schedule-II of the Income Tax Act. Further, the petitioner has not disclosed all the material and relevant facts. The valuation report obtained by the Bank was from an approved Valuer. As the State of Chhattisgarh was established w.e.f. 01.11.2000 and Raipur was notified as the State Capital, there was spurt in the property price in Raipur. This was taken into account while fixing the reserve price and during the auction. It was contended on behalf of the Bank that the valuation certificate obtained by the petitioner from Pilliwar was incorrect. Infact, said Pilliwar was earlier in the panel of respondent-Bank, but, due to his bad reputation, no work was entrusted to him and the process to remove him from the panel of Bank approved valuers was in progress. The Bank contended that as the auction sale was fixed for 13.01.2004, no fault can be found with the view taken by the Recovery Officer to defer the consideration of objection regarding valuation of the properties, keeping in mind that the petitioner had approached only at the eleventh hour with the said objection (as objection was filed on 4.1.2004 before the Recovery Officer, though the auction notice was notified for 13.01.2004 and order of the Recovery Officer to auction the suit properties was passed on 15.11.2003). The attempt of the petitioner was to interdict the auction process and for which reason, had also issued a press note to create confusion. The petitioner tried his best to obstruct the auction sale. Notably, contended the Bank that the Recovery Officer gave full opportunity to the petitioner including to participate in the auction sale. The petitioner did not avail of the said opportunity or to offer higher price; and he was not ready to pay amount to the Bank as per the valuation report (as mentioned in valuation report relied by the petitioner) or 20% more than the auction price. Only then the Bank would have considered his request to set aside the auction sale.

5. After considering the rival contentions, the Debts Recovery Tribunal formulated only one issue for consideration - as to whether the order passed by the Recovery Officer dated 12.01.2004 was liable to be set aside. The Tribunal then proceeded to examine the matter in the context of the said issue for consideration. The Tribunal in paragraph 8 found that the valuation report of the Bank prepared in the year 2002 cannot be said to be on the lower side

considering the fact that the State of Chhattisgarh was established on 01.11.2000. In paragraph 9 of the judgment, the Tribunal then considered the reasons why the reserve price for the concerned properties was fixed and found that the approach of the Bank in that behalf was correct. In paragraph 10 of the judgment, the Tribunal found that there may be several factors that would weigh with the bidders to bid low or high price for a particular property and in the absence of any material about the nexus between the officials involved in the bid and the purchasers, the allegation of the petitioner that particular property could have fetched more price, must be discarded as baseless and without any substance. In paragraph 11, the Tribunal then proceeded to consider the objection of the petitioner about the non-compliance of procedure stipulated in Rule 53, in the context of the fact that the reserve price was fixed by the Bank on the basis of valuation report of 2002. The Tribunal found that the petitioner did not file any valuation report of his own prior to issuance of auction proclamation, for which no infirmity can be found with the auction process in question merely because of fixing of reserve price on the basis of valuation report of 2002. The Tribunal also considered the grievance of the petitioner about the formation of cartel and rejected the same since the auction was an open auction and was done in the presence of the petitioner. The Tribunal held that auction proceedings were conducted in accordance with the Rules and established procedure. The Tribunal also recorded the offer given by the respondent-Bank that, if the petitioner is still interested in getting the sale set aside, is free to pay the amount as per the petitioner's valuation report of Shri Pilliwar or 20% over and above the auction price. The petitioner, however, did not consent to that offer as well. Nevertheless, the Recovery Officer deferred the consideration of objection regarding valuation and for which reason, no fault can be found with that approach of the Recovery Officer. The Tribunal in pagaraph 12 of the judgment reiterated the position that the objection regarding correct valuation of the properties can still be considered by the Recovery Officer, which has been kept open. The Tribunal noted that the petitioner was not ready to get that objection decided before confirmation of sale as per Rule 60 of Schedule-II of the Income Tax Act. The Tribunal, thus, concluded that the appeal preferred by the petitioner was *pre mature* and dismissed the same being devoid of merits. The Tribunal has directed the Recovery Officer to dispose of the objections preferred by the petitioner without being influenced by the observations made in its judgment dated

12.03.2004.

6. Although, the Tribunal kept all the issues open, the petitioner still approached the Debts Recovery Appellate Tribunal. The pleas taken before the Tribunal and the objection before the Recovery Officer were reiterated by the petitioner even before the Appellate Tribunal. No other contention can be discerned from the judgment of the Appellate Tribunal. The Bank resisted the appeal on the same grounds and more particularly, because the appeal was *pre mature* - as the objection regarding proper valuation of the properties was yet to be adjudicated by the Recovery Officer and would be available to the petitioner before confirmation of sale. The Appellate Tribunal once again considered those points and has reiterated the opinion of the Tribunal and of the Recovery Officer. Leaving all questions regarding the said objection open, the appeal preferred by the petitioner came to be dismissed. The Appellate Tribunal also noted about the unwillingness of the petitioner to avail the offer given by the respondent-Bank and observed that the petitioner was indulging in dilatory tactics. Against these concurrent decisions, the present writ petition has been filed.

7. Although diverse grounds have been raised in the writ petition, during the arguments learned counsel for the petitioner confined to only two points. The first contention is that the petitioner was not given prior notice before the reserve price was fixed by the respondent-Bank in respect of the suit properties. That entailed in infraction of Rule 53 of the Income Tax Act. The second contention raised is again reiteration of ground taken in the objection filed before the Recovery Officer. In that, the valuation of the suit properties was not correct. Further, the reserve price was erroneously fixed on the basis of valuation report obtained by the respondent-Bank in the year 2002, though the auction was to be held on 13.01.2004.

8. The respondent-Bank has opposed this writ petition. Preliminary objection regarding the jurisdiction of Madhya Pradesh High Court has been raised on the ground that the suit properties are situated in the State of Chhattisgarh and also the Debts Recovery Appellate Tribunal, which decided the appeal by the impugned judgment is at Allahabad (State of Uttar Pradesh). On merits, the respondent-Bank has reiterated the arguments, as were canvassed before the Recovery Officer and upto the Appellate Tribunal – qua

the objection of correct valuation of the property. As regards the first point argued by the counsel for the petitioner in this writ petition, it is submitted that this plea was not taken before the Recovery Officer or for that matter before the Tribunal or the Appellate Tribunal; and, therefore, should not be permitted for the first time before this Court. Besides, reliance is placed on the decision of the Supreme Court in *Samir K. Shah and Another v. Union of India and Others*1, to buttress the argument that the petitioner was not entitled to notice or opportunity before determining the reserve price of the properties.

9. The Counsel appearing for the private respondent has adopted the arguments of the respondent-Bank, but, further submits that said respondent has acted upon the auction notice not only by participating in the auction process, but has also invested huge amount. Further, there is no merit in the objection taken by the petitioner.

10. Having considered the rival contentions, we may first take-up the preliminary objection regarding the maintainability of this writ petition. Indeed, the suit properties put-up for auction are situated in the State of Chhattisgarh. The auction notice in respect of those properties and also bidding was held in the State of Chhattisgarh. However, part of the cause of action for filing this writ petition has arisen within the jurisdiction of this Court as the petitioner had filed appeal bearing Appeal No.01-2004 before the Debts Recovery Tribunal at Jabalpur. The counsel for the respondent-Bank, therefore, did not pursue this objection further.

11. Accordingly, the matter proceeded on merits. As regards merits – from the factual narration, it is evident that right from the Recovery Officer till the Appellate Tribunal, every Forum has observed that the objection regarding correct valuation of the suit properties raised by the petitioner would be adjudicated by the Recovery Officer at the appropriate stage. This view taken by the Recovery Officer and as affirmed by the Tribunal as well as Appellate Tribunal commends to us. We hold that no other opinion is possible. The Appellate Tribunal has restated the clarification noted by the Recovery Officer and the Tribunal that all aspects with regard to the objection regarding improper valuation of the suit properties will be considered on its own merits by the Recovery Officer.

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1. (2005) 10 SCC 134

12. The question is: whether the petitioner is right in contending that the entire auction process has vitiated due to non-compliance of Rule 53 and in particular, not giving notice or opportunity to it, before determining the reserve price. This plea has been rightly countered by the respondents by relying on the exposition in the case of *Samir K. Shah* (supra). In para 10 and 11, the Supreme Court observed thus:-

> **"10.** The Rules do not require the grant of any opportunity to the debtor of being heard before the valuation is made and the reserve price fixed. The debtor is entitled to notice only for the drawing up of the proclamation sale. Presumably, the intention is to keep the debtor informed of the steps taken by the creditor to realise a fair value of the debtor's property. There is no requirement for the creditor to consider any alternative valuation filed at the instance of the debtor. The reference to the decision of this Court in *Desh Bandhu Gupta v. N.L. Anand and Rajinder Singh* by the appellant, is inapt. The decision relates to a sale in execution of a decree under Order 21 Rule 66 of the Code of Civil Procedure which expressly requires that the sale proclamation shall include the estimate of the value of the property if any given by either or both of the parties. It was in that context that this Court had said;(SCCp.132)
>
> "It is very salutary that a person's property cannot be sold without his being told that it is being so sold and given an opportunity to offer his estimate as he is the person who intimately knew the value of his property and prevailing in the locality though exaggeration may at times be possible."
>
> **11.** There is no corresponding provision in Rule 52 or 53 of the Schedule to the Income Tax Act, 1961 or in any other provision which has been incorporated into the Act by Section 29. It cannot, therefore, be said that Regulation 60 is violative of Section 29 of the Act."
>
> (emphasis supplied)

13. In the light of the decision of the Supreme Court and the unambiguous

opinion that there is no requirement of giving opportunity to the Debtor before the valuation is made and the reserve price is fixed or to consider the alternative valuation filed at the instance of the Debtor, this grievance of the petitioner about denial of opportunity due to non-issuance of notice or not deciding the objection taken in that behalf, cannot be taken forward. As a consequence of that finding, the argument of the petitioner that entire auction process is vitiated on that count, will have to be stated to be rejected. Notably, the petitioner has not taken this specific plea before the Recovery Officer or the Tribunal as well as the Appellate Tribunal. In any case, this contention does not deserve any further consideration.

14. Reverting to the argument of the petitioner about the incorrect valuation of the suit properties – that issue will have to be considered by the Recovery Officer on its own merits and in accordance with law. Whether the sale should be confirmed, set aside or otherwise, would depend on the opinion of the Recovery Officer to be given after considering the said objection. Although the Recovery Officer will have to consider the said objections afresh, as observed by the Tribunal as well as the Appellate Tribunal, that, however, does not mean that the factual narrations mentioned hitherto and available from the record would get effaced. The same, nevertheless, will have to be reckoned for deciding the matter in issue before the Recovery Officer, to form an independent opinion on that basis as well. Besides this, nothing more is required to be said at the instance of this petitioner.

15. As no other contention has been raised and arises for our consideration, the petition must fail. However, we must advert to the decision of the Supreme Court cited by the petitioner in the case of *Ram Kishun & Ors. v. State of U.P. & Ors.*2 in particular, observations found in paragraphs 8, 9, 12, 17 and 19 thereof. The Supreme Court considered the argument of the appellant that no recovery could have been made from the appellant (guarantor), as Debtor has had huge movable/ immovable property and other livestocks which could satisfy the demand of bank loan. Besides, there were two guarantors and the appellant's father was not the only guarantor. In this factual background, it was contended that the entire liability of remaining unpaid amount could not have been fastened upon the appellant. Further objection was taken on behalf of the appellant that the properties of the

2. AIR 2012 SC 2288

appellant were worth Rs.2 lac which had been sold in auction at a throw-away price of Rs.25,000/- only, that too, without following the procedure prescribed by law. For recovery of balance amount of loan, only a part of suit land could be sold. The Supreme Court no doubt referred to the provisions of the Act and the Rules and in paragraph 8 observed that merely because the recovery is in respect of public money, it should not mean that financial institutions which are concerned only with the recovery of their loans, may be permitted to behave like property dealers and be permitted to dispose of the secured assets in any unreasonable or arbitrary manner, in flagrant violation of the statutory provisions. This question does not arise for consideration in the present petition, especially when, the petitioner's objection regarding incorrect valuation of the suit properties is still pending before the Recovery Officer.

16. The argument proceeded that right to hold property to be enjoyed by the petitioner is a constitutional right as observed in para 9 of the same judgment. Indeed, right to hold property is a constitutional right as well as a human right, but that is not an absolute right. The properties so held will be subject to the procedure established by law. In the present case, the auction has been conducted by following due process and as per Rules. Hence, even this observation will be of no avail to the petitioner. Much emphasis was placed on the dictum in paragraphs 12, 17 and 19, to contend that the valuation of the suit properties was incorrect. Once again those observations need not detain us from answering the present petition, which is directed against the decision of the Recovery Officer, who has deferred the consideration of that objection and is yet to adjudicate the same.

17. Suffice it to observe that the Recovery Officer may have to consider all matters, which are germane for deciding the objection filed by the petitioner – which is still pending for adjudication.

18. For the reasons mentioned hitherto, the petition is **dismissed** being devoid of merits with cost quantified at Rs.25,000/- to be paid to the respondent-Bank, in the facts of the present case.

Petition dismissed.

I.L.R. [2016] M.P., 1703
WRIT PETITION
Before Mr. Justice A.M. Khanwilkar, Chief Justice &
Mr. Justice Sanjay Yadav
W.P. No. 1231/1999 (Jabalpur) decided on 20 November, 2015

MECH & FAB INDUSTRIES ...Petitioner
Vs.
UNION OF INDIA & anr. ...Respondents

Finance Act (2 of 1988), Section 89 - Kar Vivad Samadhan Scheme 1998 **- Declaration filed by petitioner under Form 1 B of the Scheme - Claiming of benefit under the Scheme of 1998 - Respondents rejected the declaration at threshold on the ground that amount of pending arrears in the declaration differs from amount in previous correspondence - Held - The correctness of the declaration submitted in the prescribed Form for settlement of dispute under the Scheme, cannot be judged on the basis of stand taken by the Assessee in the previous correspondence whereas the disclosures made in the declaration by the petitioner ought to be treated as relevant facts and correctness to be judged on its own merits - Petition allowed - Amount already deposited by the petitioner be given due adjustments by the authority while processing the declaration. (Paras 8 to 11, 13 & 15)**

वित्त अधिनियम (1988 का 2), धारा 89 – कर विवाद समाधान स्कीम 1998 – याची द्वारा स्कीम के प्रारूप 1 बी के अंतर्गत घोषणा प्रस्तुत की गई – 1998 की स्कीम के अंतर्गत लाभ का दावा किया गया – प्रत्यर्थीगण ने प्रारंभ में ही इस आधार पर घोषणा खारिज कर दी कि घोषणा में अंकित लंबित बकाया की राशि पूर्ववर्ती पत्राचार में अंकित राशि से भिन्न है – अभिनिर्धारित – स्कीम के अंतर्गत विवाद के निपटारे के लिए विहित प्रारूप में प्रस्तुत की गई घोषणा की सत्यता का निर्णय, करदाता द्वारा पूर्ववर्ती पत्राचार में प्रकट की गई स्थिति के आधार पर नहीं किया जा सकता बल्कि याची द्वारा घोषणा में किये गए प्रकटनों को सुसंगत तथ्यों के रूप में माना जाना चाहिए एवं उसकी सत्यता का निर्णय उसके स्वयं के गुणदोषों पर किया जाना चाहिए – याचिका मंजूर – प्राधिकारी द्वारा घोषणा पर कार्यवाही करते समय याची द्वारा पूर्व में जमा की गई राशि का सम्यक् समायोजन किया जावे।

Case referred:

(2006) 11 SCC 548.

H.K. Upadhyay, for the petitioner.
S.A. Dharmadhikari, for the respondents.

JUDGMENT

The Judgment of the Court was delivered by : **A.M. KHANWILKAR, C.J. :-** This writ petition under Article 226 of the Constitution of India takes exception to the communication-cum-order conveyed to the petitioner by the Department issued under the signature of Commissioner dated 3rd March, 1999 (Annexure P-12). The same reads thus:-

OFFICE OF THE COMMISSIONER, CUSTOMS & CENTRAL EXCISE, COMMISSIONERATE: INDORE –II,
OPPOSITE MAIDA MILL, HOSHANGABAD ROAD,
BHOPAL – 462011

C.O.IV(16)Decl-26/98/Samadhan/6185 Bhopal, dated 03.03.99

To

M/s Mech & Fab Industries
17-B, Sector-D, Industrial Area,
Govindpura,
BHOPAL.

Sub: Declaration No.26/98 filed by you under the Kar Vivad Samadhan Scheme, 1998.

Please refer to your Declaration dated 04.12.98 filed under the Kar Vivad Samadhan Scheme (allotted Decl. No.26/98), seeking settlement of case relating to Show Cause Notice No.V(85)15-40/96/Adj/61911 dated 10.12.96, and subsequent Order-in-Original No.12/CEX/97 dated 24.09.97 declaring tax arrears of Central Excise Duty of Rs.269944 and Penalty of Rs.364238.

From the declarations dated 04.12.98 filed by you, it is noticed that you have shown the amount of tax arrears as under:-

	AMOUNT OF TAX ARREARS AS PER SHOW CAUSE NOTICE	AMOUNT PAID ON OR BEFORE FILING OF DECLN.	BALANCE AMOUNT PAYABLE AS ON THE DATE OF DECLN.
DUTY	3,64,238/-	94,294/- Vide PLA E.No.02 dtd. 15.6.98	2,69,944/-
FINE	NIL	NIL	NIL
PENALTY	3,64,238/-	NIL	3,64,238/-
INTEREST	20% from date of liability	NIL	20% from date of liability.

On inquiry, it has been found that you, vide your letter No.MF/ EXCISE/98 dated 15.06.1998 have intimated to Commissioner (Appeals), Bhopal that you have made the pre-deposit of total duty of Rs.3,64,238/- vide PLA Entry Nos.26,27,28,29,30 dated 04.10.96, PLA Entry Nos.34 dated 09.10.96, PLA Entry No.02 dated 15.06.98 & RG23A Pt.II Entry No.306 dated 16.06.98. Thus you have misdeclared the amount of pending arrears in your aforesaid declarations.

Further, you have taken recredit of Rs.1,96,500 in you RG23A Pt.II account in pursuance to the Assistant Commissioner, Central Excise, Division-I's letter CNO.IV(16)518-KVS/98/7569 dated 02.12.98, without first paying the said amount from PLA. The recredit thus taken is not proper and legal.

Since, the facts show this to be a case of willful misdeclaration, in order to avail maximum undue benefit at the cost of the exchequer, the declarations is hereby rejected.

Sd/-
(SUBHASH CHANDER)
COMMISSIONER

Copy to:-

1. The Assistant Commissioner, Central Excise, Division-I, Bhopal for information.

2. The Superintendent, Central Excise, Range-IV, Bhopal for information.

Sd/-
(SUBHASH CHANDER)
COMMISSIONER"

(emphasis supplied)

2. According to the petitioner, the Authority committed manifest error in non-suiting the petitioner at the threshold on the finding that the declaration filed by the petitioner was incorrect or a case of misdeclaration, without giving opportunity to the petitioner to pursue the declaration to its logical end. The petitioner submits that the Authority clearly glossed over the factual position stated in the declaration, which is on affidavit filed in the prescribed form. That factual position stated in the declaration alone should be reckoned for considering the claim of the Petitioner with reference to the benefits to be extended under the Scheme. It is contended that the correspondence exchanged between the petitioner-assessee and the Department and the claim of the petitioner founded on such correspondence, at best, was a matter to be considered while processing the declaration of the assessee for recording opinion as to whether the assessee was entitled for the benefit of the Kar Vivad Samadhan Scheme, 1998 as propounded.

3. The respondents, on the other hand, submit that the figures stated by the petitioner in the communication sent by the petitioner dated 15th June, 1998 are not matching with the figures mentioned in the declaration dated 04.12.1998. In that, on 04.12.1998, the petitioner had already paid the amount of duty, therefore, could not have made contrary statement in the declaration on 04.12.1998; nor entitled to any benefit under the Scheme on that count. This is the broad plea taken by the Department.

4. Having considered the rival submissions, we deem it apposite to reproduce the declaration filed by the petitioner under Section 89 of the Finance (No.2) Act, 1988 in respect of Kar Vivad Samadhan Scheme, 1998 (Annexure P-11), which reads thus:-

"Form of Declaration under section 89 of the Finance (No.2) Act, 1988 in respect of Kar Vivad Samadhan Scheme, 1998

Kar Vivad Samadhan Scheme Rules, 1998.

FORM – 1B
{See rule 3(1)(b)}

To

The Designated Authority
Central Excise & Customs,
BHOPAL.

Sir/Madam,

I hereby make a declaration under section 88 of the Finance (No.2) Act, 1998.

1. Name of the declarant (in block letters)	M/S MECH & FAB INDUSTRIES 17-B, Sector-D, Industrial Area, Govindpura, Bhopal. Tel. No.Office/factory 587404 586273 Fax 527693	
2. Address: Office	----do------	
Factory address		
(if dispute relates to excisable goods)		
3. Status of the declarant (State whether Manufacturer, company etc.)	Manufacturer	Dealer, Importer, Exporter, Individual
4. (a) If a manufacturing Unit, Indicate Central Excise Registration No.	If Importer or Exporter indicate Improter or Exporter Code No.	Others
R-VI/MFI/92/BPL/86	--N.A.---	--N.A.—

(b) Name of Range/Division/Commissionerate/Custom House where assessed or from where a show cause/demand notice issued in relation to the case for which tax arrears are proposed to be settled.

Range :- IV

Division :- I

Commissionerate:- Indore II, at Bhopal

5. Details of the case and tax arrears proposed for settlement under the scheme:

	Particulars	
1.)	Commissionerate of Central Excise/Customs where Assessed or from where a show cause/demand notice issued in relation to the case for which tax arrears are proposed to be settled.	The Commissioner, Collector, Custom & Central Excise, Indore
2.)	Reference Number of show cause/demand notice and date of issue	V(85)15-40/96Adj.61911 dt. 10/12/96 & Adjudicated by Dy. Comm. CEX BHOPAL Vide O-I-O 12/CEX/97 Dt. 24/09/97
3.)	Pendency Status of the case (as on the date of declaration) (See Instruction 4)	Appeal Rejected by The Commissioner (Appeals), Custom & Central Excise, Bhopal vide his order-in-Appeal No.583-ce/BPL/ 98 dt.31/8/98 against which appeal to CEGAT New Delhi vide Appeal No.E/3016/98A
4.)	Amount of Tax Arrear as per show cause/demand Notice or as already determined (due or payable) as per lase order (as on the date of declaration) (In Rs. (See Instructions 5)	
	4(a) Duty	Rs. 3,64,238.00
	4(b) Fine	Rs. Nil
	4(c) Penalty	Rs. 3,64,238.00
	4(d) Interest	Rs. 20% from the date of liability

5.) Amount of Tax arrear paid on or before the date of Declaration (along with Date of payment and payment particulars) (in Rs.) (See Instruction 6)	PLA No. 02	RG23P(II) -	Date 15/06/98	Amount 94294
				94294

6. Balance amount payable as on the date of declaration (Col.4 – 5)

Duty/Cess	Rs. 2,69,944.00
Fine	Rs. Nil
Penalty	Rs.3,64,238.00
Interest	Rs. 20% from the date of liability

7. Settlement amount Claimed as payable for the case under Section 88(f) (In Rs.) — 50% of the above i.e. Rs.1,34,972.00

8. Is there any seizure of goods involved in the Case, if so, give details of seizure. — NIL

9. Is it a case where Department has filed an appeal against any of the orders passed at any stage in respect of this case, if so, give details.

10. Remarks

VERIFICATION

I, MAHESH AGRAWAL (name in block letters) son of Shri Bansidhar Agrawal solemnly declare that to the best of my knowledge and belief.

(a) The information given in this declaration and statements and annexures accompanying it is correct and complete and amount of tax arrears and other particulars shown therein are truly stated.

(b) I am not disqualified in any manner from making a declaration under the Scheme with reference to the provisions of Section

95 of Finance (No.2) Act, 1998.

I further declare that I am making this declaration in my capacity as Managing Partner (designation) M/s Mech & Fab Industries, Govindpura, Bhopal and that I am competent to make this declaration and verify it.

For MECH & FAB INDUSTRIES

PLACE: BHOPAL
DATE: 04/12/98

(MAHESH AGRAWAL)
MANAGING PARTNER"

5. Notably, it is not the argument of the respondents that the factual position stated against column Nos.4 to 7 of the declaration in particular, is incorrect as such. What has been held against the petitioner, is that, the petitioner in the communication sent on 15.06.1998 had mentioned different factual position. For that, we may usefully refer to said communication (Annexure P-5) which reads thus:-

"MF/Excise/98
June 15, 1998

The Commissioner (Appeals),
Customs & Central Excise,
Opp. Maida Mill,
Hoshangabad Road,
Bhopal.

Subject: Our application for stay/against Appeal No.12/98.

Ref: Your letter C. No.12-CE/BPL/APPL/98 (No.172- CE/BPL/98) 1450dated 18/05/98.

Dear Sir,

We wish to draw your kind attention towards your above mentioned letter vide which you have instructed us to deposit the duty adjudged. In this connection, we wish to inform you that we have pre-deposited the duty adjudged vide the following details.

S.No.	PLA	RG 23 A Part II	Amount
1.	26, 27, 28, 29, 30 dated 04.10.96	---	70917.00
2.	34 dated 09.10.96	---	2527.00
3.	02 dated 15.06.98	---	94294.00
4.	----	306 dated 15.06.98	196500.00
		Total =	364238.00

The photocopies of the relevant pages of PLA and RG 23 A Part II are being enclosed herewith. This is for your further necessary action.

Thanking you

Yours faithfully

For MECH & FAB INDUSTRIES
Sd/-
Mahesh Agrawal
Managing Director."

6. It may be mentioned at this stage that after this communication, the petitioner received communication from the Assistant Commissioner, Central Excise, Division-I on 02.12.1998, Annexure P-6, which reads thus:-

"OFFICE OF THE ASSISTANT COMMISSIONER

CENTRAL EXCISE, DIVISION, BHOPAL

C.No.IV(16)818-KVs/98/7567 Bhopal dt. 2.12.98

To,

M/s Mech & Fab Industries
17-B, Sector-D, Industrial Area,
Govindapura, Bhopal.

Gentleman,

Sub: Payment of Arrears through RG23A Part II-C/R.

On scrutiny of RI 12 for the month of June, 98, it was observed by

Range Supdt. That you have paid the arrears against order – in original No.12/ CEN/Dc/97 dt. 24.9.97 vide RG23-A Pt. II E.No.306, dt.15.6.98, for Rs.1,96,500/- without maintaining sufficient balance in RG23-A Pt.II account during the intervening period.

You are directed to pay the Arrears of Rs.1,96,500/- in cash or through RA. However, you can take revenue entry of the amount debited vide RG23-A Pt.II E.No.306 dt.15.6.98 as per law.

Yours faithfully,
Sd/- 2.12.98
Assistant Commissioner
Central Excise Dv.I, Bhopal.

Copy to: The Supdt. Central Excise,
Range-IV for information and necessary action."

7. In response to the said communication the petitioner on 03.12.1998 (Annexure P-7) wrote back to the Commissioner as follows:-

"MF/EXCISE/98
December 3, 1998

The Assistant Commissioner
Central Excise
Division – I.
Bhopal

Sub :- Intimation

Ref :- Your Letter No. C.No.IV(16) 518-KVS/98 Dated 02.12.98.

Dear Sir,

We refer to your above mentioned letter, accordingly we wish to inform you that we have reversed the amount of Rs.1,96,500/- in RG-23 A Part II vide Entry No.1154 dated 02/12/98 against previously debited in RG-23 A Part II entry No. 306 dt. 15/06/98.

This is for your kind information and record.

Thanks

Yours Faithfully,
for Mech & Fab Industries

Mahesh Agrawal
Managing Partner

CC: Superintendent,
Central Excise
Division-I
BHOPAL"

8. As aforesaid, the core issue, as is rightly contended by the petitioner, is: whether the factual position stated by the petitioner in the declaration, which is required to be filed in the prescribed Form No.1-B, is incorrect in any manner?

9. The counsel for the respondents is not in a position to point out as to how the facts or figures stated in clauses 4 to 7 of the declaration are incorrect. The argument of the respondents, however, proceeds that since the petitioner had already paid the amount of Rs.2,69,944/- towards duty/cess before 4.12.1998, that amount could not have been shown as the balance amount payable by the petitioner in the declaration. Per contra, the petitioner points out that the petitioner had made necessary book entries in the books of accounts, as was expected to be done in terms of communication received from the Assistant Commissioner, Central Excise, Division-I dated 02.12.1998 and which was duly communicated to the Department by letter dated 03.12.1998 Annexure P-7. As a consequence thereof, on the date of submitting declaration on 04.12.1998, the amount mentioned in clause 6 of the declaration against item Duty/cess was payable by the petitioner.

10. Assuming that the Department is right in pointing out that the duty/ cess was already paid by the petitioner and was not due on 04.12.1998 when the declaration was filed, we fail to understand as to how that would result in causing willful loss to the public exchequer, as such. It would be a different matter, if the petitioner was to incorrectly claim that the amount was not outstanding on the day of filing declaration. Only then it would be a case of wrong or incorrect disclosure made to cause loss to public exchequer. Further, we hold that the correctness of the declaration submitted in the prescribed form for settlement of the dispute under the Scheme, cannot be judged on the basis of the stand taken by the assessee in the correspondence exchanged with the Department, prior to submission of such declaration. That approach

will be counterproductive to the purpose and intent for which the Scheme has been launched – for resolution of the disputes. In other words, the declaration cannot be jettisoned at the threshold as has been done in the present case, by referring to the stand taken by petitioner in its previous correspondence exchanged with the Department. Instead, the Department ought to have treated the disclosures made in the declaration by the petitioner as relevant facts; and the correctness thereof could be judged on its own merits. For, the term "declaration", as expounded by the Supreme Court in *B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd. and others*[1], has a definite connotation. It is a statement of material facts announced solemnly or officially. It may constitute a formal announcement or deliberate statement. Thus, it is an act of declaring; something which is declared, or a statement made. In para 40 of the above decision, the Supreme Court held thus:

> **"40.** The expression "declaration" has a definite connotation. It is a statement of material facts. It may constitute a formal announcement or a deliberate statement. A declaration must be announced solemnly or officially. It must be made with a view "to make known" or "to announce". (See *Prativa Pal v. Janhavi Charan Chatterjee*.) When a person is placed in the category of a declared defaulter, it must precede (sic be preceded by) a decision. The expression "declared" is wider than the words "found" or "made". Declared defaulter should be an actual defaulter and not an alleged defaulter."

11. We have no manner of doubt that in the facts of the present case, it was not open to the Department to non-suit the petitioner from participating in the said Scheme at the threshold on the ground that the factual position stated in the declaration dated 04.12.1998, submitted in the prescribed Form 1-B, Annexure P-11, was incorrect as it was not consistent with the previous communication sent by the petitioner dated 15.06.1998 – much less is of such a nature that it would cause loss to public exchequer either directly or indirectly. If the petitioner has already paid the amount towards Duty/cess, there can be no loss to the public exchequer as such. The petitioner, at best, would be entitled for adjustment as per the Scheme propounded, which is a matter to be considered by the Appropriate Authority. It is also open to the Appropriate Authority to consider as to whether the assessee, who has already paid the amount towards Duty/cess is eligible to participate in the Scheme.

1. (2006) 11 SCC 548 (Para 40)

12. In our opinion, the communication dated 03.03.1998, Annexure P-12, is founded on incorrect understanding of the requirement of declaration to be filed in the prescribed format and disclosures made by the assessee in respect of the respective items to be declared therein. In the fact situation of the present case, it is not possible to hold that the petitioner had misdeclared the relevant information, as noted in the impugned communication.

13. Accordingly, this petition succeeds. The impugned communication, Annexure P-12, is quashed and set aside. Instead, the Appropriate Authority is directed to process the proposal/declaration of the petitioner under the Scheme as per law.

14. We make it clear that we are not expressing any opinion on the merits of the issues to be considered by the Appropriate Authority including the question of applicability of the Scheme to the petitioner-assessee on other counts, which are not dealt with nor have arisen for consideration in the present petition.

15. The amount already deposited by the petitioner with the Department during the concerned assessment period either directly or in terms of order passed by the Court, be given due adjustments in the final decision to be taken by the Appropriate Authority.

16. Petition disposed of on the above terms with no order as to costs.

Order accordingly.

I.L.R. [2016] M.P., 1715
WRIT PETITION
Before Mr. Justice Alok Aradhe
W.P. No. 2934/2013 (Gwalior) decided on 9 December, 2015

SHYAMA ...Petitioner
Vs.
GODAWARI ...Respondent

(Alongwith W.P. No. 283/2014)

Civil Procedure Code (5 of 1908), Sections 10 & 151 - Stay of Suit - Pendency of Criminal Case **- Defendant filed an application after four years of filing of W.S. for staying the proceedings of the civil suit on the ground of pendency of criminal case in respect of the same cause**

of action - Held - There is no invariable Rule that the proceedings in the civil suit be stayed, unless disposal of criminal case or that simultaneous prosecution of criminal case and civil suit will invariably embarrass the accused - Defendant failed to disclose as to how the continuance of civil proceedings would cause embarrassment to him - No case was found to stay civil suit - Trial Court directed to proceed with the trial expeditiously. (Paras 6 & 7)

सिविल प्रकिया संहिता (1908 का 5), धाराऐं 10 व 151 – वाद का रोका जाना – दाण्डिक प्रकरण का लंबित रहना – प्रतिवादी ने लिखित कथन प्रस्तुत करने के चार वर्ष पश्चात्, समान वाद हेतुक के संबंध में दाण्डिक प्रकरण लंबित होने के आधार पर, सिविल वाद की कार्यवाहियों को रोके जाने हेतु आवेदन प्रस्तुत किया – अभिनिर्धारित – ऐसा कोई स्थिर नियम नही है कि सिविल वाद में कार्यवाहियां स्थगित की जाएं, जब तक कि दाण्डिक प्रकरण का निपटान अथवा सिविल वाद एवं दाण्डिक प्रकरण का समसामयिक अभियोजन अभियुक्त को सदैव उलझन में न डालता हो – प्रतिवादी यह प्रकट करने में असफल रहा है कि सिविल कार्यवाहियों के जारी रहने से उसे किस प्रकार उलझन कारित होगी – सिविल वाद को रोकने हेतु कोई मामला नही पाया गया – विचारण न्यायालय को प्रकरण के शीघ्र विचारण हेतु निर्देशित किया गया।

Cases referred:

2009(1) MPWN 104, AIR 1954 SC 397, 2010(8) SCC 775, 2013 (7) SCC 622.

Akshay Jain, for the petitioner.
R.P. Rathi, for the respondents no. 1 & 2.

(Supplied: Paragraph numbers)

ORDER

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

2. In W.P. No. 2934/13(I) the petitioner has challenged the validity of the order dated 26.02.2013, by which the application preferred by the petitioner u/S 10 of the Code of Civil Procedure has been rejected, whereas in W.P. No. No. 283/14, the petitioner has challenged the validity of the order dated 24.02.2012, by which the application filed by the respondent u/S 10 of the Code of Civil Procedure has been allowed.

3. Facts giving rise to filing of these petitions, briefly stated, are that respondent/plaintiff in W.P. No. 2934/13 and petitioner/plaintiff in W.P. No. 283/14 had instituted suits against the defendant (Shyama) for seeking compensation for death of their son Gabbar in W.P. No. 2934/13 and Dheeraj in W.P. No. 283/2014. The plaintiffs in both the cases pleaded that the defendant being the owner of the boat was rowing the boat in a negligent manner, despite being aware of the leakage in the boat, due to which it overturned in the river Chambal, as a result of which, sons of plaintiffs died. The intimation about the aforesaid accident was given to the police. Thereupon, crime no. 64/2006 was registered for an offence punishable u/S 304-A of the Indian Penal Code against the defendant. The plaintiffs in the suits sought compensation to the tune of Rs.2,00,000/- each. The defendant in both the suits, filed a written statement on 09.05.2008 and denied the averments made in the plaint. It is the stand of the defendent (sic:defendant) that he did not have any boat as claimed by the plaintiffs.

4. After four years of filing of the written statement in both the cases, the defendant moved an application u/S 10 read with Sec 151 of the Code of Civil Procedure on 27.02.2012 in Civil Suit No. 2-A/2014 on the ground that since a criminal case u/S 304-A of the Indian Penal Code is pending against the defendant and the cause of action in respect of the civil suit as well as the criminal case is the same, therefore proceeding in the suit be stayed. The trial Court dismissed the aforesaid application vide order dates 26.02.2013, which is the subject-matter of challenge in W.P. No. 2934/213. The application filed by the defendant was allowed by the trial Court in another suit namely Civil Suit No. 1-A/2011 vide order dated 24.02.2012. The aforesaid order is the subject-matter of challenge in W.P. No. 283/2014. In the aforesaid factual background,the petitioners have approached this Court.

5. Learned counsel for the petitioner while placing reliance on the Division Bench decision of this Court in case of *Ved Prakash & Others Vs. Guru Granth Saheb Sthan & Another* reported in 2009(1) MPWN 104 submitted that since civil suit and criminal proceeding are based on the same cause of action, therefore the civil suit should be stayed till criminal case is decided. On the other hand, learned counsel for the respondent submitted that in both the cases, the defendant has filed written statement on 09.05.2008 and thereafter, after a period of four years, the defendant had submitted an application u/S 10 of the Code of Civil Procedure which has wrongly been

allowed in Civil Suit No. 1-A/2011 and has rightly been rejected in Civil Suit No. 2-A/2014.

6. I have considered the respective submission made by the learned counsel for parties and perused the record. The Supreme Court in the case of *M.S. Sheriff Vs. The State of Madras & Others*[AIR 1954 SC 397], while dealing with the question of stay of proceedings namely civil or criminal, held the embarrassment to be a relevant aspect and after having regard to certain factors, the Supreme Court found expedient in the case of *M.S. Sheriff*(supra) to stay civil proceedings. However, it was made clear that it was not hard and fast rule and special considerations present in any particular case might make some other course more expedient and just. The decision rendered in the case of *M.S. Sheriff* (supra) was considered by the Supreme Court subsequently in the case of *Kishan Singh Thru LR's Vs. Gurpal Singh & Others* [2010(8) SCC 775] and in the case of *Guru Granth Saheb Sthan Meerghat Vanaras Vs. Ved Prakash* 2013(7) SCC 622 and it was held that the decision in *M.S. Sheriff's* case does not lay down invariable rule that simultaneous prosecution of criminal proceedings and civil suit will embarrass the accused or that invariably the proceedings in the civil suit should be stayed, unless disposal of criminal case.

7. In the backdrop of aforesaid well settled legal position, the facts of the case may be seen. In the instant case, admittedly, the petitioner filed application under Section 10 of the Code of Civil Procedure after filing of the written statement. It is pertinent to mention here that applications under Section 10 of the Code of Civil Procedure were filed after a period of four years. By that time, sufficient progress must have been made in the proceedings before the trial Court in criminal case. The defendant has failed to disclose as to how the continuance of the civil proceedings would cause an embarrassment to him. The impugned order dated 24.02.2012 passed in Civil Suit No. 1-A/ 2011 suffers from error apparent on the face of record, whereas, the trial Court has rightly rejected the application u/S 10 of the Code of Civil Procedure, in another civil suit.

8. In view of preceding analysis, the W.P. No. 2934/2013 is dismissed and the order dated 24.02.2012 passed in Civil Suit no. 1-A/2011 is quashed.

Accordingly, W.P. No. 283/2014 is allowed. The trial Court is directed to proceed with the trial of the aforesaid expeditiously in accordance with law.

9. With the aforesaid directions, petition stands disposed of.

Certified copy as per rules.

Petition disposed of.

I.L.R. [2016] M.P., 1719
ELECTION PETITION
Before Mr. Justice C.V. Sirpurkar
E.P. No. 24/2014 (Jabalpur) order passed on 4 January, 2016

KAMAL PATEL ...Petitioner
Vs.
SHRI RAM KISHORE DOGNE ...Respondent

***Evidence Act (1 of 1872), Section 65-B - Election petition - Electronic record* - In cases of CD, VCD, Chip etc., the same shall be accompanied by the certificate in terms of Section 65-B obtained at the time of taking the documents, without which, the secondary evidence pertaining to that electronic record, is inadmissible. (Para 12)**

साक्ष्य अधिनियम (1872 का 1), धारा 65–बी – चुनाव याचिका – इलेक्ट्रॉनिक अभिलेख – सीडी, वीसीडी, चिप इत्यादि के मामलों में, उनके साथ, दस्तावेज लिए जाते समय धारा 65–बी के निबंधनों के अनुसार प्राप्त किया गया प्रमाण पत्र संलग्न किया जाएगा, जिसके बिना, उक्त इलेक्ट्रॉनिक अभिलेख से संबंधित द्वितीयक साक्ष्य अग्राह्य होगी।

Case referred:

2014 (10) SCC 473.

R.P. Agrawal with *Anuj Agrawal*, for the petitioner.
Imtiaz Hussain, for the respondent No. 1.
Sushma Pandey, for the respondent No. 11.

O R D E R

C.V. SIRPURKAR, J. :- This order shall govern the disposal of **I.A. No. 14040/2015** filed on behalf of election petitioner under Order 16 Rule 1 of the Code of Civil Procedure and **I.A. No. 14043/2015** also filed on behalf

of the election petitioner under Order 7 Rule 14 (3) of the Code of Civil Procedure.

I.A.No.14040/2015

2. This application under Order 16 Rule 1 of the Code of Civil Procedure, has been filed on behalf of election petitioner Kamal Patel on 26-10-2015 for summoning the record from the office of Returning Officer of 135, Harda assembly constituency.

3. It has been submitted hereby that in paragraph no.16 of the election petition, the petitioner had pleaded that the Election Commission of India had video-graphed the public meetings of all candidates of major political parties, including the public meetings held by respondent No.1 Ram Kishore Dogne. The petitioner had obtained copies of such video-recordings in the form of Compact Discs. The petitioner filed an application before the District Election Officer on 25-12-2013 (copy of the application, Document No. 1 annexed to I.A. No. 14040/2015). Pursuant to aforesaid application, the Returning Officer instructed the petitioner to deposit requisite amount vide his letter dated 26-12-2013 (document no. 2). Accordingly, the petitioner deposited the requisite amount on 31-12-2013 vide document no. 3. Thereafter, the Compact Discs were duly supplied to him which were filed along with election petition as annexure numbers from P/19 to P/25. The original Compact Discs officially prepared by the Election Commission are in the possession of the Returning Officer. Therefore, it has been prayed that the Returning Officer of 135, Harda Assembly Constituency be summoned with originals Compact Discs in the Court.

4. It has further been submitted that it has been pleaded in paragraph no.16 (iii) of the petition that Shri Surendra Jain, who was Election Agent of the petitioner, lodged a complaint (Annexure-P/14) with the Returning Officer on 19-11-2013 to the effect that the respondent installed a large hoarding at State Bank Chowk, Harda, making false allegations about the petitioner so as to prejudice his electoral prospects. Annexure-P/14 was accompanied by the image of the flex hoarding in a Compact Disc, as also the judgment and order of concerned criminal Court, discharging the petitioner in the criminal case. Though, the Election Agent of the petitioner, Surendra Jain, retained copy of the complaint (Annexure-P/14), he did not retain the copy of the Compact Disc. Therefore, it has further been prayed that the Returning Officer of

aforesaid Constituency be summoned with original complaint along with enclosed Compact Disc.

5. **I.A.No.14040/2015** has been vehemently opposed by learned counsel for the respondent Ram Kishore Dogne by filing a written reply. It has been submitted in the reply that for just decision of I.A.No.14040/2015, it is imperative to keep in mind the pleadings of the petitioner. It has been pleaded in the election petition that the petitioner has obtained copies of the video-recordings which are in the form of Compact Discs; however, the source from which the so called Compact Discs were obtained by him, has not been disclosed. It has not been pleaded that the petitioner applied to the Election Commission or any of its authorities to obtain certified copies of such Compact Discs. The date of application has also not been pleaded. No pleading with regard to deposit of any amount with the Election Commission for obtaining certified copy of the Compact Discs is to be found in the petition. Likewise, there is no mention in the petition of the date on which such copies were furnished to him. The Compact Discs (from Annexures P/19 to P/25) annexed to the election petition do not bear any certification on their body. Even the name, address and signatures of the person preparing such Compact Discs and the manner in which they were prepared, has not been mentioned in any of the aforesaid annexures. No certification as per requirement of section 65-B of the Evidence Act, accompanies the Compact Discs. There is no mention of the original source of the contents of CDs either. In the election petition, the petitioner has not mentioned that the Compact Discs which are in his possession, are in fact certified copies of the originals, duly obtained from the Election Commission.

6. With regard to compact disc accompanying the complaint made by Surendra Jain dated 19-11-2013 (Annexure-P/14), it has been submitted on behalf of respondent No.1 that the pleadings do not disclose the name of the person who video-graphed the said flex hoarding on his mobile, the mobile number of such person, the person who is said to have transferred video from mobile phone to computer and then from computer to the Compact Disc. Thus, summoning of the Compact Disc from the Returning Officer would serve no legal purpose. On the basis of aforesaid arguments, it has been prayed that I.A.No.14040/2015 be dismissed.

7. On perusal of the averments made in I.A.No.14040/2015 in the backdrop of pleadings of the petitioner and due consideration of the rival

contentions in this regard, this Court is of the view that I.A.No.14040/2015 must be dismissed for the reasons hereinafter stated:

8. I.A.No.14040/2015 essentially contains two distinct prayers.

(i) Summoning of Returning Officer of concerned Assembly Constituency along with original Compact Discs containing video recordings of the electoral meetings convened by all candidates, including those convened by respondent Ram Kishore Dogne.

(ii) Summoning the Returning Officer along with Compact Disc that accompanied the complaint made by Surendra Jain, Election Agent of the petitioner, to the Returning Officer containing imaginary of the flex hoarding, which allegedly contained material, defamatory to the petitioner.

9. Thus, there is no doubt that the petitioner is seeking production of electronic documents which are in possession of the Returning Officer. It appears from the averments made by the petitioner in election petition and I.A.No.14040/2015 that annexures from P/19 to P/25 appended to the election petition, are in fact certified copies of the CDs prepared by the Election Commission; however, the averments made in paragraph 11 by the petitioner in I.A.No.14043/2015 reveals that the copies of CDs supplied to the petitioner by the Returning Officer have in fact been misplaced and cannot be traced inspite of best efforts and annexures P/19 to P/25 are in fact the copies made from CDs supplied by the office of the District Election Officer.

10. Section 65-A of the Evidence Act provides that the contents of electronic record may be proved in accordance with the provisions of section 65-B. In the case of *Anwar P.V. vs. P.K. Basheer,* 2014 (10) SCC 473, interpreting section 65-B of the Evidence Act, a three judge Bench of the Supreme Court has held as follows:

14. Any documentary evidence by way of an electronic record under the Evidence Act, in view of Sections 59 and 65-A, can be proved only in accordance with the procedure prescribed under Section 65-B. Section 65-B deals with the admissibility of the electronic record. The purpose of these provisions is to sanctify secondary evidence in electronic form, generated by a computer. It may be noted that the section starts with a non obstante clause. Thus, notwithstanding anything contained in the Evidence Act, any information contained in an electronic record which

is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be a document only if the conditions mentioned under sub-section (2) are satisfied, without further proof or production of the original. The very admissibility of such a document i.e. electronic record which is called as computer output, depends on the satisfaction of the four conditions under Section 65-B(2). Following are the specified conditions under Section 65-B(2) of the Evidence Act:

(i) The electronic record containing the information should have been produced by the computer during the period over which the same was regularly used to store or process information for the purpose of any activity regularly carried on over that period by the person having lawful control over the use of that computer;

(ii) The information of the kind contained in electronic record or of the kind from which the information is derived was regularly fed into the computer in the ordinary course of the said activity;

(iii) During the material part of the said period, the computer was operating properly and that even if it was not operating properly for some time, the break or breaks had not affected either the record or the accuracy of its contents; and

(iv) The information contained in the record should be a reproduction or derivation from the information fed into the computer in the ordinary course of the said activity.

15. *Under Section 65-B (4) of the Evidence Act, if it is desired to give a statement in any proceedings pertaining to an electronic record, it is permissible provided the following conditions are satisfied:*

(a) There must be a certificate which identifies the electronic record containing the statement;

(b) The certificate must describe the manner in which the electronic record was produced;

(c) The certificate must furnish the particulars of the device

involved in the production of that record;

(d) The certificate must deal with the applicable conditions mentioned under Section 65-B(2) of the Evidence Act; and

(e) The certificate must be signed by a person occupying a responsible official position in relation to the operation of the relevant device.

***16.** It is further clarified that the person need only to state in the certificate that the same is to the best of his knowledge and belief. Most importantly, such a certificate must accompany the electronic record like computer printout, compact disc (CD), video compact disc (VCD), pen drive, etc., pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence. All these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record sought to be used as evidence. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc. without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice.*

***17.** Only if the electronic record is duly produced in terms of Section 65-B of the Evidence Act, would the question arise as to the genuineness thereof and in that situation, resort can be made to Section 45-A-opinion of Examiner of Electronic Evidence.*

***18.** The Evidence Act does not contemplate or permit the proof of an electronic record by oral evidence if requirements under Section 65-B of the Evidence Act are not complied with, as the law now stands in India.*

***19.** It is relevant to note that Section 69 of the Police and Criminal Evidence Act, 1984 (PACE) dealing with evidence on computer records in the United Kingdom was repealed by Section 60 of the Youth Justice and Criminal Evidence Act, 1999. Computer evidence hence must follow the common law rule, where a presumption exists that the computer producing the evidential output was recording properly at the material time. The*

presumption can be rebutted if evidence to the contrary is adduced. In the United States of America, under Federal Rule of Evidence, reliability of records normally go to the weight of evidence and not to admissibility.

20. *Proof of electronic record is a special provision introduced by the IT Act amending various provisions under the Evidence Act. The very caption of Section 65-A of the Evidence Act, read with Sections 59 and 65-B is sufficient to hold that the special provisions on evidence relating to electronic record shall be governed by the procedure prescribed under Section 65-B of the Evidence Act. That is a complete code in itself. Being a special law, the general law under Sections 63 and 65 has to yield.*

21. *In State (NCT of Delhi) v. Navjot Sandhu[2] a two-Judge Bench of this Court had an occasion to consider an issue on production of electronic record as evidence. While considering the printouts of the computerised records of the calls pertaining to the cellphones, it was held at para 150 as follows: (SCC p. 714)*

> *"150. According to Section 63, "secondary evidence" means and includes, among other things, 'copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies'. Section 65 enables secondary evidence of the contents of a document to be adduced if the original is of such a nature as not to be easily movable. It is not in dispute that the information contained in the call records is stored in huge servers which cannot be easily moved and produced in the court. That is what the High Court has also observed[1]* at para 276. Hence, printouts taken from the computers/servers by mechanical process and certified by a responsible official of the service-providing company can be led in evidence through a witness who can identify the signatures of the certifying officer or otherwise speak of the facts based on his personal knowledge. Irrespective of the compliance with the requirements of Section 65-B, which is a provision dealing with admissibility of electronic records, there is no bar to adducing

secondary evidence under the other provisions of the Evidence Act, namely, Sections 63 and 65. It may be that the certificate containing the details in sub-section (4) of Section 65-B is not filed in the instant case, but that does not mean that secondary evidence cannot be given even if the law permits such evidence to be given in the circumstances mentioned in the relevant provisions, namely, Sections 63 and 65."

It may be seen that it was a case where a responsible official had duly certified the document at the time of production itself. The signatures in the certificate were also identified. That is apparently in compliance with the procedure prescribed under Section 65-B of the Evidence Act. However, it was held that irrespective of the compliance with the requirements of Section 65-B, which is a special provision dealing with admissibility of the electronic record, there is no bar in adducing secondary evidence, under Sections 63 and 65, of an electronic record.

22. The evidence relating to electronic record, as noted hereinbefore, being a special provision, the general law on secondary evidence under Section 63 read with Section 65 of the Evidence Act shall yield to the same. Generalia specialibus non derogant, special law will always prevail over the general law. It appears, the court omitted to take note of Sections 59 and 65-A dealing with the admissibility of electronic record. Sections 63 and 65 have no application in the case of secondary evidence by way of electronic record; the same is wholly governed by Sections 65-A and 65-B. To that extent, the statement of law on admissibility of secondary evidence pertaining to electronic record, as stated by this Court in Navjot Sandhu case[2], does not lay down the correct legal position. It requires to be overruled and we do so. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65-B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65-B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible.

23. The appellant admittedly has not produced any certificate in terms of Section 65-B in respect of the CDs, Exts. P-4, P-8, P-9, P-10, P-12, P-13, P-15, P-20 and P-22. Therefore, the same cannot be admitted in evidence. Thus, the whole case set up regarding the corrupt practice using songs, announcements and speeches fall to the ground.

24. The situation would have been different had the appellant adduced primary evidence, by making available in evidence, the CDs used for announcement and songs. Had those CDs used for objectionable songs or announcements been duly got seized through the police or Election Commission and had the same been used as primary evidence, the High Court could have played the same in court to see whether the allegations were true. That is not the situation in this case. The speeches, songs and announcements were recorded using other instruments and by feeding them into a computer, CDs were made therefrom which were produced in court, without due certification. Those CDs cannot be admitted in evidence since the mandatory requirements of Section 65-B of the Evidence Act are not satisfied. It is clarified that notwithstanding what we have stated herein in the preceding paragraphs on the secondary evidence of electronic record with reference to Sections 59, 65-A and 65-B of the Evidence Act, if an electronic record as such is used as primary evidence under Section 62 of the Evidence Act, the same is admissible in evidence, without compliance with the conditions in Section 65-B of the Evidence Act.

(Emphasis Supplied)

11. In the case of *Anwar P.V.*(supra), compact discs were used for announcing objectionable matter, songs etc.; however, CDs from which the objectionable matter was played, had not been got duly seized by the petitioner through police or Election Commission. In these circumstances, the Supreme Court observed that had the CDs from which the objectionable matter was played, been got seized through police or Election Commission, they would have constituted primary evidence and could have been produced by the petitioner without the certificate as envisaged under section 65-B (4) of the Evidence Act. In the case of *Anwar P.V.* (supra) objectionable speeches, songs and announcement were recorded using other instruments and by feeding

them into a computer, CDs were made therefrom, which were produced in the Court, without due certification. Therefore, Supreme Court held that such CDs could not be admitted in evidence because mandatory requirements of section 65-B, were not satisfied.

12. In the case at hand, the objectionable matter formed part of the speeches made in the public meetings convened by the respondent. Those speeches were recorded video-graphed by the Election Commission, presumably by using video cameras. Thereafter, the contents of the memory card of the video cameras must have been transferred to a computer and the CDs forming record of the Election Commission must have been prepared. Thus, even the so called original CDs in the record of the Election Commission, would not constitute primary electronic evidence of the speeches. Moreover, in the case at hand, the CDs supplied to the petitioner were copies of the record maintained in the Election Commission and annexures P/19 to P/25 are in fact the copies prepared from the copies supplied to the petitioner by the Election Commission. Thus, in order to ensure the source and authenticity of the electronic record, a contemporaneous certificate issued at the time of each transfer in terms of section 65-B (4) of the Evidence Act, would be required because the Supreme Court has specifically held that in the case of CD, VCD, chip etc, the same shall be accompanied by the certificate in terms of section 65-B **obtained at the time of taking the documents,** without which, the secondary evidence pertaining to that electronic record, is inadmissible.

13. In aforesaid view of the matter, no useful purpose would be served by indulging in the exercise of summoning the Returning Officer along with CDs/ DVDs of annexures-P/19 to P/25 maintained by the Election Commission because even those CDs/DVDs would be inadmissible.

14. Coming to the second prayer regarding the Compact Discs sent to the Returning Officer along with complaint dated 19-11-2013, it may be noted that there is no pleading in the election petition as to who prepared the video recording of the flex hoarding displayed near State Bank of India and in what manner, using which instrument. However, by means of I.A.No.14043/2015, which would be considered in latter part of this order, the certificate on affidavit issued by one Santosh S/o Ram Narayan Agrawal is sought to be filed, stating that he had video-graphed the flex hoarding using his mobile phone. He transferred the video into his computer and prepared the Compact Disc

furnished to the Returning Officer along with the complaint. However, it may be noted that aforesaid certificate is dated 21-10-2015; whereas the CD was prepared before 19-11-2013. Thus, the certificate now sought to be filed was not "obtained at the time of taking the electronic document" and is valueless for purpose of ensuring the source and authenticity of the contents of the Compact Disc. Thus, the second part of prayer can also not be allowed.

15. Consequently, I.A.No.14040/2015 is **dismissed.**

I.A. No. 14043/2015

16. This interlocutory application has been filed on behalf of the petitioner under Order 7 Rule 14 (3) of the Code of Civil Procedure. By means of this application, the petitioner proposes to file following four documents:

(i) . True copy of the application dated 25-12-2013 submitted by the petitioner to the Returning Officer for CDs of all functions organized by the candidates in the year 2013.

(ii) Original letter dated 26-12-2013 received from the office of Returning Officer informing the petitioner that there are in all fourteen DVDs of the functions organized by all candidates and he is required to deposit a challan at the rate of Rs.300/- per DVD, as per rules.

(iii) Certified copy of the letter dated 13-12-2013 written by the petitioner to the Deputy District Returning Officer informing that he is depositing a sum of Rs.13,800/- by way of challan along with certified copy of challan; and

(iv) Certificate issued by Deputy District Returning Officer certifying that Shri Surendra Jain was appointed as Election Agent of the petitioner together with photocopy of Form No.8.

17. At the outset, learned counsel for the respondent submitted that he does not object to the filing of the certificate dated 05-10-2015 issued by Deputy Returning Officer, District Harda, certifying that during the Assembly Elections in the year 2013, Shri Surendra Jain was appointed as election agent of the candidate of Bhartiya Janata Party, Shri Kamal Patel. As such, certificate dated 05-10-2015 being relevant, is permitted to be taken on record.

18. So far as remaining three documents are concerned, they relate to the Compact Discs (Annexures-P/19 to P/25). Since in foregoing paragraphs of this order, the Court has refused to summon the Returning Officer along with CDs/DVDs maintained by the Election Commission for the purpose of proving the CDs (Annexures- P/19 to P/25), filing and proving of document nos. 1, 2 & 3 above, is redundant.

19. Therefore, I.A.No.14043/2015 is **partly allowed**. The certificate dated 05-10-2015 prepared by Deputy Returning Officer District Harda is permitted to be taken on record. Rest of the documents shall not be taken on record.

20. It is clarified that the certificate dated 05-10-2015 shall be admitted in evidence only after it is proved in accordance with the provisions of the Evidence Act.

Order accordingly.

I.L.R. [2016] M.P., 1730
REVIEW PETITION
Before Mr.Justice A.M. Khanwilkar, Chief Justice &
Mr. Justice Sanjay Yadav
R.P. No. 866/2015 (Jabalpur) decided on 17 March, 2016

SANJAY LEDWANI ...Petitioner
Vs.
GOPAL DAS KABRA & ors. ...Respondents

(Alongwith R.P. No. 950/2015 & R.P. No. 33/2016)

A. Civil Procedure Code (5 of 1908) - Section 114 - Review against order passed in Writ Appeal **- Decision passed in Writ Appeal challenged by way of SLP before Apex Court - SLP dismissed - Held - That against the Writ Appellate Order SLP too has been dismissed, thereby affirming the Appellate order, so review petition is devoid of merits - Petition dismissed. (Para 9)**

क. सिविल प्रक्रिया संहिता (1908 का 5) – धारा 114 – रिट अपील में पारित आदेश के विरूद्ध पुनर्विलोकन – रिट अपील में पारित निर्णय को उच्चतम न्यायालय के समक्ष एस.एल.पी. के माध्यम से चुनौती दी गई – एस.एल.पी. खारिज – अभिनिर्धारित – रिट अपीलीय आदेश के विरूद्ध प्रस्तुत एस.एल.पी. भी खारिज की

गई जिससे अपीलीय आदेश अभिपुष्ट होता है, अतः पुनर्विलोकन याचिका गुणदोष विहीन है – याचिका खारिज।

B. ***Interpretation of statutes - Cantonments Act (41 of 2006), Section 28 and Representation of the Peoples Act (43 of 1950), Section 15 - Distinction*** **- Election to Assembly and Parliament Assemblies are conducted in terms of the Act of 1951 - Whereas Act of 2006 is a Special Legislation for administration of Cantonment area including Municipal Elections, so the Act of 1951 cannot be the basis to interpret the provisions of the Act of 2006. (Para 11)**

ख. कानूनों का निर्वचन – छावनी अधिनियम (2006 का 41), धारा 28 एवं लोक प्रतिनिधित्व अधिनियम (1950 का 43), धारा 15 – विभेद – विधानसभा तथा संसद सभाओं के चुनाव 1951 के अधिनियम के निबंधनों के अनुसार संचालित किये जाते हैं – जबकि, 2006 का अधिनियम छावनी क्षेत्र के अंतर्गत नगर पालिका चुनावों सहित उसके प्रशासन हेतु एक विशेष विधान है, इसलिए अधिनियम 2006 के उपबंधों के निर्वचन हेतु 1951 का अधिनियम आधार नहीं हो सकता।

C. ***Cantonments Act (41 of 2006), Section 28*** **- Whether a person occupying illegal/unauthorized structure in the cantonment area can claim to have any right to be enrolled in the electoral rolls prepared for the concerned Municipal Constituency - Held - No, as the right to vote or to be enrolled as a voter in the electoral rolls is not a fundamental right but it is a creature of statute and only occupants residing in houses approved or recognized by the Cantonment Board as legal area eligible to be voters. (Para 10)**

ग. छावनी अधिनियम (2006 का 41), धारा 28 – क्या छावनी क्षेत्र में अवैध/अनधिकृत निर्माण का अधिभोगी कोई व्यक्ति, संबंधित नगर पालिका निर्वाचन क्षेत्र हेतु तैयार की गई निर्वाचक नामावलियों में नामांकित किये जाने के किसी अधिकार का दावा कर सकता है – अभिनिर्धारित – नहीं, क्योंकि मत देने का अधिकार अथवा निर्वाचक नामावलियों में एक मतदाता के तौर पर नामांकित किये जाने का अधिकार, मूलभूत अधिकार नहीं है, बल्कि यह कानून का सृजन है एवं मात्र छावनी बोर्ड द्वारा अनुमोदित अथवा अभिज्ञात विधिक क्षेत्र के गृहों में निवासरत अधिभोगी ही मतदाता होने हेतु पात्र हैं।

D. ***Cantonments Act (41 of 2006), Section 28*** **- Right to vote - Whether stay granted by the Supreme Court to occupants of unauthorized or illegal structures creates any right in their favour to**

be voters - Held - No, as the stay can only protect their occupation of the concerned structure and no legal right enures in any of the occupants of the unauthorized and illegal structures to be a voter. (Para 10)

घ. छावनी अधिनियम (2006 का 41), धारा 28 – मत देने का अधिकार – क्या सर्वोच्च न्यायालय द्वारा अनधिकृत अथवा अवैध निर्माणों के अधिभोगियों को प्रदान की गई रोक उनके हित में मतदाता के तौर पर कोई अधिकार सृजित करता है – अभिनिर्धारित – नहीं, क्योंकि रोक संबंधित निर्माण में मात्र उनके अधिभोग को संरक्षित करती है एवं इससे अनधिकृत तथा अवैध निर्माणों के अधिभोगियों में से किसी को मतदाता बनने का कोई विधिक अधिकार सृजित नहीं होता है।

***E. Cantonments Act (41 of 2006), Section 28 - Voter list* - Elections of Ward No. 1 to 6 were set aside - Order was affirmed in W.A. and SLP - Voter list of ward No. 7 was not under challenge - Questions about what would happen to elections of ward No. 7 - Held - The option is left on the appropriate authority to decide whether to conduct elections only for ward no. 1 to 6 or for all the 7 wards. (Paras 12 to 17)**

ङ. छावनी अधिनियम (2006 का 41), धारा 28 – मतदाता सूची – वार्ड क्र. 1 से 6 के चुनाव अपास्त किए गए – आदेश को रिट अपील एवं एस.एल.पी. में अभिपुष्ट किया गया – वार्ड क्र. 7 की मतदाता सूची को चुनौती नहीं दी गई – प्रश्न उत्पन्न कि वार्ड क्र. 7 के चुनावों का क्या होगा – अभिनिर्धारित – यह विकल्प समुचित प्राधिकारी पर है कि वह यह विनिश्चित करे कि क्या केवल वार्ड क्र. 1 से 6 तक अथवा समस्त सातों वार्डों हेतु चुनाव संचालित किये जायें।

***F. Cantonments Act (41 of 2006), Section 28 - Judgment in rem* - As the correctness of the decision under review has been affirmed by the Supreme Court in SLP and it is a decision *in rem* and the said election has been treated as *non est* in the eyes of law, so in such a situation giving personal hearing to all candidates or making them party was not necessary - Review petition dismissed. (Para 19)**

च. छावनी अधिनियम (2006 का 41), धारा 28 – सर्वबंधी निर्णय – चूंकि पुनर्विलोकन के अधीन निर्णय की सत्यता सर्वोच्च न्यायालय द्वारा एस.एल.पी. में अभिपुष्ट की गई है एवं यह एक सर्वबंधी निर्णय है तथा विधि की दृष्टि में उक्त निर्वाचन अकृत माना गया है, अतः ऐसी स्थिति में सभी प्रत्याशीगणों को व्यक्तिगत सुनना अथवा उन्हें पक्षकार बनाना आवश्यक नहीं था – पुनर्विलोकन याचिका खारिज।

Prashant Singh, for the petitioner in R.P. No. 866/2015 & R.P. No. 33/2016.

R.N. Singh with *Rajas Pohankar,* for the petitioner in R.P. No. 950/2015 and for the respondent No. 4 in R.P. No. 866/2015.

Vivek Rusia, for the respondent No. 1 in R.P. No. 866/2015.

ORDER

The Order of the Court was delivered by : **A.M. KHANWILKAR, C.J. :- I.A. No.15012/2015** (R.P. No.866/2015), **I.A. No.666/2016** (R.P. No.950/2015) and **I.A. No. 1390/2016** (R.P. No.33/2016) – for condonation of delay.

For the reasons stated in the applications, being sufficient cause, in the interest of justice, applications are **allowed.** Delay is condoned.

Heard counsel for the parties on admission forthwith, by consent.

1. The Review Petition No.950/2015 is filed by the Cantonment Board. The other two review petitions are filed by the persons, who claim to have been declared elected as Corporators in the elections held on 17.05.2015, which, however, has been quashed and set aside by this Court.

2. The decision of the learned Single Judge, which was the subject matter of appeal, being Writ Appeal No.204/2015 and Writ Appeal No.288/2015, was confirmed and the appeals were disposed of with observations. The legal position regarding the governing statutory provisions has been interpreted by the Division Bench of this Court vide decision dated 21.07.2015.

3. It is not in dispute that against the said decision, Special Leave Petitions were filed before the Supreme Court, which have been dismissed on 05.10.2015, bearing S.L.P. (C) CC No(s).17256-17257/2015.

4. The principal question answered by the Division Bench was : whether a person occupying illegal/unauthorised structure in the Cantonment Area can claim to have any right to be enrolled in the electoral rolls AFR prepared for the concerned Municipal constituency. As aforesaid, that question has been answered after analyzing the relevant provisions of the Central enactment, which has been held to be a special law applicable to Cantonment Areas and including the mode of conducting elections in respect of those areas. The Court, in substance, has held that the right to vote in the Cantonment Area is

linked to the occupation of a legal house/structure recognized by the Cantonment Area as such.

5. In the review petition filed by the Cantonment Board, three points have been raised. Firstly, the Division Bench has omitted to consider the efficacy of the stay order granted by the Supreme Court on 09.05.2014 and 11.06.2014. Another shade of the same grievance is, on account of the stay order granted by the Supreme Court, the Authorities have been restrained from removing the structures occupied by the concerned occupants and those persons would continue to reside in the Cantonment Area. The number of such persons is very large and cannot be ignored in the matter of efficient administration of municipal area.

6. The second contention, is that, the challenge in the writ petition was only limited to electoral rolls prepared for Ward Nos.1 to 6. But, the effect of the decision under review would require the Authorities to conduct election of all the Ward Nos.1 to 7 respectively. This would result in incurring avoidable public expenditure, at least, in respect of Ward No.7, where no change in the electoral roll has been noticed by the Appropriate Authority. Further, the persons whose names have not been indicated in the voters list, as were found to be occupying unauthorized/illegal structures, their names would nevertheless continue to be in the voters list for the Assembly and Parliamentary Constituencies of the same areas. This would be an anomalous position, which cannot be countenanced and in larger public interest, the decision of setting aside the election deserves to be recalled and reviewed.

7. The last contention on behalf of the Cantonment Board is that Section 28 of the Cantonment Act and Rule 10(3) of the Rules predicates substantial compliance; and that position has been restated by the Division Bench of this Court in Writ Appeal No.798/2010 dated 24.09.2010. According to the Board, substantial compliance of these provisions would mean identifying and earmarking the structures, which are illegal and unauthorized.

8. Counsel for the private petitioners - claiming to be elected Corporators of the concerned Ward, additionally, submits that the Ward Members, who contested in the concluded election, were not made parties in the writ petition nor were afforded opportunity of being heard before passing of the decision under review. Besides these submissions, no other point has been argued by the counsel for the concerned review petitioners.

9. Having considered the rival submissions, we find that these review petitions are devoid of merits. In that, the legal question has already been answered in the decision dated 21.07.2015 in W.A. No.204/2015 and W.A. No.288/2015, which, indisputably has been affirmed by the Supreme Court after dismissal of S.L.P. (C) CC No(s).17256-17257/2015 on 05.10.2015.

10. Taking the first contention of the Board, it obviously overlooks the settled legal position. Right to vote or to be enrolled as a voter in the electoral roll prepared for the constituency, is not a fundamental right. It is a creature of the statute. The Cantonment Act being a special law, postulates that only occupants residing in houses approved or recognized by the Cantonment Board as legal are eligible to be voters. The fact that person is residing in Cantonment Area, by itself, would not become a voter automatically. The law does not recognize that right. The stay granted by the Supreme Court to such persons restraining the Authority to forebear from demolishing their structures, does not create any right in their favour to be voters. It would, at best, protect his occupation of the concerned structure. No legal right enures in any of the occupant of unauthorized and illegal structures, to be a voter or eligible to be named as voter in the electoral roll. For the same reason, the argument of the Board that large number of persons residing in the Cantonment Area will be deprived from participating in the election process will be of no avail. That may be the sequel of the operation of law, as is in force at present. That being a special law and legislation made by the Parliament, must be given its due play and enforced strictly in respect of constitution of Local Authority.

11. In our opinion, therefore, neither the argument of stay granted by the Supreme Court or for that matter large number of persons would be affected or left out from the Municipal elections even though they would continue to remain in the voters list of Assembly and Parliamentary elections, will be of no avail. The election to Assembly and Parliament Assemblies are conducted in terms of the provisions of the Representation of Peoples Act. The dispensation provided in the Representation of Peoples Act, cannot be the basis to interpret the provisions of the Cantonment Act, which is a special legislation for administration of the Cantonment Area. The two legislations are different and provide for different dispensation. We must readily agree and accept that the Parliament was conscious about the difference in the two provisions when the respective enactments have been enacted. As a result, even this argument cannot take the matter any further.

12. The next argument was about the confusion prevailing in the concerned quarters as to whether the election of all the Wards have been set aside by this Court or must be confined to Ward Nos.1 to 6 only, as the voters list, Annexure P-12, which was the subject matter of challenge in the writ petition, pertains only to Ward Nos.1 to 6. Further, no change has been noticed in the voters list of Ward No.7.

13. It is true that the relief claimed in the writ petition from which the appeal arose, is limited to challenge to the voters list, Annexure P-12, which pertains only to Ward Nos.1 to 6. It must be, therefore, assumed that only that limited relief has been granted, in the first place, by the learned Single Judge and reiterated and confirmed by the Division Bench in the decision dated 21.07.2015, which has been upheld by the Supreme Court with rejection of Special Leave Petitions.

14. Learned counsel for the Cantonment Board may be justified in raising further doubt as to what would happen to the elections of Ward No.7 already conducted as per the earlier notification. That, in our opinion, is a matter to be examined by the Appropriate Authority, who is entrusted with the responsibility to conduct elections within specified time and to install the newly elected Board within such time. The Appropriate Authority may have two options before it. The first option would be to treat the elections pertaining to Ward No.7 as recalled; and, to conduct fresh election even for Ward No.7 along with the other six Wards. There are only seven Wards in the Pachmarhi Cantonment Board and as almost over 90% of the Constituencies (six out of seven), will go for fresh elections, even the election for Ward No.7 can be conducted together so that there will be common tenure of all the Ward Members from the respective Wards elected on the basis of fresh elections.

15. We were informed that although the review petitioners have been declared elected in the elections conducted on the basis of earlier notification, however, the Board has not been constituted so far, because of the confusion prevailing in the Administration. In that sense, elections of Ward No.7 can also be held afresh. The other option for the Pachmarhi Cantonment Board is to segregate Ward No.7 and notify elections only for Ward Nos.1 to 6 on the basis of fresh electoral roll prepared by the Board for those wards, which, we are informed, is now in conformity with the directions and pronouncements of this Court in writ appeal as confirmed by the Supreme Court. There can be no manner of doubt that – be it fresh election of Ward Nos.1 to 6 or of Ward

Nos.1 to 7 – will have to be considered as general election with tenure of five years as provided in the Statute. That tenure cannot be limited to the remainder period, not being a case of biennial elections because of any vacancy created against the concerned seat.

16. Be that as it may, we may not be understood to have expressed any opinion either way on the aforesaid options. These are only possibilities, which can be explored by the Appropriate Authority of the Cantonment Board, as per law. While taking decision, the observations made in this regard may not be considered as any binding effect, but, only of having indicated the possibilities available to the Appropriate Authority. There may be other options available to the Appropriate Authority, in law, which can be resorted to.

17. Suffice it to observe that it would be the prerogative of the Appropriate Authority to take decision to go ahead with the general elections only for Ward Nos.1 to 6 or for all the seven Wards, as may be advised. If any person is aggrieved by that decision, will be free to challenge the same, which challenge can be considered on its own merits.

18. That takes us to the last contention canvassed on behalf of the Cantonment Board. It was submitted that the voters list prepared on the earlier occasion was in substantial compliance of Section 28 read with Rule 10(3) of the Rules. That aspect has already been considered in the decision under review and we find no reason to take a different view. Once it is held that only occupants or residents in authorized or legal houses/structures, which are recognized by the Cantonment Board alone are eligible to become voters and included in the voters list, there is no necessity of preparing the voters list of occupants of unauthorized houses. The fact that such voters list was prepared by the Cantonment Board, cannot be cited as a case of substantial compliance as such. Assuming it is a case of substantial compliance, of preparing the voters list of occupants/residents residing in authorized and recognized houses, the other voters list of unauthorized houses cannot be reckoned for the purposes of conducting elections to the Board. Hence, even this argument does not commend to us.

19. That leaves us with the additional argument canvassed by the learned counsel for the private review petitioners. Even this argument deserves to be stated to be rejected. The fact that the candidates, who had participated in the concluded election, which, later on, has been set aside by this Court,

were not party to the writ petition nor heard by the Court, cannot be the basis to doubt the correctness of the legal position stated in the decision under review, which has been affirmed by the Supreme Court by dismissal of Special Leave Petitions. That decision is *in rem* and concerning the subject election process. Moreover, the Court during the pendency of appeal had made it amply clear that any action taken by the Board on the basis of the impugned voters list would be subject to the outcome of the appeal; and the appeal having succeeded for the reasons recorded in the decision under review, the said election has been found to be vitiated and treated as *non est* in the eye of law. In such a situation, giving personal hearing to all candidates or making them party, was not necessary.

20. The fact that the elections were proceeding on the basis of conditional order passed by this Court, was in public domain and review petitioners, who were participating in the elections cannot be heard to say that they were not aware of that position. In any case, when the entire election process is vitiated, not hearing persons, who are affected by the decision, by itself, cannot be the basis to review the decision, which, otherwise, is unexceptionable. Hence, even this objection does not commend to us.

21. Accordingly, we **dispose of** these review petitions with the above observations and liberty to the Appropriate Authority of the Pachmarhi Cantonment Board to proceed in the matter, in accordance with law, expeditiously.

Petition disposed of.

I.L.R. [2016] M.P., 1738
APPELLATE CIVIL
Before Mr. Justice K.K. Trivedi
S.A. No. 1063/2004 (Jabalpur) decided on 16 April, 2015

RAMRAJ PATEL & anr. ...Appellants
Vs.
HIRALAL PATEL & ors. ...Respondents

A. Civil Procedure Code (5 of 1908) - Section 100 - Second Appeal - **Burden was on the appellants to prove that there was a partition and that the property subsequently purchased was not purchased from the nucleus of the joint family property - Since the appellants have**

failed to prove the previous partition, their entire stand was wiped up - The courts below have rightly decreed the suit filed by the respondents/ plaintiffs - No substantial question of law arises for adjudication - Appeal dismissed. (Paras 11 & 12)

क. सिविल प्रक्रिया संहिता (1908 का 5) – धारा 100 – द्वितीय अपील – यह सिद्ध करने का भार अपीलार्थीगण पर था कि विभाजन हुआ था एवं पश्चात्वर्ती रूप से क्रय की गई संपत्ति संयुक्त परिवार की संपत्ति के केन्द्रक में से क्रय नहीं की गई थी – चूंकि अपीलार्थीगण पूर्ववर्ती विभाजन सिद्ध करने में असफल रहे हैं, अतः उनके संपूर्ण आधार का सफाया हो गया – निचले न्यायालयों ने प्रत्यर्थी/वादीगण द्वारा प्रस्तुत वाद उचित रूप से डिक्रीत किया – न्यायनिर्णयन हेतु विधि का कोई सारवान प्रश्न उत्पन्न नहीं होता – अपील खारिज।

***B. Civil Procedure Code (5 of 1908) - Section 100 - Finding of fact* - Concurrent findings of the two courts about the joint family property are not required to be interfered with. (Para 11)**

ख. सिविल प्रक्रिया संहिता (1908 का 5) – धारा 100 – तथ्य का निष्कर्ष – संयुक्त परिवार की संपत्ति के संबंध में दोनों न्यायालयों के समवर्ती निष्कर्षों में हस्तक्षेप किया जाना अपेक्षित नहीं।

Cases referred:

AIR 1954 SC 379, AIR 1986 SC 79, AIR 1960 SC 335, AIR 1966 SC 411, AIR 1995 Orissa 300, AIR 1996 SC 1148, (1990) 4 SCC 45, (2007) 1 SCC 521, AIR 1938 Mad. 841.

S.K. Dubey, for the appellants.
Umesh Shrivastava, for the respondents.

JUDGMENT

K.K. Trivedi, J. :- This second appeal by the defendants under Section 100 of the Code of Civil Procedure is against the judgment and decree dated 16th July, 2004 passed in Civil Appeal No.40-A/2004 by the District Judge, Rewa arising out of judgment and decree dated 23.2.2004 passed in Civil Suit No.229-A/2000 by First Additional Civil Judge, Class-I, Rewa.

2. The plaintiffs filed a suit for partition of the family property alleging that the father of the plaintiffs and the defendant/appellant No.1 was having three wives. Out of the aforesaid wedlock the parties to the suit were born. The father of the appellants and the defendant No.1 were having certain

properties at village Panti, Gaidi and Hardi. Some part of the property of village Hardi was given to son of the second wife of the father of plaintiffs and defendant No.1, but rest of the property was never partitioned. Since two other brothers of the father of the plaintiffs and the defendant No.1 were having no issues, they also gave their property to the said son of the second wife of the father of plaintiffs and defendant No.1. Right from the very beginning the defendant No.1 was acting as Karta of the family. The plaintiff No.2 was in service and was away from the village, but out of his income from the service, he was giving savings to the appellant No.1. However, the property said to be purchased from the joint family was illegally got mutated in the name of the wife of defendant No.1 whereas the parties to the suit were having 1/3rd share each in the said property. Thus seeking to challenge such action and claiming partition of the joint Hindu family property the suit was filed.

3. The suit was contested by the appellant by filing a written statement alleging that the appellant No.1 was not acting as Karta of the family. On the other hand, in the year 1980 the partition had taken place amongst the members of the family during the lifetime of the original holder of the land, the father of the appellant No.1, and each member of the family was cultivating the land given in share. Since the daughters have not claimed any share, the members of the family were enjoying the fruits of the agriculture produce from their land given in share. Out of the said income certain more property was purchased by the defendant/appellant No.1 in the name of the wife. In fact the share given to the son of the second wife of the father of the appellant and the property bequeathed to him were also purchased by the defendant No.1 in the name of the wife, the defendant No.2, out of the independent income. Though earlier the plaintiffs/respondents have agreed to pay the part of sale consideration, but they have not paid any amount towards the sale consideration and as such the respondents/plaintiffs were not entitled to any share in the property so purchased by the appellants. However, to some extent the jointness of the family and its property was admitted by the appellants/defendants in the written statement and the court statements.

4. The trial court after framing the issues reached to the conclusion that sufficient evidence was produced by the respondents/plaintiffs to draw a presumption that the family was joint and that suit property was belonging to the said joint Hindu family. Categorical finding was recorded that the defendants/ appellants have failed to prove the fact of partition, devolving the shares of

the joint family property in each family member separately, income from the share and purchase of the part of the suit property from the said income. The suit was thus decreed.

5. The appellants preferred an appeal before the lower appellate court, which, after appreciating the evidence once again, analyzing the findings recorded by the trial court, reached to the conclusion that the suit was rightly decreed by the trial court and dismissed the appeal of the appellant. Hence, this second appeal.

6. It is vehemently contended by the learned counsel for the appellant that the entire burden was shifted on the defendants/appellants as if they were required to prove the fact of jointness of the family. In fact this was the burden on the plaintiffs as no presumption in law is available unless it is demonstrated that the family was joint. Applying the principle it was wrongly held by the lower appellate court that since partition was not proved by the appellants, as claimed, the findings were rightly recorded regarding jointness of Hindu family property. It is contended that for proving the fact that the purchase made by the appellant No.1 was out of the nucleus of the joint Hindu family, the burden was on the plaintiffs/respondents and since such a burden was not discharged effectively, virtually the suit was required to be dismissed. Instead of dismissing the suit, the trial court decreed the same and such a decree has been erroneously affirmed by the lower appellate court. According to learned counsel for the appellants such impugned judgment and decree are liable to be set aside.

7. The submissions of the learned counsel for the appellants are examined in view of the pleadings raised in the plaint and written statement. The defendants in very specific words contended that the property in suit was obtained by the ancestor, the father of the appellants and the plaintiffs by name Prabhunath @ Ram Prabhav Patel. The categorical statements made in paragraph 3 and 7 of the plaint were required to be answered properly by the defendants, specially when they were of the opinion that such a claim was incorrect. Though the genealogy was disputed, but in para-4 of the written statement the fact regarding jointness of the property and devolving of the suit property through the father Prabhunath @ Ram Prabhav Patel was not specifically denied. However, it was categorical contention raised that there was a partition amongst the family members sometime in the year 1980 when the original holder Prabhunath @ Ram Prabhav Patel was alive. In para-7,

while giving the reply to the plaint allegations, certain subsequent purchase made by the appellants were described. From such a pleading, it is clear that it was not disputed by the appellants at the initial stage that the family was joint and the said joint family was the owner of the land in dispute. The moment such statements were made in the written statement, automatically the burden of proving the partition of the joint Hindu family property was shifted on the appellants/defendants. They have not disputed that there was jointness in the family right from the very beginning.

8. The Apex Court and the High Courts on several occasions have categorically held that there would normally be a presumption of jointness of a family, if alleged, and is not denied by the other side. The moment denial is made regarding the jointness of the family, the burden is on the persons, who claim that the family was not joint. Likewise, it is held that in case the burden is discharged by the party claiming that the family was joint, it automatically shifted on the other side, who claims that there was no joint family.

9. In view of this the findings recorded by the courts below are seen. The trial Court has categorically held that when it was alleged by the defendants/ appellants that there was a partition amongst the members of the joint family, it has to be inferred that there was a joint family earlier. In case the partition is not proved effectively, it has to be held that the joint family exists and there is no partition amongst the members of the family. While testing the statements of witnesses, the trial court has reached to the conclusion that it was a case of the appellants/defendants that there was a partition amongst the members of the joint family in the year 1980 and that was the burden on the appellants/ defendants to prove such a partition. Though for the proof of partition it was said that there were witnesses who were present when partition had taken place, but barring for one, none was examined by the appellants/defendants. The witness, who was examined, has denied the knowledge about the partition amongst the family members. In fact he was only a witness cited by the defendants/appellants per chance, as he was attesting witness of all the sale deeds obtained by the defendants/appellants. After recording this fact, the trial court analyzed the other evidence and reached to the conclusion that there was no proof of partition amongst the family members and since by virtue of alleged partition property was said to be obtained, it was to be held that the said property was joint Hindu family property, which has never been put to partition amongst the family members, and the suit was decreed. The

reappreciation of the evidence of the trial court by the lower appellate court cannot be said to be perverse in any manner as no piece of evidence is made available to show that such evidence was not taken into consideration by the courts below. In view of this, the allegation that the property was not joint and, therefore, no decree could be granted to the respondents/plaintiffs, is incorrect.

10. Learned counsel appearing for the appellants has heavily relied on certain decision of the Apex Court and the other High Courts and has mainly placed reliance in the case of *Srinivas Krishnarao Kango v. Narayan Devji Kango and others*, AIR 1954 SC 379 . It is contended by the learned counsel for the appellants that burden was wrongly shifted on appellants to prove the partition. In fact this Court failed to understand as to how such a law would support the appellants as the law laid down by the Apex Court is that primary burden is on the person, who claims that the property was joint, but where it is established that the family possessed some joint property which from its nature and relative value may have formed the nucleus from which the property in question may have been acquired, the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family property. As has been described hereinabove, this law supports the respondents and not the appellants as it was the case of the appellants that there was a partition amongst the family members. Same was the situation in the case of *Bhagwant P. Sulakhe v. Digambar Gopal Sulakhe & others,* AIR 1986 SC 79 . Rather it was categorically held by the Apex Court that the severance of status of joint family is alleged by someone, has to be proved by him and such a statement will not effect the nature of the joint family property which will remain to be joint until it is partition. This law also does not help the appellant in any manner. In the case of *Mst. Rukhmabai v. Lala Laxminarayan and others*, AIR 1960 SC 335 the presumption of the joint Hindu family property was drawn where the partition was not effectively proved. This law will also not give any assistance to the appellant. Similar is the position, while the previous laws were considered by the Apex Court in the case of *Achuthan Nair v. Chinnammu Amma and others*, AIR 1966 SC 411 . There also the Apex Court was dealing with the purchase made in the name of a junior member of the joint family and it was held that when it was found that severance of the joint family was not proved, therefore, the purchase said to be made was to be treated as out of the nucleus of the joint

Hindu family property. In fact under a different discipline of the law such a finding was recorded, which will not be helpful to the appellants in any manner. The law laid down by the Orissa High Court in the case of *Santanu Kumar Das and others v. Bairagi Charan Das and others*, AIR 1995 Orissa 300 also does not support the contention of the learned counsel for the appellants.

11. The case of *Surendra Kumar v. Phoolchand (dead) through and another,* AIR 1996 SC 1148 relied by the learned counsel for the appellant deals with the Land Acquisition Act where a reference was required to be made. However, again it was held by the Apex Court that concurrent findings of the two courts about the joint family property are not required to be interfered with. This law is also of no assistance to the appellant. In the case of *Ramchandra Pandurang Sonar (deceased) through his heirs and legal representatives and others vs. Murlidhar Ramchandra Sonar and others,* (1990) 4 SCC 45 the question before the Apex Court was whether without framing of any substantial questions of law or where there were no substantial questions of law, was it possible for the High Court to set aside the judgment and decree reversing the judgment and decree of the lower appellate court and affirming the judgment and decree of the trial court. Since the findings of the present case are concurrent findings of the two courts, such a question does not arise. Lastly, learned counsel for the appellants has placed his reliance in the case of *Appasaheb Peerappa Chamdgade vs. Devendra Peerappa Chamdgade and others*, (2007) 1 SCC 521 and has contended that in terms of the law laid down by the Apex Court, the appellants would be entitled to the relief claimed in this appeal. Again it is not understood as to how the aforesaid case would be applicable in the case of the present appellants where facts and circumstances are totally different. Here in this case in hand the appellants have admitted the jointness of the property, but have set out a plea of previous partition for denying the relief of partition to the plaintiffs/ respondents. Since the appellants have failed to prove the previous partition, their entire stand was wiped up. Equally the reliance placed in the case of *C.V.Vythinatha Aiyar vs. C.V. Varadaraja Aiyar and Ors,* AIR 1938 Mad. 841 in the facts and circumstances of the present case is also misconceived. The burden was on the appellants to prove that there was a partition and that the property subsequently purchased was not purchased from the nucleus of the joint family property. Having failed to discharge such burden as is appreciated hereinabove and as has been concurrently found by the two courts below, no

case to interfere in the impugned judgment and decree is made out.

12. There is no error of law committed by the two courts below in recording the findings on the appreciation of the evidence available on record. No substantial questions of law arise for consideration in this appeal, which fails and is hereby dismissed. All previous orders of interim protection stand vacated.

Appeal dismissed.

I.L.R. [2016] M.P., 1745
APPELLATE CIVIL
Before Mr. Justice Rajendra Menon &
Mr. Justice K.K. Trivedi
F.A. No. 485/2004 (Jabalpur) decided on 27 November, 2015

GIRDHAR JETHA & ors. ...Appellants
Vs.
MUNICIPAL CORPORATION,
THROUGH THE COMMISSIONER NAGAR NIGAM,
JABALPUR ...Respondent

A. ***Specific Relief Act (47 of 1963), Sections 5 & 39 and Municipal Corporation Act, M.P. (23 of 1956), Section 80*** **- Civil suit for mandatory injunction for recovery of possession under statutory lease - Whether a suit for mandatory injunction seeking delivery of possession under Section 39 of the 1963 Act is maintainable in view of the fact that relief of recovery of possession ought to have been obtained u/s 5 of the 1963 Act - Held - Court has power to grant a decree of mandatory injunction of possession for discharge of statutory liability and it is not necessary that relief of recovery of possession to be obtained u/s 5 of the Act of 1963 - Suit for mandatory injunction is maintainable. (Paras 12 to 15 & 21)**

क. विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धाराएँ 5 व 39 एवं नगरपालिक निगम अधिनियम, म.प्र. (1956 का 23), धारा 80 – कानूनी पट्टे के अंतर्गत कब्जे के प्रत्युद्धरण के लिए आज्ञापक व्यादेश हेतु सिविल वाद – क्या अधिनियम 1963 की धारा 39 के अंतर्गत कब्जे की सुपुर्दगी हेतु आज्ञापक व्यादेश का वाद इस तथ्य के आलोक में पोषणीय है कि कब्जे के प्रत्युद्धरण के अनुतोष को अधिनियम 1963 की धारा 5 के अंतर्गत अभिप्राप्त किया जाना चाहिए था –

अभिनिर्धारित – कानूनी दायित्व के निर्वहन हेतु कब्जे के आज्ञापक व्यादेश की डिक्री प्रदान करने की शक्ति न्यायालय को है तथा यह आवश्यक नहीं है कि कब्जे के प्रत्युद्धरण का अनुतोष अधिनियम 1963 की धारा 5 के अंतर्गत प्राप्त की जाए – आज्ञापक व्यादेश हेतु वाद पोषणीय।

B. ***Specific Relief Act (47 of 1963), Section 39*** **- Civil Suit for mandatory injunction for recovery of possession - Initially lease was executed in the year 1926 for 30 years - Lease expired in the year 1956 - Lease was not renewed but, appellant continued in possession - Premium was also accepted by the Municipal Corporation - Lease was renewed on 19.12.1989 for 60 years including regularization of lease - Encroachments removed in the year 1999 - Possession taken by the defendant/corporation in the year 1999, while removing encroachers - Demand for re-possession by appellants not considered - Suit filed on 22.04.2003 - Suit is not delayed. (Para 26)**

ख. विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 39 – कब्जे के प्रत्युद्धरण के लिए आज्ञापक व्यादेश हेतु सिविल वाद – प्रारंभ में वर्ष 1926 में 30 वर्ष के लिए पट्टा निष्पादित किया गया था – वर्ष 1956 में पट्टे का अवसान हुआ – पट्टे का नवीनीकरण नहीं किया गया परंतु अपीलार्थी निरंतर रूप से कब्जारत रहा – नगर निगम द्वारा प्रीमियम भी स्वीकार किया गया था – पट्टे के नियमितीकरण सहित उसका नवीनीकरण दिनांक 19.12.1989 को 60 वर्ष की अवधि हेतु किया गया – वर्ष 1999 में अधिक्रमण हटाया गया – वर्ष 1999 में प्रतिवादी/निगम द्वारा अधिक्रामकों को हटाते हुए कब्जा लिया गया – कब्जे की पुनः वापिसी हेतु अपीलार्थीगण की मांग को विचार में नहीं लिया गया – वाद दिनांक 22.04.2003 को प्रस्तुत – वाद विलंब से प्रस्तुत नहीं।

C. ***Municipal Corporation Act, M.P. (23 of 1956), Section 80, Transfer of Property Act (4 of 1882), Section 108 and Specific Relief Act (47 of 1963), Section 39 - Suit for mandatory injunction for recovery of possession*** **- Dismissed by Trial Court - Statutory lease granted by Municipal Corporation - Initially lease was executed in the year 1926 which expired in year 1956 - Lease was not renewed however appellant continued in possession - Premium also accepted by Municipal Corporation - Renewal of lease done on 19.12.1989 for a period of 60 years including regularization of lease with understanding that Corporation to remove the encroachment on the land - Encroachment removed in the year 1999 - Corporation entering in possession in the year 1999 but not giving possession to appellants - Hence, the suit -**

Held - As the lessor was accepting premium of the land, so it was responsibility of the lessor to put the lessee in possession of the land, so that lessee can enjoy the fruit of the lease - Finding refusing delivery of possession set aside - Suit of the appellants decreed to that extent - Appeal allowed. (Paras 23 to 25)

ग. नगरपालिक निगम अधिनियम, म.प्र. (1956 का 23), धारा 80, सम्पत्ति अन्तरण अधिनियम (1882 का 4),धारा 108 एवं विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 39 – कब्जे के प्रत्युद्धरण के लिए आज्ञापक व्यादेश हेतु वाद – विचारण न्यायालय द्वारा खारिज – नगर निगम द्वारा कानूनी पट्टा प्रदत्त किया गया – प्रारंभ में पट्टा वर्ष 1926 में निष्पादित किया गया था जिसका वर्ष 1956 में अवसान हुआ – पट्टे का नवीनीकरण नहीं किया गया किंतु अपीलार्थी निरंतर कब्जारत – नगर निगम द्वारा प्रीमियम भी स्वीकार किया गया – पट्टे के नियमितीकरण सहित दिनांक 19.12.1989 को उसका नवीनीकरण 60 वर्ष की अवधि हेतु इस सम्मति के साथ किया गया कि निगम भूमि पर से अतिक्रमण हटायेगा – अतिक्रमण वर्ष 1999 में हटाया गया – निगम ने वर्ष 1999 में कब्जा लिया किंतु अपीलार्थीगण को कब्जा नहीं दिया – अतः यह वाद – अभिनिर्धारित – चूंकि पट्टाकर्ता भूमि का प्रीमियम प्राप्त कर रहा था, इसलिए यह पट्टाकर्ता का दायित्व था कि वह पट्टेदार को भूमि का कब्जा सौंपे, ताकि पट्टेदार पट्टे के लाभ का उपभोग कर सके – कब्जे की सुपुर्दगी से इंकार का निष्कर्ष अपास्त – इस सीमा तक अपीलार्थीगण का वाद डिक्रीत – अपील मंजूर।

***D. Registration Act (16 of 1908), Sections 17 & 49 - Unregistered document of lease* - Whether unregistered document of lease granted under a statutory liability is inadmissible in evidence - Held - As the lease deed was a statutory lease granted under the Municipal Corporation Act, 1956, therefore merely because the lease was not registered, right accrued under the said lease deed that too a statutory right was not to be denied to the appellants and even otherwise execution of the said deed was admitted in evidence by the witnesses of the defendant - Therefore, the said unregistered lease deed is admissible in evidence. (Para 27)**

घ. रजिस्ट्रीकरण अधिनियम (1908 का 16), धाराएँ 17 व 49 – पट्टे का अपंजीकृत दस्तावेज – क्या कानूनी दायित्व के अधीन प्रदत्त पट्टे का अपंजीकृत दस्तावेज साक्ष्य में अग्राह्य है – अभिनिर्धारित – चूंकि पट्टा विलेख नगर निगम अधिनियम 1956 के अंतर्गत प्रदत्त एक कानूनी पट्टा था, इसलिए पट्टे के अपंजीकृत होने मात्र से अपीलार्थीगण को उक्त पट्टा विलेख से प्रोद्भूत अधिकार से, जो कि कानूनी अधिकार था, इंकार नहीं किया जाना था एवं यहां तक

कि अन्यथा भी प्रतिवादी के साक्षीगण द्वारा उक्त विलेख का निष्पादन, साक्ष्य में स्वीकार किया गया था – अतएव, उक्त अपंजीकृत पट्टा विलेख साक्ष्य में ग्राह्य है।

Cases referred:

(2008) 4 SCC 594, AIR 1985 SC 857, (2004) 12 SCC 673, AIR 1973 SC 2609, (2003) 8 SCC 752, AIR 2004 SC 4082, (2005) 4 SCC 314, (2007) 5 SCC 392.

Kishore Shrivastava & Naman Nagrath with *Kapil Jain & Himanshu Mishra,* for the appellants.

Anshuman Singh, for the respondent.

JUDGMENT

The Judgment of the Court was delivered by :

K.K. TRIVEDI, J. :- This First Appeal under Section 96 of the Code of Civil Procedure by the appellants/plaintiffs takes exception to the judgment and decree dated 24.6.2004, passed in Civil Suit No.51-A/2004, by the VI Addl. District Judge, Jabalpur, by which the suit for grant of mandatory injunction filed by the appellants/plaintiffs, has been dismissed.

2. The appellants/plaintiffs filed the suit alleging that the appellant No.2 was the successor of the earlier Coronation Club, of Jabalpur which in fact was extended a lease by the Municipal Corporation, Jabalpur, in respect of the land bearing diversion Plot No.107, Sheet No.85, situated in Marhatal, Jabalpur. The said land was belonging to the Municipal Corporation Jabalpur. The lease was to expire in the year 1956. However, no renewal of the lease was done thereafter. The appellant/plaintiff No.2-Club remained in possession of the said land and out of the said land leased to the appellants/plaintiffs, a part of the land was encroached by some persons. Thereafter, in the meeting held with the authorities of the Municipal Corporation, it was decided that on payment of certain compounding charges, the lease would be renewed in favour of the plaintiff No.2-Club and the Corporation Authority would remove the encroachment made by others on the land leased to the appellants and would put the appellants/plaintiffs in possession. Accordingly, on 19.12.1989, the lease was renewed for a period of 60 years, out of which the period of 30 years was treated to regularised the lease, which had expired on 12.2.1956 and from 13.2.1986, the lease of the land was granted for a period of next 30 years. In terms of the settlement between the Corporation and the office bearers

of the plaintiff No.2-Club, since it was decided that a part of the land was to be released in favour of the Municipal Corporation for the purposes of construction and widening of the road, a total area of 70264 sq. ft was leased out to the appellants/plaintiffs.

3. In terms of the lease, out of the total area allotted, 27600 sq. ft land was to be used for commercial purposes and remaining 42664 sq. ft land was to be used for residential purpose. While executing the lease deed, certain conditions were prescribed in the lease deed. The appellants/plaintiffs after execution of the lease deed deposited the amount, but for a considerable long time, no action whatsoever was taken by the Municipal Corporation to remove encroachment from the land and to put the appellants/plaintiffs in possession of the said land. In the year 1999, ultimately, the land was got vacated by the Municipal Corporation by removing the encroachment, but instead of putting the appellants/plaintiffs in possession of the said land, the Corporation started using the land for its own purposes. Threatening the appellants/plaintiffs that since there was breach of the lease condition, a notice was issued to the appellants/plaintiffs of which a reply was submitted, but since there was a threat, the suit was required to be filed, seeking a mandatory injunction against the respondent Corporation to put the appellants/plaintiffs in possession of the land so leased out. The relief to that extent was claimed in the suit.

4. While filing the written statement, the respondent/ defendant contested the claim of the appellants/plaintiffs *inter alia* on the ground that the leased land was used by the appellants/plaintiffs for the commercial purposes and holding exhibitions by subletting the same to the other individuals without the consent of the respondent/defendant. In fact, after coming into know about the said fact, action was taken by the Corporation and taking recourse to the provisions of the Municipal Corporation Act, 1956, the encroachers were removed from the said land and possession of the same was taken by the Municipal Corporation. Since the object of granting lease to the appellant was to provide certain curriculum activities and facilities to the citizen of the City, which object was frustrated because of the illegal act of the appellants/ plaintiffs by subletting the land, the lease automatically become *non est* and ineffective to that extent. Now the land is being used by the respondent-defendant for the purposes of keeping the Government vehicle on the said land and as such, the relief as claimed in the suit cannot be granted. As a whole, the claim made by the appellants/plaintiffs in the suit was denied by the

respondent/defendant.

5. The trial Court framed the issues which for the purposes of convenience are reproduced and translated in English :-

"(1)–(ए)– क्या वादी को वादग्रस्त स्थान डायवर्सन प्लाट नं.–107 डायवर्सन शीट नं.85 मढ़ाताल जबलपुर कुल एरिया 92352 वर्गफीट की लीज प्रतिवादी के द्वारा वर्ष 1926 से प्रदान की गई है और जिसे सन्–2016 तक के लिये रिन्यू (नवीनीकरण) के लीज डीड दिनांकित 19.12.89 के द्वारा किया गया है ?

(बी)– यदि हॉ तो क्या वादी इस आशय की घोषणा की सहायता प्राप्त करने का अधिकारी हैं ?

(2)– (ए)– क्या प्रतिवादी के द्वारा वादपत्र के साथ संलग्न नक्शे में दर्शित स्थान को अपने कब्जे में ले लिया गया है और प्रतिवादी उक्त स्थान पर निर्माण कार्य करना चाहता हैं ?

(बी)– यदि हॉ तो क्या वादी प्रतिवादी के विरूद्ध इस आशय की आदेशात्मक निषेधाज्ञा प्राप्त करने का अधिकारी है कि प्रतिवादी वादग्रस्त स्थान से अपना कब्जा हटाकर वादी को कब्जा सौंपे ?

(3)– क्या वादीगण ने लीज पर आवंटित भूमि का लीजडीड शर्तों का उल्लंघन करते हुये दुरूपयोग किया है, यदि हॉ तो प्रभाव ?

(4)– सहायता एवं व्यय ?"

"(1-A): Whether the plaintiff was granted lease of diversion Plot No.107, Sheet No.85, Marhatal, Jabalpur, Total area 92353 sq. ft. by the defendant in 1926 and which has now been renewed upto 2016 vide lease deed dated 19.12.1989 ?

(B): If yes, whether the plaintiff is entiled to a declaration to this effect ?

(2-A): Whether the defendant has taken in possession the land shown in the attached map and is intending to make any construction on the said land ?

(B): If yes, whether plaintiff can be granted a decree of mandatory injunction to put the plaintiff in possession of the said land after

removal of the possession of the defendant ?

(3) Whether plaintiff has violated any of the conditions of the lease deed, if yes, the effect ?

(4) Reliefs and Costs ?"

6. After framing the aforesaid issues, the trial Court recorded the evidence of the parties. Plaintiffs examined the Secretary of the plaintiff No.2-Club, the plaintiff No.1 and the respondent/defendant examined two persons. Various documents were produced, original record was also produced by the Municipal Corporation and some of the documents placed on record were exhibited. After assessing the evidence available on record, the trial Court reached to the conclusion that the appellants/plaintiffs have failed to prove the case and dismissed the suit. Hence, this appeal.

7. It is, vehemently, contended by learned counsel for the appellants that dismissal of the suit was not justified in view of the fact that a statutory duty was cast upon the respondent Corporation in terms of the provisions of Transfer of Property Act, more particularly, in terms of provisions of Section 108(b) of the said Act. For the purposes of appreciation, sufficient evidence was available on record to show that the duty is the statutory duty cast on the respondent/defendant but was not discharged even when the fees for the renewal of the lease was taken from the appellants/plaintiffs. Further, it is contended that in terms of law well explained by the Apex Court, every renewal of the lease is in fact a fresh grant and, therefore, the provisions of Section 108 of the Transfer of Property Act would be squarely applicable. In view of the aforesaid, the findings recorded by the trial Court cannot be sustained. There cannot be any breach alleged against the appellants/plaintiffs in the mater (sic:matter) of terms and conditions of the lease deed in view of the fact that the entire land was never put in possession of the appellants/plaintiffs. The fact remains that in terms of lease conditions, the appellants have obtained sanction from the Municipal Corporation itself for construction of the building, but for the reason that the land was not made available to the appellants/ plaintiffs, the construction could not be done. Because of such conduct of the respondent/defendant any action was not to be taken against the appellants/ plaintiffs as the said right was waived by the respondent/defendant. Explanation in all that respect was given, evidence was produced, but the same was not looked into by the trial Court and the finding is recorded that the decree as

claimed cannot be granted to the appellants/plaintiffs. According to learned Senior counsel, such findings are perverse and deserve to be set aside. The appellants/ plaintiffs are entitled to the decree as claimed.

8. *Per contra*, it is contended by learned counsel appearing for the respondent/defendant that *prima facie* the suit itself was not maintainable. He admits that though a preliminary objection to that extent was never raised before the trial Court, but relying on the decision of the Apex Court, submitted that such objection can be taken at any stage even before the appellate Court as the factual aspect is not to be considered and admitted positions are not to be ignored. Putting reliance in several cases, it is contended that the suit simplicitor for grant of mandatory injunction for possession was not maintainable in view of the fact that the possession of a land is to be claimed under Section 5 of the Specific Relief Act and no injunction to that extent can be granted under Section 39 of the aforesaid Act. It is contended that the issue raised in respect of the claim is squarely covered by a decision rendered by this Court in Writ Petition No.2660/2001, decided on 2.4.2002, wherein these aspects have been considered by the Court. Further, since the appellants/plaintiffs were party to the said writ proceedings, which order has not been called in question anywhere, the appellants/plaintiffs were not entitled to any decree and the suit was rightly dismissed. It is next contended by learned counsel for the respondent/ defendant that the entire claim is made on the basis of unregistered document which is inadmissible in evidence in terms of provisions of Section 17 of the Registration Act. The consequence of such is in Section 49 of the said Act and, therefore, even otherwise the relief as claimed in the suit, was not to be granted to the appellants/plaintiffs. In fact, it was a case where the land was already surrendered or impliedly surrendered in favour of the respondent/defendant in terms of the provisions of Section 108 of the Transfer of Property Act, and therefore, if considering all these aspects, where specific pleadings in paragraphs 5, 6 and 9 of the written statement were raised, there was no question of granting any relief to the appellants/plaintiffs. Even otherwise because of the breach of the conditions of lease, the appellants/ plaintiffs were not entitled to the reliefs claimed and as such, the suit has rightly been dismissed, which judgment and decree need no interference in this appeal by this Court.

9. Refuting such submissions raised by learned counsel for the respondent/ defendant, learned Senior counsel for the appellants/plaintiffs would contend

that the suit for grant of mandatory injunction in such circumstances is maintainable where a statutory contract is executed in between the appellants/ plaintiffs and the defendant/ respondent. The respondent Corporation was duty bound to put the appellants/plaintiffs in possession of the land in terms of the lease executed and for that statutory performance, a suit for mandatory injunction is maintainable. It is not a case that a private individual is being asked to put somebody in possession, who was dispossessed from the said property unauthorisedly, for which purpose, the suit under Section 5 of the Specific Relief Act on payment of ad valorem Court Fee is required to be filed. Thus, such an objection regarding maintainability of the suit was not required to be considered at all. The other aspect is that the appellants/plaintiffs herein, more particularly, the appellant No.2 was the party to the writ proceedings as a respondent with the Municipal Corporation. The writ petition was filed by those who were the encroachers on the land so leased out to the appellants/plaintiffs and who were removed by the Municipal Corporation. The relief was claimed against the Municipal Corporation by the said persons. The reference to the agreement in between appellants/plaintiffs herein and the respondent/defendant Municipal Corporation was made in the said writ petition and for that purpose, the appellants/plaintiffs were impleaded as a respondent in the said writ proceedings. Since there was no inter se dispute in between the present appellants/plaintiffs and the Municipal Corporation in that writ proceedings, any judgment delivered in the said case would not operate as *res judicata* in the matter of claim made by the appellants/plaintiffs in the suit. Therefore, the provisions as have been pointed out by the respondent/defendant would not be attracted at all. The well settled law is that for aforesaid purposes, a suit for mandatory injunction for delivery of possession is permissible in law. For the purposes of establishing a right, even an unregistered document can be placed on record, because no title is being claimed on the basis of such a document and, therefore, provision of Section 17 of the Registration Act, would not be attracted. Rather, the exception of the said Chapter of the Act would be applicable in the case of appellants/plaintiffs. Thus, it is contended that the impugned judgment and decree is liable to be set aside and the appellants/plaintiffs are entitled to the reliefs claimed in the suit.

10. We have heard learned counsel for the parties at length and we have examined the record of the trial Court minutely.

11. To appreciate the real controversy involved in the appeal, we have to

record certain admitted facts by the parties or the facts which have been found proved by the trial Court and are not challenged before us in this appeal. In short, the said facts are recorded hereunder :-

(i) There was a lease deed executed in favour of Coronation Club of Jabalpur for a period of 30 years, as was admitted by the defendant/respondent. The said lease was to expire in the year 1956.

(ii) The appellant/plaintiff Jabalpur Club was the successor of the Coronation Club of Jabalpur and had continued in possession of the land pursuance to the lease executed in the year 1926, even after expiry of the period of lease in the year 1956.

(iii) No efforts were made by the Municipal Corporation, Jabalpur, to take back the possession of the land from the Jabalpur Club, after expiry of the lease of the year 1926. The Jabalpur Club had also not delivered back the possession of the land leased to it, to the lessor.

(iv) The fact relating to encroachment on the land so leased to the appellant/plaintiff Jabalpur Club came to the notice of the respondent/defendant much before, but even then no enquiry whatsoever was conducted as to whether the plaintiff No.2 Jabalpur Club was responsible for parting with the possession of the said land to the encroachers in any manner.

(v) The notice in respect of alleged breach was issued by the Municipal Corporation to the Jabalpur Club only on 14.7.1988 (Ex.P/4) in which also the fact was recorded that there was no renewal of the lease of the year 1926 after its expiry in the year 1956, even then the appellant/plaintiff Jabalpur Club was in possession of the land.

(vi) Thereafter, meetings were held in between office bearer of Jabalpur club and the officials of the Municipal Corporation for renewal of the lease. Proposal to that extent was given on 21.9.1988 vide Ex.P/12 by the Municipal Corporation.

(vii) Ultimately, decision in terms of the aforesaid talks was taken and communication was sent on 1.9.1989 Ex.P/13. The amount as demanded was deposited by the plaintiff- Jabalpur Club with the Municipal Corporation and in terms of the settlement between the office bearer of Jabalpur Club and officials of the Municipal Corporation reached in the meeting held on 21.9.1988, further actions were taken. Proceedings of meeting is Ex.P/40.

(viii) Ultimately, in terms of aforesaid talks, renewal of the lease was done on 19.12.1989 for a complete period of 60 years including the regularisation of the lapsed period of lease with effect from 13.2.1956, till 12.2.1986 and the rest of the period of 30 years to be concluded on 13.2.2016.

(ix) In fact, there was no revocation of lease by the Municipal Corporation Jabalpur, till the date of suit.

12. Now, we are required to deal with the preliminary objection raised by the learned counsel for the respondent/ defendant regarding the maintainability of the suit for grant of mandatory injunction. As has been pointed out herein above, it has been vehemently contended by learned counsel for the respondent/defendant that such a suit for mandatory injunction filed under Section 39 of the Specific Relief Act, seeking delivery of possession was not maintainable. For the said purposes, learned counsel for the respondent/ defendant has placed his reliance in the case of *Anthula Sudhakar Vs. P. Buchi Reddy (dead) by L.Rs. and others*[1] , more particularly paragraph 13 of the said report. It is contended that a suit for mandatory injunction would not be maintainable in view of the fact that possession is required to be obtained by the appellants/ plaintiffs for which a suit under Section 5 of the Specific Relief Act is required to be filed. It is contended that the *ad valorem* Court Fees on the value of the land of which possession is sought is required to be paid in terms of the provisions of Section 7 of the Court Fees Act and then only the claim can be made in that respect. The possession of the land is sought by the appellants/plaintiffs by mere a suit under Section 39 of the Specific Relief Act, which according to learned counsel for the respondent/defendant is not maintainable.

1. (2008) 4 SCC 594

13. We have considered the aforesaid submissions thoroughly. What are the circumstances in which a suit for mandatory injunction for delivery of possession is not maintainable, is required to be examined by us. In the case of *Anthula Sudhakar* (supra), the Apex Court was dealing with some what different situation. There was no statutory obligation on the respondent/ defendant to restore back the possession of the appellants/plaintiffs. The suit was filed on the basis of title and it was stated that while the appellants/plaintiffs were taking steps for making certain construction, the respondent/defendant in the said suit interfered with the said work and, therefore, an injunction was sought. The general principles were laid down by the Apex Court in paragraph 13 on which heavy reliance is placed by learned counsel for the respondent/ defendant and it was stated that if there is a cloud on the title, a simple suit for injunction would not be maintainable. It was a case of grant of mandatory injunction for possession and, therefore, the analogy as laid down by the Apex Court in the said case are not attracted. The facts and circumstances in the present case are totally different, such a reliance placed by learned counsel for the respondent/defendant cannot be accepted.

14. For the purposes of maintainability of the suit, we are required to see the law and to examine whether there was any statutory duty on the respondent/ defendant to put the appellants/plaintiffs in possession of the suit land or not. The Specific Relief Act more particularly Part-III of the said Act deals with the injunction. Chapter-VII is for the purposes of preventing relief of temporary and perpetual injunction as prescribed under Sections 36 and 37 of the said Act. Chapter-VIII in the said part, deals with the perpetual injunction and Section 39 deals with mandatory injunction. Since we are required to examine the aspect of said Section 39, the same is reproduced hereunder :-

> "39. **Mandatory injunctions.**- When, to prevent the breach of an obligation, it is necessary to compel the performance of certain acts which the court is capable of enforcing, the court may in its discretion grant an injunction to prevent the breach complained of, and also to compel performance of the requisite acts."

15. Section 40 of the Specific Relief Act in Chapter-VIII, Part-III deals with damages or in lieu of, or in addition to, injunction and Section 41 of the said Act specifically deals with the provision when injunction can be refused. None of the contingencies prescribed under Section 41 of the Specific Relief

Act, contains a prohibition that a plaintiff who is seeking enforcement of his right accrued on the basis of a statutory contract cannot ask for grant of a mandatory injunction. Section 42 of the Specific Relief Act deals with injunction to perform negative agreements which are not to be enforced. Again nothing is provided in this Section also to prohibit grant of injunction to discharge the statutory the duties. This makes it clear that a mandatory injunction can be issued to prevent the breach of an obligation or to compel the performance of certain acts which the Court can direct, non-compliance of which is complaint to the Court. In some what similar circumstances, the Apex Court in the case of *Sant Lal Jain Vs. Avtar Singh*[2] has held that in certain circumstances even the mandatory injunction can be issued for delivery of possession of the land. The Apex Court has further considered the aspect of grant of decree of mandatory injunction under Section 39 of the Specific Relief Act, 1963 and has specifically dealt with the provisions of Section 36 to 42 of the aforesaid Act while looking to a claim for modification of decree of injunction granted by the Court. In the case of *State of Haryana vs. State of Punjab and another*[3], in paragraphs 36 onwards the reasons are specifically recorded as to under what circumstances a claim for grant of mandatory injunction can be made. It is categorically held by the Apex Court that unless the plaintiff establishes that there is such a right in law, there would be no question of Court deciding any dispute regarding the extent or existence of such right. Whether the mandatory injunction is granted as a final relief or it is in the nature of a protection till adjudication of the claim, has to be taken note of. Once the command is issued by the Court by granting a mandatory injunction under Section 39 of the Specific Relief Act for compliance of the statutory provisions or the liability, that has to be treated as a final decree executable in law. The Apex Court has considered various decisions of the other Courts including the Courts of the other countries and has categorically reached to the conclusion that there is distinction between a final peremptory injunction and a final decree, which requires a continuous course of action. It will be a different case where only a preventive injunction is asked for. The simple meaning of the aforesaid is that the Court has power to grant a mandatory injunction for discharge of statutory liability and for that purpose it is not necessary that an ordinary suit under Section 5 of the Specific Relief Act for grant of a decree of possession be filed. We say so because it will be harsh to

2. AIR 1985 SC 857 3. (2004) 12 SCC 673

a plaintiff to ask for possession of the land, which has been leased out to him only in an ordinary suit under Section 5 of the Specific Relief Act, on payment of ad volerum Court fees to the tune of the value of the land, even when there is statutory liability cast on the lessor to put the aforesaid plaintiff in possession of the land leased to him. As has been explained by the Apex Court, if an obligation is on the lessor to put the lessee in possession of the land and the lessor is not performing the said Act nor is discharging his obligation, a mandatory injunction can be issued to perform such act by the Court. However, while dealing with such a situation, as a caution is sounded by the Apex Court, the Courts are required to look into pleadings of the parties, examine the records and documents, consider the law and then only issue such an injunction. To us, this being a bounden duty of the Court while dealing with a claim for grant of mandatory injunction for the said purposes, the trial Courts are to act more cautiously and not in casual manner. We say so, because, but for the aforesaid reasons, normally a suit for possession is not to be filed under Section 39 of the Specific Relief Act, on the other hand, a regular Civil Suit in terms of the provisions of Section 5 of the aforesaid Act is required to be filed in the manner provided by the Code of Civil Procedure.

16. This takes us to examine whether there was any statutory duty cast on the respondent Municipal Corporation to put the appellants/plaintiffs in possession of the land in suit and for that purposes, a suit of mandatory injunction could be filed by the appellants/plaintiffs. The leases are to be granted by the Municipal Corporation in terms of the provisions of M.P. Municipal Corporation Act, 1956 (hereinafter referred to as the Act for short). Chapter- VI of the aforesaid Act, deals with the municipal property and liabilities. Section 80 of the said Act prescribes the provisions governing the disposal of municipal property or property vesting in or under the management of Corporation. Since this particular law is required to be tested exhaustively, the provisions of Section 80 of the Act aforesaid are reproduced hereunder :-

> **"80. Provisions governing the disposal of municipal property or property vesting in or under the management of Corporation.-** (1) No streets, lands, public places, drains or irrigation channels shall be sold, leased or otherwise alienated, save in accordance with such rules, as may be made in this behalf.
>
> (2) Subject to the provisions of sub-section (1) -

(a) the Commissioner may, in his discretion, grant a lease of any immovable property belonging to the Corporation, including any right of fishing or of gathering and taking fruit, flowers and the like, of which the premium or rent, or both, as the case may be, does not exceed five hundred rupees for any period not exceeding twelve months at a time.

Provided that every such lease granted by the Commissioner, other than the lease of the class in respect of which Mayor-in-Council has by resolution exempted the Commissioner from compliance with the requirements of this proviso, shall be reported by him to the Mayor-in-Council within 15 days after the same has been granted;

(b) with the sanction of the Mayor-in- Council, the Commissioner may be sale or otherwise grant a lease of immovable property including any such right as aforesaid, for any period not exceeding three years at a time of which the premium or rent or both, as the case may be, for any one year does not exceed three thousand rupees;

(c) with the sanction of the Corporation the Commissioner may lease, sell or otherwise convey any immovable property belonging to the Corporation.

(3) The Commissioner may -

(a) in his discretion dispose of by sale, letting out on hire or otherwise, any movable property belonging to the Corporation not exceeding five hundred rupees in value;

(b) with the sanction of Mayor-in-Council, dispose of by sale, letting out on hire, or otherwise any movable property belonging to the Corporation not exceeding five thousand rupees in value;

(c) with the sanction of the Corporation, sell, let out on hire or otherwise convey any movable property belonging to the Corporation.

(4) The sanction of the Mayor-in-Council or of the

Corporation under sub-section (2) or sub-section (3) may be given either generally for any class of cases or specifically in any particular case.

(5) The foregoing provisions of this section shall apply to every disposal of property belonging to the Corporation made under or for the purpose of this Act;

Provided that -

(i) no property vesting in the Corporation in trust shall be leased, sold or otherwise conveyed in a manner that is likely to prejudicially affect the purpose of the trust subject to which such property is held;

(ii) no land [value of which may be prescribed] shall be sold or otherwise conveyed without the previous sanction of the Government and every sale, or other conveyance of property vesting in the Corporation shall be deemed to be subject to the conditions and limitations imposed by this Act or by any other enactment for the time being in force."

17. A perusal of Section (2) of Section 80 of the Act, makes it clear that till the Rules are made by the competent authority, powers can be exercised by the Commissioner of the Municipal Corporation to lease the property to some extent. Sub-clause (c) of Sub-section (2) of Section 80 of the Act prescribes that with the sanction of the Corporation, the Commissioner may lease, sell or otherwise convey any immovable property belonging to the Corporation. The transfer of immovable property of the Municipal Corporation was not governed by any Rules as the Rules for the first time were made by the State Government in the year 1970, which are known as M.P. Municipal Corporation (Transfer of Immovable Property) Rules, 1994 (hereinafter referred to as 1994 Rules for short). Prior to coming into force of these Rules, the properties belonging to the Municipal Corporation could be leased out in the manner indicated in Sub-section (2) of Section 80 of the aforesaid Act. Precisely, this was the power which was exercised by the Municipal Corporation in executing the lease deed in favour of the appellant/plaintiff No.2 Jabalpur Club on 19.12.1989 i.e. much before coming into force of 1994 Rules.

18. It is the submission of learned Senior counsel for the appellants/plaintiffs that renewal of any lease is in fact a fresh grant. There cannot be any dispute to that extent as the law in that respect has already been settled by the Apex Court in the case of *Delhi Development Authority Vs. Durga Chand Kaushish*[4]. If the fresh grant was also made prior to coming into force of 1994 Rules, the same cannot be said to be violative of any provisions of the Act. The Transfer of Property Act deals with the lease of immovable property as is contained in Chapter-V. The leases are defined in Section 105 of the aforesaid Act, which means that a lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, expressed or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms. Rights and liabilities of lessor and lessee are prescribed under Section 108 of the Transfer of Property Act, which are required to be examined exhaustively and, therefore, the entire provision is quoted herein below :-

> "108. **Rights and liabilities of lessor and lessee.-**
>
> In the absence of a contract or local usage to the contrary, the lessor and the lessee of immoveable property, as against one another, respectively, possess the rights and are subject to the liabilities mentioned in the rules next following, or such of them as are applicable to the property leased:—
>
> (A) Rights and Liabilities of the Lessor
>
> (a) The lessor is bound to disclose to the lessee any material defect in the property, with reference to its intended use, of which the former is and the latter is not aware, and which the latter could not with ordinary care discover;
>
> (b) the lessor is bound on the lessee's request to put him in possession of the property;
>
> (c) the lessor shall be deemed to contract with the

4. AIR 1973 SC 2609

lessee that, if the latter pays the rent reserved by the lease and performs the contracts binding on the lessee, he may hold the property during the time limited by the lease without interruption. The benefit of such contract shall be annexed to and go with the lessee's interest as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

(B) Rights and Liabilities of the Lessee

(d) If during the continuance of the lease any accession is made to the property, such accession (subject to the law relating to alluvion for the time being in force) shall be deemed to be comprised in the lease;

(e) if by fire, tempest or flood, or violence of an army or of a mob, or other irresistible force, any material part of the property be wholly destroyed or rendered substantially and permanently unfit for the purposes for which it was let, the lease shall, at the option of the lessee, be void: Provided that, if the injury be occasioned by the wrongful act or default of the lessee, he shall not be entitled to avail himself of the benefit of this provision;

(f) if the lessor neglects to make, within a reasonable time after notice, any repairs which he is bound to make to the property, the lessee may make the same himself, and deduct the expense of such repairs with interest from the rent, or otherwise recover it from the lessor;

(g) if the lessor neglects to make any payment which he is bound to make, and which, if not made by him, is recoverable from the lessee or against the property, the lessee may make such payment himself, and deduct it with interest from the rent, or otherwise recover it from the lessor;

(h) the lessee may 1[even after the determination of

the lease] remove, at any time 2[whilst he is in possession of the property leased but not afterwards] all things which he has attached to the earth; provided he leaves the property in the state in which he received it;

(i) when a lease of uncertain duration determines by any means except the fault of the lessee, he or his legal representative is entitled to all the crops planted or sown by the lessee and growing upon the property when the lease determines, and to free ingress and egress to gather and carry them;

(j) the lessee may transfer absolutely or by way of mortgage or sub-lease the whole or any part of his interest in the property, and any transferee of such interest or part may again transfer it. The lessee shall not, by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease; Nothing in this clause shall be deemed to authorise a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate under the management of a Court of Wards, to assign his interest as such tenant, farmer or lessee;

(k) the lessee is bound to disclose to the lessor any fact as to the nature or extent of the interest which the lessee is about to take, of which the lessee is, and the lessor is not, aware, and which materially increases the value of such interest;

(l) the lessee is bound to pay or tender, at the proper time and place, the premium or rent to the lessor or his agent in this behalf;

(m) the lessee is bound to keep, and on the termination of the lease to restore, the property in as good condition as it was in at the time when he was put in possession,

subject only to the changes caused by reasonable wear and tear or irresistible force, and to allow the lessor and his agents, at all reasonable times during the term, to enter upon the property and inspect the condition thereof and give or leave notice of any defect in such condition; and, when such defect has been caused by any act or default on the part of the lessee, his servants or agents, he is bound to make it good within three months after such notice has been given or left;

(n) if the lessee becomes aware of any proceeding to recover the property or any part thereof, or of any encroachment made upon, or any interference with, the lessor's rights concerning such property, he is bound to give, with reasonable diligence, notice thereof to the lessor;

(o) the lessee may use the property and its products (if any) as a person of ordinary prudence would use them if they were his own; but he must not use, or permit another to use, the property for a purpose other than that for which it was leased, or fell 1[or sell] timber, pull down or damage buildings 1[belonging to the lessor, or] work mines or quarries not open when the lease was granted, or commit any other act which is destructive or permanently injurious thereto;

(p) he must not, without the lessor's consent, erect on the property any permanent structure, except for agricultural purposes;

(q) on the determination of the lease, the lessee is bound to put the lessor into possession of the property."

19. The first part of the right and liability of the lessor deals with three contingencies, namely, the lessor is bound to disclose any material defect in the property to the lessee and **the lessor is bound on the lessee request to put him in possession of the property**. Likewise, the lessee is also responsible to deliver back the possession of the property to the lessor on the determination of the lease. In either case, when the lease is executed though

the property was not in possession of the lessor, it would be the responsibility of the lessor to get the property vacated and deliver its possession to the lessee. Likewise, the lessee is also liable to deliver back the possession to the lessor the moment the lease is determined. On a perusal of the lease deed and the documents which have been placed on record by the appellants/plaintiffs, it is clear that on the date the renewal of the lease was ordered, the respondent Municipal Corporation was not in possession of the land so leased to the appellants/plaintiffs. It is also born from the record and the evidence adduced by the parties that the land was subsequently got vacated by the Municipal Corporation in the year 1999. That being so, for the purposes of enforcement of statutory liability prescribed under Section 108 of the Transfer of Property Act, lessor was required to put the appellants/plaintiffs in possession of the leased land. For the said purposes, in the considered opinion of this Court, a suit under Section 39 of the Specific Relief Act for grant of mandatory injunction would be maintainable as it is a statutory liability which the respondent-defendant was required to discharge, and for which a mandatory injunction can be issued.

20. It is contended by learned counsel for the respondent/ defendant that there was determination of the lease in terms of provisions of Section 111 of the Transfer of Property Act. Alternatively, it is contended that there was an implied surrender of the lease by the appellants/plaintiffs and, therefore, the suit for grant of mandatory injunction was not maintainable. We are unable to accept such a submission of learned counsel for the respondent/ defendant. The fact that the land was not in possession of the Municipal Corporation right from the year 1926, was well within the knowledge of the Municipal Corporation. The said Corporation was also knowing that the initial lease granted in the year 1926 had expired in the year 1956 and then thereafter there was no renewal whatsoever in favour of the appellant No.2-plaintiff Jabalpur Club. There was no action taken by the respondent Municipal Corporation to take the possession of the suit land from the appellants/plaintiffs after the expiry of the said period. On their own, it was stated in the letter issued to the appellants/plaintiffs that the land was being enjoyed by the appellants/plaintiffs though there was no continuity of the lease. From these documentary evidence, by no stretch of imagination, could it be said that the appellants/plaintiffs have surrendered the lease or possession of the suit land to the respondent/defendant or there was any implied surrender as is envisaged

under Section 111 of Transfer of Property Act. To claim such a benefit, at least the documentary evidence to the effect that such a demand was made and then thereafter possession was taken by the respondent/defendant, was required to be produced before the trial Court. Not a single document to that effect was filed precisely because none was available. Even there is no determination of the lease or any intention shown in that respect. Only a threat is given that in case reply is not filed, such an order would be passed, but at least till the date of suit, there was no determination of lease by the respondent Municipal Corporation. The situation as have been enumerated in Section 111 of the Transfer of Property Act, which amounts to determination of lease are thus not achieved as the respondent Municipal Corporation itself has regularised the period of lease which was already lapsed, by grant of lease on 19.12.1989. Therefore, the provisions of Section 111 of the Transfer of Property Act, would not come to the rescue of the respondent/defendant.

21. On the aforesaid analogy and discussions, we have to hold that the suit for grant of mandatory injunction was rightly filed by the appellants/plaintiffs and the same was maintainable for grant of possession of the leased land to the appellants/plaintiffs by the respondent Municipal Corporation in performance of the statutory liability prescribed under Section 108 of the Transfer of Property Act read with Section 80 of the Municipal Corporation Act.

22. Having dealt with such a preliminary objection, now we have to proceed further to examine whether the trial Court has rightly considered the material evidence available on record and has decided the issues in appropriate manner or not ?

23. For the purposes of convenience, we have already reproduced the issues in paragraph 5 of this judgment. We have examined that Issue No.1 was decided in favour of the appellants/plaintiffs and against the respondent/ defendant. No cross appeal or objection has been filed before this Court and such finding and decree has been accepted by the respondent/defendant. Rightly it has been done so because the lease agreement was executed by the respondent/defendant. So far as the Issue No.1-B is concerned, no finding in that respect was required to be given for the simple reason that the consequence of grant of renewal of the lease is only that the lessee is to enjoy the grant till its expiration. So far as the Issue No.2 is concerned, finding was neither against the appellants/ plaintiffs nor in favour of respondent/defendant. It was an

admitted position that in the year 1999, the respondent Municipal Corporation has taken in possession the land so leased to the appellants/plaintiffs, after removing the encroachment from the said land. In fact, the Issue No.2-B should have been decided appropriately and this is the only finding which the appellants/plaintiffs have challenged before this Court. The Issue No.3 was decided in favour of the appellants/plaintiffs as no breach of lease conditions were found by the trial Court. The findings in that respect have not been called in question before us by the respondent/defendant. Virtually, the trial Court has not recorded any finding in respect of Issue No.3. Now whatever the circumstances, we have to examine the findings recorded by the trial Court in paragraphs 14, 15,16 and 17 of the impugned Judgment.

24. A perusal of the evidence indicates that the appellants/plaintiffs had written to the competent authority of the respondent Municipal Corporation and to the district Administration for removal of the encroachment from the land. This fact was categorically stated by the appellants/ plaintiffs in its reply to the show cause notice issued to the appellant No.2/plaintiff, which has been placed on record as Ex.P/7. Along with the said reply, the letter written to the competent authorities of the Electricity Board, letter written to the Station House Officer, letter written to the other authorities of the State are also produced. No finding was recorded in that respect by the trial Court whether these actions of the appellants/plaintiffs were to be treated as sufficient for taking steps for getting the encroachment removed from the land leased to the appellants/plaintiffs or not. Further, the admitted position which was recorded in the proceedings written by the respondent-defendant Corporation authorities and duly exhibited and proved vide Ex.P/40, indicates that in fact Corporation authorities themselves have agreed that they will get the land vacated from the encroachers. In fact, it was recorded that the lessee, the appellants/plaintiffs before the trial Court was coordinating in the said proceedings. Whatever the circumstances, this fact was well within the knowledge of the respondent/ defendant that the land sought to be leased out to the appellants/plaintiffs was not readily available to deliver possession of the same to the appellants/plaintiffs as it was encroached by some outsiders. If that was the situation, the respondent/defendant Municipal authorities could have said that there was no possibility of renewal of the lease and the entire matter was to be closed at that stage. On the other hand, the corporation authorities extended the period of the lease knowing fully well that they were not in possession of the land,

with certain conditions to make construction over the land so leased to the appellants/ plaintiffs. In Clause (c) of the conditions mentioned in paragraph 4, it was recorded thus :-

> "(c) In case of land not built upon, the lessee shall commence to build within one year from the date of commencement of the lease of the said land and shall within two years from the date erect or/and complete on the said land dwelling use/or accommodation for business purpose (out building according to the conditions mentioned thereafter and design to be approved by the lessor or by such person as he may appoint for the purpose and shall not without the previous consent in writing of the lessor or of such person make/ alteration in the land, any projection of or structure overhanging upon any land out- side the said land hereby demised)."

25. The appellants/plaintiffs thereafter prepared a map for construction placed the same for grant of sanction before the respondent Corporation authorities which document has been produced in evidence as Ex.P/10. After grant of the sanction when the commencement of the construction could not take place, the period of completion of construction was extended by the Corporation authorities themselves. Mainly this was done only because the land so leased to the appellants/plaintiffs was not put in possession of the appellants/plaintiffs and, therefore, it was not possible for the appellants/ plaintiffs to start the construction work. In these circumstances, the findings recorded by the trial Court against the appellants/ plaintiffs cannot be sustained. For a long period, in case the lessee is not put in possession, he cannot be denied the benefits. There was no delay on the part of the appellants/plaintiffs in approaching the Court as after making request when the land was not put in possession of the appellant and a threat was given to the appellants/plaintiffs to cancel the lease, the suit was filed on 22.4.2003 before the Court. Thus, in fact the evidence to this extent available on record was not appreciated by the trial Court in appropriate manner and a perverse finding was recorded. From the statements of defendant, it is clear that till the year 1998, when the inspection was done by the Commissioner of Municipal Corporation though the fact was well within the knowledge of the authorities of the Municipal Corporation that unauthorisd encroachment has been made on the land, action was not taken for removal of those unauthorised occupant from the leased land. For such

lapses on the part of the Municipal Corporation authorities, the appellants/ plaintiffs were not to be blamed and the relief was not to be denied to them.

26. The denial of the decree to the appellants/plaintiffs by the Trial Court was only on the ground of delay in approaching the Courts of law as the finding is recorded that the suit was filed after a delay of about 14 years. To us, such a finding recorded by the Trial Court is perverse, for the simple reason that the evidence adduced by the parties indicate that the appellants/ plaintiffs were pointing out that the land was encroached by someone else and was not in possession of the appellants. No action whatsoever was taken by the Municipal Corporation, the respondent/defendant, to take back possession of the land from the appellants even when the lease period had expired in the year 1956 for a considerable long time. The agreement was reached between the appellants and the officials of the Municipal Corporation in the year 1988-89 and ultimately the renewal of the lease was done on 19.12.1989 with an understanding that the removal of the unauthorized encroachment would be done by the Municipal Corporation and if any litigation is brought in that respect before the Court of law, the appellants would stand along with the Municipal Corporation to defend the said claim. Further, ultimately the unauthorized encroachers were removed in the year 1999 and thereafter the land was taken in possession by the respondent/defendant. The demand was thereafter made by the appellants for putting the appellants, more particularly appellant No.2, in possession of the land, which was not considered to in terms of the provisions of Section 108 of the Transfer of Property Act and, therefore, the suit was required to be filed. This explanation itself given in the plaint as also adduced in evidence before the Trial Court was enough to hold that there was no unexplained delay caused in approaching the Court of law for grant of mandatory injunction. Thus, the finding recorded by the Court below in aforesaid paragraphs 14, 15, 16 and 17 of the impugned judgment are perverse and cannot be given a stamp of approval by this Court. Further fact is found proved from the evidence of the said DW/2 that right from 1988, every time deposit was being made by the appellants/plaintiffs towards premium of the leased land and the said amount was accepted by the Municipal Corporation without any demur. Deposit of that amount was also proved by the evidence adduced by the appellants/plaintiffs and several receipts in that receipts were produced and exhibited. If the lessor was accepting the premium of the land, it was the responsibility of the lessor to put the lessee in

possession of the land, for the consideration paid, so that the lessee may enjoy the property obtained on lease. In view of this, the findings recorded by the trial Court in this respect cannot be upheld.

27. Learned counsel for the respondent/defendant has vehemently contended that the entire suit was founded on an unregistered document of lease, which was inadmissible in evidence as the registration of such document was necessary under Section 17 of the Registration Act. It is contended that such a document though was relied by the appellants/plaintiffs was neither registered nor impounded and the consequence of such was as prescribed under Section 49 of the Registration Act, therefore, even for this reason, the relief was not available to the appellants/plaintiffs as claimed in the suit founded on an unregistered document and the suit was liable to be dismissed on this count alone. For the purpose of aforesaid, learned counsel for the respondent/ defendant has placed his reliance in the case of *R. V.E. Venkatachala Gounder Vs. Arulmigu Viswesaraswami & V.P. Temple and another*[5] and would contend that since such an objection can be taken at any stage even in the appellate Court and if make out such a suit is to be treated as dismissed. It is contended that relying on the said decision in the case of *R. V.E. Venkatachala Gounder* (supra), further the law has been laid down by the Apex Court in the case of *Smt. Dayamathi Bai Vs. K.M. Shaffi*[6]. We have given our considered thought to the aforesaid submissions of learned counsel for the respondent/defendant and we have reasons to reject the same. First of all, the document was not made the basis for grant of any such relief of possession. It was shown for the purposes of pointing out the liability on the lessor, the respondent-Municipal Corporation in terms of the provisions of Section 108 of the Transfer of Property Act. Secondly, though the said document was said to be denied by the respondent/defendant, but their own action was based only on the said document as all notices were issued by the respondent-Municipal Corporation to the appellants/plaintiffs alleging breach of the said lease deed. Further, the lease deed was a statutory one and, therefore, merely because the same was not registered, a right accrued under the said lease deed that too a statutory right was not to be denied to the appellants/plaintiffs. The facts and circumstances in the case of *R. V.E. Venkatachala Gounder* (supra) and *Smt. Dayamathi Bai* (supra), are distinguishable. In the case of

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5. [(2003) 8 SCC 752 6. AIR 2004 SC 4082

R.V.E. Venkatachala Gounder (supra), a private contract was in between the parties and there were certain private documents relating to the title. The Apex Court while considering the said documents, reached to the conclusion that unregistered documents were of no consequence as Section 49 of the Registration Act prohibit admission of such documents in evidence. The similar distinguishable features were also available in the case of *Smt. Dayamathi Bai* (supra), which facts were considered in relation to a certified copy of the documents in absence of the proof of execution of the said document. Factual aspect that such a lease deed was executed in favour of the appellants/ plaintiffs was in fact admitted by DW/2, who himself has proved the said document of lease dated 19.12.1989. If execution of such a document for the purposes of granting lease was admitted in evidence, by the witnesses of the respondent/ defendant, at this stage, such an objection raised regarding admissibility of the document is not to be entertained. The respondent would not be benefited by the decisions of the Apex Court relied by the learned counsel for the respondent/defendant in view of the aforesaid distinguishable features.

28. The objection raised by learned counsel for the respondent/ defendant in respect of waiver of rights by the appellants/plaintiffs in the mater (sic:matter) of claim of possession and the reliance placed by learned counsel for respondent/ defendant in the case of *Vithalbhai (P) Ltd. Vs. Union Bank of India*[7] and *Tarachand Vs. Sagarbai alias Chaiyalibai*[8] are wholly misconceived. We have already discussed the provisions of Section 111 of the Transfer of Property Act and further actions to be taken in that respect and we have already given our finding that such a submission of learned counsel for the respondent/defendant is not acceptable. Therefore, we have to say that such reliance by the learned counsel for the respondent/defendant is misconceived. In the facts and circumstances, as have been recorded herein above, the law laid down by the Apex Court would not be attracted in the present case as neither there is any implied surrender of the land nor waiver of rights by the lessee in respect of possession of the land demised to the appellants/ plaintiffs under the lease.

29. In view of the aforesaid analysis, we **allow the appeal.** The judgment and decree in so far as it relates to refusal of grant of decree of mandatory

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7. [(2005) 4 SCC 314] 8. [(2007) 5 SCC 392]

injunction directing respondent/defendant to put the appellant/plaintiff No.2 in possession of the leased land is set aside. The suit of the appellants/plaintiffs is decreed to that extent. However, in peculiar facts and circumstances of the case, parties to the appeal shall bear their own cost of the proceedings.

A decree be drawn accordingly.

Appeal allowed.

I.L.R. [2016] M.P., 1772
APPELLATE CIVIL
Before Mr. Justice Rajendra Menon &
Mr. Justice Sushil Kumar Palo
F.A. No. 679/2008 (Jabalpur) decided on 3 March, 2016

KIRAN CHOURASIYA (SMT.) ...Appellant
Vs.
SHRI MANOJ CHOURASIYA ...Respondent

Hindu Marriage Act (25 of 1955), Sections 13 (1)(i a) & 13 (1)(i b) - Cruelty and Desertion **- Application under Section 13 of the Act of 1955 by husband on the ground of Cruelty & Desertion - Trial Court decreed the suit - Appeal on the ground that husband had cohabitated within two years immediately preceding presentation of the divorce petition - Held - As the fact of cohabitation within two years immediately preceding presentation of the divorce petition has been denied by the husband & parties are living separately for last 15 years, the conduct of the wife amounts to cruelty - Impugned Judgment & decree u/s 13 (1)(i a) & u/s 13 (1)(i b) of the Act of 1955 does not call for any interference - Appeal is hereby dismissed. (Paras 5, 7 to 12)**

हिन्दू विवाह अधिनियम (1955 का 25), धाराएँ 13 (1)(i ए) व 13 (1)(i बी) – क्रूरता एवं अभित्यजन – पति द्वारा क्रूरता एवं अभित्यजन के आधार पर अधिनियम 1955 की धारा 13 के अंतर्गत आवेदन किया गया – विचारण न्यायालय ने वाद डिक्रीत किया – इस आधार पर अपील कि पति ने विवाह–विच्छेद याचिका प्रस्तुत किये जाने के ठीक पूर्ववर्ती दो वर्ष के भीतर सहवास किया था – अभिनिर्धारित – चूंकि विवाह–विच्छेद याचिका प्रस्तुत किये जाने के ठीक पूर्ववर्ती दो वर्ष के भीतर सहवास करने के तथ्य से पति द्वारा इंकार किया गया है तथा पक्षकारगण विगत 15 वर्षों से पृथक् निवास कर रहे हैं, अतः पत्नी का आचरण क्रूरता की कोटि में आता है – अधिनियम 1955 की धारा 13(1)(i ए) एवं धारा 13(1)(i बी) के अंतर्गत पारित

आक्षेपित निर्णय एवं डिक्री में हस्तक्षेप की आवश्यकता नहीं – अपील एतद्द्वारा खारिज।

Cases referred:

(2014) 7 SCC 640, (2013) 5 SCC 226, AIR 1974 SC 710.

A. Usmani, for the appellant.
Akhilesh Jain, for the respondent.

JUDGMENT

The Judgment of the Court was delivered by : **S.K. Palo, J. :-** The appellant-wife feeling aggrieved by the judgment dated 30.08.2008, pronounced by First ADJ, Seoni in Civil Suit No, 4A/2005 whereby the application under Section 13 of Hindu Marriage Act, 1955 filed by the respondent-husband was allowed and the marriage between the appellant and respondent solemnized on 24.05.2001 has been dissolved, preferred this appeal under Section 28 of the Hindu Marriage Act, 1955 (for brevity Act, 1955).

2 It is not disputed that the appellant and respondent are husband and wife. Their marriage was solemnized on 24.05.2001. Due to this wedlock, a male child was born to the appellant. The respondent issued a notice to the appellant for restitution of conjugal right. The respondent then instituted Civil Suit No. 6A/2002 in which a finding was given by the Court in favour of the respondent that the appellant wife deserted respondent-husband without any sufficient cause, however, the civil suit was dismissed. It is also not disputed that the appellant-wife has filed a criminal case before JMFC, Chhindwara under Section 406 I.P.C read with Sections 4, 5 and 6 of the Dowry Prohibition Act, which is yet to be decided.

3 The learned trial Court after gone through the pleadings and evidence observed that after her marriage, the appellant-wife pressurized respondent-husband to live separately from his family. When the respondent-husband denied the same, the appellant- wife stopped doing domestic work and started sleeping separately. The appellant-wife also got herself transferred from village Linga, Distt. Chhindwara to Seoni. The appellant-wife treated the respondent-husband with cruelty and deserted the respondent-husband from 07.10.2010. The trial Court, under Section 13 (1) (1) (A) and 13 (1) (1) (B) Act, 1955

granted decree of divorce in favour of the respondent-husband.

4 In the present case, the appellant-wife has assailed the judgment under Section 28 of the Act, 1955 on the ground that the finding of the trial Court is illegal, perverse and contrary to law and contrary to evidence available on record. It is also claimed that the respondent-husband and his family members treated her with cruelty. They harassed and tortured her and compelled her to bring dowry from her parent's house. No remedy left with the wife, except to leave Chhindwara and for that she cannot be held responsible for deserting the husband. On the other hand, it is the husband who is responsible for the said desertion. The husband himself is responsible for the estrangement and separation of the parties, therefore, he cannot take advantage of the same. The learned trial Court has wrongly appreciated the evidence in this regard, hence, the impugned judgment be set aside.

5 During the course of arguments, it is vehemently contended by the learned counsel for the appellant that the learned trial Court also erred in appreciating the evidence that, for the treatment of their child, they had gone to Ernakulam (Kerela). In between 22.07.2004 to 05.08.2004, they stayed in the same hotel room and cohabited, therefore, the petition on the ground of desertion is liable to be dismissed for the simple reason that the petition was filed on 04.01.2006 and the husband and wife stayed and cohabited within the period of two years immediately preceding presentation of the divorce petition. He placed reliance on *Malathi Ravi, M.D. Vs. B.V. Ravi, M.D.* reported as (2014) 7 SCC 640, in which the Hon'ble Apex Court has held that:

> **"Hindu Marriage Act, 1955- S. 13(1) (i-b)- Desertion for continuous period of 2 yrs-Husband admitted to have once stayed with wife at wife's place for 2 days within period of 2 yrs immediately preceding presentation of divorce petition by him-Held, desertion not established."**

6. Rebutting to the above submissions, learned counsel for the respondent has submits that the learned trial Court after having gone through the evidence on record has pronounced the impugned judgment which calls for no interference, as it is based on the facts and evidence of the case. He pointed out that the marriage was solemnized on 24.05.2001. On 04.10.2001 the appellant-wife pressurized the respondent-husband to leave his mother and

sister. When the respondent-husband did not pay any heed to it, on 05.10.2001, she left her matrimonial home. Since then she has been living separately. The appellant-wife did not return to the matrimonial home and there was a finding in the Civil Suit No. 16A/2002 in this regard. It is strongly contended that the appellant-wife also alleged demand of dowry and cruelty against the members of the family of respondent-husband in the criminal case. The Hon'ble Supreme Court has acquitted the accused persons. She has lodged a report of demand of dowry as well as she registered a criminal case under Section 406 of the I.P.C against the respondent-husband which falls in the category of cruelty, therefore, the respondent-husband has succeeded in proving desertion as well as cruelty against the appellant-wife.

7. We have considered the contentions advanced by the appellant as well as respondent and gone through the material available on record. The parties are living separately since 2001. The appellant-wife claims that Alok Kumar, their only child was under treatment at Sure Tech Hospital, Nagpur, who was subsequently, taken to Institute of Medical Science and Research Centre, Ernakulam Kerela for treatment by Dr. R. Krishna Kumar. The appellant-wife alleged that the respondent-husband stayed with her in a hotel room and they cohabitated. But this contention of the appellant-wife has been denied by the respondent-husband. In paragraph 46 to 49, the learned trial Court dealt with this issue and has opined that when the appellant's son was ill, both of them had gone for his treatment to Ernakulam. At that time, having the background that parties have refused to live together, allowing the ill-child to stay with another person, staying as husband-wife in a hotel room is not reliably believed, specially when other members of the family were also present there for treatment of the child. The reasons assigned by the learned trial Court is cogent. We cannot endorse another view in the circumstances prevailed in the case and the evidence available on record.

8 On the backdrop of the facts that the marriage is done for all the purposes and the husband and wife are living separately for almost about fifteen years. Despite many efforts by the husband for conciliation and for bringing the appellant-wife to the matrimonial home has failed. We cannot overlook the fact that the appellant-wife did not turn up on 06.03.2006, 8.04.2006, 22.04.2006, 15.05.2006 and 24.06.2006 despite the order of the Court for re-conciliation. On 21.06.2007, the respondent even agreed to

go to the appellant's place to live with her, but the appellant-wife refused to live with the respondent-husband even at her maternal home. She pleaded that she was subjected to cruelty and harassment to such a degree that she could not live with the husband. But she could not prove the same.

9 In case of *K.Srinivas Rao Vs. D.A. Deepa* (2013) 5 SCC 226 Hon'ble the Apex Court has discussed a similar situation in the following words:

> "30. It is also to be noted that the appellant- husband and the respondent-wife are staying apart from 27.4.1999, thus, they are living separately for more than ten years. This separation has created an unbridgeable distance between the two. AS held in Samar Ghosh, if we refuse to saver the tie, it may lead to mental cruelty.
>
> 31. We are also satisfied that this marriage has irretrievably broken down. Irretrievable break down of marriage is not a ground for divorce under the Hindu Marriage Act, 1955. But, where marriage is beyond repair on account of bitterness created by the acts of the husband or the wife or of both, the Court have always taken irretrievable break-down of marriage as a very weighty circumstance amongst others necessitating severance of marital tie. A marriage, which is dead for all purposes cannot be revived by the Court's verdict, if the parties are not willing. This is because marriage involves human sentiments and emotions and if they are dried up there is hardly any chance of their springing back to life on account of artificial reunion created by the Court's decree."

10. Similar is the situation in the present case, in the facts and circumstances of the case, it is established that the conduct of appellant-wife has inflicted mental pain and suffering upon the respondent-husband. In case of *V Bhagat Vs. D Bhagat* reported as AIR (1974) 8CC 716, the Apex Court has held that "any conduct inflicts such mental pain and suffering one of the parties and is of such nature that the parties henceforth cannot possibly live together amounts to mental cruelty and under such circumstances the wrong party cannot reasonably to put up with such conduct and continue to live with the other party."

11 In these circumstances, in our considered opinion, the conclusion recorded by the trial Court about the conduct of the appellant-wife amounts to "cruelty" and her departure from the matrimonial home amounts to "desertion" under Section 13 (I) (I) (A) and 13 (I) (I) (B) Act, 1955. Therefore, the impugned judgment dated 30.08.2008 does not suffer from any illegality or perversity or any material irregularity and does not call for any interference by this Court.

12 Be that as it may be, the appeal filed by the appellant-wife being meritless deserves to be and is hereby dismissed. There is no order as to costs.

Appeal dismissed.

I.L.R. [2016] M.P., 1777
APPELLATE CRIMINAL
Before Mr. Justice S.K. Palo
Cr.A. No. 254/2012 (Gwalior) order passed on 5 February, 2015

RAJMAL AGARWAL ...Appellant
Vs.
DINESH SAHU ...Respondent

Negotiable Instruments Act (26 of 1881) - Section 138 - Complaint **- Appeal against acquittal is pending - During pendency of appeal appellant died - Applicant on the basis of Will claiming for substitution as legal representative in appeal - Whether in a complaint under Section 138 of the Act of 1881, on death of Complainant or Appellant the proceeding or appeal will abate - Held - No, the proceedings or appeal will not abate on death of Complainant or Appellant and legal representative of a Complainant or Appellant is entitled to be substituted for further prosecuting the complaint or appeal - I.A. allowed - Amendment to be incorporated accordingly. (Paras 12 & 13)**

परक्राम्य लिखत अधिनियम (1881 का 26) – धारा 138 – परिवाद – दोषमुक्ति के विरूद्ध अपील लंबित है – अपील के लंबित रहने के दौरान अपीलार्थी की मृत्यु हुई – आवेदक ने वसीयत के आधार पर अपील में विधिक प्रतिनिधि के तौर पर प्रतिस्थापित किये जाने हेतु दावा किया – क्या अधिनियम, 1881 की धारा 138 के अंतर्गत परिवाद में परिवादी अथवा अपीलार्थी की मृत्यु होने पर कार्यवाही अथवा अपील का उपशमन हो जाएगा – अभिनिर्धारित – नहीं, परिवादी अथवा

अपीलार्थी की मृत्यु होने पर कार्यवाहियों अथवा अपील का उपशमन नहीं होगा एवं परिवादी अथवा अपीलार्थी का विधिक प्रतिनिधि परिवाद अथवा अपील के अभियोजन हेतु प्रतिस्थापित किये जाने का हकदार होगा – अंतर्वर्ती आवेदन मंजूर – तदनुसार संशोधन समाविष्ट किया जावे।

Cases referred:

(2000) CrLJ 1622, (2005) 11 SCC 412, 1998 CrLJ 3770 (Guj.).

Sanjay Mishra, for the appellant.
Pavan Singh Raghuvanshi, for the respondent.

(Supplied: Paragraph numbers)

ORDER

S.K. Palo, J. :- Appellant is dead.

2. Heard on I.A. No. 786/2015, an application for substituting the LRs of appellant.

3. Briefly stated the facts are that the complainant's case was filed by Rajmal Agarwal against the respondent before the learned JMFC. Vidisha in the Criminal Case No. 1000/2006 decided on 26.07.2010. The learned Trial Court acquitted the respondent under Section 138 of the Negotiable Instrument Act. Therefore, this appeal was filed by the appellant Rajmal Agrawal. During the pendeney of this appeal, the complainant-appellant Rajmal Agrawal died on 27.12.2014 at Vidisha. Applicant Ashok Kumar Agrawal has filed the present application along with the death certificate of Rajmal Agrawal and a 'Will' stating that he is the legal representative of the deceased/appellant Rajmal Agrawal. Therefore, his name be substituted in place of the appellant.

4. The respondent opposed the same on the ground that the applicant Ashok Kumar Agrawal is not the legal heir of the appellant and one daughter of Rajmal Agrawal is alive.

5. It is submitted by the counsel for the applicant that Rajmal Agrawal has a daughter but after her marriage, she is living in her in-laws house. The "Will" dated 31.03.1997 duly registered has been executed by the deceased Rajmal Agrawal in presence of two witnesses, hence, the applicant is the legal representative of the deceased/appellant Rajmal Agrawal.

6. Heard the rival contentions of the parties.

7. The document death certificate and the registered "Will", *prima facie* show that the applicant Ashok Kumar Agrawal is the legal representative of the deceased appellant Rajmal Agrawal.

8. In *Helen C. Pinheiro v. M/s. Kamaxi Steel Products* reported in 2000 CrLJ 1622, it is held that "the Magistrate is competent to proceed with the complaint even where complainant died during pendency of complaint."

9. In *Assem Shabanli Merchant Vs. Brij Mehra* reported in (2005) 11 SCC 412, it is held that "in prosecution for offence under S. 138 of the Negotiable Instrument Act; on the death of the complainant, the Court would allow his son to conduct the prosecution and appoint a counsel of his choice."

10. Similarly in *Anil G. Shah Vs. I.J. Chittaranjan Co.* reported in 1998 CrLJ 3770 (Guj.), it is held that "in prosecution under Section 138 of the Negotiable Instrument Act, on the death of the complainant, proceedings do not abate, dismissal of the complaint is not proper".

11. It is true that the appellant is dead. It is also true that *prima facie* a registered will is executed in favour of the applicant Ashok Kumar Agrawal. Therefore, it is sufficient in a criminal case to infer that the applicant is a legal representative of the appellant.

12. The *maxim actio personal is moritur cum persona* has no application to criminal prosecution. The death of the complainant cannot *ipso facto* bring the termination of the proceedings.

13. That being so, this Court has no hesitation to allow the present application and to substitute name of the applicant Ashok Kumar Agrawal, as the appellant, for further prosecuting the criminal appeal. Accordingly, I.A. No. 786/2015 is allowed. Amendment be incorporated accordingly.

Case be listed for final hearing in due course.

Order accordingly.

I.L.R. [2016] M.P., 1780
APPELLATE CRIMINAL
Before Mr. Justice Subhash Kakade
Cr.A. No. 1375/2012 (Jabalpur) order passed on 22 March, 2016

HAJARILAL HANOTIYA ...Appellant
Vs.
SACHIN SINGH THAKUR ...Respondent

Criminal Procedure Code, 1973 (2 of 1974), Sections 378 (iv) & 394 (2) - Abatement of appeal **- Appeal filed by complainant already admitted - On account of the death of the complainant whether the same will be abated in terms of Section 394(2) of Cr.P.C. - Held - Word "Appellant" used in Section 394(2) of the Code denotes the appellant who is accused not complainant - Since the appeal is already admitted during the life time of the complainant/appellant, appeal shall not abate and it will be decided on its merits. (Paras 8, 10 & 11)**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 378(iv) व 394 (2) – अपील का उपशमन – परिवादी द्वारा प्रस्तुत अपील पूर्व से ही स्वीकृत – परिवादी की मृत्यु हो जाने पर द0प्र0स0 की धारा 394(2) के निबंधनों के अंतर्गत क्या अपील का उपशमन हो जाएगा – अभिनिर्धारित – संहिता की धारा 394(2) में प्रयुक्त शब्द "अपीलार्थी" उस अपीलार्थी का द्योतक है, जो अभियुक्त है न कि परिवादी – चूंकि अपील पूर्व में ही परिवादी/अपीलार्थी के जीवनकाल में स्वीकार हो चुकी है, इसलिए अपील का उपशमन नही होगा तथा उसे उसके गुणदोषों पर ही विनिश्चित किया जाएगा।

B.M. Prasad, for the appellant.
Shobhitaditya, for the respondent.

ORDER

SUBHASH KAKADE, J. :- This appeal has been preferred by the appellant/complainant being aggrieved by the judgment of acquittal of the respondent/accused dated 10.07.09 passed by learned Sessions Judge, Hoshangabad in Criminal Appeal No. 187/08, arising out of order of conviction passed by learned JMFC, Itarsi on 25.10.08 in Criminal Case No. 1078/06 for offence punishable under Section 138 of Negotiable Instruments Act (for short "the Act").

2. The short facts of criminal complaint case are that the respondent/

accused issued a cheque of Rs.20,000/- in favour of appellant to discharge of his liability vide Cheque No. 232863 dated 24.05.06 of State Bank of India, Branch Seoni Malwa on account of commercial transaction between the parties. The appellant presented the cheque through his banker for collection, but the same was dishonoured due to insufficient fund in the account of respondent. After issuance of required legal notice , the appellant filed a complaint case under Section 138 of the Act against the respondent.

3. After taking cognizance in compliance of process issued by learned trial Court, the respondent appeared and abjured his guilt. Learned JMFC on basis of recorded evidence held that there was dishonour of cheque for insufficiency of funds in account of respondent, hence convicted him for the offence punishable under Section 138 of the Act and sentenced him to suffer R.I.for four months and fine of Rs.5000/- with default stipulation and also awarded compensation of Rs.25,000/- to be paid to the appellant. Aggrieved thereby the respondent preferred a Criminal Appeal, learned appellate Court allowing the appeal acquitted the respondent hence the appellant approached this Court.

4. It is pertinent to mention here that the appellant Hajarilal had passed away on dated 20.02.13.

5. Learned counsel for the respondent has submitted on the strength of provisions of Section 394 of the Code of Criminal Procedure,1973 (hereinafter referred to as "the Code") that as the appellant has died, therefore, this appeal stands abated.

6. Question arises whether appeal filed by the appellant/complainant against the acquittal of the respondent/accused under the provisions of Section 378(iv) of the Code will be abated in terms of provisions of Section 394 (2) of the Code as the appellant/complainant has died ?

7. At this juncture , perusal of provisions of Section 394 (1) of the Code will be beneficial to resolve the controversy which reads as under :-

> **"Abatement of appeals :-** (1) Every appeal under Section 377 or section 378 shall finally abate on the death of the accused.

8. The word "appellant" is used in Section 394(2) of the Code necessarily indicates the appellant who was accused, this word "appellant" does not

include the person who was complainant and file an appeal against the acquittal of the accused.

9. This fact finds support from the reading of the proviso of sub-section (2) of Section 394 of the Code, which reads as under :-

> (2) Every other appeal under this Chapter (except an appeal from a sentence of fine)_shall finally abate on the death of the appellant:
>
> Provided that where the appeal is against a conviction and sentence of death or of imprisonment, and the appellant dies during the pendency of the appeal, any of his near relatives may, within thirty days of the death of the appellant, apply to the Appellate Court for leave to continue the appeal; and if leave is granted, the appeal shall not abate."
>
> Explanation : In this section, "near relative" means a parent, spouse, lineal descendant, brother or sister.

10. Hence, there is no doubt that the word "appellant" used for Section 394(2) of the Code denotes the appellant who is accused not complainant.

11. As the appeal is already admitted vide order dated 18.06.12, in life time of the appellant, therefore, now it will be decided on its merits irrespective of the fact that the appellant is no more now.

Order accordingly.

I.L.R. [2016] M.P., 1782
COMPANY APPEAL
Before Mr. Justice Prakash Shrivastava
Company Appeal No. 05/2008 (Indore) decided on 10 March, 2016

SERIOUS FRAUD INVESTIGATION OFFICE (SFIO) ...Appellant
Vs.

M/S. BONANZA BIOTECH LTD. & ors. .....Respondents

Company Act (1 of 1956), Section 10 F - Appeal - Condonation - **Appeal filed with delay of 131 days - Held - Under Section 10 F, including original and extended period, limitation is only of 120 days from date of communication of order - Word 'not exceeding' in proviso reflect that after**

expiry of original period of 60 days only 60 days can be condoned and no delay beyond that can be condoned - Section 5 r/w Section 29 of Limitation Act not applicable in case, because Companies Act not only provides the period of limitation but also prescribes outer limit for condoning the delay - Proviso to Section 10 F gives rider of "further period of not exceeding sixty days" has the effect of exclusion of Section 5 of Limitation Act - Appeal dismissed as barred by limitation. (Paras 8, 9 & 16)

कम्पनी अधिनियम (1956 का 1), धारा 10 एफ – अपील – माफी – अपील 131 दिवस के विलंब से प्रस्तुत की गई – अभिनिर्धारित – धारा 10 एफ के अंतर्गत परिसीमा की अवधि, मूल एवं बढ़ाई गई अवधि को सम्मिलित करते हुए, आदेश की संसूचना की तिथि से केवल 120 दिवस है – परन्तुक में शब्द "अनधिक" यह दर्शाता है कि 60 दिवस की मूल अवधि के अवसान के पश्चात् केवल 60 दिवस की अवधि और माफ की जा सकती है तथा उसके परे विलंब माफ नहीं किया जा सकता है – परिसीमा अधिनियम की धारा 5 सहपठित धारा 29 इस प्रकरण में लागू नहीं होती, क्योंकि कंपनी अधिनियम न केवल परिसीमा की अवधि उपबंधित करता है बल्कि विलंब माफ किये जाने हेतु बाह्य सीमा को भी विहित करता है – धारा 10 एफ के परन्तुक में प्रदत्त "60 दिवस से अनधिक की अतिरिक्त अवधि" की उपरिका के प्रभाववश परिसीमा अधिनियम की धारा 5 का अपवर्जन हो जाता है – परिसीमा से वर्जित होने से अपील खारिज।

Cases referred:

(2009) 152 Company Case 75, FEMA No. 1/2010 decided on 11.01.2016, (2008) 7 SCC 169, (2008) 3 SCC 70, (2010) 5 SCC 23, AIR 2015 Punjab & Haryana 45.

Deepak Rawal, for the appellant.
Vijay Assudani, for the respondents no. 2 to 7.

(Supplied: Paragraph numbers)

ORDER

PRAKASH SHRIVASTAVA, J. :- Heard on IA Nos. 11538/08 and 11539/08 which are applications for condonation of delay under Section 5 of Limitation Act.

2. Learned counsel for appellant submits that delay was on account of following the administrative procedure therefore, the same deserves to be condoned.

3. Learned counsel for respondents has raised an objection that delay of more than 120 days cannot be condoned and appeal has been preferred with a delay of about 131 days.

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

5. This appeal under Section 10F of Companies Act, 1956 was originally preferred by appellant against orders of Company Law board dated 29/4/08, 13/6/08 and 20/6/08. The Registry had noted defect on 9/1/2009 of not filing separate appeals against each order. Thereafter separate appeals have been filed.

6. In the present case two applications being IA Nos. 11538/08 & 11539/08 have been filed for condonation of delay in filing the appeal.

7. This appeal has been filed on 15/12/2008, if the limitation is calculated w.e.f. the date of orders i.e. 29/4/08, 13/6/08 and 20/6/08 then apparently there is a long delay in filing the appeal. In IA No. 11538/08 though the appellant had stated that orders under challenge were brought to the notice of SFIO much after 20/4/08 but no date of knowledge of the order by the SFIO has been disclosed. In the second application IA No. 11539/08 it has been averred as under:

> 2. That, the orders of compounding are dated 29/4/2008, 13/6/2008 but these orders were brought to the notice of SFIO much after 20.04.2008 on 6-7 August, 2008. Therefore, present separate application seeking condonation of delay of 131 days is also filed for the condonation of delay in filing the appeal.
>
> 3. That the delay of aforementioned days has been caused because of procedure and taking order of Higher Authorities and therefore the delay is bonafide and deserve to be condoned by the Hon'ble court in the interest of justice.
>
> 4. That, therefore, it is prayed that the delay of 131 days in filing the appeal be condoned in the interest of justice.

Thus admittedly there is a delay of 131 days in filing the present appeal.

8. The appeal under Section 10F of Act can be filed within 60 days from the date of communication of the order of Company Law Board and in terms

of proviso on showing sufficient cause further period of not exceeding 60 days can be granted by this Court. Section 10F reads as under:-

> **"10F. Appeals against the order of the Company Law Board.**-Any person aggrieved by any decision or order of the Company Law Board [made before the commencement of the Companies (Second Amendment) Act, 2002] may file an appeal to the High court within sixty days from the date of communication of the decision or order of the Company Law Board to him on any question of law arising out of such order:
>
> Provided that the High court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days."

9. Thus in terms of the above provision, including the original and extended period, the limitation of only 120 days from the date of communication of order is available. The words "not exceeding" contained in the proviso reflect the clear intention of the legislature that after expiry of original period of 60 days delay only 60 days can be condoned and no delay beyond that can be condoned. So far as issue of applicability of Section 5 of the Limitation Act is concerned, Section 5 read with Section 29 of the Limitation Act will not be applicable in the present case because the Companies Act not only provides the period of limitation but also prescribes the outer limit for condoning the delay. The proviso to Section 10F containing the provision for extending the period of limitation with a rider of "further period not exceeding sixty days" has the effect of exclusion of Section 5 of the Limitation Act.

10. Bombay High court in the matter of *Smt. Hetal Alpesh Muchhala Vs. Adityesh Educational Institute and others* reported in [2009] 152 Company Case 75 has considered the aforesaid proviso and taking note of the earlier judgments on the point has held that delay beyond extended period permitted under Section 10F cannot be condoned and Section 5 of Limitation Act does not apply in such cases. Bombay High court has held as under:

> The legislative intent as reflected from the amendments to the Companies Act, 1956 resulting in the constitution of the Company Law Board and the insertion of Section 10F providing for a limited appeal make it abundantly clear that

the Legislature intended to restrict the power of the Court to condone the delay beyond the period exceeding 60 days and thus prescribed in a mandatory language as under:

> "Provided that the High court may if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding 60 days."

Thus, borrowing the language of the Hon'ble Supreme court in Union of India Vs. Popular Construction Co.(supra), if there were any residual doubt on the interpretation of the language used in section 10F, the legislative intent behind the constitution of the Company Law Board and the object of insertion of Section 10F would resolve the issue involved of curtailment of the court's power with the exclusion of the operation of the section 5 of the Limitation Act, 1963.

In view thereof, the scheme of the Companies Act, 1956, as amended from time to time surely supports the curtailment of the court's powers by the exclusion of operation of section 5 of the Limitation Act, 1963.

In the circumstances and for the reasons stated earlier, the question of condoning delay in filing company appeal under section 10F of the Companies Act, 1956, does not arise and the said application is dismissed.

11. Similar proviso contained in Section 35 of Foreign Exchange Management Act, 1999 came up for consideration before Division Bench of this court in the matter of *The Special Directorate of Enforcement Directorate Vs. M/s Cyno Pharma* in FEMA No. 1/2010 wherein Division Bench by order dated 11/1/16 has held that the delay beyond the prescribed period of 60 days cannot be condoned. In Section 35 thereof the similarly worded provision permitting filing of appeal within 60 days is contained considering which the Division Bench has held as under:

> 6. The delay cannot be condoned after a period of 60 days as per the proviso of Section 35 of the Act of 1999. The proviso

to Section 35 is analogous to Section 5 of the Limitation Act. Section 5 does not put any limitation with respect to the period, but proviso to Section 35 gives discretion to the court to condone the delay for a sufficient cause but the discretion is limited to a maximum period of 60 days.

7. In the present case it is not in dispute that the appeal is barred by 113 days, i.e. beyond the maximum period of 60 days and the same cannot be condoned.

12. Supreme court in the matter of *Consolidation Engineering Enterprises Vs. Principal Secretary, Irrigation Department and others* reported in (2008) 7 SCC 169 while considering Section 34(3) of Arbitration and Conciliation Act, 1996 and taking note of the fact that sub-section provides for the limitation as also the further period which can be extended on sufficient cause being shown "but not thereafter", has held that Section 5 of Limitation Act would not be applicable. In the matter of *Singh Enterprises Vs. Commissioner of Central Excise, Jamshedpur and others* reported in (2008) 3 SCC 70 while considering Section 35(1) of Central Excise Act, 1944 which provides for entertaining the appeal by condoning the delay only up to 30 days after the expiry of 60 days which is the normal period for preferring the appeal, has held that there is complete exclusion of Section 5 of Limitation Act.

13. In the matter of *Chhattisgarh State Electricity Board Vs. Central Electricity Regulatory Commission and others* reported in (2010) 5 SCC 23 on examination of Section 125 of Electricity Act, 2003 which provides for filing of appeal before the Court against the order of Tribunal within 60 days and empowering the court to entertain the appeal "within a further period of not exceeding 60 days" on sufficient cause has held that Section 5 of Limitation Act is not attracted because there is outer limit prescribed.

14. Full Bench of Punjab and Haryana High court in the matter of *State of Haryana Vs. Hindustan Machine Tools Limited and others* reported in AIR 2015 Punjab & Haryana 45 while examining similar issue in respect of Section 25 of Sick Industrial Companies (Special Provision) Act, 1986 has held that limitation Act cannot be pressed into service in aid of belated application under Section 25 of the Act seeking condonation of delay beyond period prescribed thereunder.

15. Considering the law which has been settled in the above judgments and also taking note of the fact that under proviso to Section 10F an outer limit of 60 days for condoning the delay has been prescribed, I am of the opinion that delay beyond the period prescribed in filing the appeal under Section 10F of Act cannot be condoned by invoking provision of Section 5 of Limitation Act. Hence the delay of 131 days in filing the present appeal cannot be condoned.

16. Accordingly IA Nos. 11538/08 and 11539/08 are rejected and appeal is dismissed as barred by time.

C.C. As per rules.

Appeal dismissed.

I.L.R. [2016] M.P., 1788
CIVIL REVISION
Before Mr. Justice Alok Aradhe
C.R. No. 200/2014 (Jabalpur) decided on 2 February, 2016

DINESH SHARMA ...Applicant
Vs.
SMT. JYOTI SHARMA ...Non-applicant

Family Courts Act (66 of 1984), Section 7 - Jurisdiction - Execution of decree **- Decree to pay Rs. 5 lacs was granted by District Court towards education and marriage expenses of daughter - Execution application filed before Family Court - Execution proceeding is not an original proceeding, as recourse to the same is taken after termination of the *lis* between the parties - Execution proceeding is not covered in the expression "proceeding" as used in Section 7 - Executing Court has jurisdiction to execute decree which was passed prior to establishment of Family Court - Family Court has no jurisdiction to entertain the application for execution of decree granted by District Court - Non-applicant would be at liberty to institute proceeding before the Civil Court which had passed the decree. (Paras 8 to 10)**

कुटुम्ब न्यायालय अधिनियम (1984 का 66), धारा 7 – अधिकारिता – डिक्री का निष्पादन – पुत्री की शिक्षा एवं विवाह के व्यय हेतु रू0 5 लाख अदा करने बावत् डिक्री जिला न्यायालय द्वारा पारित की गई – निष्पादन आवेदन को कुटुम्ब न्यायालय के समक्ष प्रस्तुत किया गया – निष्पादन कार्यवाही मूल कार्यवाही नहीं है, क्योंकि पक्षकारों के मध्य

वाद समाप्त होने के पश्चात् उसका अवलंब लिया गया है – निष्पादन कार्यवाही धारा 7 में वर्णित पद "कार्यवाही" से आच्छादित नहीं है – निष्पादक न्यायालय को उस डिक्री का निष्पादन करने की अधिकारिता है, जो कुटुम्ब न्यायालय की स्थापना से पूर्व पारित की गई थी – कुटुम्ब न्यायालय को जिला न्यायालय द्वारा प्रदान की गई डिक्री के निष्पादन हेतु प्रस्तुत आवेदन को सुनने की अधिकारिता नहीं है – अनावेदक डिक्री पारित करने वाले सिविल न्यायालय के समक्ष कार्यवाही संस्थित करने के लिए स्वतंत्र होगा।

Cases referred:

AIR 2006 Kerala 337, 2010(IV) MPJR 263, AIR 1999 Orissa 81, II (1994) DMC 401, 1 (1998) DMC 110 (DB), 1(1998) DMC 318 (DB), (2013) 9 SCC 491, AIR 1956 SC 87.

M.P. Acharya, for the applicant.
Amit Verma, for the non-applicant.

ORDER

ALOK ARADHE, J. :- The applicant in this revision preferred under section 115 of the Code of Civil Procedure has assailed the validity of the order dated 16.1.2014, by which, the objections raised by the applicant to the maintainability of the execution proceeding initiated by the non-applicant before the Family Court, Bhopal have been rejected. In order to appreciate the controversy involved in this revision, few facts need mention which are stated *infra.*

2. The marriage between the applicant and non-applicant was solemnized on 21.5.1983. Sometime in the year 1990, the non-applicant initiated a proceeding under section 10 of the Hindu Marriage Act, 1955 (hereinafter referred to as the "1955 Act") in which, an *ex parte* decree was passed on 4.4.1990. Thereafter, the applicant in the year 1999 initiated the proceeding under section 13(1)(a) of the 1955 Act seeking dissolution of marriage, which was decreed vide judgment and decree dated 31.8.1999. The non-applicant filed an appeal before the High Court. The High Court vide judgment and decree dated 2.9.2009 set aside the judgment and decree passed by the trial Court and on the application of the non-applicant filed under section 25 of the Act granted an amount of Rs.5,00,000/- (Rupees Five Lacs only) to daughter of the parties, namely, Neha towards education and marriage expenses. Being aggrieved, the applicant filed Special Leave Petition before the Supreme Court which was dismissed vide order dated 29.1.2010.

Thereafter, the applicant filed review of the judgment dated 2.9.2009 before this Court which was dismissed on 11.8.2011.

3. Thereafter, the non-applicant filed an application under Order 21 Rule 11 read with section 151 of the Code of Civil Procedure before the Principal Judge, Family Court, Bhopal. The applicant filed reply on 2.12.2013, and thereafter on 20.12.2013 filed an application under section 151 of the Code of Civil Procedure, by which, an objection was raised that the execution proceeding initiated before the Family Court is not maintainable as the decree was passed by the District Court. Thereafter, another objection was filed on 16.1.2014, *inter alia,* on the ground that the decree passed in favour of non-applicant is illegal. The trial court vide order dated 16.1.2011 dismissed the objections raised by the applicant. Thereafter, the applicant filed an application for review before the Executing Court which was rejected by the Executing Court vide order dated 24.2.2014. The applicant filed a writ petition against the order dated 16.1.2014 passed by the Executing Court and on 5.4.2014, the aforesaid writ petition was dismissed as withdrawn with liberty to challenge the order dated 16.1.2014 in revision under section 115 of the Code of Civil Procedure. In the aforesaid factual background, the applicant has approached this Court.

4. Learned counsel for the applicant submitted that in view of section 37 of the Code of Civil Procedure, the execution proceeding initiated by the non-applicant before the Family Court is not maintainable. While inviting the attention of this Court to Section 7 of the Family Courts Act, 1984 (hereinafter referred to as "Act"), it is argued that the Family Court has no jurisdiction to execute the decree as the expression "suit" or "proceeding" used in Section 7 does not include execution proceeding. In support of aforesaid submission, learned counsel for the applicant has placed reliance on the decision of Supreme Court in the case of *Josekutty Joseph v. Aniamma Thomas and another*, AIR 2006 Kerala 337 and decision of this Court in the case of *Arvind Singh Bhadouria vs. Smt.Kunti Bhadouria*, 2010 (IV) MPJR 263.

5. On the other hand, learned counsel for the non-applicant has invited attention of this Court to section 37 as well as section 8 of the Family Courts Act and has submitted that the only Family Court has the jurisdiction to entertain the proceeding and the decision relied on by the counsel for the applicant in case of *Josekutty Joseph* (supra) has no application to the fact situation of

the case. In support of the his submissions, learned counsel for the non-applicant has placed reliance on the decisions in the cases of *Mayadhar Mallik vs. Smt.Laxmi Mallik and others,* AIR 1999 Orissa 81, *Marya Teresa Martin vs. Martin,* II(1994) DMC 401, *Devaki vs. Chandrika,* 1 (1998) DMC 110 (DB), *Smt.Rathna vs. M.P.Ramchandran,* 1 (1998) DMC 318 (DB) and *Satyawati vs. Rajinder Singh and another*, (2013) 9 SCC 491.

6. I have considered the rival submissions made at the Bar. The moot question which arises for consideration is whether the expression "suit" or "proceeding" used by the Legislature in Section 7 of the Act would include an execution proceeding. The rule of construction *noscitur a sociis* as explained by Lord Mac Millan means: "The meaning of a word is to be judged by the company it keeps". As stated by the Privy Council: "It is a legitimate rule of construction to construe words in an Act of Parliament with reference to words found in immediate connection with them". It is a rule wider than the rule of *ejusdem generis*; rather the latter rule is only an application of the former. The rule has been lucidly explained by Gajendragadkar, J, in the following words: "This rule, according to Maxwell, means that when two or more words which are susceptible of analogous meaning are coupled together, they are understood to be used in their cognate sense. They take as it were their colour from each other, that is, the more general is restricted to a sense analogous to a less general. The same rule is thus interpreted in Words and Phrases". Associated words take their meaning from one another under the doctrine of *noscitur a sociis,* the philosophy of which is that the meaning of the doubtful word may be ascertained by reference to the meaning of words associated with it; such doctrine is broader than the maxim *ejusdem generis.* [See: ***Principles of Statutory Interpretation,*** 14th Edition by Justice G.P.Singh Page 555].

7. In the backdrop of aforesaid well settled principle of statutory interpretation, it would be appropriate to take note of sections 7 and 8 of the Family Courts Act, 1984, which read as under:-

> *"7.* ***Jurisdiction.****- (1) Subject to the other provisions of this Act, a Family Court shall-*
>
> *(a) have and excercise all the jurisdiction exercisable by any district court or any subordinate civil court under any law for the time being in force in respect of suits and*

proceedings of the nature referred to in the explanation; and

(b) be deemed, for the purposes of exercising such jurisdiction under such law, to be a district court or, as the case may be, such subordinate civil court for the area to which the jurisdiction of the Family Court extends.

Explanation.- *The suits and proceedings referred to in this sub-section are suits and proceedings of the following nature, namely:*

(a) a suit or proceeding between the parties to a marriage for a decree of nullity of marriage (declaring the marriage to be null and void or, as the case may be, annulling the marriage) or restitution of conjugal rights or judicial separation or dissolution of marriage;

(b) a suit or proceeding for a declaration as to the validity of a marriage or as to the matrimonial status of any person;

(c) a suit or proceeding for declaration as to the validity of a marriage with respect to the property of the parties or of either of them;

(d) a suit or proceeding for an order or injunction in circumstances arising out of a marital relationship;

(e) a suit or proceeding for a declaration as to the legitimacy of any person;

(f) a suit or proceeding for maintenance;

(g) a suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor.

(2) Subject to the other provisions of this Act, a Family Court shall also have and exercise-

(a) the jurisdiction exercisable by a Magistrate of the First Class under Chapter IX (relating to order for maintenance of wife, children and parents) of the Code of

Criminal Procedure, 1973 (2 of 1974); and

(b) such other jurisdiction as may be conferred on it by any other enactment.

*8. **Exclusion of jurisdiction and pending proceedings.**- Where a Family Court has been established for any area, -*

(a) no district court or any subordinate civil court referred to in sub-section (1) of Section 7 shall, in relation to such area, have or exercise any jurisdiction in respect of any suit or proceeding of the nature referred to in the Explanation to that sub-section;

(b) no magistrate shall, in relation to such area, have or exercise any jurisdiction or power under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974);

(c) every suit or proceeding of the nature referred to in the Explanation to sub-section (1) of Section 7 and every proceeding under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974).-

(i) which is pending immediately before the establishment of such Family Court before any district court or subordinate court referred to in that sub-section or, as the case may be, before any magistrate under the said Code; and

(ii) which would have been required to be instituted or taken before or by such Family Court if, before the date on which such suit or proceeding was instituted or taken, this Act had come into force and such Family Court had been established,

shall stand transferred to such Family Court on the date on which it is established."

8. In the instant case, a decree for maintenance has been passed by the Civil Court which has been affirmed by the Supreme Court. The non-applicant has initiated execution proceeding of the aforesaid decree before the Family

Court at Bhopal. The expression "proceeding" used in Section 7 of the Act if it is construed by applying the principle of *noscitur a sociis* leaves no iota of doubt that the same coveys (sic:conveys) an expression that it is a proceeding akin to an original proceeding and execution proceeding is not an original proceeding, as recourse to the same is taken after termination of the *lis* between the parties. It is pertinent to mention here that in case of claims for reliefs under the statutes like Hindu Marriage Act, 1955, Indian Divorce Act, 1869, Special Marriage Act, 1954 and the Guardian & Wards Act, 1890 etc. contemplates a petition not a suit. The Family Court can also entertain a claim under section 125 of the Code of Criminal Procedure, which again is not a suit. It is presumably for this reason that the legislature has employed the expression "suit" or "proceeding" in section 7(f) of the Act. All the suits or proceedings contemplated by section 7 of the Act are original in nature, which culminate into a decree. Whether a Court which actually passed a decree loses its jurisdiction to execute the decree by reason of subject matter thereof being transferred to the jurisdiction of another court is no longer *res integra* and the same has been answered in affirmative by the Supreme Court in the case of *Rammana Vs. Nallaparaju*, AIR 1956 SC 87 in which it has been held that the Court which has passed the decree has the jurisdiction to execute it. Since the execution proceeding is not covered in the expression "proceeding" as used in section 7 of the Act, therefore, the bar contained in section 8 of the Act does not apply to the fact situation of the case. Therefore, the executing court has the jurisdiction to execute the decree which was passed prior to establishment of Family Court.

9. So far as the decision placed reliance upon by the learned counsel for the non-applicant in the case of *Mayadhar Mallik* (supra) is concerned the Division Bench dealt with the question whether the proceeding pending before the civil court at the time of establishment of Family Court is required to be transferred to the Family Court and it has been held that proceeding has to be transferred to the Family Court. The aforesaid question does not arise in the fact situation of the case, therefore, reliance placed upon is of no assistance to non-applicant. Similarly, the decision in the case of *Marya Teresa Martin* (supra) does not apply to the fact situation of the case as the Court was concerned with the issue whether the District Court has the jurisdiction to pass decree in the matter of appointment of guardian where the Family Court exists and the aforesaid question was answered in the negative. Similarly,

decision in the case of *Devaki* (supra) also does not apply to the fact situation as the same dealt with the question of about forum before which the application under Order 9 Rule 13 CPC would lie for setting aside *ex parte* decree. The decision in the case of *Smt.Ratha* (supra) also does not apply to the fact situation of the case as the Court dealt with the question about the forum before which the application seeking maintenance would lie.

10. In view of preceding analysis it is evident, the impugned order suffers from the jurisdictional infirmity. The same cannot be sustained in the eye of law. It is accordingly quashed. Needless to state, the non-applicant would be at liberty to institute the proceeding before the civil court which had passed the decree and in case such an application is filed, the civil court shall make an endeavour to conclude the proceeding within a period of three months from the date of presentation of such an application.

11. With the aforesaid directions, the revision stands disposed of

Revision disposed of.

I.L.R. [2016] M.P., 1795
CIVIL REVISION
Before Ms. Justice Vandana Kasrekar
C.R. No. 100/2015 (Jabalpur) decided on 11 March, 2016

C.M.D. (EZ) MPPKVVCL & anr. ...Applicants
Vs.
SHARAD OSHWAL ...Non-applicant

Civil Procedure Code (5 of 1908), Order 7 Rule 11 and Micro, Small and Medium Enterprises Development Act (27 of 2006), Sections 15, 16, 17, 18 & 24 - Rejection of Plaint -- Alternate remedy **- Application for rejection of plaint by defendant - Whether in the light of provisions as contained in Sections 18 & 24 of the Act of 2006 relating to availability of alternate remedy for reference of dispute to Micro & Small Enterprises Facilitation Council, the jurisdiction of the Civil Court is barred - Held - Yes, as per Section 18 (1) & Section 24 of the Act of 2006 the plaintiff has an alternate remedy of referring the dispute to the Facilitation Council and without availing that remedy the plaintiff cannot approach directly to the Civil Court in Civil Suit - Trial Court committed error in rejecting application under Order 7 Rule 11 of C.P.C.**

- Revision allowed and the suit is dismissed. (Paras 7 to 13)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 7 नियम 11 एवं सूक्ष्म, लघु और मध्यम उद्यम विकास अधिनियम (2006 का 27), धाराएँ 15, 16, 17, 18 व 24 – वाद पत्र अस्वीकार किया जाना – वैकल्पिक उपचार – प्रतिवादी द्वारा वाद पत्र अस्वीकार किये जाने हेतु आवेदन पत्र – क्या सूक्ष्म एवं लघु उद्यम सरलीकरण परिषद् को विवाद निर्देशित किये जाने हेतु वैकल्पिक उपचार की उपलब्धता से संबंधित, अधिनियम 2006 की धारा 18 एवं 24 में यथा समाविष्ट उपबंधों के आलोक में, सिविल न्यायालय की अधिकारिता वर्जित है – अभिनिर्धारित – हां, अधिनियम 2006 की धारा 18(1) एवं 24 के अनुसार वादी को विवाद को सरलीकरण परिषद् को निर्देशित करने हेतु वैकल्पिक उपचार प्राप्त है एवं उस उपचार का अवलंब लिए बिना वादी सीधे ही सिविल न्यायालय में सिविल वाद नहीं ला सकता है – विचारण न्यायालय ने सि.प्र.सं. के आदेश 7 नियम 11 के अंतर्गत आवेदन को अस्वीकार करने में त्रुटि कारित की – पुनरीक्षण मंजूर एवं वाद खारिज।

Cases referred:

AIR 1969 SC 78, 2013(2) MPLJ 525, AIR 2012 Bombay 178, ILR (2008) MP 2487.

A.P. Shroti, for the applicants.
U.K. Bassi, for the non-applicant.

ORDER

VANDANA KASREKAR, J. :- The petitioners have filed the present revision challenging the order dated 27/8/2014 passed by 10th Additional District Judge, Jabalpur in Civil Suit No.111-A/2011 thereby rejecting an application filed by the petitioners under Order 7 Rule 11 of Code of Civil Procedure.

2. Brief facts of the case are that the respondent has filed a civil suit against the petitioners for recovery of an amount of Rs.2,89,000/- together with interest at the rate of 28%. The aforesaid amount has been sought to be recovered as interest on the delayed payment to the respondent. The respondent is a Small Scale Industry and in the plaint reliance has been placed on the provisions of Micro, Small and Medium Enterprises Development Act, 2006 (hereinafter referred to as 'the Act of 2006'). The petitioners have filed an application under Order 7 Rule 11 of CPC on the ground that the suit, as appeared from the statement of plaint, to be barred under the Act of 2006. It has been submitted that the Act of 2006 is a self-contained Code creating

right in favour, inter-alia, of Small Scale Industry to recover interest on the delayed payment as well as the forum for recovery of such payment, thus, the respondent has an efficacious remedy available under the Act of 2006 for recovery of amount.

3. The respondent has filed reply to the said application and submitted that Section 18 of the Act of 2006 does not bar the jurisdiction of the Civil Court and, therefore, in absence of any express exclusion of any civil proceeding, civil suit is maintainable.

4. The trial Court by its order dated 27/8/2014 has dismissed the said application on the ground that the provisions of Sections of the Act of 2006 no where bar the Civil Court to exercise its jurisdiction and, therefore, civil suit is maintainable. Being aggrieved by this order, the applicants have preferred this civil revision before this Court.

5. Learned counsel for the petitioners has submitted that Section 15 of the Act provides for liability of buyer to make payment and as per said section, the supplier when supplies the goods, then the buyer shall make payment therefor on or before the date agreed upon between them. Section 16 provides for payment of interest and Section 18 provides reference to Micro and Small Enterprises Facilitation Council. He has submitted that as per Section 16 of the Act of 2006, when there is a delay in payment by the buyer, then according to Section 15, the buyer shall liable to pay compound interest with monthly rate to the supplier on that amount from the appointed day. Section 17 provides for recovery of amount due. Section 18 provides that when there is any dispute with regard to any amount due to Section 17, then a reference shall be made to the Micro and Small Enterprises Facilitation Council. Thus, as per the said section, if there is any dispute regarding the amount due, then the matter has to be referred to the Micro and Small Enterprises Facilitation Council. He has contended that in the present case from the plaint allegation, it is clear that there is a dispute about payment of interest under the Act and, therefore, the respondent has to approach to the Micro and Small Enterprises Facilitation Council for recovery of the said amount and the Civil Court has no jurisdiction to entertain the suit. He has relied upon the judgment passed by the Apex Court in the case of *Dhulabhai etc Vs. State of Madhya Pradesh and another* reported in AIR 1969 SC 78 and the judgment passed by this Court in the case of *R.R. Home Developers Pvt. Ltd. and others Vs. Rajendra*

Jain, reported in 2013(2) MPLJ 525, in which it has been held that where a statute creates a special right or liability and provides for determination of such rights or liability by any forum constituted under such statute, the maintainability of civil suit in such cases is impliedly barred. He, thus, has argued that although the civil suit is not specifically barred by the Act of 2006 but as in the present case a statute creates a special authority for determination of rights or liability, therefore, the civil suit is impliedly barred. He has further argued that the right to receive the interest on the delayed payment has been created under Sections 16 and 17 of the Act of 2006 and a complete procedure has been prescribed for recovery of the amount of interest. He also submitted that the conciliation for resolution of dispute is to be constituted under Section 18(2) of the Act of 2006 and when the conciliation is unsuccessful, the resolution of dispute as per Arbitration and Conciliation Act, 1996, then section 18 of the Act of 2006 mandatorily provides first for conciliation and then arbitration for resolution of dispute regarding interest on the delayed payment which has overriding effect as per Section 24 of the Act of 2006. For the said preposition, he has relied upon the judgment passed by the Bombay High Court in the case of *M/s Steel Authority of India Ltd. and another Vs. Micro Small Enterprise Facilitation Council* reported in AIR 2012 Bombay 178.

6. On the other hand, learned counsel for the respondent has submitted that Section 18 of the Act of 2006 does not bar the jurisdiction of the Civil Court and the word 'may' used in the said section is not mandatory in nature. He has further argued that the order passed by the trial Court is a well reasoned order. He, therefore, supports the order passed by the trial Court. He has relied upon the judgment passed by the Apex Court in the case of *Sulochana Vs. Rajinder Singh* reported in ILR [2008] MP 2487 in which it has been held by the Apex Court that the provisions regarding exclusion of jurisdiction of Civil Court are to be strictly construed. He, thus, prays for dismissal of the civil revision.

7. I have heard learned counsel for the parties and perused the record as well as the provisions of law. Sections 15, 16, 17 and 18 of the Act of 2006 read as under :

> **"15. Liability of buyer to make payment.-** Where any supplier, supplies any goods or renders any services to any buyer, the buyer shall make payment therefor on or before the

date agreed upon between him and the supplier in writing or, where there is no agreement in this behalf, before the appointed day:

Provided that in no case the period agreed upon between the supplier and the buyer in writing shall exceed forty-five days from the day of acceptance or the day of deemed acceptance.

16. **Date from which and rate at which interest is payable.-** Where any buyer fails to make payment of the amount to the supplier, as required under Section 15, the buyer shall, notwithstanding anything contained in any agreement between the buyer and the supplier or in any law for the time being in force, be liable to pay compound interest with monthly rests to the supplier on that amount from the appointed day or, as the case may be, from the date immediately following the date agreed upon, at three times of the bank rate notified by the Reserve Bank.

17. **Recovery of amount due.-** For any goods supplied or services rendered by the supplier, the buyer shall be liable to pay the amount with interest thereon as provided under Section 16.

18. **Reference to Micro and Small Enterprises Facilitation Council.-** (1) Notwithstanding anything contained in any other law for the time being in force, any party to a dispute may, with regard to any amount due under Section 17, make a reference to the Micro and Small Enterprises Facilitation Council.

(2) On receipt of a reference under sub-section (1), the Council shall either itself conduct conciliation in the matter or seek the assistance of any institution or centre providing alternate resolution services by making a reference to such an institution or centre, for conducting conciliation and the provisions of Sections 65 to 81 of the Arbitration and Conciliation Act, 1966 (26 of 1996) shall apply to such a

dispute as if the conciliation was initiated under Part III of that Act.

(3) Where the conciliation initiated under sub-section (2) is not successful and stands terminated without any settlement between the parties, the Council shall either itself take up the dispute for arbitration or refer to it any institution or centre providing alternate dispute resolution services for such arbitration and the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall then apply to the dispute as if the arbitration was in pursuance of an arbitration agreement referred to in sub-section (1) of section 7 of the Act.

(4) Notwithstanding anything contained in any other law for the time being in force, the Micro and Small Enterprises Council or the centre providing alternate dispute resolution services shall have jurisdiction to act as an Arbitrator or Conciliator under this section in a dispute between the supplier located within its jurisdiction and a buyer located anywhere in India.

(5) Every reference made under this section shall be decided within a period of ninety days from the date of making such a reference."

8. From perusal of these sections, it is clear that as per Section 15 of the Act of 2006, there is a liability of buyer to make payment to the supplier who supplies any goods or renders any services to any buyer and if there is any delay, then the buyer is required to pay compound interest to the supplier as provided under Section 16 of the Act. Section 17 provides for recovery of interest as provided under Section 16 of the Act of 2006. Section 18 provides that when there is any dispute with regard to any amount due under Section 17, then a reference shall be made to the Micro and Small Enterprises Facilitation Council. Sub-section (2) of Section 18 provides that on receipt of a reference under sub-section (1), the Council shall either itself conduct conciliation in the matter or seek the assistance of any institution or centre providing alternate dispute resolution services by making a reference to such an institution or centre. Where conciliation initiated under sub-section (2) is not successful and stands terminated without any settlement between the parties,

then the Council shall either itself take up the dispute for arbitration or refer to it any institution or centre providing alternate dispute resolution services. Sub-section (4) of Section 18 provides for a clause stating that Micro and Small Enterprises Facilitation Council or centre providing alternate dispute resolution services shall be jurisdiction to act as an Arbitrator or Council under this section. Sub-section (5) provides that every reference made under this section shall be decided within ninety days from the date of making such reference. Thus, as per the said sections, a complete mechanism has been provided for redressal of grievance of the supplier including the payment of interest. The word 'may' used in this section qualifies the rights of the petitioners to invoke jurisdiction of Micro and Small Enterprises Facilitation Council under Section 18(1) of the Act of 2006, however, Section 24 of the Act of 2006 impliedly bars such other remedies which are inconsistent, inter-alia, with Section 18(1), therefore, the trial Court has erred in holding that it is within the jurisdiction of the plaintiff whether to invoke the jurisdiction of Micro and Small Enterprises Facilitation Council under Section 18 or any other forum by completing overlooking the provisions of Section 24 of the Micro, Small and Medium Enterprises Development Act, 2006.

9. The Bombay High Court in the case of *M/s Steel Authority of India Ltd. and another* (supra) in para-13 has held as under :

> "13. At one stage, it was also submitted at the bar that the procedure contemplated by Section 18 of the Act for resolution of dispute is not compulsory either for the seller or the buyer and the parties are free to adopt any course including the civil suit. We, however, find that it is not possible for the parties whether a buyer or seller to invoke jurisdiction of a Civil Court by filing Civil Suit in respect of its claim particularly since the requirement of conciliation is mandatory and the buyer or seller must approach the Council where there is a dispute with regard to any amount due under Section 17 of the Act."

10. This Court in the case of *R.R. Home Developers Pvt. Ltd. and others* (supra) in para 21 has held as under :

> "21. In view of the forgoing discussion and after going through the provisions of Sections 9 and 10 of the Companies Act, it is clear that the word "Court" defined in the Companies Act

> would have a jurisdiction to decide the issue in relation to the affairs of the company and by the specified Court. In the Companies Act, for the purpose of certain causes remedies have been specified. But under the Act, it has not been specified that the jurisdiction of the Civil Court has been barred even in cases to which remedy lies to Company Court. In the said context if section 9 of the Civil Procedure Code has been read with the provisions of Companies Act, then it is clear that the remedy to file a civil suit conferred to a citizen to go in a Civil Court having jurisdiction to try the suit of civil nature, except in a case where the cognizance is expressly or impliedly barred. In cases where under the Companies Act remedy is available, the maintainability of civil suit is impliedly barred. In other cases where remedy is not available in Companies Act, civil suit can be maintained."

11. Thus, from perusal of the above cited judgments passed by the Apex Court as well as by this Court, Bombay High Court and the provisions of the Micro, Small and Medium Enterprises Development Act, 2006, it is clear that the respondent has an alternate remedy of referring the dispute to the Micro and Small Enterprises Facilitation Council and without availing that remedy, the respondent cannot approach to the Civil Court. Thus, the trial Court has committed an error in rejecting an application filed by the petitioner under Order 7 Rule 11 of CPC.

12. The judgment relied by learned counsel for the respondent in the case of *Sulochana* (supra) is not applicable in the present case as the facts of that case are different than the present case because the said judgment relates to the provisions of M.P. Accommodation Control Act related to Chapter-III-A of the M.P. Accommodation Control Act.

13. Ex-consequentie, the revision is allowed. The impugned order dated 27/8/2014 passed by 10th Additional District Judge, Jabalpur in Civil Suit No.111-A/2011 is hereby set aside. The application filed by the petitioners under Order 7 Rule 11 of the Code of Civil Procedure is hereby allowed and the suit is dismissed.

Revision allowed.

I.L.R. [2016] M.P., 1803
CRIMINAL REVISION
Before Mr. Justice Alok Verma
Cr.Rev. No. 649/2015 (Indore) decided on 29 July, 2015

JASSU @ JASRATH & ors. ...Applicants
Vs.
STATE OF M.P. ...Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Sections 227 & 228 and Penal Code (45 of 1860), Section 302/34 - Murder - Framing of charge **- Three accused and deceased were cooking meals when altercation took place between them - When applicants were cleaning utensils, deceased was also nearby - Applicant No. 1, in spur of moment hit the deceased on his head and due to impact, the deceased fell down in well and died due to drowning - On seeing the deceased falling in well, all the three applicants fled away - Held - Even if entire prosecution story is accepted there appears to be no prior meeting of mind and no act was done in furtherance of common intention - No case is made out against applicants No. 2 & 3 - Charges framed against them are set aside. (Paras 2 & 5)**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएँ 227 व 228 एवं दण्ड संहिता (1860 का 45), धारा 302/34 – हत्या – आरोप विरचित किया जाना – तीन अभियुक्तगण एवं मृतक भोजन पका रहे थे जब उनके मध्य कहा सुनी हुई थी – जब आवेदकगण बर्तन साफ कर रहे थे, मृतक भी वहीं पास में था – आवेदक क्र01 ने क्षणिक आवेश में मृतक के सिर पर प्रहार किया एवं उसके संघात से मृतक कुंए में गिर गया तथा डूबने से उसकी मृत्यु हो गई – मृतक को कुंए में गिरता देख तीनों आवेदकगण भाग गए – अभिनिर्धारित – यदि संपूर्ण अभियोजन कथानक को स्वीकार कर भी लिया जाए, तब भी मस्तिष्कों का पूर्व मिलन होना एवं सामान्य आशय के अग्रसरण में कार्य किया जाना प्रकट नहीं होता है – आवेदकगण क्र. 2 एवं 3 के विरूद्ध कोई मामला नहीं बनता – उनके विरूद्ध विरचित आरोप अपास्त।

Virendra Sharma, for the applicants.
Mini Ravindran, for the non-applicant/State.

(Supplied: Paragraph numbers)

ORDER

ALOK VERMA, J. :- This criminal revision filed under section 397 read with section 401 of Cr.P.C. is directed against the order passed by

learned 3rd Additional Sessions Judge, Ujjain in Criminal Case No.214/2015 dated 25.05.2015 whereby, learned Additional Sessions Judge framed charges under section 302/34 of IPC against the applicants no.2 and 3 and under section 302 of IPC against the applicant no.1.

2. Brief facts giving rise to this application are that according to prosecution story, on 15.03.2015 at about 10:00 pm, present applicants alongwith deceased Kailash were cooking food for themselves and some other friends in village Karanj ka Jungle. Some altercation took place between these three applicants and deceased Kailash. As per the story of the prosecution, present applicants were using abusive language against the deceased. After some time, present applicants were washing utensils and the deceased was also nearby. In spur of moment, applicant Jassu @ Jasrath hit deceased Kailash on his head with thali, while he was standing close to the well. Due to the impact, he fell down in the well and it is alleged that on seeing him falling in the well, all the three applicants fled away from the spot. The deceased died due to drowning.

3. Counsel for the applicants submits that there was no intention to cause death of the deceased. Specially, he argued that applicants no.2 and 3 did nothing as per prosecution story. The only allegation is that they were with applicant no.1 using abusive language against deceased. Another allegation is that they fled away with applicant no.1.

4. So far as applicant no.1 is concerned, I find that there is prima facie evidence available at this stage. An overt act assigned to him. Accordingly, in respect of applicant no.1, this revision is liable to be dismissed and is hereby dismissed.

5. So far as applicants no.2 and 3 are concerned, no case is made out against them under section 302 read with section 34 of IPC. Even if story of prosecution is accepted, there appears to be no prior meeting of mind and no act was done by them in furtherance of their common intention. Therefore, at this stage, even if story of the prosecution is accepted as whole, no case is made out against applicants no.2 and 3.

6. In this view of the matter, the revision so far as it relates to applicants no.2 and 3, deserves to be allowed and is hereby allowed. Charge framed under section 302/34 of IPC against applicants no.2 and 3 is set aside. Applicants no.2 and 3 are discharged from the offence under section 302/34 of IPC. Their bail and bonds are cancelled.

7. With the above observation, the revision stands disposed of.

C.c as per rules

Revision disposed of.

I.L.R. [2016] M.P., 1805
CRIMINAL REVISION
Before Mr. Justice C.V. Sirpurkar
Cr.Rev. No. 2270/2013 (Jabalpur) decided on 7 December, 2015

KAILASH CHAND JAIN ...Applicant
Vs.
STATE OF M.P. ...Non-applicant

Public Gambling Act (3 of 1867), Sections 3, 4 & 4-A - Applicant running business of gambling (Satta Patti) - Raid **- Seizure of hand written gambling slips, mobile phone, one landline telephone and Rs. 83,830/- in cash - Trial Court imposed fine u/S 3 & 4 of 1867 Act & also forfeited amount of Rs. 83,830/- - Appellate Court upheld the same - Held - Not actively engaged in the said business as no one other than applicant was present at the time of raid - No investigation regarding call details was made - Independent witness turned hostile - 'Satta Patti' neither printed nor published - Applicant previously instituted a suit for malicious prosecution against police - Random hand written figures and a few words on small stray slips of paper, without any supporting evidence can not be presumed to be gaming slips or any record or evidence of gaming or proceeds of gaming - Revision allowed - Conviction and sentence of fine set aside - Order of forfeiture of Rs. 83,830/- set aside - Applicant entitled to receive back the amount of Rs. 83,830/-. (Paras 10 to 24)**

सार्वजनिक द्यूत अधिनियम (1867 का 3), धाराएं 3, 4 व 4–ए – आवेदक जुए (सट्टा पट्टी) का व्यापार चला रहा था – छापा – जुए की हस्तलिखित पर्चियां, मोबाईल फोन, एक लैण्डलाईन दूरभाष यंत्र एवं रूपये 83,830/– नकद की जब्ती – विचारण न्यायालय द्वारा अधिनियम 1867 की धारा 3 व 4 के अंतर्गत अर्थदण्ड अधिरोपित किया गया एवं रूपये 83,830/– की राशि भी समपहृत की गई – अपीलीय न्यायालय ने उसकी अभिपुष्टि की – अभिनिर्धारित – उक्त व्यापार में सक्रिय रूप से संलग्न नहीं क्योंकि छापे के समय आवेदक के अतिरिक्त और कोई मौजूद नहीं था – कॉल विवरण के संबंध में कोई अन्वेषण नहीं किया गया – स्वतंत्र साक्षी पक्ष विरोधी हो गया – 'सट्टा पट्टी' न तो कहीं मुद्रित एवं न ही कहीं प्रकाशित – आवेदक ने पूर्व में पुलिस के विरूद्ध

विद्वेषपूर्ण अभियोजन का वाद संस्थित किया – बिना किसी समर्थक साक्ष्य के बेतरतीब हस्तलिखित अंकों एवं छोटी बिखरी हुई कागज की पर्चियों पर अंकित कुछ शब्दों को, जुए की पर्चियाँ अथवा अभिलेख अथवा जुए का साक्ष्य अथवा जुए के आगम होना उपधारित नहीं किया जा सकता – पुनरीक्षण मंजूर – दोषसिद्धि एवं अर्थदण्ड का दण्डादेश अपास्त – रूपये 83,830/– का समपहरण आदेश अपास्त – आवेदक रूपये 83,830/– वापस प्राप्त करने हेतु हकदार।

Cases referred:

2014 Cr.L.J. 2927, 1955 Cr.L.J. 170(2).

Ajay Raizada, for the applicant.
K.S. Patel, P.L. for the non-applicant.

ORDER

C.V. SIRPURKAR, J. :- This criminal revision filed on behalf of the revisionist/ accused Kailash Chand Jain is preferred against the order dated 07.09.2013 passed in Criminal Appeal No. 33 of 2013, Passed by the Court of Second Additional Sessions Judge, Seoni, whereby conviction and sentence of revisionist Kailash Chand Jain under Section 3 and 4 of the Public Gambling Act imposed by Judicial Magistrate First Class Seoni in Criminal Case No. 4050/2008, by judgment dated 05.03.2013, was affirmed.

2. The case of prosecution before the learned Magistrate may be summarized as hereunder: on 06.06.2008 Town Inspector of P.S. Kotwali, Seoni, received an information from the informant to the effect that accused/ revisionist Kailash Chand Jain runs business of gaming (Satta) on telephone and mobile phone from his house. He keeps his house closed so as to ward off a raid by police. He has purchaseed (sic:purchased) properties on a large scale from the business of gaming (Satta). It was further informed by the informant that he goes to the temple every morning and after returning from temple he takes account of the earnings from gaming and receives the disburses the amount.

3. On aforesaid information, on 7.6.2008 Town Inspector Basant Naik took independent witnesses Pramod Kumar and Jagdish Prasad and apprised them of aforesaid information. He duly obtained a search warrant and constituted a raid party comprising Sub-Inspector Hitendra Nath Sharma, Head Constable Ramesh Maneshwar and seven other Constables and a Home Guard and raided the house of the accused/ revisionist. They reached the spot

by official vehicle at about 9:25 am. On entering the house and taking search of second room, they found handwritten gaming slips containing names of certain persons and figures (Satta Patti), a mobile phone, one landline telephone and Rs. 83,830/- in cash lying on the bed. Apart from aforesaid, several bank pass books, documents and revenue documents relating to land, postal pass books, insurance policies, fixed deposit receipts and Kisan Vikas Patra etc. reflecting income earned from gaming business, were discovered in the house and duly seized.

4. A First Information Report under Sections 3 and 4-A were registered against the revisionist and a charge sheet in the Court of Judicial Magistrate first class was filed. Learned Magistrate explained particulars of charge to the revisionist under Section 3 and 4 (5) of the Public Gambling Act, who abjured the guilt and claimed to be tried. He took the defence to the effect that he had made a complaint against the police; therefore, the police force of Seoni forcibly entered his house and took away 12 tolas gold ornaments and Rs. 1.5 lacs in cash and falsely implicated him in this case. The police has shown a lessor (sic:lesser) amount in seizure memo then (sic:than) the one actually seized. He is innocent. He does not indulge in gaming. He and all the family members are traders and earned their living honestly. The revisionist also examined three witnesses in defence.

5. After trial, learned Magistrate found the offence under Section 3 and 4 of the Public Gambling Act proved beyond doubt against the revisionist and imposed a fine of Rs. 1000/- under Section 3 and a fine of Rs. 500/- under Section 4 of Public Gambling Act and in default of payment of fine, he was directed to undergo further period of simple imprisonment of one month and 15 days respectively. In addition thereto, the amount of Rs. 83,830/- recovered from the revisionist was also forfeited in favour of the State.

6. The revisionist challenged the judgment dated 5-3-2013 passed by the learned Magistrate before the Second Additional Sessions Judge, Sioni (sic:Seoni), Who affirmed conviction under sections 3 and 4 of the Public Gambling Act, as also the sentence of fine so imposed. The forfeiture of the seized amount of Rs. 83,830/- was also upheld.

7. The judgment passed by the learned Additional Judge, has been challenged in this criminal revision mainly on following grounds:

(a) The particulars of offence as explained by learned Magistrate to the

revisionist were fundamentally defective and misled the revisionist.

(b) It is not the case of the prosecution that the revisionist was actively engaged in gambling at the time of raid.

(c) There was no one other than the revisionist present in the house at the time of the raid.

(d) No investigation with regard to call details of the mobile phone etc. was made to establish that the seized telephones were actually used for the purpose of gaming.

(e) The names and figures on alleged Satta Patti were neither printed nor published nor any information with regard thereto, was disseminated.

(f) The independent witness had turned hostile.

(g) The accused had previously instituted a suit for malicious prosecution against certain officers of police department, therefore they had motive to falsely implicate the accused.

(h) In aforesaid circumstances no presumption under the act arises.

8. A perusal of the record of the trial Court reveals that independent witnesses Pramod Tiwari (PW-1) and Ashish Trivedi (PW-2) have turned hostile and have blandly stated that they are neither acquainted with the accused nor any such raid was conducted in their presence. They signed the documents simply because Police had asked them to do so. However, prosecution witnesses Town Inspector Basant Nayak (PW-3) and Sub Inspector Hitendra Nath Sharma (PW-4) have supported the prosecution story. The gist of their evidence is that on receiving information from the informant at 6:10 am on 7.6.2008 Sub-Inspector Hitendra Nath Sharma was sent to Sub-Divisional Officer, for obtaining search warrant. After receiving search warrant, they summoned independent witnesses. The witnesses were informed about the information received from the informant; thereafter, a raid party comprising Town Inspector Basant Nayak and Sub-Inspector Hitendra Nath Sharma, Head Constable Ramesh Maneshwar and seven other constables and a home guard was constituted. The raid party surrounded the house of the accused/ applicant. On due search, in second room of the house, gaming slips (Satta Patti) from articles A1 to A5, a mobile phone, a land-line telephone and a sum of Rs. 83,830/- in cash were found on the bed, which were duly seized. In addition thereto, several pass books, insurance policies, revenue documents

relating to agricultural land, fixed deposit receipts, Kisan Vikas Patra and several other documents showing investment of earnings from gaming business, were discovered in the house and were duly seized. The accused was arrested and released on bail. First Information Report was recorded and after investigation, a charge-sheet as aforesaid, was filed in the Court of Judicial Magistrate First Class.

9. Learned trial Court explained particulars of offence under Sections "3, 4 (5)" of the Public Gambling Act, 1867 (hereinafter referred to in this order, as "the Act"). It may be noted at the out-set that there is no sub-section (5) to Section 4 of the Act. The first information report was recorded under Section 3, and 4-A of the Act. The charge-sheet was filed under Section 3 / 4 of the Act.

10. Sections 3, 4 and 4-A of the Public Gambling Act 1867 as applicable to the State of Madhya Pradesh read as follows:

*"3. **Penalty for owning or keeping or having charge of a gaming-house:-** Whoever, being the owner or occupier, or having the use, of any house, room, tent, enclosure, space, vehicle, vessel or place situate within the limits to which this Act applies, opens, keeps or uses the same as a common gaming-house; and*

whoever, being the owner or occupier of any such house, room, tent, enclosure, space, vehicle, vessel or place as aforesaid, knowingly or willfully permits the same to be opened, occupied, used or kept by any other person as a common gaming-house; and

whoever has the care or management of, or in any manner assists in conducting the business of any house, room, tent, enclosure, space, vehicle, vessel or place as aforesaid, opened, occupied, used or kept for the purpose aforesaid; and

Whoever advances or furnishes money for the purpose of gaming with persons frequenting such house, room, tent, enclosure, space, vehicle, vessel or place,

shall be punished--

(a) for the first offence with imprisonment which may extend to six months or with fine which may extend to one thousand rupees;

(b) for a second offence with imprisonment which may extend to one year and, in the absence of special reasons to the contrary to be mentioned in the judgment of the Court, shall not be less than fourteen days, either with or without fine which may extend to two thousand rupees; and

(c) for a third or subsequent offence with imprisonment which may extend to one year and, in the absence of special reasons to the contrary to be mentioned in the judgment of the Court, shall not be less than four months, together with fine which may extend to two thousand rupees".

***"4. Penalty for being found in gaming-house:-** Whoever is found in any such house, room, tent, enclosure, space, vehicle, vessel or place, playing or gaming with cards, dice, counters, money or other instruments of gaming or is found there present for the purpose of gaming, whether playing for any money, wager, stake or otherwise, shall be liable to a fine not exceeding five hundred rupees, or to imprisonment of either description, as defined in the Indian Penal Code (45 of 1860) for any term not exceeding four months."*

***4A. Punishment for printing or publishing digits, figures, signs, symbols or pictures relating to Worli Matkas or other form of gaming--** (1) Whoever prints or publishes in any manner whatsoever any digits or figures or signs or symbols or pictures or combination of any two or more of such digits or figures or signs or symbols or pictures relating to Worli Matka or any other form of gaming under any heading whatsoever or by adopting any form of device, or disseminates or attempts to disseminates or abets dissemination of information relating to such digits or figures or signs or symbols or pictures or combination of any two or more of them shall be punishable with imprisonment which may extend to six months and with fine which may extend to one-thousand rupees.*

(2) Where any person is accused of an offence under sub-section (1), any digits or figures or signs or symbols or pictures or combinations of any two or more of such digits or figures or symbols or pictures in respect of which the offence is alleged to have been committed, shall be presumed to relate to Worli Matka gaming or some other form of gaming unless the contrary is proved by accused.

11. It has been recorded in the particulars of offence as explained to the accused/revisionist that the accused performed illegal act by inviting stakes

for losing or wining money on the figures recorded in gaming slips (Satta Patti) through mobile phone and telephone.

12. As per the prosecution case, hand written slips of paper containing names of certain persons and figures (Satta patti), a mobile phone, one land line telephone and Rs. 83830/- in cash lying on the bed in the house of the accused, were seized. Out of aforesaid articles, apart from the alleged gaming slips, no other article can be said to be incriminating in nature by itself. The amount of Rs. 83,800/-, though large, by itself cannot incriminate the accused unless it is proved by the prosecution that the amount constituted proceeds of gaming transactions.

13. No investigation was made with regard to call-details of mobile phone or land line phone to ascertain whether the persons to whom the accused spoke on those phones tallied with the names recorded in one of the gaming slips (Article A-4). Thus, there is no evidence to suggest that mobile phones or the land line telephone were used for the purpose of gaming.

14. When the alleged gaming slips from articles A1 to A5, are examined, it is found that apart from random figures and names like Gopi, Mama, Sheetal, Prakash etc. and words Auto, cash ("Nakdi"), passbook, passbook number in digits, "S.B." etc. are mentioned. These figures and words appear to be unrelated to each other. The alleged gaming slips are hand written. They are not in printed form. For want of any evidence, they cannot be said to have been published in any form. Since no investigation with regard to calls made on mobile phone or land line telephone was made, it cannot be said that the accused had disseminated, attempted to disseminate or abated dissemination of any information relating to aforesaid digits or figures in any manner. Thus Section 4-A of the Act, would not apply to the present case and the presumption under Sub Section (2) of Section 4 would also not arise.

15. Section 1 of the Act as applicable to State of Madhya Pradesh, defines expression **"instruments of gaming"** as follows:

"The expression "instruments of gaming" includes any article used or intend to be used as subject or means of gaming, any document used or intended to be used as a register or record or evidence of any gaming, the proceeds of any gaming and any winnings or prizes in money or otherwise distributed or intended to be distributed in respect of any gaming."

16. Sub Section (2) of Section 1, as applicable in the State of Madhya Pradesh, defines **"common gaming-house"** as follows:

"Common gaming house" means

(i) in the case of gaming-

(a) ***

(b) ***

(c) ***

(d) ***

(e) ***

(f) *"on the digits or figures or signs or symbols or pictures used in stating the opening, middle or closing digits or figures or signs or symbols or pictures declared for or in connection with worli matka gaming or any other form of gaming.*

(ii) In the case of any other form of gaming any house, room, tent, enclosure, space, vehicle, vessel or any place whatsoever, in which any instruments of gaming are kept or used for the profit or gain of the person owning, occupying, using or keeping such house, room, tent, enclosure, space, vehicle, vessel, place or instrument or otherwise howsoever".

17. It may be noted here that it is not the case of the prosecution that any person other than the accused was present at the time of raid. Thus, it is not as if any active gaming or gambling was going on in the house of the accused. The only arguments of the prosecution is that the articles A1 to A5 constituted "instruments of gaming" as define (sic:defined) in the Act and since these were found in the house of the accused at the time of the raid, it falls under the definition of "common gaming house".

18. Now the question that arises for consideration is, whether random hand-written figures and a few words on small, stray, slips of paper, as seized in the present case, without any supporting evidence, can be presumed to be gaming slips or any record or evidence of gaming or proceeds of gaming?

19. In this regard, the judgment rendered by a Co-ordinate Bench of this Court in the case of *Usuf Khan Vs. State of Madhya Pradesh,* 2014, Cr.L.J. 2927 may profitably be referred to. The paragraph no. 7 of the judgment which reads as follows:

"(7) "if the huge sum with some satta slips are recovered from the applicant then, it was for the investigation officer to prove that those were satta slips and therefore, he was expected to tell the reason as to why he found those slips to be satta slips but, in the evidence of Shivbahadursingh, he submitted that neither he saw anybody playing with the applicant through satta slips nor he could show those slips were used for satta purposes".

20. Likewise, in an old case of *Narayan Vs. State,* 1955 Cr.L.J. 170 (2) Madhya Pradesh High Court held that mere making of the assertion that articles seized are records of gaming without giving any reason, is not sufficient to unable the court to draw a presumption against the accused under Section 6; thus there was no material which could enable the Court to draw the inference that articles seized were instruments of gaming.

21. Reverting back to the facts of the case at hand, it may be seen that neither Inspector Basant Nayak (PW-3) nor Sub- Inspector Hitendra Nath Sharma (PW-4) have stated in their evidence as to what were the grounds, which made them believe that articles A1 to A5 were gaming slips. They have simply stated that they found satta slips (A1 to A5) on the bed of accused's house. In these circumstances, there is no material before the Court to presume that slips of paper (from A1 to A5) were in fact gaming slips, or records of gaming or records of proceeds of gaming transaction, shifting the burden on the accused to prove otherwise. Since, aforesaid articles were not proved to have been gaming slips or record of gaming or proceeds of gaming, it cannot be said that any instrument of gaming was seized from the house of the accused. Consequently, the house of the accused cannot be said to be common gaming house, wherefrom instruments of gaming were seized.

22. In aforesaid view of the matter, neither offence under Section 3 nor offence under Section 4 nor offence under Section 4-A of the Public Gambling Act, 1867, is proved against the revisionist/accused. Thus, the Courts below committed error in law in holding that the prosecution had proved the offence under Section 3 and 4 of Public Gambling Act against accused/revisionist

beyond reasonable doubt. Thus, the impugned judgment is not sustainable in the eyes of law.

23. Consequently, this criminal revision is allowed. Impugned judgment is set aside. The conviction of the revisionist/accused under Section 3 and 4 of the Public Gambling Act, 1867, and sentence of fine imposed upon him under aforesaid provisions, is set aside.

24. The order of forfeiture of amount of Rs. 83,830/- seized from the possession of the accused/revisionist is also set aside. Since, the revisionist/ accused has claimed aforesaid amount as belonging to him, he is entitled to receive it back. Consequently, the amount shall be returned to him.

Revision allowed.

I.L.R. [2016] M.P., 1814
CRIMINAL REVISION
Before Mr. Justice C.V. Sirpurkar
Cr.Rev. No. 1917/2015 (Jabalpur) decided on 4 February, 2016

DAMODAR SINGH ...Applicant
Vs.
STATE OF M.P. ...Non-applicant

Evidence Act (1 of 1872), Sections 65 & 66 - Secondary Evidence **- Prosecution filed photo copies of enquiry report and certain other documents along with charge sheet - Permission was sought to lead secondary evidence on the ground that the person who had prepared the enquiry report had kept the original with him and now he has expired - As prosecution has sought permission to lead secondary evidence on the ground that original is lost and therefore, the phrase " for any other reason not arising from his own default or neglect" is not applicable - Therefore, order granting blanket permission to lead secondary evidence is set aside - Prosecution shall be free to tender secondary evidence of relevant documents - Defence shall be free to take objection as to the relevance or admissibility to each document - Revision partly allowed. (Paras 13 to 17)**

साक्ष्य अधिनियम (1872 का 1), धाराएं 65 व 66 – द्वितीयक साक्ष्य – अभियोजन ने जांच प्रतिवेदन एवं कतिपय अन्य दस्तावेजों की छायाप्रतियाँ आरोप पत्र के साथ प्रस्तुत कीं – द्वितीयक साक्ष्य प्रस्तुत करने की अनुमति इस आधार पर चाही गई कि जाँच

प्रतिवेदन तैयार करने वाले व्यक्ति ने मूल प्रति अपने पास रखी थी एवं अब उसकी मृत्यु हो चुकी है – चूंकि अभियोजन ने द्वितीयक साक्ष्य प्रस्तुत करने की अनुमति इस आधार पर चाही है कि मूलप्रति गुम हो चुकी है, और इसलिए यह वाक्यांश कि "अन्य किसी भी कारण से जो उसके स्वयं के व्यतिक्रम अथवा उपेक्षा से उद्भूत न हो" लागू नहीं होता – अतएव, द्वितीयक साक्ष्य प्रस्तुत करने की व्यापक अनुमति प्रदान करने वाला आदेश अपास्त – अभियोजन सुसंगत दस्तावेजों की द्वितीयक साक्ष्य प्रस्तुत करने हेतु स्वतंत्र होगा – बचाव पक्ष प्रत्येक दस्तावेज की प्रासंगिकता एवं ग्राह्यता के संबंध में आपत्ति लेने हेतु स्वतंत्र होगा – पुनरीक्षण अंशतः मंजूर।

Cases referred:

AIR 2007 SC 1721, 2002 Cr.L.J.2367.

Neeraj Singh Chouhan, for the applicant.
S.K. Kashyap, G.A. for the non-applicant/State.

ORDER

C.V. SIRPURKAR, J. :- This criminal revision filed on behalf of the applicant/accused Damodar Singh is directed against order dated 30.5.2015 passed by the Court of Second Additional Sessions Judge, Sidhi, in Session Trial No. 25/2014, whereby learned trial Judged (sic:Judge) had allowed the application filed by the prosecution under Section 65 and 66 of the Evidence Act read with Section 173(5) of the Code of Criminal Procedure and permitted taking document numbers 2 to 71 appended to the application along with attested true copy of the report of technical report on record and allowed production of secondary evidence.

2. The facts necessary for disposal of this criminal revision may be summarized as hereunder: An FIR was lodged with the Economic Offences Wing of the State against the applicant/accused Damodar Singh and 19 other co-accused persons in the year 1997 for offences committed under Sections 409, 420, 467 and 468 read with Section 120-B of the I.P.C. in the year 1994, in respect of the works executed under Special Work Plan for the District Sidhi. After investigation, the charge-sheet in the matter was filed in the year, 2014. The Court of Second Additional Sessions Judge, Sidhi, framed charges as aforesaid, against the applicant and other co-accused on 24.6.2014.

3. During the course of trial, prosecution moved an application (Annexure A/1) under Sections 65 and 66 of the Evidence Act and 173 (5) of the Code of Criminal Procedure for permission to file secondary evidence of the technical

report and the documents filed therewith in the form of verified true copies. It was submitted on the basis of a letter written to the District Prosecution Officer, Sidhi, by the Superintendent of Police, Economic Offences Wing, Rewa, dated 19.1.2015 (Annexure A/3); that the original inquiry report relating to the works executed under Special Work Plan for District Sidhi, in the year 1994-95, is not available but only photo copy is available. The original note-sheet bearing initials of the then Regional Additional Commissioner, Shri B.P. Singh, on each page, is available in the file. It was further submitted that it appears that inquiry report was prepared on the basis of the note-sheet. The original inquiry report was kept by Shri B.P. Singh with himself. Shri B.P. Singh has retired and has since expired. The death certificate of Shri B.P. Singh was appended to the letter. Inspite of the best efforts, the whereabouts of the original inquiry report could not be ascertained. Thus, the original inquiry report is not traceable and there is no possibility of the report being traced in near future. In aforesaid circumstances, the application for permission to adduce secondary evidence was moved.

4. The application was opposed by the accused persons on various grounds; however, learned trial Judge, after hearing the parties, observed that verified true copy of the technical report was filed along with the charge-sheet. It was further observed that by virtue of Section 65 (c) of the Evidence Act, any secondary evidence is admissible, where the original report is shown to have been lost; therefore, the application was allowed and the prosecution was permitted to adduce secondary evidence of aforesaid report and the documents filed therewith, in the form of verified true copies.

5. The impugned order has been assailed by the learned counsel for the applicant on the grounds that first information report was lodged in the year, 1997. At that time, the original was very much available. The Investigating Agency made no attempt to seize the original during investigation. There is no explanation as to why the original was not seized at that point of time. Thus, the loss of the original document is attributable to the negligence of the Investigating Agency. As such, the prosecution is not entitled to adduce the secondary evidence of the technical report under section 65(c) of the Evidence Act; thus, learned trial Judge grossly erred in allowing the application.

6. Learned Panel Lawyer for the respondent/State on the other hand, has supported the impugned order.

7. Before adverting to the fact situation in the case, it would be appropriate to a take look at the relevant provisions of Evidence Act with regard to admissibility of secondary evidence. The relevant part of Section 65 (c) of the Evidence Act reads as hereunder:-

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

*(d)**

*(e)**

*(f)**

*(g)**

In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible.

8. Section 63 defines secondary evidence. The relevant part is herein below reproduced:

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

*(1) **

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

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

*(4) **

*(5) *"*

9. Illustration B of Section 63 is relevant to the case at hand and is reproduced for ready reference.

"A copy compared with copy of a letter made by a copying machine is secondary evidence of the contents of the letter, if it is shown that the copy made by the copying machine was made from the original."

10. In this regard it is apposite to take a look at the illustration (b) of section 136 of the Evidence Act, which reads as follows:

"It is proposed to prove, by a copy, the contents of a document said to be lost. The fact that the original is lost must be proved by the person proposing to produce the copy, before the copy is produced."

11. The Apex Court in the case of *J.Yashoda Vs. K. Shobha Rani* AIR 2007 S.C. 1721 has held that:

"9. The rule which is the most universal, namely that the best evidence the nature of the case will admit shall be produced, decides this objection that rule only means that, so long as the higher or superior evidence is within your possession or may be reached by you, you shall give no inferior proof in relation to it. Section 65 deals with the proof of the contents of the documents tendered in evidence. In order to enable a party to produce secondary evidence it is necessary for the party to prove existence and execution of the original document. Under Section 64, documents are to be proved by primary evidence. Section 65, however permits secondary evidence to be given of the existence, condition or contents of documents under the circumstances mentioned. The conditions laid down in the said Section must be fulfilled before secondary evidence can be admitted. Secondary evidence of the contents of a document cannot be admitted without non-production of the original being first accounted for in such a manner as to bring it within one or other of the cases provided for in the Section."

12. The main ground on which the impugned order has been assailed by applicant/accused Damodar Singh is that the case was registered way back in the year 1997. At that time aforesaid B.P.Singh, who was said to be in the possession of the original inquiry report and the documents appended thereto, was very much alive but the investigating agency neglected to seize the original documents from him, resulting in their subsequent loss. Therefore, the prosecution should not, at this stage, be allowed to adduce secondary evidence. Aforesaid argument of the applicant is not acceptable.

13. A careful reading of section 65(c) of the Evidence Act reveals that

only condition that is required to be fulfilled before secondary evidence may be adduced is that it has to be established that original has been destroyed or lost. The phrase "for any other reason not arising from his own default or neglect", is applicable in the situation where the party offering evidence of the contents of the original, cannot produce it in reasonable time. In the case at hand, the prosecution is seeking to adduce secondary evidence on the ground that original is lost; therefore, the phrase "for any other reason not arising from his own default or neglect", is not applicable.

14. However, a perusal of letter dated 09-01-2015 written by Superintendent of Police, Economic Offences Wing, Rewa, addressed to the District Prosecution Officer dated 09-01-2015 (Annexure-A/3), on the basis of which application under sections 65 and 66 of the Evidence Act had been moved, reveals that it leaves several relevant questions having a bearing on the permissibility of secondary evidence, unanswered. For example, it is not clear as to who verified the true copies of the technical report and the documents filed therewith, which were filed along with the charge-sheet? Under what circumstances were they verified? Whether at the time of verification the original documents were available before the verifying authority? Whether the prosecution would be able to produce the original note-sheet, on the basis of which the technical report is said to have been prepared, and duly prove the same?

15. It may be noted that the copies of the aforesaid documents are not before this Court. Thus, a blanket permission to admit entire body of secondary evidence, as has been granted by the impugned order, would not be appropriate and therefore deserves to be set aside. However, the stand of applicant/accused that at this stage, the Court does not have jurisdiction to admit any document, other than those filed with the charge-sheet is not acceptable.

16. In this regard, judgment rendered by a coordinate bench of this Court in the case of *Raju vs. State of Madhya Pradesh,* 2002 Cr.L.J. 2367 may profitably be-referred to wherein it was held that:

"Under these provisions the learned trial Court had ample power and discretion to interfere and control conduction of trial properly, effectively and in manner as prescribed by law. While conducting the trial Court is not required to sit as a silent spectator or umpire but to take active part well within the boundaries of law. In the present case so many important

documents were not got proved though filed along with charge sheet, so many important documents as pointed hereinabove, were not filed which all could be important and relevant for the just decision of a trial, and the same could be got proved and directed to be produced by trial Court under S. 165 of Evidence Act and 311 of Cr. P.C."

17. In the light of foregoing discussion, this criminal revision is partly allowed. The impugned order granting blanket permission to adduce entire body of secondary evidence is set aside with the direction that the prosecution shall be free to tender secondary evidence of aforesaid relevant documents. The defence shall be free to take objection as to the relevance and/or admissibility to each document, as and when it is tendered in evidence. On such objection being taken, the Court shall decide it keeping in view the principles of law hereinbefore stated.

18. With the aforesaid observations, this criminal revision stands **disposed of.**

Revision disposed of.

I.L.R. [2016] M.P., 1820
CRIMINAL REVISION
Before Mr. Justice C.V. Sirpurkar
Cr.Rev. No. 1677/2014 (Jabalpur) decided on 5 February, 2016

SHEIKH MUBARIK ...Applicant
Vs.
STATE OF M.P. ...Non-applicant

***Penal Code (45 of 1860), Sections 376 & 376(2)(n) and Criminal Procedure Code, 1973 (2 of 1974), Sections 227 & 228 - Framing of Charge - Misconception of fact* - Accused had sexual intercourse with prosecutrix on false promise of marriage - Whether the consent was given under misconception of fact or because of love and passion felt by prosecutrix for the accused, can be decided only after the trial - Trial Court rightly framed Charges - Revision dismissed. (Paras 7 to 9)**

दण्ड संहिता (1860 का 45), धाराएं 376 व 376(2)(एन) एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएं 227 व 228 – आरोप विरचित करना – तथ्य का भ्रम – विवाह का मिथ्या वचन देकर अभियुक्त ने अभियोक्त्री के साथ लैंगिक प्रवेशन किया – यह केवल विचारण के पश्चात् ही विनिश्चित किया जा सकता है कि क्या अभियोक्त्री द्वारा तथ्य के भ्रम के अंतर्गत अथवा अभियुक्त के प्रति प्रेम और

भावावेश महसूस करने के कारण सहमति दी गई थी – विचारण न्यायालय ने आरोप उचित रूप से विरचित किए – पुनरीक्षण खारिज।

Cases referred:

AIR 2003 SC 1639, AIR 2013 SC 2071, AIR 1980 SC 52.

Anil Kumar Soni, for the applicant.
A.K. Singh, P.L. for the non-applicant/State.

ORDER

C.V. SIRPURKAR, J. :- This criminal revision is directed against the order dated 16.07.2014 passed by the Court of Special Judge, Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, Narsinhgpur (sic:Narsinghpur), in Special Case No.46/2014, whereby the charges under Sections 376, 376 (2) (Dhha) of the IPC and Sections 3 (1-12) and 3 (2-5) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities Act) 1989, was framed.

2. The facts necessary for disposal of this criminal revision may be summarized as hereunder: Prosecutrix aged about 22 years and belonging to a Scheduled Tribe, lived in the same neighbourhood as the petitioner/accused Sheikh Mubarik. About an year before the date of lodging of FIR on 03.04.2014, they fell in love. Accused/applicant promised to marry the prosecutrix. Thereafter, on the false promise of marriage, the petitioner has sexual intercourse with the prosecutrix on numerous occasions resulting in pregnancy. About eight days before lodging of FIR, when the prosecutrix was a month and a half pregnant, the petitioner/accused administered a tablet to her, inducing abortion. At around 4:30 a.m on 03.04.2014, the petitioner/accused called the prosecutrix to his home and informed her that he is unable to marry her because his marriage has been fixed at some other place. When the prosecutrix protested that if the petitioner would not marry to her, she would not leave his house, the petitioner slapped her. When the petitioner tried to chase the prosecturix away, she consumed "Dettol" in anger, thereafter, with a view to drive the prosecutrix away, the petitioner set the bed, on which the prosecutrix was sitting, afire. Thereafter, the petitioner ran away. Thus the petitioner raped the prosecutrix on several occasions for a period of about one year on false promise of marriage.

3. The impugned order has been assailed on the behalf of the petitioner mainly on the grounds that from the first information report and statements of the prosecutrix under Section 161 and Section 164 is clear that she is a mature

women and had sexual intercourse on several occasions with the petitioner of her own free will and accord; therefore, no charge of rape is made out.

4. Learned Panel Lawyer for the respondent/State on the other hand has supported the impugned order.

5. The Apex Court in the case of *Uday Vs. State of Karnataka*, AIR 2003 Supreme Court 1639 has essentially held as hereunder:

In a case of this nature two conditions must be fulfilled for the application of S. 90, I. P. C. Firstly, it must be shown that the consent was given under a misconception of fact. Secondly, it must be proved that the person who obtained the consent knew, or had reason to believe that the consent was given in consequence of such misconception. It, therefore, appears that the consensus of judicial opinion is in favour of the view that the consent given by the prosecutrix to sexual intercourse with a person with whom she is deeply in love on a promise that he would marry her on a later date, cannot be said to be given under a misconception of fact. A false promise is not a fact within the meaning of the Code. We are inclined to agree with this view, but we must add that there is no strait jacket formula for determining whether consent given by the prosecutrix to sexual intercourse is voluntary, or whether it is given under a misconception of fact. In the ultimate analysis, the tests laid down by the Courts provide at best guidance to the judicial mind while considering a question of consent, but the Court must, in each case, consider the evidence before it and the surrounding circumstances, before reaching a conclusion, because each case has its own peculiar facts which may have a bearing on the question whether the consent was voluntary, or was given under a misconception of fact. It must also weigh the evidence keeping in view the fact that the burden is on the prosecution to prove each and every ingredient of the offence, absence of consent being one of them.

(Emphasis supplied).

6. Likewise, in the case of *Deepak Gulati Vs. State of Haryana*, AIR 2013 Supreme Court 2071, the Supreme Court in effect, has held that:

There is a clear distinction between rape and consensual sex and in a case where there is promise of marriage, the Court must very carefully examine whether the accused had actually wanted to marry the victim, or had mala

fide motives, and had made a false promise to this effect only to satisfy his lust, as the latter falls within the ambit of cheating or deception. There is a distinction between the mere breach of a promise, and not fulfilling a false promise. Thus, the Court must examine whether there was made, at an early stage a false promise of marriage by the accused; and whether the consent involved was given after wholly, understanding the nature and consequences of sexual indulgence. There may be a case where the prosecutrix agrees to have sexual intercourse on account of her love and passion for the accused, and not solely on account of mis-representation made to her by the accused, or where an accused on account of circumstances which he could not have foreseen, or which were beyond his control, was unable to marry her, despite having every intention to do so. Such cases must be treated differently. An accused can be convicted for rape only if the Court reaches a conclusion that the intention of the accused was mala fide, and that he had clandestine motives. The "failure to keep a promise made with respect to a future uncertain date, due to reasons that are not very clear from the evidence available, does not always amount to misconception of fact. In order to come within the meaning of the term misconception of fact, the fact must have an immediate relevance." S. 90, IPC cannot be called into aid in such a situation, to pardon the act of a girl in entirety, and fasten criminal liability on the other, unless the Court is assured of the fact that from the very beginning, the accused had never really intended to marry her.

7. Thus, the crux of the matter is that firstly it must be shown that the consent was given under a misconception of fact and secondly it must be proved that the person who obtained the consent knew or had reason to believe that the consent was given in consequence of such misconception of fact. The Court has to examine very carefully, whether the accused had actually wanted to marry the victim or had mala fide motive and had made a false promise of marriage only to satisfy his lust. In the latter case, the matter would fall within the ambit of cheating or deception. There is a distinction between mere breach of promise solemnly made and non-fulfillment of a false promise. Unless the Court reaches the conclusion on careful examination of evidence on record that from the very beginning, accused had never really intended to marry the prosecutrix, it may be held that the consent was given under misconception of fact. However, where the consent was accorded not because of promise of marriage but because of love and passion felt by the prosecutrix for the accused, it cannot be said to have been accorded on misconception

facts.

8. In both of the aforesaid cases, the acquittal was recorded after careful appraisal of the evidence on record after full trial. In the present case also, the facts and circumstances under which the consent was granted, are hazy; therefore, it would not be appropriate to interfere with the charge because at this stage even a very strong suspicion founded on material which leads to presumptive opinion as to the existence of factual ingredients constituting the offence alleged, may justify the framing of charges against the accused in respect of commission of the offence (Please see *Superintendent and Remembrancer of Legal Affairs West Bengal Vs. Anil Kumar Bhanja,* AIR 1980 Supreme Court 52).

9. In aforesaid view of the matter, learned trial Court committed no illegality, irregularity or impropriety in framing the charge against the petitioner/ accused. Thus, no interference in the impugned order in exercise of revisionary jurisdiction of the High Court is warranted.

10. Consequently, this criminal revision is **dismissed.**

Revision dismissed.

I.L.R. [2016] M.P., 1824

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice S.C. Sharma

M.Cr.C.No. 5390/2010 (Indore) decided on 12 August, 2015

M.S. DAHIYA ...Applicant

Vs.

STATE OF M.P. & anr. ...Non-applicants

***Criminal Procedure Code, 1973 (2 of 1974), Section 482* - Quashment of Cognizance of complaint u/S 138 & 142 of Negotiable Instruments Act - There is no material on record to establish that the petitioner was employer/officer of the company and has committed any act or omission or was responsible for conduct of the business of Company - Petitioner cannot be held liable - Cognizance taken against him quashed. (Para 12)**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – परक्राम्य लिखत अधिनियम की धारा 138 व 142 के अंतर्गत परिवाद के संज्ञान का अभिखण्डन –

अभिलेख पर ऐसी कोई सामग्री नहीं जिससे यह स्थापित होता हो कि याची कंपनी का नियोक्ता/अधिकारी था तथा उसने कोई कृत्य या लोप कारित किया हो अथवा वह कंपनी के कामकाज को संचालित करने हेतु उत्तरदायी था – याची को दायी नहीं ठहराया जा सकता – उसके विरूद्ध लिया गया संज्ञान अभिखण्डित।

Case referred:

2009, Volume 10 SCC, page 48.

Ronak Choukse, for the applicant.
Aniket Nayak, for the non-applicant/State.
None for the non-applicant No. 2.

(Supplied: Paragraph numbers)

ORDER

S.C. SHARMA, J. :- The petitioner before this court who is completely paralyzed and disabled person suffering from parkinson disease has filed the present Miscellaneous Criminal Case under Section 482 of Code of Criminal Procedure for quashment of the order dated 01/06/2001 passed in Criminal Case No. 801/01 by the Judicial Magistrate First Class, Indore (Case No. 0/08).

2. The facts of the case reveal that M/s. Gujarat Mercantile Credit Sahakarita Ltd., a Co-operative Bank has advanced loan to M/s. Cottage Creations Pvt. Ltd., Mr. Amar Jyoti Bindal and Mr. Diwanchand Bindal were the Directors of the company and Dr. V.K. Agrawal and M.S. Dahiya were the guarantors in respect of the loan granted by the society amounting to Rs. 37 lacs.

3. As many as 14 cheques were issued under the signatures of Amar Jyoti Bindal, Director of M/S. Cottage Creations Pvt. Ltd., and they were presented for encashment. Some of the cheques were dishonoured. The cheques were issued in the year 1998 & 1999 drawn on Central Bank of India. Thereafter, as cheques were dishonoured a committee was constituted on behalf of the bank and a meeting took place as stated in the complaint with Mr. Amar Jyoti Bindal and three persons namely Mr. Nagori, Dr. Akshay Dubey and Mr. P.K. Dua appearing on behalf of the society.

4. Shri A.J. Bindal who is also one of the accused, in the meeting agreed to pay a part payment of Rs. 1,09,573 and tendered a fresh cheque on 20/03/2001 drawn on Central Bank of India, Gwalior. The cheque was again

submitted to the bank by society, however it was returned with a remark **"Insufficient Funds"**. Thereafter a complaint has been filed under Section 138 & 142 of the Negotiable Instruments Act and the present petitioner has been implicated as respondent No. 5.

5. The present petitioner is a Chartered Accountant and he was a guarantor in respect of loan transaction which took place between Gujarat Mercantile Credit Sahakarita Ltd., and M/s. Cottage Creations Pvt. Ltd., He was not the Managing Director nor the Director of the company in question and was not at all remotely related with M/S. Cottage Creations Pvt. Ltd., In fact he is a Chartered Accountant and he was a partner at a relevant point of time with M/s. Nagori & Dhaiya, which is a firm of Chartered Accounts.

6. This court has carefully gone through the complaint filed by M/s. Gujarat Mercantile Credit Sahakarita Ltd., It does not contain material to implicate the present petitioner. He was neither borrower nor has issued any cheque at any point of time making him liable for action under Section 138 & 142 of the Negotiable Instruments Act.

7. The learned counsel has argued that the Judicial Magistrate, First Class by passing a two line order has simply stated that he has gone through the evidence and the evidence makes it clear that a case is made out for proceeding ahead under Section 138 of Negotiable Instruments Act and he has taken cognizance of the same. Summons were issued on 01/06/2001. The petitioner did not receive the summon however, received a warrant on 04/08/2004 and appeared before the trial court and as he was suffering from Parkinson disease could not approach this court in time.

8. This court has carefully gone through the entire material on record and is of the considered opinion that it was not the petitioner, who was a signatory of the cheque which is the subject matter of dispute nor he has given any undertaking in respect of the repayment of loan by issuing any cheque nor he was a member to the meeting which took place between the bank and the borrowers and therefore, he has been falsely implicated in the complaint. Section 138 of the Negotiable Instrument Act reads as under:-

> [138 Dishonour of cheque for insufficiency, etc., of funds in the account. —Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other

liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for 19 [a term which may be extended to two years], or with fine which may extend to twice the amount of the cheque, or with both: Provided that nothing contained in this section shall apply unless—

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, 20 [within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

9. In light of the aforesaid statutory provision of law, by no stretch of imagination, keeping in view the allegations made in the complaint as none of the cheque was not issued by the present petitioner, he cannot be brought within the preview of Sections 138 & 142 of the Negotiable Instruments Act. The Delhi High Court in the case of *Hardeep Singh Nagra vs. State* in paragraph 15 is held as under:-

15. In *Nitin Kumar and others v. NCT of Delhi* through its Standing Counsel and another, 2010(1) JCC [NI] 9, it was found that the complainant had generally alleged in the plaint that the accused had been actively involved in the affairs of accused No.1. Noticing that there was no allegation in the complaint that the petitioner was in overall control of the day to day business of the company nor are there any such factual

averment from which such a control could be inferred nor there was any allegation in the complaint that the petitioner was party to any decision to issue cheque in question or to get it dishonoured, it was held by this Court that the case could not be brought within the purview of sub-Section 2 of Section 141 of the Negotiable Instruments Act.

"In the cases before this Court, there is no allegation either in the complaint or in the affidavit filed by the complainant that the petitioner Hardeep Singh Nagra was party to a decision to issue the cheques which, when presented to the bank, were dishonoured or to get those cheques dishonoured. Admittedly, none of the cheques was signed by him. There is no averment in the complaint that the cheques were issued and then dishonoured with the consent or connivance of the petitioner or that the same was attributable to any negligence on his part. Therefore, the case against the petitioner cannot be brought within the purview of sub-Section (2) of Section 141 of the Negotiable Instruments Act.

For the reasons given in the preceding paragraphs, I see no good reason to recall the order dated 21 st January, 2010. The applications are devoid of any merit and are hereby dismissed."

10. In light of the aforesaid judgment as none of the cheques were issued by the present petitioner and the allegations do not implicate the petitioner, he can not be brought within the preview of Sections 138 & 142 of the Negotiable Instruments Act 1881.

11. The Apex Court in the case of *K.K. Ahuja and V.K. Vora and Another* reported in 2009, Volume 10 SCC, Page 48 in paragraph 28 & 29 is held as under:-

"28. If a mere reproduction of the wording of section 141(1) in the complaint is sufficient to make a person liable to face prosecution, virtually every officer/employee of a company without exception could be impleaded as accused by merely making an averment that at the time when the offence was committed they were in charge of and were responsible to the company for the conduct and business of the company. This

would mean that if a company had 100 branches and the cheque issued from one branch was dishonoured, the officers of all the 100 branches could be made accused by simply making an allegation that they were in charge of and were responsible to the company for the conduct of the business of the company. That would be absurd and not intended under the Act.

29.As the trauma, harassment and hardship of a criminal proceedings in such cases, may be more serious than the ultimate punishment, it is not proper to subject all and sundry to be impleaded as accused in a complaint against a company, even when the requirements of section 138 read and section 141 of the Act are not fulfilled. "

12. There is no material on record to establish that the petitioner was employer / Officer of the Company and has committed any act or omission or was responsible for the conduct of the business of the company and therefore, in light of the aforesaid judgment the petitioner can not be held liable and the petition preferred under Section 482 deserves to be allowed to the extent it relates to the petitioner.

13. Resultantly, the petition preferred under Section 482 is allowed and the order dated 01/06/2001 to the extent cognizance has been taken against the petitioner is hereby quashed.

Certified copy as per rules.

Application allowed.

I.L.R. [2016] M.P., 1829

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice Alok Verma

M.Cr.C. No. 3222/2015 (Indore) decided on 30 September, 2015

NEERAJ VERMA ...Applicant

Vs.

STATE OF M.P. ...Non-applicant

A. ***Criminal Procedure Code, 1973 (2 of 1974), Section 210*** **- One case arises on police report under Section 173 Cr.P.C. and other being complaint under Section 92 of Factories Act, 1948 - Both cases**

should be heard together when death or bodily injury caused to person not covered under Factories Act - Otherwise, proceedings and punishment should be under Section 92 of Factories Act. (Para 11)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2) धारा 210 – एक प्रकरण दं0प्र0सं0 की धारा 173 के अंतर्गत पुलिस प्रतिवेदन से उद्भूत है एवं दूसरा प्रकरण कारखाना अधिनियम, 1948 की धारा 92 के अंतर्गत परिवाद है – जब मृत्यु अथवा शारीरिक क्षति से पीड़ित व्यक्ति कारखाना अधिनियम से आच्छादित न हो तब दोनों ही प्रकरण साथ–साथ सुने जाने चाहिए – अन्यथा, कार्यवाहियाँ एवं दण्डाज्ञा, कारखाना अधिनियम की धारा 92 के अंतर्गत होनी चाहिए।

***B. Criminal Procedure Code, 1973 (2 of 1974), Section 300* - Workers died in factory during work - Offences registered under Sections 287 & 304 A of IPC - Other case for same incident under Sections 36, 7(A), 32(B), 31, 73 read with Section 92 of Factories Act, 1948 - Fine of Rs. 1,05,000/- imposed under Factories Act - Held - Death and bodily injury occurred to workers during course of employment due to grave omission on the part of Occupier and Manager - Provisions of Factories Act being special law shall prevail over general law of IPC - Proceedings under Sections 287 and 304A of IPC quashed - Petitioners discharged. (Paras 10, 12 & 13)**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 300 – कारखाने में कार्य के दौरान श्रमिकों की मृत्यु हुई – भा.दं.सं. की धारा 287 एवं 304–ए के अंतर्गत अपराध पंजीबद्ध किये गये – समान घटना हेतु एक अन्य प्रकरण कारखाना अधिनियम, 1948 की धाराओं 36, 7(ए), 32(बी), 31, 73 सहपठित धारा 92 के अंतर्गत – कारखाना अधिनियम के अंतर्गत रूपये 1,05,000/– का अर्थदण्ड अधिरोपित किया गया – अभिनिर्धारित – अधिभोगी एवं प्रबंधक की ओर से गंभीर चूक के कारण नियोजन अवधि के दौरान श्रमिकों की मृत्यु एवं शारीरिक क्षति कारित हुई – कारखाना अधिनियम के उपबंध विशेष विधि होने के कारण भा.दं.सं. की सामान्य विधि पर अभिभावी होंगे – भा.दं.सं. की धारा 287 व 304–ए के अंतर्गत कार्यवाहियाँ अभिखण्डित – याचीगण को आरोपमुक्त किया गया।

Cases referred:

Crl.O.P. No. 3749/2007 & M.P. No. 1/2007 decided on 26.09.2008 (Madras High Court), 2007(2) JCR 334 Jhr, Cr. M.P. No. 911/2007 decided on 03.09.2009 (High Court of Jharkhand), Cr. Misc. Petition No. 36/2009 decided on 28.02.2009 (High Court of Chhatisgarh), Cr. Petition No. 2408/2014 (Karnataka High Court).

Rajeev Bhatjiwale, for the applicant.
Mamta Shandilya, for the non-applicant/State.

(Supplied: Paragraph numbers)

ORDER

ALOK VERMA, J. :- This application under Section 482 Cr.P.C. is for quashment of proceedings in Criminal Case No.10293/2010 pending before Judicial Magistrate First Class, Indore under Sections 287, 304-A of IPC. According to the averments in the application, the petitioner-Neeraj Verma is Manager of M/s Vindhya Paper Factory, Sanwer Road, Indore. On 11.11.2010, maintenance work in the pulp chamber of the factory was in progress. Some poisonous gas erupted from the gas chamber, which was inhaled by two workers- Lakhan and Manish. They suffered death after haling (sic:inhaling) the poisonous gas and other two workers went unconscious. The matter was informed to Police Station-Banganga, District-Indore where a merg under Section 174 of Cr.P.C. was registered. After merg inquiry, crime No.997/2010 was registered by the Police Station under Section 287 and 304-A of IPC. After due investigation, a charge-sheet was filed against the present petitioner, which was registered as RT No.10293/2010.

2. The Factory Inspector under Factories Act, 1948 also initiated inquiry under Section 92 read with section 105 of Factories Act, 1948 (hereinafter called the 'Act'). The Chief Judicial Magistrate, Indore commenced the trial in both the cases separately. The case filed on the complaint of the Factory Inspector was registered as Criminal Case No.27864/2010 under Sections 36, 7(A), 32(B), 31, 73 read with section 92 of the Act. The petitioner was fined Rs.1,05,000/-. After suffering conviction in case No.27864/2010, the proceedings in RT No.10293/2010 became infructuous. In view of the provisions of Section 300 of Cr.P.C., now the petitioner cannot be punished twice for the offence based on the same set of facts.

3. This application is filed on the ground that (i) offence under Sections 92 of the Act and 304-A & 287 of IPC are based on the same set of facts, and therefore, both the cases cannot run simultaneously. (ii) The provisions of the Act being a special Act would override the provisions of Indian Penal Code, which is a general law. (iii) Under Section 300 of Cr.P.C., prosecution of a person in an offence based on the same set of facts is prohibited, and therefore, once the petitioner is convicted under Section 92 of the Act, the

proceedings in another case under Section 304-A and 287 of IPC cannot continue. On these grounds, the present petitioner prays that the proceedings and case No.10293/2010 be quashed.

4. Learned counsel for the respondent/State opposed the application on the ground that offence under Sections 304-A, 287 of IPC and Section 92 of the Act are different offences and both the cases can run together and the proceedings therein would be hit by the provisions of Section 300 of Cr.P.C.

5. Learned counsel for the petitioner placed reliance on judgement of Madras High Court in *"R. Kannan Vs. State"* in Crl. O.P. No.3749/2007 and M.P. No.1/2007 decided on 26.09.2008. In this case, the petitioner was fined Rs.25,000/- in a proceeding arising out of Section 92 of the Act. The High Court of Madras observed in Para-6 that the occurrence that taken place on 09.05.2005 at about 7:30 PM on account of burst of boiler that was installed in the factory and that was the basis for filing the cases - one before Chief Judicial Magistrate, Erode and another before the Judicial Magistrate, Erode. The Court observed that both the cases should have been trial (sic:tried) together. However, no steps were taken by the respondent for simultaneous trial of the cases by the Court. Taking the view that after conviction in sentence imposed in the cases pending before the Chief Judicial Magistrate under Section 92 of the Act, the proceedings in another case would not be maintainable because occurrence is one and the same, and hence, proceedings with the criminal case for the same occurrence amounts to total jeopardy, and therefore, while allowing the petition, the proceedings pending before the Judicial Magistrate under Section 304-A IPC were quashed.

6. On this point, I have found two orders of Jharkhand High Court -one in the case of *"Ashwini Kumar Singh and another Vs. State of Jharkhand"* 2007 (2) JCR 334 Jhr delivered on 02.12.2006. In this case, workman Mukesh Singh was directed to handover the hammer to Supervisor. In pursuant to that order while he was moving towards the Supervisor, he slipped in the open metal chamber and as a result of which, he sustained serious burn injuries. He was immediately shifted to TATA Main Hospital, Jamshedpur where he succumbed his burn injuries. When he was in hospital, he gave a dying declaration to the police, on basis of which, a case was registered by the police under Section 304-A of IPC. The Factory Inspector also conducted an inquiry under the provisions of the Act and also filed a complaint before the Court. It was submitted by the counsel for the petitioner that two criminal

cases based on the same set of facts cannot proceed together and they are hit by the provisions of Section 300 of Cr.P.C. The Single Bench of Jharkhand High Court observed in para-7 to 9 as under :-

> **7. Having regard to the facts and circumstances of the case, I find that the prosecution has not disputed that the occurrence/accident took place within the factory premises of Golbana Engineering Department, a factory defined under Section 2(m)(i) of the Factories Act, 1948. The Factories Act, 1948 is an enactment meant to provide protection to the workers from being exploited by the greedy business establishments and it also provides for the approvement of working conditions within the factory premises as well as the safety measures. For its objective against exploitation and to regulate the safety provisions in the factories penal provisions have been made in the Factories Act, 1948. The enactment is for the safety and security of the workers in the hazardous process of the factory and for such motive and beneficial construction Act is made self contained. I find from the record that on the statement of the victim recorded on 28.9.2005 Golmuri (Burma Mines) P.S. Case No. 187/05 was registered on 1.10.2005 and the FIR was received in the Court of CJM, Jamshedpur on 5.10.2005 and the police after investigation submitted charge-sheet on 2.2.2006 and accordingly cognizance of the offence was taken against the accused persons under Sections 287/288/338 and 304-A, IPC. At the same time, I find that on information given by the authority of the factory in respect of the accident which took place in the Tubes Division of Tata Steel Limited to the Factory Inspector, Jamshedpur Circle No. 1, Jamshedpur on 26.9.2005 in Form No. 17-A, a preliminary enquiry was conducted and upon being satisfied and finding a prima facie case the Factory Inspector filed a complaint against the occupier and director of the Tubes Division of Tata Steel Limited as well as its Manager and the case was numbered as C/2 No. 5011/05 for the alleged offence under Section**

92 of the Factories Act, 1948 for the alleged contravention of Sections 32(a) and 33(i) of the Factories Act.

8. The law is settled in the various decisions that the special law shall prevail over the general law but both shall not run concurrently for the same cause of action. I find that when the complaint case has been instituted vide C/2 No. 5211/05 under Special law (Factories Act, 1948) the continuation of the criminal prosecution against the petitioners for the offence prescribed in the general law of Indian Penal Code is unsustainable. In both the statutes viz. under- Section 304-A, Indian Penal Code (general law) and under Section 92 of the Factories Act, 1948 the sentence prescribed to the convict is similar but with additional fine to the extent of Rs. One lakh in the Special Act to the occupier and in this manner the extent of fine is more severe in special law and both cannot proceed at a time. The criminal prosecution of the petitioners, therefore, under Indian Penal Code is unsustainable.

9. In the facts and circumstances, the criminal prosecution of the petitioners in G.R. No. 2112/05 arising out of Golmuri (Burma Mines) P.S. Case No. 187/05 including the order taking cognizance of the offence is quashed and this petition is allowed. Petition allowed.

7. Subsequently, the same High Court in case of *"Ejaj Ahmad Vs. State of Jharkhand"* in Cr.M.P. No.911/2007 delivered a judgment on 03.09.2009. In this case, the accident took place on 25.11.2005 by explosion in the hot chamber in the painting shop of the factory. The allegation was that the said hot chamber was not properly maintained by the management of the factory. Under the same situation, two cases were registered. The police registered case under Sections 285, 286, 337, 338, 304-A of IPC and also a case under Section 92 of the Act. The Court observed in para-11 as under :-

11.....There is nothing in the Factories Act, which prescribe punishment for the rash and negligent act of occupier or manager of the factory which resulted

into the death of any worker or any other person. Thus, I find that there is no specific punishment prescribed under the Factories Act (Special Law) for the rash and negligent act of the petitioner, which resulted into death or bodily injury of any person. Therefore, in my view, the general law i.e. IPC will apply.

And finally the Court observed in Para-13 as under :-

13.....Moreover section 300 of the Cr.P.C. will apply for the same offence. As notice above, in the instant case, the offence under section 92 of the Factories Act is different from the offences under section 285,286, 337,338 and 304(A) of the IPC. Thus, in my considered view, section 300 of the Cr.P.C. have no application in the facts and circumstances of the present case.

8. Thus, the High Court of Jharkhand gave two different views on this point and held that the offence under Section 304-A of IPC and Section 92 of the Act are two different offences and proceedings can run simultaneously. This principle laid down by Jharkhand High Court was followed by High Court of Chhatisgarh in case of *"Firoz Alam Vs. State of Chhatisgarh"* passed in Criminal Miscellaneous Petition No.36/2009 delivered on 28.02.2009. The High Court of Chhatisgarh took a view that since no punishment is prescribed in the Act for rash and negligent act, therefore, the provisions of Section 300 of Cr.P.C. and Article 20 (2) of Constitution of India would not barred simultaneous hearing in two cases. It was further observed that if in one case, petitioner is convicted then proceeding cannot continue in another case. Placing reliance in case of *"Ashwini Kumar Singh* (supra) of Jharkhand High Court", there is also a judgment of Karnataka High Court passed in Criminal Petition No.2408/2014 titled as *"Sri Sridhar Punachithya and others Vs. State of Karnataka & another"*. In this case, the High Court of Karnataka considered the provisions of Section 300 of Cr.P.C. vis-a-vis Section 92 of the Act and Section 304-A of IPC. Also the principle laid down in case of *"Ashwini Kumar Singh* (supra) of Jharkhand High Court" was taken into consideration.

In its final finding, the High Court of Karnataka observed in para-9 of the order thus :-

9. On reading of the above said provisions, it is clear that facts of this particular case, for which the accused has been convicted for the offence under Section 92 of the Factories Act are exactly the same to the alleged offences under Section 304-A of IPC. The Court can frame charges under Section 304-A, but it can only frame on the basis of the same facts. Therefore, in my opinion Section 300 of Cr.P.C. is also applicable to the present facts and circumstances of the case. Once the accused/ petitioner No.4 herein has been convicted for the offences under Section 92 of the Factories Act, he or any other person cannot be once again prosecuted for the offences under Section 304-A of IPC.

9. With due respect to the view taken by High Court of Jharkhand in case of *'Ejaj Ahmad* (Supra)' and High Court of Chhatisgarh in case of '*Firoz Alam* (Supra)', I differ from their views that the Act does not provide any punishment for rash and negligent Act of occupier or manager of the factory. There are certain occasions when the statutory duties imposed on occupier and manager of the factory under the Act, are not performed properly, they are under obligation to provide sufficient safeguards to prevent happening of any untoward incident. When such safeguards are not provided i.e.on omission on their part and dereliction of a statutory duties imposed on them by the Act, such omission results into a death and that is equal to rash and negligent Act, and accordingly, the word 'Act' used in Section 304-A of IPC may on some occasions includes omission also, and therefore, when there are such grave omission on the part of the occupier and manager of the factory in which a worker under their employment suffers death or grievous bodily injuries then provisions of Section 92 of the Act are attracted. Based on the same set of facts, hypothetically, if provisions of Section 92 of the Act are not there, then provisions of Section 304-A are attracted, and therefore, in my view, the provisions of Section occupy the same field, so far as an incident in a premises of the factory is concerned, and therefore, the provisions of Factories Act being a special law shall prevail over provisions of Indian Penal Code, which is a general law.

10. After taking into consideration all the views taken by different High Courts, in my considered opinion, there can be certain occasions when provisions of Factories Act under Section 92 do not apply, e.g. death may

occur or grievous hurt may be caused to a person who came in the premises of a factory authorised by the management for some other works like repair of machinery, inspection etc. Another occasion may be that a worker, who is under employment of the management may suffer such bodily injury or death when he was performing the act, which was not part of his obligations under the employment - e.g. on being requested by his fellow-worker, he may be helping them in performance of an act, which was not assigned to him. Under these circumstances, may be, provisions of Section 304-A of IPC may apply, otherwise, when act and bodily injury is caused to a workman while discharging his obligation under the terms of employment, the provisions of IPC, which are general law cannot be applied. When such situation arises, two cases should be trial (sic:tried) together by the same Court and one being a case of police report filed under Section 173 of Cr.P.C., another being a complaint filed under Section 92 of the Act, both the cases should be heard together under the provisions of Section 210 of Cr.P.C. and when it is found that bodily injury or the death is caused to a person, who is not covered by provisions of Factories Act, due to negligent act or omission on the part of the factory management then the provisions of Section 304-A of IPC may be applied, otherwise, proceedings and punishment should be under Section 92 of the Act.

11. Reverting back to the present case, there is no dispute that the workers who suffered death while discharging their obligations under the terms of employment, they were performing his (sic:their) duties which they were assigned by the factory management/occupier, and therefore, the petitioners were convicted under Section 92 of the Act. The proceedings in case filed on police report under Section 287, 304-A of IPC cannot continue.

12. In this view of the matter, this application is allowed. The proceedings in RT No.10293/2010 pending before Judicial Magistrate First Class under Section 287, 304-A of IPC are quashed. The petitioner is discharged from the offence under Sections 287, 304-A of IPC.

13. With observations and direction as aforesaid, the matter stands disposed of.

Certified copy, as per rules.

Application allowed.

I.L.R. [2016] M.P., 1838
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice Jarat Kumar Jain
M.Cr.C. No. 1211/2012 (Indore), decided on 6 January, 2016

VIVEKANAND & ors. ...Applicants
Vs.
STATE OF M.P. ...Non-applicant

Prevention of Food Adulteration Act (37 of 1954), Section 7(i)(iii) r/w Section 16(i) A (i) - Applicability **- Applies only on articles of food meant for consumption inside the country - Not applicable to articles meant for export - Petitioner's 100% export oriented Unit situated in Special Economic Zone - Food Inspector taking samples from unit without prior approval of Development Commissioner and certainly he is not a notified officer - Cognizance taken by CJM is without jurisdiction - Order set aside - Petition allowed. (Paras 11, 12 & 14)**

खाद्य अपमिश्रण निवारण अधिनियम (1954 का 37), धारा 7(i)(iii) सहपठित धारा 16(i), ए (i) – प्रयोज्यता – केवल देश के भीतर उपयोग हेतु आशयित खाद्य वस्तुओं/सामग्री पर लागू होती है – निर्यात हेतु आशयित वस्तुओं पर प्रयोज्य नहीं – याची की 100% निर्यातोन्मुख इकाई, विशेष आर्थिक क्षेत्र में स्थित है – खाद्य निरीक्षक द्वारा विकास आयुक्त के पूर्व अनुमोदन के बिना इकाई से नमूने लिये गये और निश्चित रूप से वह अधिसूचित अधिकारी नहीं है – मुख्य न्यायिक दण्डाधिकारी द्वारा लिया गया संज्ञान अधिकारिता विहीन है – आदेश अपास्त – याचिका मंजूर।

Vivek Singh, for the applicants.
Milind Phadke, G.A. for the non-applicant/State.

ORDER

J.K. JAIN, J. :- THIS petition under Section 482 of the Code of Criminal Procedure [for short "the Code"] has been filed for quashment of Criminal Case No. 30/2012, pending before Chief Judicial Magistrate (CJM), Dhar.

2. Brief facts of this case are that petitioner NO.1 is General Manager(Works) in the petitioner No.2 Company and company has authorized petitioner No.1 to appear in this case on behalf of the Company. The unit of petitioner No.2 situated inside the Indore Special Economic Zone at Pithampur,(Dhar) and the unit is 100% export oriented unit, dealing in

processing of organic spices for exports. On 20/06/2011 non-applicant Food Inspector Shri K.S.Solanki entered the premises of petitioner NO.2 and has taken the samples of two spices namely Chilly powder and organic turmeric powder from consignment destined for exports. On 19/01/2012 petitioners have received a letter along with the report of Public Analyst that the samples were adulterated. Thereafter, the Food Inspector has filed a private complaint against the petitioners which is registered as Criminal Case NO. 30/2012 for the offence under Section 7(i)(iii) read with Section 16(i) A(i) of the Prevention of Food Adulteration Act, 1954 (in brief "the Act") in the Court of Chief Judicial Magistrate, Dhar. Chief Judicial Magistrate has taken the cognizance. Being aggrieved, the petitioners have filed this petition on various grounds.

3. Learned counsel for the petitioners submits that the petitioner's unit is situated inside the Indore Special Economic Zone at Pithampur (Dhar) and the unit is 100% export oriented unit. Thus, it is governed by the Special Economic Zones Act, 2005(for short "SEZ Act") and rules made there under. Government of India Ministry of Finance Department of Revenue Central Board of Excise and Customs New Delhi issued a circular dated 8th January, 2002 (Annexure P/7) that the PFA Act is not applicable for food meant for export. The Food Inspector is not notified officer under Section 20 of the SEZ Act. Hence, he has no jurisdiction for taking sample from such unit. Therefore, the private complaint filed by the Food Inspector and taking cognizance by the CJM is without jurisdiction. Hence, the order of taking cognizance be set-aside.

4. On the other hand learned Government Advocate opposes the prayer and submits that the development Commissioner Indore, Special Economic Zone, granted permission to establish the unit in the Special Economic Zone vide Letter No. G- 3/SSE/PROJ/2006-07/167 dated 25/07/2006 under certain terms and conditions. There is one of the condition that the petitioner may supply/sell goods or services in domestic tariff area in the terms of the provisions of SEZ Act, 2005 and rules and order made there under. Since Development Commissioner permitted to sell and supply goods and services in domestic tariff area, therefore, the petitioners are required to take license under PFA Act, 1954 and rules made there under. It is also pointed out that SEZ units are not exempted from taking license and following the rules there under. In such circumstances it cannot be held that Food Inspector was not authorized to take sample as per the provisions of PFA Act, 1954. Thus,

there is no merit in the petition and it be dismissed.

5. After hearing the learned counsel for the parties I have perused the record.

6. The manufacturing unit of petitioner No.2 company is situated in Indore, Special Economic Zone. The unit is 100% export oriented unit, to this effect the petitioners have filed the certificate of Importer Exporter Code (LEC) Number 420700001 date of issue on 28/08/2007. The question before this Court is whether the provisions of the PFA Act, 1954 are applicable to the petitioners unit. For this purpose it is useful to refer the relevant portion of Statement of Objects and Reasons annexed to the PFA (Amendment) bill 1974 which reads as under:-

> "Adulteration of food articles is rampant in the country and has become a grave menace to the health and well being of the community. Keeping in view the gravity of the problem and the growing danger that it poses to the health of the nation, it has become necessary to amend the P.F.A. Act, 1954, so as to plug loopholes and provide for more stringent and effective measures with a view to curb this menace."

7. It was the above bill which became the law as the P.F.A. (Amendment) Act 34 of 1976. It is thus evident that the Parliament in enacting the law was concerned only with the adulteration of food meant for consumption within the country. It is only proper to point out in this connection that while S. 5 of the Act prohibits import of adulterated and misbranded food there is no provision prohibiting export of such food. Sec. 16 provides for penalty on person who "whether himself or by another person on his behalf, imports into India or manufactures for sale or stores, sells or distribute any article of food". While there is a specific mention about import, there is significant omission of the word 'export'. This also is an indication to show that the purpose of the Act is confined to providing unadulterated articles of food to the people of the country and has no application to commodities meant for export.

8. Now, I would like to refer Objects and Reasons of the Special Economic Zones, Act 2005 which reads as under :-

"The Government of India had announced a Special Economic Zone Scheme in April, 2000 with a view to provide an internationally

competitive environment for exports. The objectives of Special Economic Zones include making available goods and services free of taxes and duties supported by integrated infrastructure for export production, expeditious and single window approval mechanism and a package of incentives to attract foreign and domestic investments for promoting export-led growth."

9. There are quality control provisions enacted in Section 20,21,22 of the SEZ Act,2005. For ready reference these Sections are as under:

> "20. Agency to inspect.—Notwithstanding anything contained in any other law for the time being in force, the Central Government may, by notification, specify any officer or agency to carry out surveys or inspections for securing of compliance with the provisions of any Central Act by a Developer or an entrepreneur, as the case may be, and such officer or agency shall submit verification and compliance reports, in such manner and within such time as may be specified in the said notification.
>
> 21. Single enforcement officer or agency for notified offences.—
>
> (1) The Central Government may, by notification, specify any act or omission made punishable under any Central Act, as notified offence for the purposes of this Act.
>
> (2) The Central Government may, by general or special order, authorise any officer or agency to be the enforcement officer or agency in respect of any notified offence or offences committed in a Special Economic Zone.
>
> (3) Every officer or agency authorised under subsection (2) shall have all the corresponding powers of investigation, inspection, search or seizure as is provided under the relevant Central Act in respect of the notified offences.
>
> 22. Investigation, inspection and search or seizure.—The agency or officer, specified under section 20 or section 21, may, with prior intimation to the Development Commissioner concerned, carry out the investigation, inspection and search

or seizure in the Special Economic Zone or in a Unit if such agency or officer has reasons to believe (reasons to be recorded in writing) that a notified offence has been committed or is likely to be committed in the Special Economic Zone: Provided that no investigation, inspection and search or seizure shall be carried out in a Special Economic Zone by any agency or officer other than those referred to in sub-section (2) or subsection (3) of section 21 without prior approval of the Development Commissioner concerned: Provided further that any officer or agency, if so authorised by the Central Government, may carry out the investigation, inspection and search or seizure in the Special Economic Zone or Unit without prior intimation or approval of the Development Commissioner."

10. Central Govt. while exercising the power under Section 1(3) of SEZ Act, 2005, appointed the date 13/01/2010 on which the Sections 20,21 and 22 of the said Act came into force. Central Govt. has also notified that the Act or omission made punishable under the foreign trade (Development and Regulation) Act, 1992 as notified offences for the purpose of SEZ Act, 2005 and authorized the Development Commissioner of the jurisdictional Special Economic Zone to be enforcement Officer in respect of the notified offences committed in a Special Economic Zone.

11. Section 22 of the SEZ Act provided that no investigation, inspection and search or seizure carried out in a Special Economic Zone by any agency or officer other than those referred to in sub-section (2) or sub-section (3) of Section 21 without prior approval of the Development Commissioner concerned:

In the present case Food Inspector K.S.Solanki has taken the sample without prior approval of the concerned Development Commissioner and certainly he is not notified officer to carry out search or inspection. For securing the compliance of provision of any Central Act it is also relevant to mention that Section 51 of the SEZ Act provides that the provisions of this Act shall have effect notwithstanding anything inconsistent herewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

12. The provisions of P.F.A. Act applies only to articles of food meant for consumption inside the country and as such no application to articles of food meant for export. In the present case, petitioner's unit is situated in Special Economic Zone and petitioner's unit is 100% export oriented unit. Thus, the provisions of PFA Act are not applicable to the petitioner's unit.

13. The development Commissioner Indore, Special Economic Zone, granted permission to establish the unit in the Special Economic Zone vide Letter No. G-3/SSE/PROJ/2006-07/167 dated 25/07/2006. Prosecution has not filed any document to the effect that the petitioner's unit is manufacturing good or services for domestic tariff area. There is no case of the complainant that the chilly powder and organic turmeric powder were meant for local sell or sell inside the country.

14. In such a situation, I am of the view that the provisions of PFA Act shall not be applicable to the petitioners unit, situated inside the Special Economic Zone. Thus, the Food Inspector has no authority to take the sample from petitioners unit which is 100% export oriented unit. Therefore, taking samples from the petitioner's unit and taking cognizance by the CJM is without jurisdiction.

15. Thus, the petition is hereby allowed and the order of taking the cognizance by the CJM in Criminal Case No. 30/2012 (State of M.P. through K.S.Solanki Food Inspector Vs. Vivekanand) is set-aside.

Copy of the order be sent to CJM Dhar for compliance.

Application allowed.

I.L.R. [2016] M.P., 1843
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice N.K. Gupta
M.Cr.C. No. 9024/2015 (Gwalior) decided on 12 April, 2016

HARGOVIND BHARGAVA & anr. ...Applicants
Vs.
STATE OF M.P. & anr. ...Non-applicants

A. ***Criminal Procedure Code, 1973 (2 of 1974), Section 482*** **- Petition against order of Subordinate Court dismissed as withdrawn with liberty to raise objections at proper stage - Effect thereof -**

Whether points can be reagitated afresh before Subordinate Court in the garb of such liberty - Held - No - In the petition filed by applicants against the said order, liberty granted by the High Court was misunderstood - No court can give liberty to agitate the points afresh before the lowest court all over again which are already considered and decided by the superior Court - Power under Section 482 Cr.P.C. vested in the High Court cannot be delegated by the grant of liberty - Liberty can be granted within the permissible limit of provisions of various laws that are in force for the time being. (Paras 5, 6 & 7)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – अधीनस्थ न्यायालय के आदेश के विरूद्ध प्रस्तुत याचिका, उचित प्रक्रम पर आक्षेप उठाने की स्वतंत्रता के साथ, वापस लिये जाने पर खारिज की गई – उसका प्रभाव – क्या उक्त स्वतंत्रता की आड़ में अधीनस्थ न्यायालय के समक्ष उक्त बिंदुओं पर नये सिरे से पुनः प्रश्न उठाये जा सकते हैं – अभिनिर्धारित – नहीं – आवेदकगण द्वारा उक्त आदेश के विरूद्ध प्रस्तुत याचिका में उच्च न्यायालय द्वारा प्रदान की गई स्वतंत्रता को गलत अर्थ में लिया गया – कोई भी न्यायालय अधीनस्थ न्यायालय के समक्ष पुनः नये सिरे से उन बिंदुओं पर प्रश्न उठाने की स्वतंत्रता प्रदान नहीं कर सकता, जिन्हें कि पूर्व में ही वरिष्ठ न्यायालय द्वारा विचार में लिया जाकर विनिश्चित किया जा चुका हो – दण्ड प्रक्रिया संहिता की धारा 482 के अंतर्गत उच्च न्यायालय में निहित शक्ति को स्वतंत्रता प्रदान करके प्रत्यायोजित नहीं किया जा सकता – तत्समय प्रवृत्त विभिन्न विधियों के उपबंधों की अनुज्ञेय सीमा के भीतर ही स्वतंत्रता प्रदान की जा सकती है।

***B. Criminal Procedure Code, 1973 (2 of 1974), Section 36 - Whether supervision report under Section 36 of Cr.P.C. is a part of investigation* - Held - If investigation is done by the Investigation Officer having power of investigation and if any superior officer gives supervision report under Section 36 of Cr.P.C., then it cannot be considered as a part of investigation. (Para 24)**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 36 – क्या दण्ड प्रक्रिया संहिता की धारा 36 के अंतर्गत पर्यवेक्षण प्रतिवेदन, अन्वेषण का एक भाग है – अभिनिर्धारित – यदि अन्वेषण करने की शक्ति रखने वाला अन्वेषण अधिकारी अन्वेषण करता है तथा कोई वरिष्ठ अधिकारी दण्ड प्रक्रिया संहिता की धारा 36 के अंतर्गत पर्यवेक्षण प्रतिवेदन देता है, तब उसे अन्वेषण का भाग होना नहीं माना जा सकता है।

C. Criminal Procedure Code, 1973 (2 of 1974), Section 167(2)

- *Duty of Investigation Officer/Agency* - Held - It is not permissible for the Investigation Officer to keep the investigation pending for some accused and to file charge-sheet against the arrested accused to defeat the provisions of Section 167(2) of Cr.P.C. so that bail should not be granted to the arrested accused due to incomplete investigation - Further held - Investigation Agency is empowered under Section 173(8) of Cr.P.C. to further investigate the matter after filing of charge-sheet but not to re-investigate or re-open the matter. (Paras 13, 14, 15 & 18)

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 167(2) – अन्वेषण अधिकारी/अभिकरण का कर्तव्य – अभिनिर्धारित – अन्वेषण अधिकारी को यह अनुमति नहीं होगी कि वह दण्ड प्रक्रिया संहिता की धारा 167(2) के उपबंधों को विफल करने की दृष्टि से किसी अभियुक्त का अन्वेषण लंबित रखे और गिरफ्तार किए गए अभियुक्त का अभियोग पत्र प्रस्तुत कर दे, ताकि गिरफ्तार किए गए अभियुक्त को अपूर्ण अन्वेषण के कारण जमानत न मिल पाए – आगे यह भी अभिनिर्धारित – अन्वेषण अभिकरण को दण्ड प्रक्रिया संहिता की धारा 173(8) के अंतर्गत मामले में अभियोग पत्र प्रस्तुत करने के पश्चात् आगे अन्वेषण करने की शक्ति प्राप्त है परंतु मामले का पुनः अन्वेषण करने अथवा उसे पुनः प्रारंभ करने की शक्ति नहीं है।

D. *Criminal Procedure Code, 1973 (2 of 1974), Section 173 - Charge sheet and Supplementary Charge-sheet explained* - The final report filed under Section 173(2) of Cr.P.C. is known as charge-sheet - Provisions of Section 173(8) of Cr.P.C. gives residuary power to the Investigation Officer that if after filing of charge-sheet, any extra material is found in the case then the additional report can be filed which is generally known as supplementary charge-sheet - Held- Report under Section 173(2) of Cr.P.C. shall be filed after complete investigation of the case and not of a particular accused - After due investigation it is the right of the police to declare some of the accused persons as absconding or at the time of filing of charge-sheet, he may file a report under Section 169 of Cr.P.C. against some of the accused persons with the opinion that no offence is made out against them. (Paras 12, 17 & 20)

घ. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 173 – अभियोग पत्र एवं पूरक अभियोग पत्र की व्याख्या – दण्ड प्रक्रिया संहिता की धारा 173(2) के अंतर्गत प्रस्तुत अंतिम प्रतिवेदन को अभियोग पत्र के रूप में जाना जाता है – दण्ड प्रक्रिया संहिता की धारा 173(8) के उपबंध अन्वेषण अधिकारी को यह अवशिष्ट शक्ति प्रदान करते हैं कि यदि अभियोग पत्र प्रस्तुत करने के पश्चात् मामले में कोई

अतिरिक्त तत्व मिलता है तब अतिरिक्त प्रतिवेदन प्रस्तुत किया जा सकता है जिसे सामान्यतः पूरक अभियोग पत्र के रूप में जाना जाता है – अभिनिर्धारित– दण्ड प्रक्रिया संहिता की धारा 173(2) के अंतर्गत प्रतिवेदन किसी एक अभियुक्त विशेष के लिए प्रस्तुत न किया जाकर अन्वेषण पूर्ण होने के पश्चात् प्रस्तुत किया जाना चाहिए – सम्यक् अन्वेषण के पश्चात् पुलिस को यह अधिकार है कि वह अभियुक्तगण में से कुछ को फरार घोषित कर दे अथवा अभियोग पत्र प्रस्तुत करते समय वह दण्ड प्रक्रिया संहिता की धारा 169 के अंतर्गत कुछ अभियुक्तगण के संबंध में इस मत के साथ प्रतिवेदन प्रस्तुत करे कि उनके विरूद्ध कोई अपराध नहीं बनता है।

E. ***Criminal Procedure Code, 1973 (2 of 1974), Section 209 - Committal explained*** **- It is the case which is committed to the Court of Sessions and not the accused. (Para 15)**

ङ. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 209 – उपार्पण की व्याख्या – किसी मामले को सत्र न्यायालय को उपार्पित किया जाता है न कि अभियुक्त को।

F. ***Criminal Practice*** **- Power and duty of Magistrate in case a part charge-sheet is submitted before it or a final report is filed - The Magistrate neither can accept a part charge-sheet after a partial investigation nor can permit any police officer to re-investigate the matter for few accused persons - Held - It is the duty of the Magistrate while considering the final closure report to hear the complainant and he could examine the complainant to record his objections on the closure report. (Paras 19 & 22)**

च. दाण्डिक पद्धति – दण्डाधिकारी के समक्ष भागिक आरोप पत्र अथवा अंतिम प्रतिवेदन प्रस्तुत किये जाने की दशा में उसकी शक्ति एवं कर्तव्य – दण्डाधिकारी न तो आंशिक अन्वेषण के पश्चात् प्रस्तुत किए गए भागिक आरोप पत्र को स्वीकार कर सकता है तथा न ही पुलिस अधिकारी को मामले में कुछ अभियुक्तगण के संबंध में पुनः अन्वेषण की अनुमति दे सकता है – अभिनिर्धारित – यह दण्डाधिकारी का कर्तव्य है कि वह अंतिम समापन प्रतिवेदन पर विचार करते समय परिवादी को सुने तथा वह समापन प्रतिवेदन पर परिवादी के आक्षेपों को अभिलिखित करने हेतु उसका परीक्षण भी कर सकता है।

G. ***Words & Phrases - Investigation when complete*** **- Investigation would be complete if the Investigation Officer would be in a position to opine that crime was found committed and hence, charge-sheet is filed with the final conclusion of the Investigation Officer. (Para 18)**

छ. शब्द एवं वाक्यांश – अन्वेषण कब पूर्ण होता है – अन्वेषण तब पूर्ण होता है जब अन्वेषण अधिकारी यह मत देने की स्थिति में हो कि अपराध कारित किया जाना पाया गया है तथा इसलिए अभियोग पत्र अन्वेषण अधिकारी के अंतिम निष्कर्ष के साथ प्रस्तुत किया जाता है।

Cases referred:

(2009) 6 SCC 332, (2012) 3 SCC 383, (2014) 2 SCC (Cri) 86, (2010) 6 SCC 243, 1979 Cr.L.J. 333, (1998) 5 SCC 223, (2013) 5 SCC 762, (2008) 5 SCC 413, (2007) Cr.L.J. 4281, 2006 Cr.L.J. 3981.

Arun Pateriya with *R.K.Sharma,* for the applicants.
Sudha Shrivastava, P.L. for the State.
Rajendra Singh Yadav, for the non-applicant No. 2.

ORDER

N.K. GUPTA, J. :- The applicants have preferred the present petition under Section 482 of the Code of Criminal Procedure, 1973 against the order dated 18-08-2015 passed by the First Additional Sessions Judge, Dabra District Gwalior in Criminal Revision No.386/2014 whereby the order dated 01-11-2013 passed in Criminal Case No.805/2012 was confirmed by which the Magisterial Court has taken cognizance against the applicants of the offence under Sections 147, 148, 323, 325, 307 and 302 re.. with Section 149 of IPC.

2. Facts of the case in short are that a named FIR was lodged against the applicants relating to the aforesaid offences. The charge-sheet was filed against other accused but investigation of the applicants was kept pending by the Investigation Officer under Section 173 (8) of Cr.P.C. However, the magisterial Court issued the warrants against the applicants then they preferred a petition under Section 482 of Cr.P.C. registered as M.Cr.C.No.6940/2012 in which the Single Bench of this Court vide order dated 03-10-2012 cancelled the order relating to issuance of warrant. The respondent No.2 thereafter preferred a petition under Section 482 of Cr.P.C. registered as M.Cr.C.No.3111/2013 in which vide order dated 26-04-2013 it was directed that fair investigation be done against the applicants and to file final report within 3 months. The review petition was also filed against that order and the same was dismissed on 15-05-2013. During pendency of various petitions,

the Single Bench of this Court had stayed filing of charge-sheet against the applicants and therefore, the charge-sheet was filed against other accused persons, except the applicants. Again the prosecution has filed the report under Section 173(2) and 173(8) of Cr.P.C. with the information that no offence was found constituted against the applicants. However, the Magistrate vide order dated 01-11-2013 took cognizance of the offence against the applicants under Section 190 of Cr.P.C. The Criminal Revision No.55/2014 against that order was filed before the revisionary Court which was dismissed on 25-02-2014. Thereafter, a petition under Section 482 of Cr.P.C. was filed against the order dated 25-02-2014 and that petition bearing M.Cr.C.No.2089/2014 was dismissed vide order dated 12-09-2014 being withdrawn; however, the Court has granted the bail to the applicants liberally. Again the applicants have moved applications before the Magisterial Court on 22-09-2014 and 27-09-2014 and vide order dated 10-10-2014, the same were dismissed. Actually the criminal revision No.386/2014 filed by the applicants before the First Additional Sessions Judge, Dabra was filed against the order dated 10-10-2014 which was dismissed on 18-08-2015. The applicants have filed the present petition against the order of the revisionary Court and prayed to set aside the order dated 01-11-2013 passed by the Magistrate. The order dated 10-10- 2014 is not challenged.

3. I have heard learned counsel for the parties on admission.

4. In the present matter, many questions of law are involved in the case. It is apparent from the order dated 01-11- 2013 that cognizance was taken by the Court of JMFC, Dabra against the applicants. The revision No.55/2014 was filed against that order which was dismissed vide order dated 25-02-2014 and a petition under Section 482 of Cr.P.C. which was registered as M.Cr.C.No.2089/2014 was also dismissed on 12-09-2014 being withdrawn with the liberty that such objections can be raised by the applicants a**t the proper stage** and hence by the order dated 12-09-2014, the order dated 01-11-2013 has attained finality and it could not be challenged further before the committal Court by filing the application. The learned counsel of the applicants has submitted that fresh applications were moved before the Magisterial Court on 22-09-2014 and 27-09-2014 on the various grounds because liberty was granted by the Single Bench of this Court while passing the order dated 12-09-2014.

5. It appears that the liberty as granted in the order dated 12-09-2014 was misunderstood. When the petition under Section 482 of Cr.P.C. was dismissed being withdrawn which was filed against the order dated 01-11-2013 then entire controversy relating to the order dated 01-11-2013 came to an end. No Court can give liberty to agitate the points afresh before the lowest Court all over again which are already settled by the Court. Also the power under Section 482 of Cr.P.C. vested in the High Court cannot be delegated by the grant of liberty. The applicants were not entitled to raise the objections against the order dated 01-11-2013 by filing fresh applications because that order was challenged in a revision petition which was dismissed. That order of revisionary court was again challenged in a petition under Section 482 of Cr.P.C. and that petition was withdrawn which indicates that petition was to be dismissed after hearing the parties and no flaw was found in the order dated 01-11-2013, therefore, it was withdrawn, hence the liberty cannot be granted to re-agitate all the points against the order dated 01-11-2013 passed by the Magisterial Court before the same lowest Court. It should be clear in the mind of litigants as well as judges and magistrates that liberty can be granted within the permissible limit of provisions of various laws that are in force for the time being. Liberty cannot be given to agitate the same points before the trial Court which are already considered and decided by the superior Court.

6. The liberty which was granted vide order dated 12-09-2014 was only granted to the effect that the applicants would be free to prove their alibi before the trial Court at the time of defence evidence and therefore, it was clearly mentioned that the applicants may raise all the objections at appropriate stage before the trial Court and the Magisterial Court was not the trial Court, therefore, no such liberty was granted so that the applicants could file a fresh application to re-agitate the objections against the order dated 01-11-2013 which has already attained the finality. Under these circumstances, the applications filed by the applicants against the order dated 01-11-2013 were not maintainable in the light of order dated 12-09-2014 passed by this Court and the order dated 01-11-2013 has attained finality, the application filed by the applicants were filed without jurisdiction and those could not be entertained and therefore, if both the Courts below have dismissed the applications against the order dated 01-11-2013 then the present matter of the applicants should be dismissed without hearing it on merits. Filing of those applications before

the trial Court amounts to contempt of the order dated 12-09-2014 which cannot be permitted to be done by any Court and therefore, the petition filed by the applicants is liable to be dismissed without hearing.

7. It is pertinent to note that no power under Section 482 of Cr.P.C. is available to the Courts below. In this connection para 15 of the judgment passed by the Apex Court in case of *"Mithabhai Pashabhai Patel Vs. State of Gujarat"*, {(2009) 6 SCC 332} may be perused which is as under:

> *"The investigating agency and/or a court exercise their jurisdiction conferred on them only in terms of the provisions of the Code. The courts subordinate to the High Court even do not have any inherent power under Section 482 of the Code of Criminal Procedure or otherwise."*

It is also be made clear that power under Section 482 of Cr.P.C. cannot be delegated by the High Court to its subordinate Court. Hence, the Magistrate while considering the applications dated 22-09-2014 and 27-09-2014 could not review its own order dated 01-11-2013 when the order dated 01-11-2013 has already attained finality. Both such applications were not maintainable and the Courts below would have dismissed the same being not maintainable.

8. Since the revisionary Court has passed the order dated 18-08-2015 on merits and dismissed the revision, it would not be appropriate to dismiss the petition only because the applications were not maintainable. However, if the matter is considered on merits then it would be apparent that the charge-sheet was filed before the Magisterial Court against other accused persons whereas the investigation was reserved against the applicants -Hargovind Bhargava and Santosh Bhargava under Section 173(8) of Cr.P.C. It is submitted by learned counsel for the applicants that when the subsequent charge-sheet was filed under Section 173(8) of Cr.P.C. and the application under Section 319 of Cr.P.C. was pending before the trial Court relating to the applicants then the Magisterial Court was not competent to pass the order dated 01-11-2013 under Section 173 (8) of Cr.P.C. In support of this contention, attention of this Court is invited to the judgment passed by the Apex Court in the case of *"Jile Singh Vs. State of Uttar Pradesh and another"* {(2012) 3 SCC 383}. However, this judgment is related to the procedure relating to registration of complaint under Section 204 of Cr.P.C. and to exercise the

power under Section 319 of Cr.P.C. at that stage. In the present matter the application under Section 319 of Cr.P.C. was pending before the trial Court and the Magisterial Court (the commitial Court) was not dealing any matter under the provisions of Section 319 of Cr.P.C. and therefore, the law laid in the case of *Jile Singh* (supra) is not applicable in the present case.

9. On the other hand, learned counsel for respondent No.2 has relied upon the judgment passed by the Apex Court in the case of *"Hardeep Singh and others Vs. State of Punjab and others"* {(2014) 2 SCC (Cri) 86}, however, this judgment is related with the provisions of Section 319 of Cr.P.C. whereas it is not a case relating to the provisions of Section 319 of Cr.P.C. and the application of respondent No.2 under Section 319 of Cr.P.C. was pending before the trial Court and therefore, the law laid in the case of *Hardeep Singh and others* (supra) cannot be applied in the present case because the present petition is not filed against the order of trial Court under Section 319 of Cr.P.C.

10. The learned counsel for the applicants has also invited the attention of this Court to the judgment passed by the Apex Court in the case of *Jeffrey J. Diermeier and another Vs. State of West Bengal and another,* {(2010) 6 SCC 243} in which the law has been laid for the provisions of Section 482 of Cr.P.C. It is not held in that judgment that once the order has been challenged from bottom to the top and the challenge was dismissed then again on second challenge, the petition filed by the applicants should be accepted under Section 482 of Cr.P.C., therefore, the law laid in the case of *Jeffrey J. Diermeier* (supra) cannot be applied in the present case.

11. The contention of learned counsel for the applicants is misconceived that the report under Section 173(8) of Cr.P.C. was filed before the Magisterial Court who took the cognizance. It is misconception in the mind of some police officers of the State that they can reserve the investigation of crime for some accused persons and part charge-sheet may be filed against remaining accused persons. In this connection the provisions of Section 173 (1), (2) and (8) may be reproduced as under:

> *"173(1) Every investigation under this Chapter shall be completed without unnecessary delay.*
>
> *** *** ***

173(2) (i) As soon as it is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government, stating-

(a) the names of the parties;

(b) the nature of the information;

(c) the names of the persons who appear to be acquainted with the circumstances of the case;

(d) whether any offence appears to have been committed and, if so, by whom;

(e) whether the accused has been arrested;

(f) whether he has been released on his bond and, if so, weather (sic:whether) with or without sureties;

(g) whether he has been forwarded in custody under section 170.

(ii) The officer shall also communicate, In such manner as may be prescribed by the State Government, the action taken by him, to the person, if any, by whom the information relating to the commission of the offence was first given.

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173 (8) Nothing in this section shall be deemed to preclude ***further investigation*** *in respect of an offence after a report under sub- section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub-sections (2) to (6) shall, as far as may be, apply in relation to such report*

or reports as they apply in relation to a report forwarded under sub- section (2)."

12. In this connection, the provisions of Sections 167 of Cr.P.C. may be referred which are crystal clear and which relate to limitation that if investigation is not completed within a particular period after arrest of the accused and no police report is filed according to the provisions of Section 173(1) and 173(2) of Cr.P.C. then the arrested accused shall get bail due to that non filing of charge-sheet. Though there is no specific definition of word "charge-sheet" but the final police report filed under Section 173 (2) of Cr.P.C., against the accused is known as a charge-sheet. The provisions of Section 173(2) of Cr.P.C. clearly indicates that after completing the investigation, the charge-sheet should be filed and the provisions of Section 173(8) of Cr.P.C. gives residuary power to the investigating officer that after filing of the charge-sheet if any extra material is found in the case then the additional report under Section 173(8) of Cr.P.C. can be filed which is generally known as "supplementary charge-sheet".

13. When the provisions of Section 173(2) and 173(8) of Cr.P.C. simply empowers to file final report and to file supplementary report then no right is accrued to the investigating officer to keep the investigation pending against a particular accused. It is not permissible for the investigating officer to file a charge-sheet against few accused persons on believing the evidence of some eye-witnesses or other witnesses by believing them and to keep the investigation pending against the other accused persons with the pretext that the testimony of such witnesses is yet to be examined for remaining accused persons. The investigating officer cannot be permitted to create any impossible situation before the Court. If a crime is registered and investigation is started then it should be completed within a particular span of time.

14. The investigating officer cannot be permitted to keep the investigation pending for some accused and to file the charge-sheet against the arrested accused to defeat the provisions of Section 167(2) of Cr.P.C. so that bail should not be granted due to incomplete investigation to the persons who were arrested by the investigating officer. But such procedure is commonly practiced in our State by a few investigating officers that they keep the investigation pending for some of the accused as a right in the light of the provisions of Section 173 (8) of Cr.P.C. However due to such procedure the

Session Court starts trial against few accused persons and in the meantime supplementary charge-sheet is filed by adding one or two accused and thereafter re-trial starts if previous trial is not completed and again a piecemeal charge-sheet is filed against remaining accused persons resulting in a retrial or a fresh trial.Such activities of police creates multiplicity of trial against the accused persons who were arrested earlier.

15. In this connection the judgment of Apex Court in the case of *"Joginder Singh and another Vs. State of Punjab and another"* (1979 Cr.L.J. 333) may be referred. A little portion of para 6 and 8 of that judgment is reproduced as under:

> *"6..... .....It will be noticed that both under Section 193 and s. 209 the commitment is of 'the case' and not of 'the accused' whereas under the equivalent provision of the old Code viz. s. 193(1) and Section 207 A it was 'the accused' who was committed and not 'the case'.*
>
> *8. It will thus appear clear that under S.193 read with S.209 the code when a case is committed to the court of session in respect of an offence the court of session takes cognizance of the offence and not of the accused....."*

The legal position is thus clear from the judgment that the case is committed to the Court of Session and accused are not committed to the Court of Session and also that investigating agency is empowered under Section 173 (8) of Cr.P.C. to further investigate the matter after filing of the charge-sheet but not to re-investigate the matter.

16. Similarly the judgment passed by the Apex Court in the case of *"K. Chandrasekhar Vs. State of Kerala and others"*, {(1998) 5 SCC 223}, little portion of para 24 may be referred which is as under:

> *"From a plain reading of the above Section it is evident that even after submission of police report under sub-section (2) on completion of investigation, the police has a right of "further" investigation under sub-section (8) but not "fresh investigation" or "re-investigation"."*

Similarly in the case of *"Vinay Tyagi Vs. Irshad Ali alias Deepak*

and others" {(2013) 5 SCC 762} it is held that power to order/direct "re-investigation" or "de novo" investigation falls in the domain of higher Courts that too in exceptional cases. Similarly in the case of *Mithabhai* (supra), the Apex Court has quoted para 7 of the judgment passed by the Apex Court in the case of *"Ramachandran Vs. R. Udhayakumar"*, {(2008) 5 SCC 413} a small portion of para 13 of that judgment passed in *Mithabhai's* case (supra) is reproduced as under:

> *"It is, however, beyond any cavil that "further investigation" and "re-investigation" stand on different footing. It may be that in a given situation a superior court in exercise of its constitutional power, namely under Articles 226 and 32 of the Constitution of India could direct a "State" to get an offence investigated and/or further investigated by a different agency. Direction of a reinvestigation, however, being forbidden in law, no superior court would ordinarily issue such a direction."*

17. Similarly para 7 of the judgment passed in the case of *Ramachandran* (supra) may be reproduced as under:

> *"7. At this juncture it would be necessary to take note of Section 173 of the Code. From a plain reading of the above section it is evident that even after completion of investigation under sub-section (2) of Section 173 of the Code, the police has right to further investigate under sub-section (8), but not fresh investigation or reinvestigation."*

In the light of the judgment passed by the Apex Court in case of *K. Chandrasekhar* (supra) it is held that report under Section 173(2) of Cr.P.C. shall be filed when investigation is complete. Hence, when charge-sheet is filed then it should be after the complete investigation of the case and not of a particular accused. In case of *Joginder Singh* (supra) it is held that it is a case that is committed to the court of Session and not the accused. If charge sheet is filed for few accused and investigation is reserved for few other accused then it is not a complete charge sheet of a case but it would be a part charge-sheet of the case and in that case, entire case cannot be committed to the court of Sessions. Hence, such part chargesheet can not be filed under Section

173(2) of Cr.P.C. by keeping the right of investigation reserved against remaining accused. Charge-sheet filed under Section 173(2) of Cr.P.C. can be filed when investigation of entire case is complete.

18. Investigation would be complete if the investigation officer would be in a position to opine that crime was found committed and hence charge sheet is filed with the final conclusion of the investigation officer. A clear distinction needs to be drawn amongst power under Section 173(8) of Cr.P.C. for further investigation, which would not result in subsequent reinvestigation. An investigation officer cannot be allowed to reinvestigate his own conclusions. As held by the Apex Court in cases of *Mithabhai* (supra), *Vinay Tyagi* (supra), *Ramchandran* (supra) and *K. Chandrasekhar* (supra) that under the power of Section 173(8) of Cr.P.C. only further investigation can be done by the investigation officer though the investigation agency is changed, but re-investigation or "de novo" investigation cannot be done. Hence when chargesheet is filed, the investigation officer has no right to reserve the investigation for few accused under Section 173(8) of Cr.P.C. because he is not permitted under that provision to reopen the case or reinvestigate the matter.

19. The learned counsel for the State has submitted that in the present case such right of reinvestigation was reserved with the permission of the Magistrate at the time of filing of the chargesheet. Such contention cannot be accepted. The investigation officer cannot reserve any right of reinvestigation either on his own or the magistrate is competent to give such permission. In case of *Ramchandra* (supra) it is held by the Apex Court that police has a right of further investigation under Section 173(8) of Cr.P.C., but does not have any right of fresh investigation or reinvestigation. In case of *Vinay Tyagi* (supra), *Mithabhai* (supra) and *Ramchandran* (supra) it is made clear by the Supreme Court that permission to reinvestigate the matter falls under the domain of superior courts and that too in exceptional cases. Such superior courts can exercise their power under Article 32 or 226 of Constitution of India to change the investigation agency and there also reinvestigation is not considered lawful and the superior court would not ordinarily issue such a direction. Hence, the Magistrate neither can accept a part charge-sheet after a partial investigation nor can permit any police officer to reinvestigate the matter for few accused persons. Hence, at the time of filing of the chargesheet investigation should

be complete of the entire case. Neither any investigation officer can reserve any part investigation (reinvestigation) for any accused at the time of filing of the charge-sheet under Section 173(8) of Cr.P.C. nor the Magistrate can give such permission by accepting the part charge-sheet, when investigation of the case is incomplete.

20. As discussed above the provisions of Section 173(8) of Cr.P.C. does not give any right to the investigating officer to keep the investigation pending against few accused persons. It is for him to complete the investigation of the case within a period prescribed under S. 167 of Cr.P.C. and if he wants to ensure as to whether any offence is made out against any person or not then such conclusion should be obtained prior to filing of charge-sheet against any of the accused persons. After due investigation, it is a right of the police to declare some of the accused persons as absconding or at the time of filing of charge-sheet he may file the report under Section 169 of Cr.P.C. against some of the accused persons with the opinion that no offence is made out against them but the police has no right to reserve the investigation against few accused persons under the residuary provisions of Section 173(8) of Cr.P.C. either to give advantage to a particular accused person or otherwise. If such procedure is not followed then the Magistrate can refuse to take cognizance of the case because the investigation is incomplete and arrested person can be released on bail under Section 167(2) of Cr.P.C.

21. If such a position of law is applied in the present case then though the investigating officer has reserved the investigation against the applicants because of stay granted by this Court but charge-sheet was to be filed against the applicants for the first time and therefore, that was not the charge-sheet under Section 173(8) of Cr.P.C. but it was a report under Section 169 of Cr.P.C. and Magistrate was competent to take cognizance against the applicants under Section 190 of Cr.P.C. Hence, in the light of aforesaid discussions, if the concerned Magistrate took cognizance vide order dated 01-11-2013 then it cannot be said that he had no power to take cognizance against the applicants when the report was filed under Section 173(8) of Cr.P.C. or the application under Section 319 of Cr.P.C. was pending before the trial Court.

22. Learned counsel for the applicants has submitted that under Section 169 of Cr.P.C. if the final report is filed then there is no right with the Magistrate to examine the witnesses along with complainant. Hence, the order dated

01-11-2013 passed by the Magistrate was beyond the jurisdiction because he did not follow the prescribed procedure. However, the contention advanced by learned counsel for the applicants cannot be accepted on this technical ground. It is the duty of the Magistrate while considering the final closure report to hear the complainant and he could examine the complainant to record his objections on the closure report. It is true that the Magistrate also examined a witness Vinod other than the complainant but if the Magistrate could have passed the order on the basis of evidence recorded by him while considering the closure report of police then the cognizance taken by the Magistrate was illegal.

23. If the factual position of the case is considered then there was a named FIR against the applicants and closure report was only filed on the ground of alibi. If alibi was not strong then by a named FIR and the evidence given by various witnesses under Section 161 of Cr.P.C., the Magisterial Court should not have discussed the testimony of the witness and it was competent to take cognizance in the case, if alibi was fishy and it was not shown conclusively that presence of the applicants was not possible at the spot, at the time of incident. If the order dated 01-11-2013 passed by the Magistrate is perused then he has considered other documents of the charge-sheet filed against other accused persons which were available in the case diary and he took cognizance on the basis of evidence given under Section 161 of Cr.P.C. of various witnesses and if he recorded the evidence of Vinod in addition to the plea of complainant -Prakash Chand then it makes no difference. Such recording of evidence of Vinod shall not vitiate the merit of the order dated 01-11-2013. The Magistrate has quoted the judgment passed by the Apex Court in the case of *"Rajendra Singh Vs. State of U.P. and others"* {(2007) Cr.L.J. 4281} in which it is held that the plea of alibi has to be proved against the accused and by that plea the statement of various witnesses recorded under Section 161 of Cr.P.C. cannot be discarded. The plea of alibi should be proved by the accused at the stage of defence. Hence, it is apparent from the order dated 01-11-2013 that the Magistrate took cognizance against the applicants on the basis of evidence otherwise collected by the Investigating Officer and statements recorded under Section 161 of Cr.P.C. Hence, if the evidence of Vinod was recorded by the Magisterial Court while considering the final closure report then it makes no adverse effect to the order dated 01-11-2013.

24. So far as order dated 01-11-2013 is concerned, it depends upon the

named FIR against the applicants and there are some witnesses who have stated against the applicants and the plea of alibi was not of conclusive nature. The applicants have relied upon the report given by the SDO(P), Dabra District Gwalior and the report given by the Station House Officer, Billowa which was prepared in the year 2012 while the charge-sheet was filed against remaining accused persons, however, such report has no value at this stage. If investigation is to be done by the investigating officer who has power of investigation and if any superior officer gives supervision report under Section 36 of the Cr.P.C. then it cannot be considered as a part of investigation. In this connection, the order passed by the Single Bench of Patna High Court in the case of *"Manilal Vs. State of Vihar"*, {2006 Cr.L.J. 3981} may be referred. Therefore, if any parallel enquiry is done by the SDO (P) then it cannot be said to be a part of investigation. According to the evidence of alibi as shown by the applicants is not so cogent, so that, by that evidence, the evidence of various witnesses under Section 161 of Cr.P.C. may be discarded. In this connection the law laid down in the case *Rajendra Singh* (supra) may be referred. Hence, the JMFC, Dabra has taken cognizance vide order dated 01-11-2013 according to the evidence available after due investigation and therefore, it cannot be said that the order dated 01-11-2013 suffers with any infirmity or illegality.

25. On the basis of aforesaid discussions, there is no reason to invoke the inherent power of this Court in favour of the applicants. It would be apparent that the applicants have challenged the order dated 01-11-2013 in a revision as well as with the petition before this Court and again started re-agitating that order by filing of application where such procedure could not be adopted. A litigant cannot be permitted to agitate a particular objection again and again. In such circumstances, looking to the conduct of the applicants, present petition is hereby dismissed at motion stage with imposition of costs of Rs.5,000/- against the applicants. The costs be deposited before the High Court Legal Services Committee within a month from the date of this judgment.

26. Copy of the order be sent to the Secretary/Registrar of the High Court Legal Services Committee for information and directions that if costs is not deposited by the applicants within the stipulated period then appropriate steps be initiated against the applicants before the competent Bench.

27. Copy of the order be sent to the Courts below for information and

compliance.

28. A copy of the order be sent to the Director General of Police of the State of Madhya Pradesh so that a proper circular be issued in consequence of this order. Also one copy of this order be sent to the Registrar General of this Court, Principal Seat at Jabalpur with a request that it be circulated amongst all the Magistrates and Judges of the Session Courts in the State for their guidance.

Order accordingly.