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THE INDIAN LAW REPORTS M.P. SERIES, 2017

(VOL.-2)

JOURNAL SECTION

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

THE MENTAL HEALTHCARE ACT, 2017

No. 10 OF 2017

[Received the assent of the President on the 7th April, 2017 and published in the Gazette of India (Extraordinary), Part II, Section 1(No.10), dated the 7th April, 2017 page no.1-51].

An Act to provide for mental healthcare and services for persons with mental illness and to protect, promote and fulfil the rights of such persons during delivery of mental healthcare and services and for matters connected therewith or incidental thereto.

WHEREAS the Convention on Rights of Persons with Disabilities and its Optional Protocol was adopted on the 13th December, 2006 at United Nations Headquarters in New York and came into force on the 3rd May, 2008;

AND WHEREAS India has signed and ratified the said Convention on the 1st day of October, 2007;

AND WHEREAS it is necessary to align and harmonise the existing laws with the said Convention.

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

CHAPTER I

PRELIMINARY

1. Short title, extent and commencement. *(1)* This Act may be called the Mental Healthcare Act, 2017.

(2) It shall extend to the whole of India.

(3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint; or on the date of completion of the period of nine months from the date on which the Mental Healthcare Act, 2017 receives the assent of the President.

2. Definitions. *(1)* In this Act, unless the context otherwise requires,–

(a) "advance directive" means an advance directive made by a person under section 5;

(b) "appropriate Government" means,—

(i) in relation to a mental health establishment established, owned or controlled by the Central Government or the Administrator of a Union territory having no legislature, the Central Government;

(ii) in relation to a mental health establishment, other than an establishment referred to in sub-clause *(i)*, established, owned or controlled within the territory of—

(A) a State, the State Government;

(B) a Union territory having legislature, the Government of that Union territory;

(c) "Authority" means the Central Mental Health Authority or the State Mental Health Authority, as the case may be;

(d) "Board" means the Mental Health Review Board constituted by the State Authority under sub-section *(1)* of section 80 in such manner as may be prescribed;

(e) "care-giver" means a person who resides with a person with mental illness and is responsible for providing care to that person and includes a relative or any other person who performs this function, either free or with remuneration;

(f) "Central Authority" means the Central Mental Health Authority constituted under section 33;

(g) "clinical psychologist" means a person—

(i) having a recognised qualification in Clinical Psychology from an institution approved and recognised, by the Rehabilitation Council of India, constituted under section 3 of the Rehabilitation Council of India Act, 1992 (34 of 1992); or

(ii) having a Post-Graduate degree in Psychology or Clinical Psychology or Applied Psychology and a Master of Philosophy in Clinical Psychology or Medical and Social Psychology obtained after completion of a full time course of two years which includes supervised clinical training from any University recognised by the University Grants Commission established under the University Grants Commission Act, 1956 (3 of 1956) and approved and recognised by the Rehabilitation Council of India Act, 1992 (34 of 1992) or such recognised qualifications as may be prescribed;

(h) "family" means a group of persons related by blood, adoption or marriage;

(i) "informed consent" means consent given for a specific intervention, without any force, undue influence, fraud, threat, mistake or misrepresentation, and obtained after disclosing to a person adequate information including risks and benefits of, and alternatives to, the specific intervention in a language and manner understood by the person;

(j) "least restrictive alternative" or "least restrictive environment" or "less restrictive option" means offering an option for treatment or a setting for treatment which—

(i) meets the person's treatment needs; and

(ii) imposes the least restriction on the person's rights;

(k) "local authority" means a Municipal Corporation or Municipal Council, or Zilla Parishad, or Nagar Panchayat, or Panchayat, by whatever name called, and includes such other authority or body having administrative control over the mental health establishment or empowered under any law for the time being in force, to function as a local authority in any city or town or village;

(l) "Magistrate" means—

(i) in relation to a metropolitan area within the meaning of

clause *(k)* of section 2 of the Code of Criminal Procedure, 1973 (2 of 1974), a Metropolitan Magistrate;

(ii) in relation to any other area, the Chief Judicial Magistrate, Sub-divisional Judicial Magistrate or such other Judicial Magistrate of the first class as the State Government may, by notification, empower to perform the functions of a Magistrate under this Act;

(m) "medical officer in charge" in relation to any mental health establishment means the psychiatrist or medical practitioner who, for the time being, is in charge of that mental health establishment;

(n) "medical practitioner" means a person who possesses a recognised medical qualification—

(i) as defined in clause *(h)* of section 2 of the Indian Medical Council Act, 1956 (102 of 1956), and whose name has been entered in the State Medical Register, as defined in clause *(k)* of that section; or

(ii) as defined in clause *(h)* of sub-section *(1)* of section 2 of the Indian Medicine Central Council Act, 1970 (48 of 1970), and whose name has been entered in a State Register of Indian Medicine, as defined in clause *(j)* of sub-section *(1)* of that section; or

(iii) as defined in clause *(g)* of sub-section *(1)* of section 2 of the Homoeopathy Central Council Act, 1973 (59 of 1973), and whose name has been entered in a State Register of Homoeopathy, as defined in clause *(i)* of sub-section *(1)* of that section;

(o) "Mental healthcare" includes analysis and diagnosis of a person's mental condition and treatment as well as care and rehabilitation of such person for his mental illness or suspected mental illness;

(p) "mental health establishment" means any health establishment, including Ayurveda, Yoga and Naturopathy, Unani, Siddha and Homoeopathy establishment, by whatever name called, either wholly or partly, meant for the care of persons with mental illness, established,

owned, controlled or maintained by the appropriate Government, local authority, trust, whether private or public, corporation, co-operative society, organisation or any other entity or person, where persons with mental illness are admitted and reside at, or kept in, for care, treatment, convalescence and rehabilitation, either temporarily or otherwise; and includes any general hospital or general nursing home established or maintained by the appropriate Government, local authority, trust, whether private or public, corporation, co-operative society, organisation or any other entity or person; but does not include a family residential place where a person with mental illness resides with his relatives or friends;

(q) "mental health nurse" means a person with a diploma or degree in general nursing or diploma or degree in psychiatric nursing recognised by the Nursing Council of India established under the Nursing Council of India Act, 1947 (38 of 1947) and registered as such with the relevant nursing council in the State;

(r) "mental health professional" means—

(i) a psychiatrist as defined in clause *(x)*; or

(ii) a professional registered with the concerned State Authority under section 55; or

(iii) a professional having a post-graduate degree (Ayurveda) in Mano Vigyan Avum Manas Roga or a post-graduate degree (Homoeopathy) in Psychiatry or a post-graduate degree (Unani) in Moalijat (Nafasiyatt) or a post-graduate degree (Siddha) in Sirappu Maruthuvam;

(s) "mental illness" means a substantial disorder of thinking, mood, perception, orientation or memory that grossly impairs judgment, behaviour, capacity to recognise reality or ability to meet the ordinary demands of life, mental conditions associated with the abuse of alcohol and drugs, but does not include mental retardation which is a condition of arrested or incomplete development of mind of a person, specially characterised by subnormality of intelligence;

(t) "minor" means a person who has not completed the age of eighteen years;

(u) "notification" means a notification published in the Official Gazette and the expression "notify" shall be construed accordingly;

(v) "prescribed" means prescribed by rules made under this Act;

(w) "prisoner with mental illness" means a person with mental illness who is an under-trial or convicted of an offence and detained in a jail or prison;

(x) "psychiatric social worker" means a person having a post-graduate degree in Social Work and a Master of Philosophy in Psychiatric Social Work obtained after completion of a full time course of two years which includes supervised clinical training from any University recognised by the University Grants Commission established under the University Grants Commission Act, 1956 (3 of 1956) or such recognised qualifications, as may be prescribed;

(y) "psychiatrist" means a medical practitioner possessing a post-graduate degree or diploma in psychiatry awarded by an university recognised by the University Grants Commission established under the University Grants Commission Act, 1956 (3 of 1956), or awarded or recognised by the National Board of Examinations and included in the First Schedule to the Indian Medical Council Act, 1956 (102 of 1956), or recognised by the Medical Council of India, constituted under the Indian Medical Council Act, 1956, and includes, in relation to any State, any medical officer who having regard to his knowledge and experience in psychiatry, has been declared by the Government of that State to be a psychiatrist for the purposes of this Act;

(z) "regulations" means regulations made under this Act;

(za) "relative" means any person related to the person with mental illness by blood, marriage or adoption;

(zb) "State Authority" means the State Mental Health Authority established under section 45.

(2) The words and expressions used and not defined in this Act but defined in the Indian Medical Council Act, 1956 (102 of 1956) or the Indian Medicine Central Council Act, 1970 (48 of 1970) and not inconsistent with this Act shall have the meanings respectively assigned to them in those Acts.

CHAPTER II

MENTAL ILLNESS AND CAPACITY TO MAKE MENTAL HEALTHCARE AND TREATMENT DECISIONS

3. Determination of mental illness. *(1)* Mental illness shall be determined in accordance with such nationally or internationally accepted medical standards (including the latest edition of the International Classification of Disease of the World Health Organisation) as may be notified by the Central Government.

(2) No person or authority shall classify a person as a person with mental illness, except for purposes directly relating to the treatment of the mental illness or in other matters as covered under this Act or any other law for the time being in force.

(3) Mental illness of a person shall not be determined on the basis of,–

(a) political, economic or social status or membership of a cultural, racial or religious group, or for any other reason not directly relevant to mental health status of the person;

(b) non-conformity with moral, social, cultural, work or political values or religious beliefs prevailing in a person's community.

(4) Past treatment or hospitalisation in a mental health establishment though relevant, shall not by itself justify any present or future determination of the person's mental illness.

(5) The determination of a person's mental illness shall alone not imply or be taken to mean that the person is of unsound mind unless he has been declared as such by a competent court.

4. Capacity to make mental healthcare and treatment decisions.

(1) Every person, including a person with mental illness shall be deemed to have capacity to make decisions regarding his mental healthcare or treatment if such person has ability to—

(a) understand the information that is relevant to take a decision on the treatment or admission or personal assistance; or

(b) appreciate any reasonably foreseeable consequence of a

decision or lack of decision on the treatment or admission or personal assistance; or

(c) communicate the decision under sub-clause *(a)* by means of speech, expression, gesture or any other means.

(2) The information referred to in sub-section *(1)* shall be given to a person using simple language, which such person understands or in sign language or visual aids or any other means to enable him to understand the information.

(3) Where a person makes a decision regarding his mental healthcare or treatment which is perceived by others as inappropriate or wrong, that by itself, shall not mean that the person does not have the capacity to make mental healthcare or treatment decision, so long as the person has the capacity to make mental healthcare or treatment decision under sub-section *(1)*.

CHAPTER III

ADVANCE DIRECTIVE

5. Advance directive. *(1)* Every person, who is not a minor, shall have a right to make an advance directive in writing, specifying any or all of the following, namely:—

(a) the way the person wishes to be cared for and treated for a mental illness;

(b) the way the person wishes not to be cared for and treated for a mental illness;

(c) the individual or individuals, in order of precedence, he wants to appoint as his nominated representative as provided under section 14.

(2) An advance directive under sub-section *(1)* may be made by a person irrespective of his past mental illness or treatment for the same.

(3) An advance directive made under sub-section *(1)*, shall be invoked only when such person ceases to have capacity to make mental healthcare or treatment decisions and shall remain effective until such person regains capacity to make mental healthcare or treatment decisions.

(4) Any decision made by a person while he has the capacity to make mental healthcare and treatment decisions shall over-ride any previously written advance directive by such person.

(5) Any advance directive made contrary to any law for the time being in force shall be *ab initio* void.

6. Manner of making advance directive. An advance directive shall be made in the manner as may be specified by the regulations made by the Central Authority.

7. Maintenance of online register. Subject to the provisions contained in clause *(a)* of sub-section *(1)* of section 91, every Board shall maintain an online register of all advance directives registered with it and make them available to the concerned mental health professionals as and when required.

8. Revocation, amendment or cancellation of advance directive.

(1) An advance directive made under section 6 may be revoked, amended or cancelled by the person who made it at any time.

(2) The procedure for revoking, amending or cancelling an advance directive shall be the same as for making an advance directive under section 6.

9. Advance directive not to apply to emergency treatment. The advance directive shall not apply to the emergency treatment given under section 103 to a person who made the advance directive.

10. Duty to follow advance directive. It shall be the duty of every medical officer in charge of a mental health establishment and the psychiatrist in charge of a person's treatment to propose or give treatment to a person with mental illness, in accordance with his valid advance directive, subject to section 11.

11. Power to review, alter, modify or cancel advance directive.

(1) Where a mental health professional or a relative or a care-giver of a person desires not to follow an advance directive while treating a person with mental illness, such mental health professional or the relative or the care-giver of the person shall make an application to the concerned Board to review, alter, modify or cancel the advance directive.

(2) Upon receipt of the application under sub-section *(1)*, the Board shall, after giving an opportunity of hearing to all concerned parties (including the person whose advance directive is in question), either uphold, modify, alter or cancel the advance directive after taking into consideration the following, namely:—

(a) whether the advance directive was made by the person out of his own free will and free from force, undue influence or coercion; or

(b) whether the person intended the advance directive to apply to the present circumstances, which may be different from those anticipated; or

(c) whether the person was sufficiently well informed to make the decision; or

(d) whether the person had capacity to make decisions relating to his mental healthcare or treatment when such advanced directive was made; or

(e) whether the content of the advance directive is contrary to other laws or constitutional provisions.

(3) The person writing the advance directive and his nominated representative shall have a duty to ensure that the medical officer in charge of a mental health establishment or a medical practitioner or a mental health professional, as the case may be, has access to the advance directive when required.

(4) The legal guardian shall have right to make an advance directive in writing in respect of a minor and all the provisions relating to advance directive, *mutatis mutandis*, shall apply to such minor till such time he attains majority.

12. Review of advance directives. *(1)* The Central Authority shall regularly and periodically review the use of advance directives and make recommendations in respect thereof.

(2) The Central Authority in its review under sub-section *(1)* shall give specific consideration to the procedure for making an advance directive and also examine whether the existing procedure protects the rights of persons with mental illness.

(3) The Central Authority may modify the procedure for making an advance directive or make additional regulations regarding the procedure for advance directive to protect the rights of persons with mental illness.

13. Liability of medical health professional in relation to advance directive. *(1)* A medical practitioner or a mental health professional shall not be held liable for any unforeseen consequences on following a valid advance directive.

(2) The medical practitioner or mental health professional shall not be held liable for not following a valid advance directive, if he has not been given a copy of the valid advance directive.

CHAPTER IV

NOMINATED REPRESENTATIVE

14. Appointment and revocation of nominated representative. *(1)* Notwithstanding anything contained in clause *(c)* of sub-section *(1)* of section 5, every person who is not a minor, shall have a right to appoint a nominated representative.

(2) The nomination under sub-section *(1)* shall be made in writing on plain paper with the person's signature or thumb impression of the person referred to in that sub-section.

(3) The person appointed as the nominated representative shall not be a minor, be competent to discharge the duties or perform the functions assigned to him under this Act, and give his consent in writing to the mental health professional to discharge his duties and perform the functions assigned to him under this Act.

(4) Where no nominated representative is appointed by a person under sub-section *(1)*, the following persons for the purposes of this Act in the order of precedence shall be deemed to be the nominated representative of a person with mental illness, namely:—

(a) the individual appointed as the nominated representative in the advance directive under clause *(c)* of sub-section *(1)* of section 5; or

(b) a relative, or if not available or not willing to be the nominated

representative of such person; or

(c) a care-giver, or if not available or not willing to be the nominated representative of such person; or

(d) a suitable person appointed as such by the concerned Board; or

(e) if no such person is available to be appointed as a nominated representative, the Board shall appoint the Director, Department of Social Welfare, or his designated representative, as the nominated representative of the person with mental illness:

Provided that a person representing an organisation registered under the Societies Registration Act, 1860 (21 of 1860) or any other law for the time being in force, working for persons with mental illness, may temporarily be engaged by the mental health professional to discharge the duties of a nominated representative pending appointment of a nominated representative by the concerned Board.

(5) The representative of the organisation, referred to in the proviso to sub-section *(4)*, may make a written application to the medical officer in-charge of the mental health establishment or the psychiatrist in-charge of the person's treatment, and such medical officer or psychiatrist, as the case may be, shall accept him as the temporary nominated representative, pending appointment of a nominated representative by the concerned Board.

(6) A person who has appointed any person as his nominated representative under this section may revoke or alter such appointment at any time in accordance with the procedure laid down for making an appointment of nominated representative under sub-section *(1)*.

(7) The Board may, if it is of the opinion that it is in the interest of the person with mental illness to do so, revoke an appointment made by it under this section, and appoint a different representative under this section.

(8) The appointment of a nominated representative, or the inability of a person with mental illness to appoint a nominated representative, shall not be construed as the lack of capacity of the person to take decisions about his mental healthcare or treatment.

(9) All persons with mental illness shall have capacity to make mental healthcare or treatment decisions but may require varying levels of support

from their nominated representative to make decisions.

15. Nominated representative of minor. *(1)* Notwithstanding anything contained in section 14, in case of minors, the legal guardian shall be their nominated representative, unless the concerned Board orders otherwise under sub-section *(2)*.

(2) Where on an application made to the concerned Board, by a mental health professional or any other person acting in the best interest of the minor, and on evidence presented before it, the concerned Board is of the opinion that,—

(a) the legal guardian is not acting in the best interests of the minor; or

(b) the legal guardian is otherwise not fit to act as the nominated representative of the minor,

it may appoint, any suitable individual who is willing to act as such, the nominated representative of the minor with mental illness:

Provided that in case no individual is available for appointment as a nominated representative, the Board shall appoint the Director in the Department of Social Welfare of the State in which such Board is located, or his nominee, as the nominated representative of the minor with mental illness.

16. Revocation, alteration, etc., of nominated representative by Board. The Board, on an application made to it by the person with mental illness, or by a relative of such person, or by the psychiatrist responsible for the care of such person, or by the medical officer in-charge of the mental health establishment where the individual is admitted or proposed to be admitted, may revoke, alter or modify the order made under clause *(e)* of sub-section *(4)* of section 14 or under sub-section *(2)* of section 15.

17. Duties of nominated representative. While fulfilling his duties under this Act, the nominated representative shall—

(a) consider the current and past wishes, the life history, values, cultural background and the best interests of the person with mental illness;

(b) give particular credence to the views of the person with mental

illness to the extent that the person understands the nature of the decisions under consideration;

(c) provide support to the person with mental illness in making treatment decisions under section 89 or section 90;

(d) have right to seek information on diagnosis and treatment to provide adequate support to the person with mental illness;

(e) have access to the family or home based rehabilitation services as provided under clause *(c)* of sub-section *(4)* of section 18 on behalf of and for the benefit of the person with mental illness;

(f) be involved in discharge planning under section 98;

(g) apply to the mental health establishment for admission under section 87 or section 89 or section 90;

(h) apply to the concerned Board on behalf of the person with mental illness for discharge under section 87 or section 89 or section 90;

(i) apply to the concerned Board against violation of rights of the person with mental illness in a mental health establishment;

(j) appoint a suitable attendant under sub-section *(5)* or sub-section *(6)* of section 87;

(k) have the right to give or withhold consent for research under circumstances mentioned under sub-section *(3)* of section 99.

CHAPTER V

RIGHTS OF PERSONS WITH MENTAL ILLNESS

18. Right to access mental-health care. *(1)* Every person shall have a right to access mental healthcare and treatment from mental health services run or funded by the appropriate Government.

(2) The right to access mental healthcare and treatment shall mean mental health services of affordable cost, of good quality, available in sufficient quantity, accessible geographically, without discrimination on the basis of gender, sex,

sexual orientation, religion, culture, caste, social or political beliefs, class, disability or any other basis and provided in a manner that is acceptable to persons with mental illness and their families and care-givers.

(3) The appropriate Government shall make sufficient provision as may be necessary, for a range of services required by persons with mental illness.

(4) Without prejudice to the generality of range of services under sub-section *(3)*, such services shall include—

(a) provision of acute mental healthcare services such as outpatient and inpatient services;

(b) provision of half-way homes, sheltered accommodation, supported accommodation as may be prescribed;

(c) provision for mental health services to support family of person with mental illness or home based rehabilitation;

(d) hospital and community based rehabilitation establishments and services as may be prescribed;

(e) provision for child mental health services and old age mental health services.

(5) The appropriate Government shall,—

(a) integrate mental health services into general healthcare services at all levels of healthcare including primary, secondary and tertiary healthcare and in all health programmes run by the appropriate Government;

(b) provide treatment in a manner, which supports persons with mental illness to live in the community and with their families;

(c) ensure that the long term care in a mental health establishment for treatment of mental illness shall be used only in exceptional circumstances, for as short a duration as possible, and only as a last resort when appropriate community based treatment has been tried and shown to have failed;

(d) ensure that no person with mental illness (including children and older persons) shall be required to travel long distances to access

mental health services and such services shall be available close to a place where a person with mental illness resides;

(e) ensure that as a minimum, mental health services run or funded by Government shall be available in each district;

(f) ensure, if minimum mental health services specified under sub-clause *(e)* of sub-section *(4)* are not available in the district where a person with mental illness resides, that the person with mental illness is entitled to access any other mental health service in the district and the costs of treatment at such establishments in that district will be borne by the appropriate Government:

Provided that till such time the services under this sub-section are made available in a health establishment run or funded by the appropriate Government, the appropriate Government shall make rules regarding reimbursement of costs of treatment at such mental health establishment.

(6) The appropriate Government shall make available a range of appropriate mental health services specified under sub-section *(4)* of section 18 at all general hospitals run or funded by such Government and basic and emergency mental healthcare services shall be available at all community health centres and upwards in the public health system run or funded by such Government.

(7) Persons with mental illness living below the poverty line whether or not in possession of a below poverty line card, or who are destitute or homeless shall be entitled to mental health treatment and services free of any charge and at no financial cost at all mental health establishments run or funded by the appropriate Government and at other mental health establishments designated by it.

(8) The appropriate Government shall ensure that the mental health services shall be of equal quality to other general health services and no discrimination be made in quality of services provided to persons with mental illness.

(9) The minimum quality standards of mental health services shall be as specified by regulations made by the State Authority.

(10) Without prejudice to the generality of range of services under sub-

section *(3)* of section 18, the appropriate Government shall notify Essential Drug List and all medicines on the Essential Drug List shall be made available free of cost to all persons with mental illness at all times at health establishments run or funded by the appropriate Government starting from Community Health Centres and upwards in the public health system:

Provided that where the health professional of ayurveda, yoga, unani, siddha, homoeopathy or naturopathy systems recognised by the Central Government are available in any health establishment, the essential medicines from any similar list relating to the appropriate ayurveda, yoga, unani, siddha, homoeopathy or naturopathy systems shall also be made available free of cost to all persons with mental illness.

(11) The appropriate Government shall take measures to ensure that necessary budgetary provisions in terms of adequacy, priority, progress and equity are made for effective implementation of the provisions of this section.

Explanation.—For the purposes of sub-section *(11)*, the expressions–

(i) "adequacy" means in terms of how much is enough to offset inflation;

(ii) "priority" means in terms of compared to other budget heads;

(iii) "equity" means in terms of fair allocation of resources taking into account the health, social and economic burden of mental illness on individuals, their families and care-givers;

(iv) "progress" means in terms of indicating an improvement in the State's response.

19. Right to community living. *(1)* Every person with mental illness shall,—

(a) have a right to live in, be part of and not be segregated from society; and

(b) not continue to remain in a mental health establishment merely because he does not have a family or is not accepted by his family or is homeless or due to absence of community based facilities.

(2) Where it is not possible for a mentally ill person to live with his family or relatives, or where a mentally ill person has been abandoned

by his family or relatives, the appropriate Government shall provide support as appropriate including legal aid and to facilitate exercising his right to family home and living in the family home.

(3) The appropriate Government shall, within a reasonable period, provide for or support the establishment of less restrictive community based establishments including half-way homes, group homes and the like for persons who no longer require treatment in more restrictive mental health establishments such as long stay mental hospitals.

20. Right to protection from cruel, inhuman and degrading treatment. *(1)* Every person with mental illness shall have a right to live with dignity.

(2) Every person with mental illness shall be protected from cruel, inhuman or degrading treatment in any mental health establishment and shall have the following rights, namely:—

(a) to live in safe and hygienic environment;

(b) to have adequate sanitary conditions;

(c) to have reasonable facilities for leisure, recreation, education and religious practices;

(d) to privacy;

(e) for proper clothing so as to protect such person from exposure of his body to maintain his dignity;

(f) to not be forced to undertake work in a mental health establishment and to receive appropriate remuneration for work when undertaken;

(g) to have adequate provision for preparing for living in the community;

(h) to have adequate provision for wholesome food, sanitation, space and access to articles of personal hygiene, in particular, women's personal hygiene be adequately addressed by providing access to items that may be required during menstruation;

(i) to not be subject to compulsory tonsuring (shaving of head

hair);

(j) to wear own personal clothes if so wished and to not be forced to wear uniforms provided by the establishment; and

(k) to be protected from all forms of physical, verbal, emotional and sexual abuse.

21. Right to equality and non-discrimination. *(1)* Every person with mental illness shall be treated as equal to persons with physical illness in the provision of all healthcare which shall include the following, namely:–

(a) there shall be no discrimination on any basis including gender, sex, sexual orientation, religion, culture, caste, social or political beliefs, class or disability;

(b) emergency facilities and emergency services for mental illness shall be of the same quality and availability as those provided to persons with physical illness;

(c) persons with mental illness shall be entitled to the use of ambulance services in the same manner, extent and quality as provided to persons with physical illness;

(d) living conditions in health establishments shall be of the same manner, extent and quality as provided to persons with physical illness; and

(e) any other health services provided to persons with physical illness shall be provided in same manner, extent and quality to persons with mental illness.

(2) A child under the age of three years of a woman receiving care, treatment or rehabilitation at a mental health establishment shall ordinarily not be separated from her during her stay in such establishment:

Provided that where the treating Psychiatrist, based on his examination of the woman, and if appropriate, on information provided by others, is of the opinion that there is risk of harm to the child from the woman due to her mental illness or it is in the interest and safety of the child, the child shall be temporarily separated from the woman during her stay at the mental health establishment:

Provided further that the woman shall continue to have access to the child under such supervision of the staff of the establishment or her family, as may be appropriate, during the period of separation.

(3) The decision to separate the woman from her child shall be reviewed every fifteen days during the woman's stay in the mental health establishment and separation shall be terminated as soon as conditions which required the separation no longer exist:

Provided that any separation permitted as per the assessment of a mental health professional, if it exceeds thirty days at a stretch, shall be required to be approved by the respective Authority.

(4) Every insurer shall make provision for medical insurance for treatment of mental illness on the same basis as is available for treatment of physical illness.

22. Right to information. *(1)* A person with mental illness and his nominated representative shall have the rights to the following information, namely:—

(a) the provision of this Act or any other law for the time being in force under which he has been admitted, if he is being admitted, and the criteria for admission under that provision;

(b) of his right to make an application to the concerned Board for a review of the admission;

(c) the nature of the person's mental illness and the proposed treatment plan which includes information about treatment proposed and the known side effects of the proposed treatment;

(d) receive the information in a language and form that such person receiving the information can understand.

(2) In case complete information cannot be given to the person with mental illness at the time of the admission or the start of treatment, it shall be the duty of the medical officer or psychiatrist in-charge of the person's care to ensure that full information is provided promptly when the individual is in a position to receive it:

Provided that where the information has not been given to the person

with mental illness at the time of the admission or the start of treatment, the medical officer or psychiatrist in charge of the person's care shall give the information to the nominated representative immediately.

23. Right to confidentiality. *(1)* A person with mental illness shall have the right to confidentiality in respect of his mental health, mental healthcare, treatment and physical healthcare.

(2) All health professionals providing care or treatment to a person with mental illness shall have a duty to keep all such information confidential which has been obtained during care or treatment with the following exceptions, namely:–

(a) release of information to the nominated representative to enable him to fulfil his duties under this Act;

(b) release of information to other mental health professionals and other health professionals to enable them to provide care and treatment to the person with mental illness;

(c) release of information if it is necessary to protect any other person from harm or violence;

(d) only such information that is necessary to protect against the harm identified shall be released;

(e) release only such information as is necessary to prevent threat to life;

(f) release of information upon an order by concerned Board or the Central Authority or High Court or Supreme Court or any other statutory authority competent to do so; and

(g) release of information in the interests of public safety and security.

24. Restriction on release of information in respect of mental illness. *(1)* No photograph or any other information relating to a person with mental illness undergoing treatment at a mental health establishment shall be released to the media without the consent of the person with mental illness.

(2) The right to confidentiality of person with mental illness shall also apply to all information stored in electronic or digital format in real or virtual space.

25. Right to access medical records. *(1)* All persons with mental illness shall have the right to access their basic medical records as may be prescribed.

(2) The mental health professional in charge of such records may withhold specific information in the medical records if disclosure would result in,—

(a) serious mental harm to the person with mental illness; or

(b) likelihood of harm to other persons.

(3) When any information in the medical records is withheld from the person, the mental health professional shall inform the person with mental illness of his right to apply to the concerned Board for an order to release such information.

26. Right to personal contacts and communication. *(1)* A person with mental illness admitted to a mental health establishment shall have the right to refuse or receive visitors and to refuse or receive and make telephone or mobile phone calls at reasonable times subject to the norms of such mental health establishment.

(2) A person with mental illness admitted in a mental health establishment may send and receive mail through electronic mode including through e-mail.

(3) Where a person with mental illness informs the medical officer or mental health professional in charge of the mental health establishment that he does not want to receive mail or email from any named person in the community, the medical officer or mental health professional in charge may restrict such communication by the named person with the person with mental illness.

(4) Nothing contained in sub-sections *(1)* to *(3)* shall apply to visits from, telephone calls to, and from mail or e-mail to, and from individuals, specified under clauses *(a)* to *(f)* under any circumstances, namely:—

(a) any Judge or officer authorised by a competent court;

(b) members of the concerned Board or the Central Authority or the State Authority;

(c) any member of the Parliament or a Member of State Legislature;

(d) nominated representative, lawyer or legal representative of the person;

(e) medical practitioner in charge of the person's treatment;

(f) any other person authorised by the appropriate Government.

27. Right to legal aid. *(1)* A person with mental illness shall be entitled to receive free legal services to exercise any of his rights given under this Act.

(2) It shall be the duty of magistrate, police officer, person in charge of such custodial institution as may be prescribed or medical officer or mental health professional in charge of a mental health establishment to inform the person with mental illness that he is entitled to free legal services under the Legal Services Authorities Act, 1987 (39 of 1987) or other relevant laws or under any order of the court if so ordered and provide the contact details of the availability of services.

28. Right to make complaints about deficiencies in provision of services. *(1)* Any person with mental illness or his nominated representative, shall have the right to complain regarding deficiencies in provision of care, treatment and services in a mental health establishment to,—

(a) the medical officer or mental health professional in charge of the establishment and if not satisfied with the response;

(b) the concerned Board and if not satisfied with the response;

(c) the State Authority.

(2) The provisions for making complaint in sub-section *(1)*, is without prejudice to the rights of the person to seek any judicial remedy for violation of his rights in a mental health establishment or by any mental health professional either under this Act or any other law for the time being in force.

CHAPTER VI

DUTIES OF APPROPRIATE GOVERNMENT

29. Promotion of mental health and preventive programmes. *(1)* The appropriate Government shall have a duty to plan, design and implement programmes for the promotion of mental health and prevention of mental illness in the country.

(2) Without prejudice to the generality of the provisions contained in sub-section *(1)*, the appropriate Government shall, in particular, plan, design and implement public health programmes to reduce suicides and attempted suicides in the country.

30. Creating awareness about mental health and illness and reducing stigma associated with mental illness. The appropriate Government shall take all measures to ensure that,—

(a) the provisions of this Act are given wide publicity through public media, including television, radio, print and online media at regular intervals;

(b) the programmes to reduce stigma associated with mental illness are planned, designed, funded and implemented in an effective manner;

(c) the appropriate Government officials including police officers and other officers of the appropriate Government are given periodic sensitisation and awareness training on the issues under this Act.

31. Appropriate Government to take measures as regard to human resource development and training, etc. *(1)* The appropriate Government shall take measures to address the human resource requirements of mental health services in the country by planning, developing and implementing educational and training programmes in collaboration with institutions of higher education and training, to increase the human resources available to deliver mental health interventions and to improve the skills of the available human resources to better address the needs of persons with mental illness.

(2) The appropriate Government shall, at the minimum, train all medical officers in public healthcare establishments and all medical officers in the prisons or jails to provide basic and emergency mental healthcare.

(3) The appropriate Government shall make efforts to meet internationally accepted guidelines for number of mental health professionals on the basis of population, within ten years from the commencement of this Act.

32. Co-ordination within appropriate Government. The appropriate Government shall take all measures to ensure effective co-ordination between services provided by concerned Ministries and Departments such as those

dealing with health, law, home affairs, human resources, social justice, employment, education, women and child development, medical education to address issues of mental health care.

CHAPTER VII

CENTRAL MENTAL HEALTH AUTHORITY

33. Establishment of Central Authority. The Central Government shall, within a period of nine months from the date on which this Act receives the assent of the President, by notification, establish, for the purposes of this Act, an Authority to be known as the Central Mental Health Authority.

34. Composition of Central Authority. *(1)* The Central Authority shall consist of the following, namely:—

(a) Secretary or Additional Secretary to the Government of India in the Department of Health and Family Welfare—chairperson *ex officio;*

(b) Joint Secretary to the Government of India in the Department of Health and Family Welfare, in charge of mental health—member *ex officio;*

(c) Joint Secretary to the Government of India in the Department of Ayurveda, Yoga and Naturopathy, Unani, Siddha and Homeopathy—member *ex officio;*

(d) Director General of Health Services—member *ex officio;*

(e) Joint Secretary to the Government of India in the Department of Disability Affairs of the Ministry of Social Justice and Empowerment–member *ex officio;*

(f) Joint Secretary to the Government of India in the Ministry of Women and Child Development— member *ex officio;*

(g) Directors of the Central Institutions for Mental Health—members *ex officio;*

(h) such other *ex officio* representatives from the relevant Central

Government Ministries or Departments;

(i) one mental health professional as defined in item *(iii)* of clause *(r)* of sub-section *(1)* of section 2 having at least fifteen years experience in the field, to be nominated by the Central Government—member;

(j) one psychiatric social worker having at least fifteen years experience in the field, to be nominated by the Central Government—member;

(k) one clinical psychologist having at least fifteen years experience in the field, to be nominated by the Central Government—member;

(l) one mental health nurse having at least fifteen years experience in the field of mental health, to be nominated by the Central Government–member;

(m) two persons representing persons who have or have had mental illness, to be nominated by the Central Government—members;

(n) two persons representing care-givers of persons with mental illness or organisations representing care-givers, to be nominated by the Central Government—members;

(o) two persons representing non-governmental organisations which provide services to persons with mental illness, to be nominated by the Central Government—members;

(p) two persons representing areas relevant to mental health, if considered necessary.

(2) The members referred to in clauses *(h)* to *(p)* of sub-section *(1)*, shall be nominated by the Central Government in such manner as may be prescribed.

35. Term of office, salaries and allowances of chairperson and members. *(1)* The members of the Central Authority referred to in clauses *(h)* to *(p)* of sub-section *(1)* of section 34 shall hold office as such for a term of three years from the date of nomination and shall be eligible for reappointment:

Provided that a member shall not hold office as such after he has attained the age of seventy years.

(2) The chairperson and other *ex officio* members of the Authority shall hold office as such chairperson or member, as the case may be, so long as he holds the office by virtue of which he is nominated.

(3) **The salaries and allowances payable to, and the other terms and conditions of service of, the chairperson and other members shall be such as may be prescribed.**

36. Resignation. A member of the Central Authority may, by notice in writing under his hand addressed to the Central Government, resign his office:

Provided that a member shall, unless he is permitted by the Central Government to relinquish his office sooner, continue to hold office until the expiry of three months from the date of receipt of such notice or until a person duly appointed as his successor enters upon the office or until the expiry of his term of office, whichever is the earliest.

37. Filling of vacancies. The Central Government shall, within two months from the date of occurrence of any vacancy by reason of death, resignation or removal of a member of the Authority and three months before the superannuation or completion of the term of office of any member of that Authority, make nomination for filling up of the vacancy.

38. Vacancies, etc., not to invalidate proceedings of Central Authority. No act or proceeding of the Central Authority shall be invalid merely by reason of—

(a) any vacancy in, or any defect in the constitution of, the Authority; or

(b) any defect in the appointment of a person as a member of the Authority; or

(c) any irregularity in the procedure of the Authority not affecting the merits of the case.

39. Member not to participate in meetings in certain cases. Any member having any direct or indirect interest, whether pecuniary or otherwise, in any matter coming up for consideration at a meeting of the Central Authority, shall, as soon as possible after the relevant circumstances have come to his knowledge, disclose the nature of his interest at such meeting and such disclosure shall be recorded in the proceedings of the Central Authority, and

the member shall not take any part in any deliberation or decision of the Authority with respect to that matter.

40. Officers and other employees of Central Authority. *(1)* There shall be a chief executive officer of the Authority, not below the rank of the Director to the Government of India, to be appointed by the Central Government.

(2) The Authority may, with the approval of the Central Government, determine the number, nature and categories of other officers and employees required by the Central Authority in the discharge of its functions.

(3) The salaries and allowances payable to, and the other terms and conditions of service (including the qualifications, experience and manner of appointment) of, the chief executive officer and other officers and employees of the Central Authority shall be such as may be specified by regulations with the approval of the Central Government.

41. Functions of chief executive officer of Central Authority. *(1)* The chief executive officer shall be the legal representative of the Central Authority and shall be responsible for—

(a) the day-to-day administration of the Central Authority;

(b) implementing the work programmes and decisions adopted by the Central Authority;

(c) drawing up of proposal for the Central Authority's work programmes;

(d) the preparation of the statement of revenue and expenditure and the execution of the budget of the Central Authority.

(2) Every year, the chief executive officer shall submit to the Central Authority for approval—

(a) a general report covering all the activities of the Central Authority in the previous year;

(b) programmes of work;

(c) the annual accounts for the previous year; and

(d) the budget for the coming year.

(3) The chief executive officer shall have administrative control over the officers and other employees of the Central Authority.

42. Transfer of assets, liabilities of Central Authority. On the establishment of the Central Authority—

(a) all the assets and liabilities of the Central Authority for Mental Health Services constituted under sub-section *(1)* of section 3 of the Mental Health Act, 1987 (14 of 1987) shall stand transferred to, and vested in, the Central Authority.

Explanation.—The assets of such Central Authority for Mental Health Services shall be deemed to include all rights and powers, and all properties, whether movable or immovable, including, in particular, cash balances, deposits and all other interests and rights in, or arising out of, such properties as may be in the possession of such Unique Identification Authority of India and all books of account and other documents relating to the same; and liabilities shall be deemed to include all debts, liabilities and obligations of whatever kind;

(b) without prejudice to the provisions of clause *(a)*, all data and information collected during enrolment, all details of authentication performed, debts, obligations and liabilities incurred, all contracts entered into and all matters and things engaged to be done by, with or for such Central Authority for Mental Health Services immediately before that day, for or in connection with the purpose of the said Central Authority for Mental Health Services, shall be deemed to have been incurred, entered into or engaged to be done by, with or for, the Central Authority;

(c) all sums of money due to the Central Authority for Mental Health Services immediately before that day shall be deemed to be due to the Central Authority; and

(d) all suits and other legal proceedings instituted or which could have been instituted by or against such Central Authority for Mental Health Services immediately before that day may be continued or may be instituted by or against the Central Authority.

43. Functions of Central Authority. *(1)* The Central Authority shall–

(a) register all mental health establishments under the control of

the Central Government and maintain a register of all mental health establishments in the country based on information provided by all State Mental Health Authorities of registered establishments and compile update and publish (including online on the internet) a register of such establishments;

(b) develop quality and service provision norms for different types of mental health establishments under the Central Government;

(c) supervise all mental health establishments under the Central Government and receive complaints about deficiencies in provision of services;

(d) maintain a national register of clinical psychologists, mental health nurses and psychiatric social workers based on information provided by all State Authorities of persons registered to work as mental health professionals for the purpose of this Act and publish the list (including online on the internet) of such registered mental health professionals;

(e) train all persons including law enforcement officials, mental health professionals and other health professionals about the provisions and implementation of this Act;

(f) advise the Central Government on all matters relating to mental healthcare and services;

(g) discharge such other functions with respect to matters relating to mental health as the Central Government may decide:

Provided that the mental health establishments under the control of the Central Government, before the commencement of this Act, registered under the Mental Health Act, 1987 (14 of 1987) or any other law for the time being in force, shall be deemed to have been registered under the provisions of this Act and copy of such registration shall be furnished to the Central Authority.

(2) The procedure for registration (including the fees to be levied for such registration) of the mental health establishments under this section shall be such as may be prescribed by the Central Government.

44. Meetings of Central Authority. *(1)* The Central Authority shall meet at such times (not less than twice in a year) and places and shall observe

such rules of procedure in regard to the transaction of business at its meetings (including quorum at such meetings) as may be specified by regulations made by the Central Authority.

(2) If the chairperson, for any reason, is unable to attend a meeting of the Central Authority, the senior-most member shall preside over the meeting of the Authority.

(3) All questions which come up before any meeting of the Authority shall be decided by a majority of votes by the members present and voting and in the event of an equality of votes, the chairperson or in his absence the member presiding over shall have a second or casting vote.

(4) All decisions of the Central Authority shall be authenticated by the signature of the chairperson or any other member authorised by the Central Authority in this behalf.

(5) If any member, who is a director of a company and who as such director, has any direct or indirect pecuniary interest in any manner coming up for consideration at a meeting of the Central Authority, he shall, as soon as possible after relevant circumstances have come to his knowledge, disclose the nature of his interest at such meeting and such disclosure shall be recorded in the proceedings of the Authority, and the member shall not take part in any deliberation or decision of the Authority with respect to that matter.

CHAPTER VIII

STATE MENTAL HEALTH AUTHORITY

45. Establishment of State Authority. Every State Government shall, within a period of nine months from the date on which this Act receives the assent of the President, by notification, establish, for the purposes of this Act, an Authority to be known as the State Mental Health Authority.

46. Composition of State Authority. *(1)* The State Authority shall consist of the following chairperson and members:—

(a) Secretary or Principal Secretary in the Department of Health of State Government—chairperson *ex officio;*

(b) Joint Secretary in the Department of Health of the State

Government, in charge of mental health—member *ex officio;*

(c) Director of Health Services or Medical Education—member *ex officio;*

(d) Joint Secretary in the Department of Social Welfare of the State Government— member *ex officio*;

(e) such other *ex officio* representatives from the relevant State Government Ministries or Departments;

(f) Head of any of the Mental Hospitals in the State or Head of Department of Psychiatry at any Government Medical College, to be nominated by the State Government–member;

(g) one eminent psychiatrist from the State not in Government service to be nominated by the State Government—member;

(h) one mental health professional as defined in item *(iii)* of clause *(q)* of sub-section *(1)* of section 2 having at least fifteen years experience in the field, to be nominated by the State Government—member;

(i) one psychiatric social worker having at least fifteen years experience in the field, to be nominated by the State Government—member;

(j) one clinical psychologist having at least fifteen years experience in the field, to be nominated by the State Government—member;

(k) one mental health nurse having at least fifteen years experience in the field of mental health, to be nominated by the State Government–member;

(l) two persons representing persons who have or have had mental illness, to be nominated by the State Government—member;

(m) two persons representing care-givers of persons with mental illness or organisations representing care-givers, to be nominated by the State Government—members;

(n) two persons representing non-governmental organisations which provide services to persons with mental illness, to be nominated by the State Government—members.

(2) The members referred to in clauses *(e)* to *(n)* of sub-section *(1)*, shall be nominated by the State Government in such manner as may be prescribed.

47. Term of office, salaries and allowances of chairperson and other members. *(1)* The members of the State Authority referred to in clauses *(e)* to *(n)* of sub-section *(1)* of section 46 shall hold office as such for a term of three years from the date of nomination and shall be eligible for reappointment:

Provided that a member shall not hold office as such after he has attained the age of seventy years.

(2) The chairperson and other *ex officio* members of the State Authority shall hold office as such chairperson or member, as the case may be, so long as he holds the office by virtue of which he is nominated.

(3) **The salaries and allowances payable to, and the other terms and conditions of service of, the chairperson and other members shall be such as may be prescribed.**

48. Resignation. A member of the State Authority may, by notice in writing under his hand addressed to the State Government, resign his office:

Provided that a member shall, unless he is permitted by the State Government to relinquish his office sooner, continue to hold office until the expiry of three months from the date of receipt of such notice or until a person duly appointed as his successor enters upon office or until the expiry of his term of office, whichever is the earliest.

49. Filling of vacancies. The State Government shall, within two months from the date of occurrence of any vacancy by reason of death, resignation or removal of a member of the Authority and three months before the superannuation or completion of the term of office of any member of that Authority, make nomination for filling up of the vacancy.

50. Vacancies, etc., not to invalidate proceedings of State Authority. No act or proceeding of the State Authority shall be invalid merely by reason of—

(a) any vacancy in, or any defect in the constitution of, the State Authority; or

(b) any defect in the appointment of a person as a member of the State Authority; or

(c) any irregularity in the procedure of the Authority not affecting the merits of the case.

51. Member not to participate in meetings in certain cases. Any member having any direct or indirect interest, whether pecuniary or otherwise, in any matter coming up for consideration at a meeting of the State Authority, shall, as soon as possible after the relevant circumstances have come to his knowledge, disclose the nature of his interest at such meeting and such disclosure shall be recorded in the proceedings of the State Authority, and the member shall not take any part in any deliberation or decision of the State Authority with respect to that matter.

52. Officers and other employees of State Authority. *(1)* There shall be a chief executive officer of the State Authority, not below the rank of the Deputy Secretary to the State Government, to be appointed by the State Government.

(2) The State Authority may, with the approval of the State Government, determine the number, nature and categories of other officers and employees required by the State Authority in the discharge of its functions.

(3) The salaries and allowances payable to, and the other terms and conditions of service (including the qualifications, experience and manner of appointment) of, the chief executive officer and other officers and employees of the State Authority shall be such as may be specified by regulations with the approval of the State Government.

53. Functions of chief executive officer of State Authority. *(1)* The chief executive officer shall be the legal representative of the State Authority and shall be responsible for—

(a) the day-to-day administration of the State Authority;

(b) implementing the work programmes and decisions adopted by the State Authority;

(c) drawing up of proposal for the State Authority's work programmes;

(d) the preparation of the statement of revenue and expenditure and the execution of the budget of the State Authority.

(2) Every year, the chief executive officer shall submit to the State Authority for approval—

(a) a general report covering all the activities of the Authority in the previous year;

(b) programmes of work;

(c) the annual accounts for the previous year; and

(d) the budget for the coming year.

(3) The chief executive officer shall have administrative control over the officers and other employees of the State Authority.

54. Transfer of assets, liabilities of State Authority. On and from the establishment of the State Authority—

(a) all the assets and liabilities of the State Authority for Mental Health Services constituted under sub-section *(1)* of section 4 of the Mental Health Act, 1987 (14 of 1987) shall stand transferred to, and vested in, the State Authority.

Explanation.—The assets of such State Authority for Mental Health Services shall be deemed to include all rights and powers, and all properties, whether movable or immovable, including, in particular, cash balances, deposits and all other interests and rights in, or arising out of, such properties as may be in the possession of such State Authority for Mental Health Services and all books of account and other documents relating to the same; and liabilities shall be deemed to include all debts, liabilities and obligations of whatever kind;

(b) without prejudice to the provisions of clause *(a)*, all data and information collected during enrolment, all details of authentication performed, debts, obligations and liabilities incurred, all contracts entered into and all matters and things engaged to be done by, with or for such State Authority for Mental Health Services immediately before that day, for or in connection with the purpose of the said State Authority for Mental Health Services, shall be deemed to have been incurred, entered

into or engaged to be done by, with or for, the State Authority;

(c) all sums of money due to the State Authority for Mental Health Services immediately before that day shall be deemed to be due to the State Authority; and

(d) all suits and other legal proceedings instituted or which could have been instituted by or against such State Authority for Mental Health Services immediately before that day may be continued or may be instituted by or against the State Authority.

55. Functions of State Authority. *(1)* The State Authority shall—

(a) register all mental health establishments in the State except those referred to in section 43 and maintain and publish (including online on the internet) a register of such establishments;

(b) develop quality and service provision norms for different types of mental health establishments in the State;

(c) supervise all mental health establishments in the State and receive complaints about deficiencies in provision of services;

(d) register clinical psychologists, mental health nurses and psychiatric social workers in the State to work as mental health professionals, and publish the list of such registered mental health professionals in such manner as may be specified by regulations by the State Authority;

(e) train all relevant persons including law enforcement officials, mental health professionals and other health professionals about the provisions and implementation of this Act;

(f) discharge such other functions with respect to matters relating to mental health as the State Government may decide:

Provided that the mental health establishments in the State (except those referred to in section 43), registered, before the commencement of this Act, under the Mental Health Act, 1987 (14 of 1987) or any other law for the time being in force, shall be deemed to have been registered under the provisions of this Act and copy of such registration shall be furnished to the State Authority.

(2) The procedure for registration (including the fees to be levied for

such registration) of the mental health establishments under this section shall be such as may be prescribed by the State Government.

56. Meetings of State Authority. *(1)* The State Authority shall meet at such times (not less than four times in a year) and places and shall observe such rules of procedure in regard to the transaction of business at its meetings (including quorum at such meetings) as may be specified by regulations made by the State Authority.

(2) If the chairperson, for any reason, is unable to attend a meeting of the State Authority, the senior- most member shall preside over the meetings of the Authority.

(3) All questions which come up before any meeting of the State Authority shall be decided by a majority of votes by the members present and voting and in the event of an equality of votes, the chairperson or in his absence the member presiding over shall have a second or casting vote.

(4) All decisions of the State Authority shall be authenticated by the signature of the chairperson or any other member authorised by the State Authority in this behalf.

(5) If any member, who is a director of a company and who as such director, has any direct or indirect pecuniary interest in any manner coming up for consideration at a meeting of the State Authority, he shall, as soon as possible after relevant circumstances have come to his knowledge, disclose the nature of his interest at such meeting and such disclosure shall be recorded in the proceedings of the Authority, and the member shall not take part in any deliberation or decision of the State Authority with respect to that matter.

CHAPTER IX

FINANCE, ACCOUNTS AND AUDIT

57. Grants by Central Government to Central Authority. The Central Government may, after due appropriation made by Parliament by law in this behalf, make to the Central Authority grants of such sums of money as the Central Government may think fit for being utilised for the purposes of this Act.

58. Central Mental Health Authority Fund. *(1)* There shall be constituted a Fund to be called the Central Mental Health Authority Fund and there shall be credited thereto—

(i) any grants and loans made to the Authority by the Central Government;

(ii) all fees and charges received by the Authority under this Act; and

(iii) all sums received by the Authority from such other sources as may be decided upon by the Central Government.

(2) The Fund referred to in sub-section *(1)* shall be applied for meeting the salary, allowances and other remuneration of the chairperson, other members, chief executive officer, other officers and employees of the Authority and the expenses of the Authority incurred in the discharge of its functions and for purposes of this Act.

59. Accounts and audit of Central Authority. *(1)* The Central Authority shall maintain proper accounts and other relevant records and prepare an annual statement of accounts in such form as may be prescribed by the Central Government, in consultation with the Comptroller and Auditor-General of India.

(2) The accounts of the Authority shall be audited by the Comptroller and Auditor-General of India at such intervals as may be specified by him and any expenditure incurred in connection with such audit shall be payable by the Authority to the Comptroller and Auditor-General of India.

(3) The Comptroller and Auditor-General of India and any other person appointed by him in connection with the audit of the accounts of the Authority shall have the same rights and privileges and authority in connection with such audit as the Comptroller and Auditor-General generally has in connection with the audit of the Government accounts and, in particular, shall have the right to demand the production of books, accounts, connected vouchers and other documents and papers and to inspect any of the office of the Authority.

(4) The accounts of the Authority as certified by the Comptroller and Auditor-General of India or any other person appointed by him in this behalf together with the audit report thereon, shall be forwarded annually to the

Central Government by the Authority and the Central Government shall cause the same to be laid before each House of Parliament.

60. Annual report of Central Authority. The Central Authority shall prepare in every year, in such form and at such time as may be prescribed by the Central Government, an annual report giving a full account of its activities during the previous year, and copies thereof along with copies of its annual accounts and auditor's report shall be forwarded to the Central Government and the Central Government shall cause the same to be laid before both Houses of Parliament.

61. Grants by State Government. The State Government may, after due appropriation made by State Legislature by law in this behalf, make to the State Authority grants of such sums of money as the State Government may think fit for being utilised for the purposes of this Act.

62. State Mental Health Authority Fund. *(1)* There shall be constituted a Fund to be called the State Mental Health Authority Fund and there shall be credited thereto—

(i) any grants and loans made to the State Authority by the State Government;

(ii) all fees and charges received by the Authority under this Act; and

(iii) all sums received by the State Authority from such other sources as may be decided upon by the State Government.

(2) The Fund referred to in sub-section *(1)* shall be applied for meeting the salary, allowances and other remuneration of the chairperson, other members, chief executive officer, other officers and employees of the State Authority and the expenses of the State Authority incurred in the discharge of its functions and for purposes of this Act.

63. Accounts and audit of State Authority. *(1)* The State Authority shall maintain proper accounts and other relevant records and prepare an annual statement of accounts in such form as may be prescribed by the State Government, in consultation with the Comptroller and Auditor-General of India.

(2) The accounts of the State Authority shall be audited by the

Comptroller and Auditor-General of India at such intervals as may be specified by him and any expenditure incurred in connection with such audit shall be payable by the State Authority to the Comptroller and Auditor-General of India.

(3) The Comptroller and Auditor-General of India and any other person appointed by him in connection with the audit of the accounts of the State Authority shall have the same rights and privileges and authority in connection with such audit as the Comptroller and Auditor-General generally has in connection with the audit of the Government accounts and, in particular, shall have the right to demand the production of books, accounts, connected vouchers and other documents and papers and to inspect any of the office of the State Authority.

64. Annual report of State Authority. The State Authority shall prepare in every year, in such form and at such time as may be prescribed by the State Government, an annual report giving a full account of its activities during the previous year, and copies thereof along with copies of its annual accounts and auditor's report shall be forwarded to the State Government and the Government shall cause the same to be laid before the State Legislature.

CHAPTER X

MENTAL HEALTH ESTABLISHMENTS

65. Registration of mental health establishment. *(1)* No person or organisation shall establish or run a mental health establishment unless it has been registered with the Authority under the provisions of this Act.

Explanation.—For the purposes of this Chapter, the expression "Authority" means—

(a) in respect of the mental health establishments under the control of the Central Government, the Central Authority;

(b) in respect of the mental health establishments in the State [not being the health establishments referred to in clause *(a)*], the State Authority.

(2) Every person or organisation who proposes to establish or run a mental health establishment shall register the said establishment with the Authority under the provisions of this Act:

Provided that the Central Government, may, by notification, exempt any category or class of existing mental health establishments from the requirement of registration under this Act.

Explanation.—In case a mental health establishment has been registered under the Clinical Establishments (Registration and Regulation) Act, 2010 (23 of 2010) or any other law for the time being in force in a State, such mental health establishment shall submit a copy of the said registration along with an application in such form as may be prescribed to the Authority with an undertaking that the mental health establishment fulfils the minimum standards, if any, specified by the Authority for the specific category of mental health establishment.

(3) The Authority shall, on receipt of application under sub-section *(2)*, on being satisfied that such mental health establishment fulfils the standards specified by the Authority, issue a certificate of registration in such form as may be prescribed:

Provided that till the period the Authority specifies the minimum standards for different categories of mental health establishments, it shall issue a provisional certificate of registration to the mental health establishment:

Provided further that on specifying the minimum standards for different categories of mental health establishments, the mental health establishment referred to in the first proviso shall, within a period of six months from the date such standards are specified, submit to the Authority an undertaking stating therein that such establishment fulfils the specified minimum standards and on being satisfied that such establishment fulfils the minimum standards, the Authority shall issue a certificate of registration to such mental health establishment.

(4) Every mental health establishment shall, for the purpose of registration and continuation of registration, fulfil—

(a) the minimum standards of facilities and services as may be specified by regulations made by the Authority;

(b) the minimum qualifications for the personnel engaged in such establishment as may be specified by regulations made by the Authority;

(c) provisions for maintenance of records and reporting as may

be specified by regulations made by the Authority; and

(d) any other conditions as may be specified by regulations made by the Authority.

(5) The Authority may—

(a) classify mental health establishments into such different categories, as may be specified by regulations made by the Central Authority;

(b) specify different standards for different categories of mental health establishments;

(c) while specifying the minimum standards for mental health establishments, have regard to local conditions.

(6) Notwithstanding anything in this section, the Authority shall, within a period of eighteen months from the commencement of this Act, by notification, specify the minimum standards for different categories of mental health establishments.

66. Procedure for registration, inspection and inquiry of mental health establishments. *(1)* The mental health establishment shall, for the purpose of registration, submit an application, in such form, accompanied with such details and fees, as may be prescribed, to the Authority.

(2) The mental health establishment may submit the application in person or by post or online.

(3) Every mental health establishment, existing on the date of commencement of this Act, shall, within a period of six months from the date of constitution of the Authority, submit an application for its provisional registration to the Authority.

(4) The Authority shall, within a period of ten days from the date of receipt of such application, issue to the mental health establishment a certificate of provisional registration in such form and containing such particulars and information as may be prescribed.

(5) The Authority shall not be required to conduct any inquiry prior to issue of provisional registration.

(6) The Authority shall, within a period of forty-five days from the date of provisional registration, publish in print and in digital form online, all particulars of the mental health establishment.

(7) A provisional registration shall be valid for a period of twelve months from the date of its issue and be renewable.

(8) Where standards for particular categories of mental health establishments have been specified under this Act, the mental health establishments in that category shall, within a period of six months from date of notifying such standards, apply for that category and obtain permanent registration.

(9) The Authority shall publish the standards in print and online in digital format.

(10) Until standards for particular categories of mental health establishments are specified under this Act, every mental health establishment shall, within thirty days before the expiry of the validity of certificate of provisional registration, apply for a renewal of provisional registration.

(11) If the application is made after the expiry of provisional registration, the Authority shall allow renewal of registration on payment of such fees, as may be prescribed.

(12) A mental health establishment shall make an application for permanent registration to the Authority in such form and accompanied with such fees as may be specified by regulations.

(13) The mental health establishment shall submit evidence that the establishment has complied with the specified minimum standards in such manner as may be specified by regulations by the Authority.

(14) As soon as the mental health establishment submits the required evidence of the mental health establishment having complied with the specified minimum standards, the Authority shall give public notice and display the same on its website for a period of thirty days, for filing objections, if any, in such manner as may be specified by regulations.

(15) The Authority shall, communicate the objections, if any, received within the period referred to in sub-section *(14)*, to the mental health establishment for response within such period as the Authority may determine.

(16) The mental health establishment shall submit evidence of compliance with the standards with reference to the objections communicated to such establishment under sub-section *(15)*, to the Authority within the specified period.

(17) The Authority shall on being satisfied that the mental health establishment fulfils the specified minimum standards for registration, grant permanent certificate of registration to such establishment.

(18) The Authority shall, within a period of forty-five days after the expiry of the period specified under this section, pass an order, either—

(a) grant permanent certificate of registration; or

(b) reject the application after recording the reasons thereof:

Provided that in case the Authority rejects the application under clause *(b)*, it shall grant such period not exceeding six months, to the mental health establishment for rectification of the deficiencies which have led to rejection of the application and such establishment may apply afresh for registration.

(19) Notwithstanding anything contained in this section, if the Authority has neither communicated any objections received by it to the mental health establishment under sub-section *(15)*, nor has passed an order under sub-section *(18)*, the registration shall be deemed to have been granted by the Authority and the Authority shall provide a permanent certificate of registration.

67. Audit of mental health establishment. *(1)* The Authority shall cause to be conducted an audit of all registered mental health establishments by such person or persons (including representatives of the local community) as may be prescribed, every three years, so as to ensure that such mental health establishments comply with the requirements of minimum standards for registration as a mental health establishment.

(2) The Authority may charge the mental health establishment such fee as may be prescribed, for conducting the audit under this section.

(3) The Authority may issue a show cause notice to a mental health establishment as to why its registration under this Act not be cancelled, if the Authority is satisfied that—

(a) the mental health establishment has failed to maintain the

minimum standards specified by the Authority; or

(b) the person or persons or entities entrusted with the management of the mental health establishment have been convicted of an offence under this Act; or

(c) the mental health establishment violates the rights of any person with mental illness.

(4) The Authority may, after giving a reasonable opportunity to the mental health establishment, if satisfied that the mental health establishment falls under clause *(a)* or clause *(b)* or clause *(c)* of sub-section *(3)*, without prejudice to any other action which it may take against the mental health establishment, cancel its registration.

(5) Every order made under sub-section *(4)* shall take effect—

(a) where no appeal has been preferred against such order, immediately on the expiry of the period specified for preferring of appeal; and

(b) where the appeal has been preferred against such an order and the appeal has been dismissed, from the date of the order of dismissal.

(6) The Authority shall, on cancellation of the registration for reasons to be recorded in writing, restrain immediately the mental health establishment from carrying on its operations, if there is imminent danger to the health and safety of the persons admitted in the mental health establishment.

(7) The Authority may cancel the registration of a mental health establishment if recommended by the Board to do so.

68. Inspection and inquiry. *(1)* The Authority may, *suo motu* or on a complaint received from any person with respect to non-adherence of minimum standards specified by or under this Act or contravention of any provision thereof, order an inspection or inquiry of any mental health establishment, to be made by such person as may be prescribed.

(2) The mental health establishment shall be entitled to be represented at such inspection or inquiry.

(3) The Authority shall communicate to the mental health establishment the results of such inspection or inquiry and may after ascertaining the opinion

of the mental health establishment, order the establishment to make necessary changes within such period as may be specified by it.

(4) The mental health establishment shall comply with the order of the Authority made under sub-section *(3)*.

(5) If the mental health establishment fails to comply with the order of the Authority made under sub-section *(3)*, the Authority may cancel the registration of the mental health establishment.

(6) The Authority or any person authorised by it may, if there is any reason to suspect that any person is operating a mental health establishment without registration, enter and search in such manner as may be prescribed, and the mental health establishment shall co-operate with such inspection or inquiry and be entitled to be represented at such inspection or inquiry.

69. Appeal to High Court against order of Authority. Any mental health establishment aggrieved by an order of the Authority refusing to grant registration or renewal of registration or cancellation of registration, may, within a period of thirty days from such order, prefer an appeal to the High Court in the State:

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

70. Certificates, fees and register of mental health establishments. *(1)* Every mental health establishment shall display the certificate of registration in a conspicuous place in the mental health establishment in such manner so as to be visible to everyone visiting the mental health establishment.

(2) In case the certificate is destroyed or lost or mutilated or damaged, the Authority may issue a duplicate certificate on the request of the mental health establishment and on the payment of such fees as may be prescribed.

(3) The certificate of registration shall be non-transferable and valid in case of change of ownership of the establishment.

(4) Any change of ownership of the mental health establishment shall be intimated to the Authority by the new owner within one month from the date of change of ownership.

(5) In the event of change of category of the mental health establishment, such establishment shall surrender the certificate of registration to the Authority and the mental health establishment shall apply afresh for grant of certificate of registration in that category.

71. Maintenance of register of mental health establishment in digital format. The Authority shall maintain in digital format a register of mental health establishments, registered by the Authority, to be called the Register of Mental Health Establishments and shall enter the particulars of the certificate of registration so granted in a separate register to be maintained in such form and manner as may be prescribed.

72. Duty of mental health establishment to display information.

(1) Every mental health establishment shall display within the establishment at conspicuous place (including on its website), the contact details including address and telephone numbers of the concerned Board.

(2) Every mental health establishment shall provide the person with necessary forms to apply to the concerned Board and also give free access to make telephone calls to the Board to apply for a review of the admission.

CHAPTER XI

MENTAL HEALTH REVIEW BOARDS

73. Constitution of Mental Health Review Boards. *(1)* The State Authority shall, by notification, constitute Boards to be called the Mental Health Review Boards, for the purposes of this Act.

(2) The requisite number, location and the jurisdiction of the Boards shall be specified by the State Authority in consultation with the State Governments concerned.

(3) The constitution of the Boards by the State Authority for a district or group of districts in a State under this section shall be such as may be prescribed by the Central Government.

(4) While making rules under sub-section *(3)*, the Central Government shall have regard to the following, namely:—

(a) the expected or actual workload of the Board in the State in which such Board is to be constituted;

(b) number of mental health establishments existing in the State;

(c) the number of persons with mental illness;

(d) population in the district in which the Board is to be constituted;

(e) geographical and climatic conditions of the district in which the Board is to be constituted.

74. Composition of Board. *(1)* Each Board shall consist of—

(a) a District Judge, or an officer of the State judicial services who is qualified to be appointed as District Judge or a retired District Judge who shall be chairperson of the Board;

(b) representative of the District Collector or District Magistrate or Deputy Commissioner of the districts in which the Board is to be constituted;

(c) two members of whom one shall be a psychiatrist and the other shall be a medical practitioner.

(d) two members who shall be persons with mental illness or care-givers or persons representing organisations of persons with mental illness or care-givers or non-governmental organisations working in the field of mental health.

(2) A person shall be disqualified to be appointed as the chairperson or a member of a Board or be removed by the State Authority, if he—

(a) has been convicted and sentenced to imprisonment for an offence which involves moral turpitude; or

(b) is adjudged as an insolvent; or

(c) has been removed or dismissed from the service of the Government or a body corporate owned or controlled by the Government; or

(d) has such financial or other interest as is likely to prejudice the discharge of his functions as a member; or

(e) has such other disqualifications as may be prescribed by the Central Government.

(3) A chairperson or member of a Board may resign his office by notice in writing under his hand addressed to the Chairperson of the State Authority and on such resignation being accepted, the vacancy shall be filled by appointment of a person, belonging to the category under sub-section *(1)* of section 74.

75. Terms and conditions of service of chairperson and members of Board. *(1)* The chairperson and members of the Board shall hold office for a term of five years or up to the age of seventy years, whichever is earlier and shall be eligible for reappointment for another term of five years or up to the age of seventy years whichever is earlier.

(2) The appointment of chairperson and members of every Board shall be made by the Chairperson of the State Authority.

(3) The honorarium and other allowances payable to, and the other terms and conditions of service of, the chairperson and members of the Board shall be such as may be prescribed by the Central Government.

76. Decisions of Authority and Board. *(1)* The decisions of the Authority or the Board, as the case may be, shall be by consensus, failing which by a majority of votes of members present and voting and in the event of equality of votes, the president or the chairperson, as the case may be, shall have a second or casting vote.

(2) The quorum of a meeting of the Authority or the Board, as the case may be, shall be three members.

77. Applications to Board. *(1)* Any person with mental illness or his nominated representative or a representative of a registered non-governmental organisation, with the consent of such a person, being aggrieved by the decision of any of the mental health establishment or whose rights under this Act have been violated, may make an application to the Board seeking redressal or appropriate relief.

(2) There shall be no fee or charge levied for making such an application.

(3) Every application referred to in sub-section *(1)* shall contain the name of applicant, his contact details, the details of the violation of his rights, the mental health establishment or any other place where such violation took place and the redressal sought from the Board.

(4) In exceptional circumstances, the Board may accept an application

made orally or over telephone from a person admitted to a mental health establishment.

78. Proceedings before Board to be judicial proceedings. All proceedings before the Board shall be deemed to be judicial proceedings within the meaning of sections 193, 219 and 228 of the Indian Penal Code (45 of 1860).

79. Meetings. The Board shall meet at such times and places and shall observe such rules of procedure in regard to the transaction of business at its meetings as may be specified by regulations made by the Central Authority.

80. Proceedings before Board. *(1)* The Board, on receipt of an application under sub-section *(1)* of section 85, shall, subject to the provisions of this section, endeavour to hear and dispose of the same within a period of ninety days.

(2) The Board shall dispose of an application—

(a) for appointment of nominated representative under clause *(d)* of sub-section *(4)* of section 14;

(b) challenging admission of a minor under section 87;

(c) challenging supported admission under sub-section *(10)* or sub-section *(11)* of section 89,

within a period of seven days from the date of receipt of such applications.

(3) The Board shall dispose of an application challenging supported admission under section 90 within a period of twenty-one days from the date of receipt of the application.

(4) The Board shall dispose of an application, other than an application referred to in sub-section *(3)*, within a period of ninety days from the date of filing of the application.

(5) The proceeding of the Board shall be held *in camera*.

(6) The Board shall not ordinarily grant an adjournment for the hearing.

(7) The parties to an application may appear in person or be represented

by a counsel or a representative of their choice.

(8) In respect of any application concerning a person with mental illness, the Board shall hold the hearings and conduct the proceedings at the mental health establishment where such person is admitted.

(9) The Board may allow any persons other than those directly interested with the application, with the permission of the person with mental illness and the chairperson of the Board, to attend the hearing.

(10) The person with mental illness whose matter is being heard shall have the right to give oral evidence to the Board, if such person desires to do so.

(11) The Board shall have the power to require the attendance and testimony of such other witnesses as it deems appropriate.

(12) The parties to a matter shall have the right to inspect any document relied upon by any other party in its submissions to the Board and may obtain copies of the same.

(13) The Board shall, within five days of the completion of the hearing, communicate its decision to the parties in writing.

(14) Any member who is directly or indirectly involved in a particular case, shall not sit on the Board during the hearings with respect to that case.

81. Central Authority to appoint Expert Committee to prepare guidance document. *(1)* The Central Authority shall appoint an Expert Committee to prepare a guidance document for medical practitioners and mental health professionals, containing procedures for assessing, when necessary or the capacity of persons to make mental health care or treatment decisions.

(2) Every medical practitioner and mental health professional shall, while assessing capacity of a person to make mental healthcare or treatment decisions, comply with the guidance document referred to in sub-section *(1)* and follow the procedure specified therein.

82. Powers and functions of Board. *(1)* Subject to the provisions of this Act, the powers and functions of the Board shall, include all or any of the following matters, namely:—

(a) to register, review, alter, modify or cancel an advance directive;

(b) to appoint a nominated representative;

(c) to receive and decide application from a person with mental illness or his nominated representative or any other interested person against the decision of medical officer or mental health professional in charge of mental health establishment or mental health establishment under section 87 or section 89 or section 90;

(d) to receive and decide applications in respect non-disclosure of information specified under sub-section *(3)* of section 25;

(e) to adjudicate complaints regarding deficiencies in care and services specified under section 28;

(f) to visit and inspect prison or jails and seek clarifications from the medical officer in-charge of health services in such prison or jail.

(2) Where it is brought to the notice of a Board or the Central Authority or State Authority, that a mental health establishment violates the rights of persons with mental illness, the Board or the Authority may conduct an inspection and inquiry and take action to protect their rights.

(3) Notwithstanding anything contained in this Act, the Board, in consultation with the Authority, may take measures to protect the rights of persons with mental illness as it considers appropriate.

(4) If the mental health establishment does not comply with the orders or directions of the Authority or the Board or wilfully neglects such order or direction, the Authority or the Board, as the case may be, may impose penalty which may extend up to five lakh rupees on such mental health establishment and the Authority on its own or on the recommendations of the Board may also cancel the registration of such mental health establishment after giving an opportunity of being heard.

83. Appeal to High Court against order of Authority or Board. Any person or establishment aggrieved by the decision of the Authority or a Board may, within a period of thirty days from such decision, prefer an appeal to the High Court of the State in which the Board is situated:

Provided that the High Court may entertain an appeal after the

expiry of the said period of thirty days, if it is satisfied that the appellant had sufficient cause for not preferring the appeal within the period of thirty days.

84. Grants by Central Government. *(1)* The Central Government may, make to the Central Authority grants of such sums of money as the Central Government may think fit for being utilised for the purposes of this Act.

(2) The grants referred to in sub-section *(1)* shall be applied for,—

(a) meeting the salary, allowances and other remuneration of the chairperson, members, officers and other employees of the Central Authority;

(b) meeting the salary, allowances and other remuneration of the chairperson, members, officers and other employees of the Boards; and

(c) the expenses of the Central Authority and the Boards incurred in the discharge of their functions and for the purposes of this Act.

CHAPTER XII

ADMISSION, TREATMENT AND DISCHARGE

85. Admission of person with mental illness as independent patient in mental health establishment. *(1)* For the purposes of this Act, "independent patient or an independent admission" refers to the admission of person with mental illness, to a mental health establishment, who has the capacity to make mental healthcare and treatment decisions or requires minimal support in making decisions.

(2) All admissions in the mental health establishment shall, as far as possible, be independent admissions except when such conditions exist as make supported admission unavoidable.

86. Independent admission and treatment. *(1)* Any person, who is not a minor and who considers himself to have a mental illness and desires to be admitted to any mental health establishment for treatment may request the medical officer or mental health professional in charge of the establishment to be admitted as an independent patient.

(2) On receipt of such request under sub-section *(1)*, the medical officer or mental health professional in charge of the establishment shall admit the person to the establishment if the medical officer or mental health professional is satisfied that—

(a) the person has a mental illness of a severity requiring admission to a mental health establishment;

(b) the person with mental illness is likely to benefit from admission and treatment to the mental health establishment;

(c) the person has understood the nature and purpose of admission to the mental health establishment, and has made the request for admission of his own free will, without any duress or undue influence and has the capacity to make mental healthcare and treatment decisions without support or requires minimal support from others in making such decisions.

(3) If a person is unable to understand the purpose, nature, likely effects of proposed treatment and of the probable result of not accepting the treatment or requires a very high level of support approaching hundred per cent. support in making decisions, he or she shall be deemed unable to understand the purpose of the admission and therefore shall not be admitted as independent patient under this section.

(4) A person admitted as an independent patient to a mental health establishment shall be bound to abide by order and instructions or bye-laws of the mental health establishment.

(5) An independent patient shall not be given treatment without his informed consent.

(6) The mental health establishment shall admit an independent patient on his own request, and shall not require the consent or presence of a nominated representative or a relative or care-giver for admitting the person to the mental health establishment.

(7) Subject to the provisions contained in section 88 an independent patient may get himself discharged from the mental health establishment without the consent of the medical officer or mental health professional in charge of such establishment.

87. Admission of minor. *(1)* A minor may be admitted to a mental health establishment only after following the procedure laid down in this section.

(2) The nominated representative of the minor shall apply to the medical officer in charge of a mental health establishment for admission of the minor to the establishment.

(3) Upon receipt of such an application, the medical officer or mental health professional in charge of the mental health establishment may admit such a minor to the establishment, if two psychiatrists, or one psychiatrist and one mental health professional or one psychiatrist and one medical practitioner, have independently examined the minor on the day of admission or in the preceding seven days and both independently conclude based on the examination and, if appropriate, on information provided by others, that,—

(a) the minor has a mental illness of a severity requiring admission to a mental health establishment;

(b) admission shall be in the best interests of the minor, with regard to his health, well-being or safety, taking into account the wishes of the minor if ascertainable and the reasons for reaching this decision;

(c) the mental healthcare needs of the minor cannot be fulfilled unless he is admitted; and

(d) all community based alternatives to admission have been shown to have failed or are demonstrably unsuitable for the needs of the minor.

(4) A minor so admitted shall be accommodated separately from adults, in an environment that takes into account his age and developmental needs and is at least of the same quality as is provided to other minors admitted to hospitals for other medical treatments.

(5) The nominated representative or an attendant appointed by the nominated representative shall under all circumstances stay with the minor in the mental health establishment for the entire duration of the admission of the minor to the mental health establishment.

(6) In the case of minor girls, where the nominated representative is male, a female attendant shall be appointed by the nominated representative and under all circumstances shall stay with the minor girl in the mental health establishment for the entire duration of her admission.

(7) A minor shall be given treatment with the informed consent of his nominated representative.

(8) If the nominated representative no longer supports admission of the minor under this section or requests discharge of the minor from the mental health establishment, the minor shall be discharged by the mental health establishment.

(9) Any admission of a minor to a mental health establishment shall be informed by the medical officer or mental health professional in charge of the mental health establishment to the concerned Board within a period of seventy-two hours.

(10) The concerned Board shall have the right to visit and interview the minor or review the medical records if the Board desires to do so.

(11) Any admission of a minor which continues for a period of thirty days shall be immediately informed to the concerned Board.

(12) The concerned Board shall carry out a mandatory review within a period of seven days of being informed, of all admissions of minors continuing beyond thirty days and every subsequent thirty days.

(13) The concerned Board shall at minimum, review the clinical records of the minor and may interview the minor if necessary.

88. Discharge of independent patients. *(1)* The medical officer or mental health professional in charge of a mental health establishment shall discharge from the mental health establishment any person admitted under section 86 as an independent patient immediately on request made by such person or if the person disagrees with his admission under section 86 subject to the provisions of sub-section *(3)*.

(2) Where a minor has been admitted to a mental health establishment under section 87 and attains the age of eighteen years during his stay in the mental health establishment, the medical officer in charge of the mental health establishment shall classify him as an independent patient under section 86 and all provisions of this Act as applicable to independent patient who is not minor, shall apply to such person.

(3) Notwithstanding anything contained in this Act, a mental health professional may prevent discharge of a person admitted as an independent

person under section 86 for a period of twenty-four hours so as to allow his assessment necessary for admission under section 89 if the mental health professional is of the opinion that—

(a) such person is unable to understand the nature and purpose of his decisions and requires substantial or very high support from his nominated representative; or

(b) has recently threatened or attempted or is threatening or attempting to cause bodily harm to himself; or

(c) has recently behaved or is behaving violently towards another person or has caused or is causing another person to fear bodily harm from him; or

(d) has recently shown or is showing an inability to care for himself to a degree that places the individual at risk of harm to himself.

(4) The person referred to in sub-section *(3)* shall be either admitted as a supported patient under section 89, or discharged from the establishment within a period of twenty-four hours or on completion of assessments for admission for a supported patient under section 89, whichever is earlier.

89. Admission and treatment of persons with mental illness, with high support needs, in mental health establishment, up to thirty days (supported admission). *(1)* The medical officer or mental health professional in charge of a mental health establishment shall admit every such person to the establishment, upon application by the nominated representative of the person, under this section, if—

(a) the person has been independently examined on the day of admission or in the preceding seven days, by one psychiatrist and the other being a mental health professional or a medical practitioner, and both independently conclude based on the examination and, if appropriate, on information provided by others, that the person has a mental illness of such severity that the person,—

(i) has recently threatened or attempted or is threatening or attempting to cause bodily harm to himself; or

(ii) has recently behaved or is behaving violently towards another person or has caused or is causing another person to fear

bodily harm from him; or

(iii) has recently shown or is showing an inability to care for himself to a degree that places the individual at risk of harm to himself;

(b) the psychiatrist or the mental health professionals or the medical practitioner, as the case may be, certify, after taking into account an advance directive, if any, that admission to the mental health establishment is the least restrictive care option possible in the circumstances; and

(c) the person is ineligible to receive care and treatment as an independent patient because the person is unable to make mental healthcare and treatment decisions independently and needs very high support from his nominated representative in making decisions.

(2) The admission of a person with mental illness to a mental health establishment under this section shall be limited to a period of thirty days.

(3) At the end of the period mentioned under sub-section *(2)*, or earlier, if the person no longer meets the criteria for admission as stated in sub-section *(1)*, the patient shall no longer remain in the establishment under this section.

(4) On the expiry of the period of thirty days referred to in sub-section *(2)*, the person may continue to remain admitted in the mental health establishment in accordance with the provisions of section 90.

(5) If the conditions under section 90 are not met, the person may continue to remain in the mental health establishment as an independent patient under section 86 and the medical officer or mental health professional in charge of the mental health establishment shall inform the person of his admission status under this Act, including his right to leave the mental health establishment.

(6) Every person with mental illness admitted under this section shall be provided treatment after taking into account,—

(a) an advance directive if any; or

(b) informed consent of the patient with the support of his nominated representative subject to the provisions of sub-section *(7)*.

(7) If a person with the mental illness admitted under this section requires nearly hundred per cent. support from his nominated representative in making a decision in respect of his treatment, the nominated representative may temporarily consent to the treatment plan of such person on his behalf.

(8) In case where consent has been given under sub-section *(7)*, the medical officer or mental health professional in charge of the mental health establishment shall record such consent in the medical records and review the capacity of the patient to give consent every seven days.

(9) The medical officer or mental health professional in charge of the mental health establishment shall report the concerned Board,—

(a) within three days the admissions of a woman or a minor;

(b) within seven days the admission of any person not being a woman or minor.

(10) A person admitted under this section or his nominated representative or a representative of a registered non-governmental organisation with the consent of the person, may apply to the concerned Board for review of the decision of the medical officer or mental health professional in charge of the mental health establishment to admit the person to the mental health establishment under this section.

(11) The concerned Board shall review the decision of the medical officer or mental health professional in charge of the mental health establishment and give its findings thereon within seven days of receipt of request for such review which shall be binding on all the concerned parties.

(12) Notwithstanding anything contained in this Act, it shall be the duty of the medical officer or mental health professional in charge of the mental health establishment to keep the condition of the person with mental illness admitted under this section on going review.

(13) If the medical officer or mental health professional in charge of the mental health establishment is of the opinion that the conditions specified under sub-section *(1)* are no longer applicable, he shall terminate the admission under this section, and inform the person and his nominated representative accordingly.

(14) Non applicability of conditions referred to in sub-section *(13)* shall

not preclude the person with mental illness remaining as an independent patient.

(15) In a case, a person with the mental illness admitted under this section has been discharged, such person shall not be readmitted under this section within a period of seven days from the date of his discharge.

(16) In case a person referred to in sub-section *(15)* requires readmission within a period of seven days referred to in that sub-section, such person shall be considered for readmission in accordance with the provisions of section 90.

(17) If the medical officer or mental health professional in charge of the mental health establishment is of the opinion that the person with mental illness admitted under this section in the mental health establishment requires or is likely to require further treatment beyond the period of thirty days, then such medical officer or mental health professional shall be duty bound to refer the matter to be examined by two psychiatrists for his admission beyond thirty days.

90. Admission and treatment of persons with mental illness, with high support needs, in mental health establishment, beyond thirty days (supported admission beyond thirty days). *(1)* If a person with mental illness admitted under section 89 requires continuous admission and treatment beyond thirty days or a person with mental illness discharged under sub-section *(15)* of that section requires readmission within seven days of such discharge, he shall be admitted in accordance with the provisions of this section.

(2) The medical officer or mental health professional in charge of a mental health establishment, upon application by the nominated representative of a person with mental illness, shall continue admission of such person with mental illness, if—

(a) two psychiatrists have independently examined the person with mental illness in the preceding seven days and both independently conclude based on the examination and, on information provided by others that the person has a mental illness of a severity that the person–

(i) has consistently over time threatened or attempted to cause bodily harm to himself; or

(ii) has consistently over time behaved violently towards

another person or has consistently over time caused another person to fear bodily harm from him; or

(iii) has consistently over time shown an inability to care for himself to a degree that places the individual at risk of harm to himself;

(b) both psychiatrists, after taking into account an advance directive, if any, certify that admission to a mental health establishment is the least restrictive care option possible under the circumstances; and

(c) the person continues to remain ineligible to receive care and treatment as a independent patient as the person cannot make mental healthcare and treatment decisions independently and needs very high support from his nominated representative, in making decisions.

(3) The medical officer or mental health professional in charge of the mental health establishment shall report all admissions or readmission under this section, within a period of seven days of such admission or readmission, to the concerned Board.

(4) The Board shall, within a period of twenty-one days from the date of last admission or readmission of person with mental illness under this section, permit such admission or readmission or order discharge of such person.

(5) While permitting admission or readmission or ordering discharge of such person under sub-section *(4)*, the Board shall examine—

(a) the need for institutional care to such person;

(b) whether such care cannot be provided in less restrictive settings based in the community.

(6) In all cases of application for readmission or continuance of admission of a person with mental illness in the mental health establishment under this section, the Board may require the medical officer or psychiatrist in charge of treatment of such person with mental illness to submit a plan for community based treatment and the progress made, or likely to be made, towards realising this plan.

(7) The person referred to in sub-section *(4)* shall not be permitted to continue in the mental health establishment in which he had been admitted or his readmission in such establishment merely on the ground of non-existence of community based services at the place where such person ordinarily resides.

(8) The admission of a person with mental illness to a mental health establishment under this section shall be limited to a period up to ninety days in the first instance.

(9) The admission of a person with mental illness to a mental health establishment under this section beyond the period of ninety days may be extended for a period of one hundred and twenty days at the first instance and thereafter for a period of one hundred and eighty days each time after complying with the provisions of sub-sections *(1)* to *(7)*.

(10) If the Board refuses to permit admission or continuation thereof or readmission under sub-section *(9)*, or on the expiry of the periods referred to in sub-section *(9)* or earlier if such person no longer falls within the criteria for admission under sub-section *(1)*, such person shall be discharged from such mental health establishment.

(11) Every person with mental illness admitted under this section shall be provided treatment, after taking into account—

(a) an advance directive; or

(b) informed consent of the person with the support from his nominated representative subject to the provision of sub-section *(12)*.

(12) If a person with mental illness admitted under this section, requires nearly hundred per cent. support from his nominated representative, in making decision in respect of his treatment, the nominated representative may temporarily consent to the treatment plan of such person on his behalf.

(13) In a case where consent has been given under sub-section *(12)*, the medical officer or mental health professional in charge of the mental health establishment shall record such consent in the medical records of such person with mental illness and review on the expiry of every fortnight, the capacity of such person to give consent.

(14) A person with mental illness admitted under this section, or his nominated representative or a representative of a registered non-governmental

organisation with the consent of the person, may apply to the concerned Board for review of the decision of the medical officer or mental health professional in charge of medical health establishment to admit such person in such establishment and the decision of the Board thereon shall be binding on all parties.

(15) Notwithstanding anything contained in this Act, if the medical officer or mental health professional in charge of the mental health establishment is of the opinion that the conditions under sub-section *(1)* are no longer applicable, such medical officer or mental health professional shall discharge such person from such establishment and inform such person and his nominated representative accordingly.

(16) The person with mental illness referred to in sub-section *(15)* may continue to remain in the mental health establishment as an independent patient.

91. Leave of absence. The medical officer or mental health professional in charge of the mental health establishment may grant leave to any person with mental illness admitted under section 87 or section 89 or section 90, to be absent from the establishment subject to such conditions, if any, and for such duration as such medical officer or psychiatrist may consider necessary.

92. Absence without leave or discharge. If any person to whom section 103 applies absents himself without leave or without discharge from the mental health establishment, he shall be taken into protection by any Police Officer at the request of the medical officer or mental health professional in-charge of the mental health establishment and shall be sent back to the mental health establishment immediately.

93. Transfer of persons with mental illness from one mental health establishment to another mental health establishment. *(1)* A person with mental illness admitted to a mental health establishment under section 87 or section 89 or section 90 or section 103, as the case may be, may subject to any general or special order of the Board be removed from such mental health establishment and admitted to another mental health establishment within the State or with the consent of the Central Authority to any mental health establishment in any other State:

Provided that no person with mental illness admitted to a mental health establishment under an order made in pursuance of an application made under

this Act shall be so removed unless intimation and reasons for the transfer have been given to the person with mental illness and his nominated representative.

(2) The State Government may make such general or special order as it thinks fit directing the removal of any prisoner with mental illness from the place where he is for the time being detained, to any mental health establishment or other place of safe custody in the State or to any mental health establishment or other place of safe custody in any other State with the consent of the Government of that other State.

94. Emergency treatment. *(1)* Notwithstanding anything contained in this Act, any medical treatment, including treatment for mental illness, may be provided by any registered medical practitioner to a person with mental illness either at a health establishment or in the community, subject to the informed consent of the nominated representative, where the nominated representative is available, and where it is immediately necessary to prevent—

(a) death or irreversible harm to the health of the person; or

(b) the person inflicting serious harm to himself or to others; or

(c) the person causing serious damage to property belonging to himself or to others where such behaviour is believed to flow directly from the person's mental illness.

Explanation.—For the purposes of this section, "emergency treatment" includes transportation of the person with mental illness to a nearest mental health establishment for assessment.

(2) Nothing in this section shall allow any medical officer or psychiatrist to give to the person with mental illness medical treatment which is not directly related to the emergency treatment specified under sub-section *(1)*.

(3) Nothing in this section shall allow any medical officer or psychiatrist to use electro-convulsive therapy as a form of treatment.

(4) The emergency treatment referred to in this section shall be limited to seventy-two hours or till the person with mental illness has been assessed at a mental health establishment, whichever is earlier:

Provided that during a disaster or emergency declared by the appropriate

Government, the period of emergency treatment referred to in this sub-section may extend up to seven days.

95. Prohibited procedures. *(1)* Notwithstanding anything contained in this Act, the following treatments shall not be performed on any person with mental illness—

(a) electro-convulsive therapy without the use of muscle relaxants and anaesthesia;

(b) electro-convulsive therapy for minors;

(c) sterilisation of men or women, when such sterilisation is intended as a treatment for mental illness;

(d) chained in any manner or form whatsoever.

(2) Notwithstanding anything contained in sub-section *(1)*, if, in the opinion of psychiatrist in charge of a minor's treatment, electro-convulsive therapy is required, then, such treatment shall be done with the informed consent of the guardian and prior permission of the concerned Board.

96. Restriction on psychosurgery for persons with mental illness.

(1) Notwithstanding anything contained in this Act, psychosurgery shall not be performed as a treatment for mental illness unless—

(a) the informed consent of the person on whom the surgery is being performed; and

(b) approval from the concerned Board to perform the surgery, has been obtained.

(2) The Central Authority may make regulations for the purpose of carrying out the provisions of this section.

97. Restraints and seclusion. *(1)* A person with mental illness shall not be subjected to seclusion or solitary confinement, and, where necessary, physical restraint may only be used when,—

(a) it is the only means available to prevent imminent and immediate harm to person concerned or to others;

(b) it is authorised by the psychiatrist in charge of the person's

treatment at the mental health establishment.

(2) Physical restraint shall not be used for a period longer than it is absolutely necessary to prevent the immediate risk of significant harm.

(3) The medical officer or mental health professional in charge of the mental health establishment shall be responsible for ensuring that the method, nature of restraint justification for its imposition and the duration of the restraint are immediately recorded in the person's medical notes.

(4) The restraint shall not be used as a form of punishment or deterrent in any circumstance and the mental health establishment shall not use restraint merely on the ground of shortage of staff in such establishment.

(5) The nominated representative of the person with mental illness shall be informed about every instance of restraint within a period of twenty-four hours.

(6) A person who is placed under restraint shall be kept in a place where he can cause no harm to himself or others and under regular ongoing supervision of the medical personnel at the mental health establishment.

(7) The mental health establishment shall include all instances of restraint in the report to be sent to the concerned Board on a monthly basis.

(8) The Central Authority may make regulations for the purpose of carrying out the provisions of this section.

(9) The Board may order a mental health establishment to desist from applying restraint if the Board is of the opinion that the mental health establishment is persistently and wilfully ignoring the provisions of this section.

98. Discharge planning. *(1)* Whenever a person undergoing treatment for mental illness in a mental health establishment is to be discharged into the community or to a different mental health establishment or where a new psychiatrist is to take responsibility of the person's care and treatment, the psychiatrist who has been responsible for the person's care and treatment shall consult with the person with mental illness, the nominated representative, the family member or care-giver with whom the person with mental illness shall reside on discharge from the hospital, the psychiatrist expected to be responsible for the person's care and treatment in the future, and such other persons as may be appropriate, as to what treatment or services would be

appropriate for the person.

(2) The psychiatrist responsible for the person's care shall in consultation with the persons referred to in sub-section *(1)* ensure that a plan is developed as to how treatment or services shall be provided to the person with mental illness.

(3) The discharge planning under this section shall apply to all discharges from a mental health establishment.

99. Research. *(1)* The professionals conducting research shall obtain free and informed consent from all persons with mental illness for participation in any research involving interviewing the person or psychological, physical, chemical or medicinal interventions.

(2) In case of research involving any psychological, physical, chemical or medicinal interventions to be conducted on person who is unable to give free and informed consent but does not resist participation in such research, permission to conduct such research shall be obtained from concerned State Authority.

(3) The State Authority may allow the research to proceed based on informed consent being obtained from the nominated representative of persons with mental illness, if the State Authority is satisfied that—

(a) the proposed research cannot be performed on persons who are capable of giving free and informed consent;

(b) the proposed research is necessary to promote the mental health of the population represented by the person;

(c) the purpose of the proposed research is to obtain knowledge relevant to the particular mental health needs of persons with mental illness;

(d) a full disclosure of the interests of persons and organisations conducting the proposed research is made and there is no conflict of interest involved; and

(e) the proposed research follows all the national and international guidelines and regulations concerning the conduct of such research and ethical approval has been obtained from the institutional ethics committee

where such research is to be conducted.

(4) The provisions of this section shall not restrict research based study of the case notes of a person who is unable to give informed consent, so long as the anonymity of the persons is secured.

(5) The person with mental illness or the nominated representative who gives informed consent for participation in any research under this Act may withdraw the consent at any time during the period of research.

CHAPTER XIII

RESPONSIBILITIES OF OTHER AGENCIES

100. Duties of police officers in respect of persons with mental illness. *(1)* Every officer in-charge of a police station shall have a duty—

(a) to take under protection any person found wandering at large within the limits of the police station whom the officer has reason to believe has mental illness and is incapable of taking care of himself; or

(b) to take under protection any person within the limits of the police station whom the officer has reason to believe to be a risk to himself or others by reason of mental illness.

(2) The officer in-charge of a police station shall inform the person who has been taken into protection under sub-section *(1)*, the grounds for taking him into such protection or his nominated representative, if in the opinion of the officer such person has difficulty in understanding those grounds.

(3) Every person taken into protection under sub-section *(1)* shall be taken to the nearest public health establishment as soon as possible but not later than twenty-four hours from the time of being taken into protection, for assessment of the person's healthcare needs.

(4) No person taken into protection under sub-section *(1)* shall be detained in the police lock up or prison in any circumstances.

(5) The medical officer in-charge of the public health establishment shall be responsible for arranging the assessment of the person and the needs of the person with mental illness will be addressed as per other provisions of this

Act as applicable in the particular circumstances.

(6) The medical officer or mental health professional in-charge of the public mental health establishment if on assessment of the person finds that such person does not have a mental illness of a nature or degree requiring admission to the mental health establishment, he shall inform his assessment to the police officer who had taken the person into protection and the police officer shall take the person to the person's residence or in case of homeless persons, to a Government establishment for homeless persons.

(7) In case of a person with mental illness who is homeless or found wandering in the community, a First Information Report of a missing person shall be lodged at the concerned police station and the station house officer shall have a duty to trace the family of such person and inform the family about the whereabouts of the person.

101. Report to Magistrate of person with mental illness in private residence who is ill-treated or neglected. *(1)* Every officer in-charge of a police station, who has reason to believe that any person residing within the limits of the police station has a mental illness and is being ill-treated or neglected, shall forthwith report the fact to the Magistrate within the local limits of whose jurisdiction the person with mental illness resides.

(2) Any person who has reason to believe that a person has mental illness and is being ill-treated or neglected by any person having responsibility for care of such person, shall report the fact to the police officer in-charge of the police station within whose jurisdiction the person with mental illness resides.

(3) If the Magistrate has reason to believe based on the report of a police officer or otherwise, that any person with mental illness within the local limits of his jurisdiction is being ill-treated or neglected, the Magistrate may cause the person with mental illness to be produced before him and pass an order in accordance with the provisions of section 102.

102. Conveying or admitting person with mental illness to mental health establishment by Magistrate. *(1)* When any person with mental illness or who may have a mental illness appears or is brought before a Magistrate, the Magistrate may, order in writing—

(a) that the person is conveyed to a public mental health establishment for assessment and treatment, if necessary and the mental

health establishment shall deal with such person in accordance with the provisions of the Act; or

(b) to authorise the admission of the person with mental illness in a mental health establishment for such period not exceeding ten days to enable the medical officer or mental health professional in charge of the mental health establishment to carry out an assessment of the person and to plan for necessary treatment, if any.

(2) On completion of the period of assessment referred to in sub-section *(1)*, the medical officer or mental health professional in charge of the mental health establishment shall submit a report to the Magistrate and the person shall be dealt with in accordance with the provisions of this Act.

103. Prisoners with mental illness. *(1)* An order under section 30 of the Prisoners Act, 1900 (3 of 1900) or under section 144 of the Air Force Act, 1950 (45 of 1950), or under section 145 of the Army Act, 1950 (46 of 1950), or under section 143 or section 144 of the Navy Act, 1957 (62 of 1957), or under section 330 or section 335 of the Code of Criminal Procedure, 1973 (2 of 1974), directing the admission of a prisoner with mental illness into any suitable mental health establishment, shall be sufficient authority for the admission of such person in such establishment to which such person may be lawfully transferred for care and treatment therein:

Provided that transfer of a prisoner with mental illness to the psychiatric ward in the medical wing of the prison shall be sufficient to meet the requirements under this section:

Provided further that where there is no provision for a psychiatric ward in the medical wing, the prisoner may be transferred to a mental health establishment with prior permission of the Board.

(2) The method, modalities and procedure by which the transfer of a prisoner under this section is to be effected shall be such as may be prescribed.

(3) The medical officer of a prison or jail shall send a quarterly report to the concerned Board certifying therein that there are no prisoners with mental illness in the prison or jail.

(4) The Board may visit the prison or jail and ask the medical officer as to why the prisoner with mental illness, if any, has been kept in the prison or

jail and not transferred for treatment to a mental health establishment.

(5) The medical officer in-charge of a mental health establishment wherein any person referred to in sub-section *(1)* is detained, shall once in every six months, make a special report regarding the mental and physical condition of such person to the authority under whose order such person is detained.

(6) The appropriate Government shall setup mental health establishment in the medical wing of at least one prison in each State and Union territory and prisoners with mental illness may ordinarily be referred to and cared for in the said mental health establishment.

(7) The mental health establishment setup under sub-section *(5)* shall be registered under this Act with the Central or State Mental Health Authority, as the case may be, and shall conform to such standards and procedures as may be prescribed.

104. Persons in custodial institutions. *(1)* If it appears to the person in-charge of a State run custodial institution (including beggars homes, orphanages, women's protection homes and children homes) that any resident of the institution has, or is likely to have, a mental illness, then, he shall take such resident of the institution to the nearest mental health establishment run or funded by the appropriate Government for assessment and treatment, as necessary.

(2) The medical officer in-charge of a mental health establishment shall be responsible for assessment of the person with mental illness, and the treatment required by such persons shall be decided in accordance with the provisions of this Act.

105. Question of mental illness in judicial process. If during any judicial process before any competent court, proof of mental illness is produced and is challenged by the other party, the court shall refer the same for further scrutiny to the concerned Board and the Board shall, after examination of the person alleged to have a mental illness either by itself or through a committee of experts, submit its opinion to the court.

CHAPTER XIV

RESTRICTION TO DISCHARGE FUNCTIONS BY PROFESSIONALS NOT COVERED BY PROFESSION

106. Restriction to discharge functions by professionals not covered by profession. No mental health professional or medical practitioner shall discharge any duty or perform any function not authorised by this Act or specify or recommend any medicine or treatment not authorised by the field of his profession.

CHAPTER XV

OFFENCES AND PENALTIES

107. Penalties for establishing or maintaining mental health establishment in contravention of provisions of this Act. *(1)* Whoever carries on a mental health establishment without registration shall be liable to a penalty which shall not be less than five thousand rupees but which may extend to fifty thousand rupees for first contravention or a penalty which shall not be less than fifty thousand rupees but which may extend to two lakh rupees for a second contravention or a penalty which shall not be less than two lakh rupees but which may extend to five lakh rupees for every subsequent contravention.

(2) Whoever knowingly serves in the capacity as a mental health professional in a mental health establishment which is not registered under this Act, shall be liable to a penalty which may extend to twenty-five thousand rupees.

(3) Save as otherwise provided in this Act, the penalty under this section shall be adjudicated by the State Authority.

(4) Whoever fails to pay the amount of penalty, the State Authority may forward the order to the Collector of the district in which such person owns any property or resides or carries on his business or profession or where the mental health establishment is situated, and the Collector shall recover from such persons or mental health establishment the amount specified thereunder, as if it were an arrear of land revenue.

(5) All sums realised by way of penalties under this Chapter shall be credited to the Consolidated Fund of India.

108. Punishment for contravention of provisions of the Act or rules or regulations made thereunder. Any person who contravenes any of the provisions of this Act, or of any rule or regulation made thereunder shall for

first contravention be punishable with imprisonment for a term which may extend to six months, or with a fine which may extend to ten thousand rupees or with both, and for any subsequent contravention with imprisonment for a term which may extend to two years or with fine which shall not be less than fifty thousand rupees but which may extend to five lakh rupees or with both.

109. Offences by companies. *(1)* Where an offence under this Act has been committed by a company, every person who at the time the offence was committed was in-charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act, if he proves that the offence was committed without his knowledge or that he has exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section *(1)*, where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

Explanation.—For the purposes of this section,—

(a) "company" means any body corporate and includes a firm or other association of individuals; and

(b) "director", in relation to a firm, means a partner in the firm.

CHAPTER XVI

MISCELLANEOUS

110. Power to call for information. *(1)* The Central Government may, by a general or special order, call upon the Authority or the Board to furnish, periodically or as and when required any information concerning the activities

carried on by the Authority or the Board, as the case may be, in such form as may be prescribed, to enable that Government, to carry out the purposes of this Act.

(2) The State Government may, by a general or special order, call upon the State Authority or the Board to furnish, periodically or as and when required any information concerning the activities carried on by the State Authority or the Board in such form as may be prescribed, to enable that Government, to carry out the purposes of this Act.

111. Power of Central Government to issue directions. *(1)* Without prejudice to the foregoing provisions of this Act, the Authority shall, in exercise of its powers or the performance of its functions under this Act, be bound by such directions on questions of policy, other than those relating to technical and administrative matters, as the Central Government may give in writing to it from time to time:

Provided that the Authority shall, as far as practicable, be given an opportunity to express its views before any direction is given under this sub-section.

(2) The decision of the Central Government whether a question is one of policy or not shall be final.

112. Power of Central Government to supersede Central Authority. *(1)* If at any time the Central Government is of the opinion—

(a) that on account of circumstances beyond the control of the Central Authority, it is unable to discharge the functions or perform the duties imposed on it by or under the provisions of this Act; or

(b) that the Central Authority has persistently defaulted in complying with any direction given by the Central Government under this Act or in the discharge of the functions or performance of the duties imposed on it by or under the provisions of this Act; or

(c) that circumstances exist which render it necessary in the public interest so to do,

the Central Government may, by notification and for reasons to be specified therein, supersede the Central Authority for such period, not exceeding six months, as may be specified in the notification:

Provided that before issuing any such notification, the Central Government shall give a reasonable opportunity to the Central Authority to make representations against the proposed supersession and shall consider representations, if any, of the Central Authority.

(2) Upon the publication of a notification under sub-section *(1)*, superseding the Central Authority,—

(a) the chairperson and other members shall, as from the date of supersession, vacate their offices as such;

(b) all the powers, functions and duties which may, by or under the provisions of this Act, be exercised or discharged by or on behalf of the Central Authority shall, until the Central Authority is reconstituted under sub-section *(3)*, be exercised and discharged by the Central Government or such authority as the Central Government may specify in this behalf;

(c) all properties owned or controlled by the Central Authority shall, until the Central Authority is reconstituted under sub-section *(3)*, vest in the Central Government.

(3) On or before the expiration of the period of supersession specified in the notification issued under sub-section *(1)*, the Central Government shall reconstitute the Central Authority by a fresh appointment of its chairperson and other members and in such case any person who had vacated his office under clause *(a)* of sub-section *(2)* shall not be deemed to be disqualified for re-appointment.

(4) The Central Government shall cause a notification issued under sub-section *(1)* and a full report of any action taken under this section and the circumstances leading to such action to be laid before each House of Parliament at the earliest.

113. Power of State Government to supersede State Authority.

(1) If at any time the State Government is of the opinion—

(a) that on account of circumstances beyond the control of the State Authority, it is unable to discharge the functions or perform the duties imposed on it by or under the provisions of this Act; or

(b) that the State Authority has persistently defaulted in complying with any direction given by the State Government under this Act or in the discharge of the functions or performance of the duties imposed on it by or under the provisions of this Act; or

(c) that circumstances exist which render it necessary in the public interest so to do,

the State Government may, by notification and for reasons to be specified therein, supersede the State Authority for such period, not exceeding six months, as may be specified in the notification:

Provided that before issuing any such notification, the State Government shall give a reasonable opportunity to the State Authority to make representations against the proposed supersession and shall consider representations, if any, of the State Authority.

(2) Upon the publication of a notification under sub-section *(1)* superseding the State Authority,—

(a) the chairperson and other members shall, as from the date of supersession, vacate their offices as such;

(b) all the powers, functions and duties which may, by or under the provisions of this Act, be exercised or discharged by or on behalf of the State Authority shall, until the State Authority is reconstituted under sub-section *(3)*, be exercised and discharged by the State Government or such authority as the State Government may specify in this behalf;

(c) all properties owned or controlled by the State Authority shall, until the State Authority is reconstituted under sub-section *(3)*, vest in the State Government.

(3) On or before the expiration of the period of supersession specified in the notification issued under sub-section *(1)*, the State Government shall reconstitute the State Authority by a fresh appointment of its chairperson and other members and in such case any person who had vacated his office under clause *(a)* of sub-section *(2)* shall not be deemed to be disqualified for re-appointment.

(4) The State Government shall cause a notification issued under sub-section *(1)* and a full report of any action taken under this section and the

circumstances leading to such action to be laid before the State Legislature at the earliest.

114. Special provisions for States in north-east and hill States.

(1) Notwithstanding anything contained in this Act, the provisions of this Act shall, taking into consideration the communication, travel and transportation difficulties, apply to the States of Assam, Meghalaya, Tripura, Mizoram, Manipur, Nagaland, Arunachal Pradesh and Sikkim, with following modifications, namely:—

(a) under sub-section *(3)* of section 73, the chairperson of the Central Authority may constitute one or more Boards for all the States;

(b) in sub-section *(2)* of section 80, reference to the period of "seven days", and in sub-section *(3)* of that section, reference to the period of "twenty-one days" shall be construed as "ten days" and "thirty days", respectively;

(c) in sub-section *(9)* of section 87, reference to the period of "seventy-two hours" shall be construed as "one hundred twenty hours", and in sub-sections *(3)* and *(12)* of that section, reference to a period of "seven days" shall be construed as "ten days";

(d) in sub-section *(3)* of section 88, reference to the period of "twenty-four hours" shall be construed as "seventy-two hours";

(e) in clauses *(a)* and *(b)* of sub-section *(9)* of section 89, reference to the period of "three days" and "seven days" shall be construed as "seven days" and "ten days" respectively;

(f) in sub-section *(3)* of section 90, reference to the period of "seven days" and in sub-section *(4)* of that section, reference to the period of "twenty-one days" shall be construed as "ten days" and "thirty days" respectively;

(g) in sub-section *(4)* of section 94, reference to the period of "seventy-two hours" shall be construed as "one hundred twenty hours".

(2) The provisions of clauses *(b)* to *(g)* of sub-section *(1)* shall also apply to the States of Uttarakhand, Himachal Pradesh and Jammu and Kashmir and the Union territories of Lakshadweep and Andaman and Nicobar Islands.

(3) The provisions of this section shall cease to have effect on the expiry of a period of ten years from the commencement of this Act, except as respects things done or omitted to be done before such cesser, and upon such cesser section 6 of the General Clauses Act, 1897 (10 of 1897), shall apply as if this Act had then been repealed by a Central Act.

115. Presumption of severe stress in case of attempt to commit suicide. *(1)* Notwithstanding anything contained in section 309 of the Indian Penal Code (45 of 1860) any person who attempts to commit suicide shall be presumed, unless proved otherwise, to have severe stress and shall not be tried and punished under the said Code.

(2) The appropriate Government shall have a duty to provide care, treatment and rehabilitation to a person, having severe stress and who attempted to commit suicide, to reduce the risk of recurrence of attempt to commit suicide.

116. Bar of jurisdiction. No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Authority or the Board is empowered by or under this Act to determine, and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.

117. Transitory provisions. The Central Government may, if it considers so necessary in the interest of persons with mental illness being governed by the Mental Health Act, 1987 (14 of 1987), take appropriate interim measures by making necessary transitory schemes.

118. Chairperson, members and staff of Authority and Board to be public servants. The chairperson, and other members and the officers and other employees of the Authority and Board shall be deemed to be public servants within the meaning of section 21 of the Indian Penal Code (45 of 1860).

119. Protection of action taken in good faith. No suit, prosecution or other legal proceeding shall lie against the appropriate Government or against the chairperson or any other member of the Authority or the Board, as the case may be, for anything which is in good faith done or intended to be done in pursuance of this Act or any rule or regulation made thereunder in the discharge of official duties.

120. Act to have overriding effect. The provisions of this Act shall have overriding effect notwithstanding anything inconsistent therewith 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.

121. Power of Central Government and State Governments to make rules. *(1)* The Central Government may, by notification, make rules for carrying out the provisions of this Act.

(2) Subject to the provisions of sub-section *(1)*, the State Government may, with the previous approval of the Central Government, by notification, make rules for carrying out the provisions of this Act:

Provided that the first rules shall be made by the Central Government, by notification.

(3) In particular, and without prejudice to the generality of the foregoing power, rules made under sub-section *(1)* may provide for all or any of the following matters, namely:—

(a) qualifications relating to clinical psychologist under sub-clause *(ii)* of clause *(f)* of sub-section *(1)* of section 2;

(b) qualifications relating to psychiatric social worker under clause *(w)* of sub-section *(1)* of section 2;

(c) the manner of nomination of members of the Central Authority under sub-section *(2)* of section 34;

(d) the salaries and allowances payable to, and the other terms and conditions of service of, the chairperson and other members of the Central Authority under sub-section *(3)* of section 35;

(e) the procedure for registration (including the fees to be levied for such registration) of the mental health establishments under sub-section *(2)* of section 43;

(f) the manner of nomination of members of the State Authority under sub-section *(2)* of section 46;

(g) the salaries and allowances payable to, and the other terms and conditions of service of, the chairperson and other members of the State Authority under sub-section *(3)* of section 47;

(h) the procedure for registration (including the fees to be levied for such registration) of the mental health establishments under sub-section *(2)* of section 55;

(i) the form of accounts and other relevant records and annual statement of accounts under sub-section *(1)* of section 59;

(j) the form in, and the time within which, an annual report shall be prepared under section 60;

(k) the form of accounts and other relevant records and annual statement of accounts under sub-section *(1)* of section 63;

(l) the form in, and the time within which, an annual report shall be prepared under section 64;

(m) manner of constitution of the Board by the State Authority for a district or groups of districts in a State;

(n) other disqualifications of chairperson or members of the Board under clause *(e)* of sub-section *(2)* of section 82;

(o) any other matter which is required to be, or may be, specified by rules or in respect for which provision is to be made by rules.

(4) In particular, and without prejudice to the generality of the foregoing power, rules made under sub-section *(2)* may provide for all or any of the following matters, namely:—

(a) the manner of proof of mental healthcare and treatment under sub-section *(1)* of section 4;

(b) provision of half-way homes, sheltered accommodation and supported accommodation under clause *(b)* of sub-section *(4)* of section 18;

(c) hospitals and community based rehabilitation establishment and services under clause *(d)* of sub-section *(4)* of section 18;

(d) basic medical records of which access is to be given to a person with mental illness under sub-section *(1)* of section 25;

(e) custodial institutions under sub-section *(2)* of section 27;

(f) the form of application to be submitted by the mental health establishment with the undertaking that the mental health establishment fulfils the minimum standards, if any, specified by the Authority, under the *Explanation* to sub-section *(2)* of section 65;

(g) the form of certificate of registration under sub-section *(3)* of section 65;

(h) the form of application, the details, the fees to be accompanied with it under sub-section *(1)* of section 66;

(i) the form of certificate of provisional registration containing particulars and information under sub-section *(4)* of section 66;

(j) the fees for renewal of registration under sub-section *(11)* of section 66;

(k) the person or persons (including representatives of the local community) for the purpose of conducting an audit of the registered mental health establishments under sub-section *(1)* and fees to be charged by the Authority for conducting such audit under sub-section *(2)* of section 67;

(l) the person or persons for the purpose of conducting and inspection or inquiry of the mental health establishments under sub-section *(1)* of section 68;

(m) the manner to enter and search of a mental health establishment operating without registration under sub-section *(6)* of section 68;

(n) the fees for issuing a duplicate certificate under sub-section *(2)* of section 70;

(o) the form and manner in which the Authority shall maintain in digital format a register of mental health establishments, the particulars of the certificate of registration so granted in a separate register to be maintained under section 71;

(p) constitution of the Boards under sub-section *(3)* of section 73;

(q) the honorarium and other allowances payable to, and the other terms and conditions of service of, the chairperson and members of the

Board under sub-section *(3)* of section 75;

(r) method, modalities and procedure for transfer of prisoners under sub-section *(2)* of section 103;

(s) the standard and procedure to which the Central or State Health Authority shall confirm under sub-section *(6)* of section 103;

(t) the form for furnishing periodical information under section 110; and

(u) any other matter which is required to be, or may be, specified by rules or in respect for which provision is to be made by rules.

122. Power of Central Authority to make regulations. *(1)* The Central Authority may, by notification, make regulations, consistent with the provisions of this Act and the rules made thereunder, to carry out the provisions of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely:—

(a) manner of making an advance directive under section 6;

(b) additional regulations, regarding the procedure of advance directive to protect the rights of persons with mental illness under sub-section *(3)* of section 12;

(c) the salaries and allowances payable to, and the other terms and conditions of service (including the qualifications, experience and manner of appointment) of, the chief executive officer and other officers and employees of the Central Authority under sub-section *(3)* of section 40;

(d) the times and places of meetings of the Central Authority and rules of procedure in regard to the transaction of business at its meetings (including quorum at such meetings) under sub-section *(1)* of section 44;

(e) the minimum standards of facilities and services under clause *(a)* of sub-section *(4)* of section 65;

(f) the minimum qualifications for the personnel engaged in mental health establishment under clause *(b)* of sub-section *(4)* of section 65;

(g) provisions for maintenance of records and reporting under clause *(c)* of sub-section *(4)* of section 65;

(h) any other conditions under clause *(d)* of sub-section *(4)* of section 65;

(i) categories of different mental health establishment under clause *(a)* of sub-section *(5)* of section 65;

(j) the form of application to be made by the mental health establishment and the fees to be accompanied with it under sub-section *(12)* of section 66;

(k) manner of submitting evidence under sub-section *(13)* of section 66;

(l) the manner of filing objections under sub-section *(14)* of section 66;

(m) the time and places and rules of procedure in regard to the transaction of business at its meetings to be observed by the Central Authority and the Board under section 87;

(n) regulations under sub-section *(2)* of section 96 and under sub-section *(8)* of section 97;

(o) any other matter which is required to be, or may be, specified by regulations or in respect of which provision is to be made by regulations.

123. Power of State Authority to make regulations. *(1)* The State Authority may, by notification, make regulations, consistent with the provision of this Act and the rules made thereunder, to carry out the provisions of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely:—

(a) the minimum quality standards of mental health services under

sub-section *(9)* of section 18;

(b) the salaries and allowances payable to, and the other terms and conditions of service (including the qualifications, experience and manner of appointment) of the chief executive officer and other officers and employees of the State Authority under sub-section *(3)* of section 52;

(c) the manner in which the State Authority shall publish the list of registered mental health professionals under clause *(d)* of sub-section *(1)* of section 55;

(d) the times and places of meetings of the State Authority and rules of procedure in regard to the transaction of business at its meetings (including quorum at such meetings) under sub-section *(1)* of section 56;

(e) the form of application to be made by the mental health establishment and the fees to be accompanied with it under sub-section *(12)* of section 66;

(f) the manner of filing objections under sub-section *(14)* of section 66;

(g) any other matter which is required to be, or may be, specified by regulations or in respect of which provision is to be made by regulations.

124. Laying of rules and regulations. *(1)* Every rule made by the Central Government and every regulation made by the Central Authority under this Act shall be laid, as soon as may be after it is made, before each House of Parliament while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or regulation, as the case may be, or both Houses agree that the rule or regulation, as the case may be, should not be made, the rule or regulation, as the case may be, shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or regulation, as the case may be.

(2) Every rule made by the State Government and every regulation made by the State Authority under this Act shall be laid, as soon as may be after it is made, before each House of the State Legislature where it consists of two Houses, or where such Legislature consists of one House, before that House.

125. Power to remove difficulties. *(1)* If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order, published in the Official Gazette, make such provisions, not inconsistent with the provisions of this Act, as may appear to be necessary or expedient for removing the difficulty:

Provided that no order shall be made under this section after the expiry of two years from the date of commencement of this Act.

(2) Every order made under this section shall, as soon as may be after it is made, be laid before each House of Parliament.

126. Repeal and saving. *(1)* The Mental Health Act, 1987 (14 of 1897) is hereby repealed.

(2) Notwithstanding such repeal,—

(a) anything done or any action taken or purported to have been done or taken (including any rule, notification, inspection, order or declaration made or any document or instrument executed or any direction given or any proceedings taken or any penalty or fine imposed) under the repealed Act shall, in so far as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken under the corresponding provisions of this Act;

(b) the Central Authority for Mental Health Services, and the State Authority for Mental Health Services established under the repealed Act shall, continue to function under the corresponding provisions of this Act, unless and until the Central Authority and the State Authority are constituted under this Act;

(c) any person appointed in the Central Authority for Mental Health Services, or the State Authority for Mental Health Services or any person appointed as the visitor under the repealed Act and holding office as such immediately before the commencement of this Act, shall, on such commencement continue to hold their respective offices under the

corresponding provisions of this Act, unless they are removed or until superannuated;

(d) any person appointed under the provisions of the repealed Act and holding office as such immediately before the commencement of this Act, shall, on such commencement continue to hold his office under the corresponding provisions of this Act, unless they are removed or until superannuated;

(e) any licence granted under the provisions of the repealed Act, shall be deemed to have been granted under the corresponding provisions of this Act unless the same are cancelled or modified under this Act;

(f) any proceeding pending in any court under the repealed Act on the commencement of this Act may be continued in that court as if this Act had not been enacted;

(g) any appeal preferred from the order of a Magistrate under the repealed Act but not disposed of before the commencement of this Act may be disposed of by the court as if this Act had not been enacted.

(3) The mention of the particular matters in sub-section *(2)* shall not be held to prejudice or affect the general application of section 6 of the General Clauses Act, 1897 (10 of 1897) with regard to the effect of repeal.

DR. G. NARAYANA RAJU,

Secretary to the Govt. of India.

NOTES OF CASES SECTION

Short Note

****(65)***

Before Mr. Justice R.S. Jha

W.P. No. 113/2012 (Jabalpur) decided on 19 July, 2016

ADARSH ADIVASI MACHHCHUA SAHKARI SAMITI MARYADIT ...Petitioner

Vs.

JOINT REGISTRAR, COOPERATIVE SOCIETIES, JABALPUR DIVISION, JABALPUR (M.P.) & ors. ...Respondents

Co-operative Societies Act, M.P. 1960 (17 of 1961), Sections 9, 18-A & 80-A – Cancellation of Registration of Society/ De-Registration – Revision – Powers of Registrar/Joint Registrar – Delegation of Authority **– In revision u/S 80-A of the Act of 1960, Registration of the society was cancelled by the Joint Registrar – Held – Powers u/S 80-A which are conferred on the Registrar are not only confined to merely examining the legality or regularity of any proceeding but also enables the Registrar to modify, annul or reverse any decision, order or proceeding taken up by any subordinate officer or the Board of Directors – Perusal of second proviso to Section 80-A and several notification of the State Government makes it clear that powers of the Registrar can be delegated but not below the rank of Joint Registrar and thus powers as conferred on the Registrar u/S 80-A of the Act can be exercised by the Joint Registrar – Further held – Despite having an alternate remedy u/S 18-A for De-Registration of a society, revisional powers u/S 80-A can be invoked and exercised by the authority – No illegality in the impugned order passed by the Joint Registrar – Petition dismissed.**

सहकारी सोसायटी अधिनियम, म.प्र. 1960 (1961 का 17), धाराएँ 9, 18–ए व 80–ए – सोसाइटी का पंजीयन निरस्त किया जाना/विपंजीकरण – पुनरीक्षण – रजिस्ट्रार/संयुक्त रजिस्ट्रार की शक्तियां – प्राधिकार का प्रत्यायोजन – अधिनियम, 1960 की धारा 80–ए के अंतर्गत पुनरीक्षण में, संयुक्त रजिस्ट्रार द्वारा सोसाइटी का पंजीयन निरस्त किया गया – अभिनिर्धारित – धारा 80–ए के अंतर्गत शक्तियां जो कि रजिस्ट्रार को प्रदत्त है, केवल किसी कार्यवाही की वैधता अथवा नियमितता के परीक्षण मात्र तक सीमित नहीं है बल्कि रजिस्ट्रार को किसी अधीनस्थ अधिकारी या बोर्ड के निदेशकों द्वारा लिये गये किसी निर्णय, आदेश अथवा कार्यवाही को परिवर्तित करने, बातिल करने या पलट देने के लिए भी समर्थ बनाती है – धारा 80–ए के द्वितीय परंतुक एवं राज्य सरकार की विभिन्न अधिसूचनाओं के परिशीलन से स्पष्ट होता है कि रजिस्ट्रार की शक्तियों का प्रत्यायोजन किया जा सकता है परंतु संयुक्त रजिस्ट्रार के पद से नीचे नहीं और इसलिए अधिनियम की धारा 80–ए के अंतर्गत रजिस्ट्रार को प्रदत्त शक्तियों का प्रयोग संयुक्त रजिस्ट्रार द्वारा किया जा सकता है – आगे अभिनिर्धारित – सोसाइटी के विपंजीकरण के लिए धारा 18–ए के अंतर्गत

वैकल्पिक उपचार उपलब्ध होने के बावजूद, प्राधिकारी द्वारा धारा 80–ए के अंतर्गत पुनरीक्षण शक्तियों का अवलंब लिया जा सकता है और प्रयोग किया जा सकता है.– संयुक्त रजिस्ट्रार द्वारा पारित आक्षेपित आदेश में कोई अवैधता नहीं – याचिका खारिज।

Case referred :

1996 RN 393.

Maninder S. Bhatti, for the petitioner.
Vikram Johri, P.L. for the respondents No. 1 to 5.
Vijay Kumar Shukla, for the respondents No. 6 & 7.

Short Note

***(66)**

Before Mr. Justice Rajeev Kumar Dubey

Cr.R. No. 1064/2015 (Indore) decided on 8 February, 2017

ANIL ...Applicant
Vs.
SMT. VEENA & ors. ...Non-applicants

Protection of Women from Domestic Violence Act (43 of 2005), Section 12 & 29 – Interim Maintenance – Grounds – Income of Wife – **In a proceeding u/S 12 of the Act, on an application being filed by wife u/S 29 of the Act, the trial Court as well as lower appellate Court directed husband to pay interim maintenance to wife @ Rs. 2000 per month – Challenge to – Held – Wife herself admitted in her reply that she is working as ANM in a hospital and is getting a salary of Rs. 11,400 per month – Salary certificate and bank pass book of wife corroborates the fact of income of wife – Further held – Interim maintenance should be awarded only where there is urgent requirement of wife to be maintained or to prevent destitution and vagrancy of woman/wife who has become used to a certain standard of living by virtue of her marriage – Trial Court as well as lower appellate court committed mistake in awarding interim maintenance – Orders passed by Courts below are set aside – Revision allowed.**

घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम (2005 का 43), धारा 12 व 29 – अंतरिम भरणपोषण – आधार – पत्नी की आय – अधिनियम की धारा 12 के अंतर्गत कार्यवाही में, पत्नी द्वारा अधिनियम की धारा 29 के अंतर्गत आवेदन प्रस्तुत किये जाने पर, विचारण न्यायालय के साथ–साथ निचले अपीली न्यायालय ने पत्नी को रू. 2000 प्रतिमाह की दर से अंतरिम भरणपोषण के भुगतान हेतु पति को

निदेशित किया – को चुनौती – अभिनिर्धारित – पत्नी ने अपने प्रतिउत्तर में स्वयं स्वीकार किया कि वह एक चिकित्सालय में ए.एन.एम. के रूप में कार्यरत है और रू. 11,400 प्रतिमाह वेतन प्राप्त कर रही है – पत्नी के वेतन प्रमाणपत्र एवं बैंक पास बुक से पत्नी की आय के तथ्य की पुष्टि होती है – आगे अभिनिर्धारित – अंतरिम भरणपोषण केवल तब प्रदान किया जाना चाहिए जब भरणपोषण हेतु पत्नी की तात्कालिक आवश्यकता है या महिला/पत्नी जो उसके विवाह के नाते जीविका के कतिपय मानक की आदी हो गई है, के अक्षम और निराश्रित होने से रोकने के लिए प्रदान किया जाना चाहिए – विचारण न्यायालय के साथ ही निचले अपीली न्यायालय ने अंतरिम भरणपोषण प्रदान करने में भूल कारित की – निचले न्यायालयों द्वारा पारित आदेशों को अपास्त किया गया – पुनरीक्षण मंजूर।

S.K. Pawnekar, for the applicant.

Short Note

****(67)***

Before Mr. Justice Vivek Rusia

W.P. No. 6460/2015 (Indore) decided on 17 August, 2016

ASHOK PARWAT ...Petitioner

Vs.

SUDARSHAN ...Respondent

Civil Procedure Code (5 of 1908), Order 39 Rule 7 & Order 26 Rule 9 **– Inspection of the suit property by appointing commission – Issue of possession – Held – Commission can be appointed only in case of demarcation and encroachment – Purpose of Order 26 Rule 9 or Order 39 Rule 7 CPC is not to collect evidence – Issue of possession is a matter to be decided only on the basis of evidence that too after framing the issues and burden lies on the plaintiff to establish by way of evidence – Such findings regarding possession cannot be recorded by the trial Court on the basis of the report of Tehsildar – Trial Court's order set aside so far it relates to recording the finding about the possession of plaintiff – Petition allowed.**

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 39 नियम 7 व आदेश 26 नियम 9 – कमीशन नियुक्ति द्वारा वाद संपत्ति का निरीक्षण – कब्जे का विवाद्यक – अभिनिर्धारित – कमीशन केवल सीमांकन एवं अतिक्रमण के प्रकरण में नियुक्त किया जा सकता है – आदेश 26 नियम 9 या आदेश 39 नियम 7 सि.प्र.सं. का प्रयोजन साक्ष्य एकत्रित करना नहीं है – कब्जे का विवाद्य एक ऐसा मामला है जिसे केवल साक्ष्य के आधार पर विनिश्चित किया जा सकता है, वह भी विवाद्यकों को विरचित किये जाने के

पश्चात् तथा वादी पर साक्ष्य द्वारा स्थापित करने का भार होगा – विचारण न्यायालय द्वारा कब्जे के संबंध में उक्त निष्कर्ष, तहसीलदार के प्रतिवेदन के आधार पर अभिलिखित नहीं किये जा सकते – विचारण न्यायालय का आदेश जहाँ तक वादी के कब्जे के बारे में निष्कर्ष अभिलिखित किये जाने से संबंधित है, अपास्त – याचिका मंजूर।

Cases referred :

W.P. No. 5957/2015 order passed on 17.06.2015, 2007 (III) MPWN 123, 2004 (3) MPLJ 213, 2002 (I) MPWN 196, (2008) 8 SCC 671, (1975) MPLJ 810, (2011) 2 MPLJ 576.

V.P. Bhagwat, for the petitioner.
Prakash Pancholi, for the respondent No. 1.
Manish Verma, for the respondent No. 2.

Short Note

****(68)***

Before Mr. Justice S.C. Sharma

W.P. No. 1645/2016 (Indore) decided on 29 August, 2016

BRIJPAL SINGH ...Petitioner
Vs.
DY. INSPECTOR GENERAL OF POLICE,
INDORE & anr. ...Respondents

Service Law – Constitution – Article 311(2)(b) – Dismissal from service **– Petitioner dismissed from service on the ground that offence has been registered against him under provisions of Prevention of Corruption Act – Held – In the instant case, neither there was any departmental enquiry conducted nor any charge-sheet was issued – Only show cause notice was issued, statement of petitioner was recorded and authority passed an order of dismissal – Article 311(2)(b) of the constitution provides that where the authority empowered to dismiss or remove a person is satisfied that for some reason to be recorded by the authority in writing that it is not reasonably practicable to hold such enquiry, disciplinary authority can dismiss a person, but in the instant case, impugned order does not reveal any such reason recorded by the authority – Order is not in consonance with Article 311(2)(b) of Constitution – Further held – Petitioner is still not convicted under the offence of corruption – Impugned order set aside – Respondents directed to reinstate the petitioner – Petition allowed.**

NOTES OF CASES SECTION

सेवा विधि – संविधान – अनुच्छेद 311(2)(बी) – सेवा से पदच्युति – याची को सेवा से इस आधार पर पदच्युत किया गया कि उसके विरूद्ध भ्रष्टाचार निवारण अधिनियम के उपबंधों के अंतर्गत अपराध पंजीबद्ध किया गया है – अभिनिर्धारित – वर्तमान प्रकरण में, न तो कोई विभागीय जांच संचालित की गई थी न ही कोई आरोप पत्र जारी किया गया था – केवल कारण बताओ नोटिस जारी किया गया था, याची का कथन अभिलिखित किया गया था और प्राधिकारी ने पदच्युति का आदेश पारित किया – संविधान का अनुच्छेद 311(2)(बी) उपबंधित करता है कि जहां एक व्यक्ति को पदच्युत अथवा हटाने हेतु सशक्त प्राधिकारी की संतुष्टि होती है कि किसी कारण, जिसे प्राधिकारी द्वारा लिखित में अभिलिखित किया जाना होगा कि उक्त जांच संचालित करना युक्तियुक्त रूप से साध्य नहीं, प्राधिकारी, एक व्यक्ति को पदच्युत कर सकता है, परंतु वर्तमान प्रकरण में, आक्षेपित आदेश, प्राधिकारी द्वारा अभिलिखित ऐसा कोई कारण प्रकट नहीं करता – आदेश, संविधान के अनुच्छेद 311(2)(बी) के अनुरूप नहीं – आगे अभिनिर्धारित – याची को अभी तक भ्रष्टाचार के अपराध में दोषसिद्ध नहीं किया गया है – आक्षेपित आदेश अपास्त – याची को सेवा में बहाल किये जाने हेतु प्रत्यर्थीगण को निदेशित किया गया – याचिका मंजूर।

Case referred:

AIR 2014 SC 2922.

Short Note

***(69)**

Before Mr. Justice G.S. Ahluwalia

M.Cr.C. No. 7418/2010 (Gwalior) decided on 6 January, 2017

HAJI NANHE KHAN & ors. ...Applicants

Vs.

STATE OF M.P. & anr. ...Non-applicants

Criminal Procedure Code, 1973 (2 of 1974), Section 482 and Penal Code (45 of 1860), Sections 420, 467, 468 & 471 – Quashment of Charges – Compromise – **Held – As per the present status of the trial, out of 20 witnesses, 16 witnesses have already been examined, hence trial has reached to an advanced stage – Proceedings cannot be quashed at this advance stage on the ground of compromise – Apart from the advanced stage of trial, as per the allegations, accused not only cheated the complainant but by making an attempt to sell the lands of other, accused has tried to cheat other persons also who are cited as witnesses and without there being any compromise between the said witnesses and accused persons, entire proceedings cannot be quashed**

merely on the ground that first informant has settled his disputes with the accused persons – Petition dismissed.

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 एवं दण्ड संहिता (1860 का 45), धाराएँ 420, 467, 468 व 471 – आरोपों का अभिखंडित किया जाना – समझौता – अभिनिर्धारित – विचारण की वर्तमान स्थिति के अनुसार, 20 साक्षीगण में से, 16 साक्षीगण का पहले ही परीक्षण किया जा चुका है, अतः विचारण एक उन्नत प्रक्रम पर पहुँच चुका है – इस उन्नत प्रक्रम पर समझौते के आधार पर कार्यवाहियाँ अभिखण्डित नहीं की जा सकती – विचारण के उन्नत प्रक्रम के अलावा, अभिकथनों के अनुसार, अभियुक्त ने परिवादी से न केवल छल किया है बल्कि अन्य की भूमि विक्रय करने का प्रयास करके, अभियुक्त ने अन्य व्यक्तियों के साथ भी छल करने का प्रयास किया है जो कि साक्षीगण के रूप में वर्णित हैं तथा उक्त साक्षीगण एवं अभियुक्तगण के मध्य किसी समझौते के बिना, संपूर्ण कार्यवाहियाँ मात्र इस आधार पर अभिखण्डित नहीं की जा सकती कि प्रथम सूचना देने वाले व्यक्ति ने अभियुक्तगण के साथ अपने विवादों का निपटारा कर लिया है – याचिका खारिज।

Cases referred :

(2014) 6 SCC 466, AIR 2003 SC 974, AIR 2006 SC 2780, AIR 2008 SC 251, AIR 2009 SC 3191, AIR 2013 SC 1952, (2007) 14 SCC 776, (2009) 3 SCC 375, (2015) 1 SCC 513, (2012) 9 SCC 460.

Sarvesh Sharma, for the applicants.
Girdhari Singh Chouhan, P.P. for the State.

Short Note

****(70)***

Before Mr. Justice Sujoy Paul

W.P. No. 3310/2011 (S) (Jabalpur) decided on 11 March, 2016

MAHIMA CHAND GANGWAR ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

Service Law – Pension and Retiral Dues – Conviction u/S 324/34 IPC and Civil Services (Pension) Rules, M.P. 1976, Rule 8 – **Petitioner, a government high school teacher, suspended from service due to conviction u/S 324/34 IPC – After retirement, he was deprived from the fruits of pension and other retiral dues – Held – Offence punishable u/S 324 IPC does not involve moral turpitude – Trial Court's judgment reveals that a private dispute resulted into a criminal case**

which has no impact on the society or public at large – Petitioner was not punished for any heinous offence – Stoppage of full pension amounts to inflicting punishment of financial death sentence – Respondents directed to pay pension and other retiral dues from the date of his retirement within three months, failing which delayed payment will carry 12% interest – Respondents may deduct the subsistence allowance and provisional pension already paid to petitioner – Petition allowed.

सेवा विधि – पेंशन एवं सेवानिवृत्ति देय – भा.दं.सं. की धारा 324/34 के अंतर्गत दोषसिद्धि एवं सिविल सेवा (पेंशन) नियम, म.प्र. 1976 का नियम 8 – याची एक शासकीय हाईस्कूल शिक्षक को भा.दं.सं. की धारा 324/34 के अंतर्गत दोषसिद्धि के कारण सेवा से निलंबित किया गया – सेवा निवृत्ति पश्चात्, उसे पेंशन एवं अन्य निवृत्ति देय के परिणामों से वंचित किया गया – अभिनिर्धारित – भा.दं.सं. की धारा 324 के अंतर्गत दण्डनीय अपराध में नैतिक अधमता शामिल नहीं – विचारण न्यायालय का निर्णय प्रकट करता है कि एक व्यक्तिगत विवाद दाण्डिक प्रकरण में परिणित हुआ जिसका समाज अथवा जनता पर व्यापक रूप से कोई प्रभाव नहीं हुआ है – याची को किसी जघन्य अपराध के लिए दण्डित नहीं किया गया था – पूर्ण पेंशन को रोका जाना, वित्तीय मृत्युदण्ड की शास्ति अधिरोपित करने की कोटि में आता है – प्रत्यर्थीगण को याची की सेवा निवृत्ति की तिथि से पेंशन एवं अन्य निवृत्ति देय का भुगतान तीन माह के भीतर करने के लिए निदेशित किया गया, ऐसा करने में विफल होने पर विलंबित भुगतान के साथ 12% ब्याज लगेगा – प्रत्यर्थीगण, याची को अदा किया जा चुका जीवन–निर्वाह भत्ता एवं अनंतिम पेंशन का कटोत्रा कर सकते है – याचिका मंजूर।

Cases referred:

2015(3) JLJ 137, 1989 Supp (2) SCC 565, (2008) 3 SCC 273.

Arvind Shrivastava, for the petitioner.
D.K. Bohre, G.A. for the respondents/State.

Short Note

****(71)***

Before Mr. Justice Sujoy Paul

W.P. No. 7285/2015 (Jabalpur) decided on 28 March, 2016

ROMA SONKAR ...Petitioner

Vs.

STATE OF M.P. & anr. ...Respondents

Constitution – Article 226 – Examination – Markings – Maintainability of Petition **– Written examination was conducted by**

the Public Service Commission (PSC) for certain vacancies/ post – It was submitted by petitioner and was duly admitted by respondent that answer to one particular question was not evaluated and marks have not been granted – It was also submitted that a candidate who obtained 1199 marks has been selected and petitioner, because of such default, secured 1197 marks and was kept in the supplementary list – On the next date of hearing, subject expert was called for evaluation of that particular answer whereby Petitioner was granted 7 marks out of 15 – Respondent directed to include 7 marks in the result of the petitioner and she be given appropriate placement in the merit list and shall be considered accordingly for the appropriate post – Further held – Under Article 14 and 16 of the Constitution, right of consideration is a fundamental right of a candidate which includes a right of fair consideration, which in the present case was infringed because of improper valuation by the respondent – Valuation must be done meticulously – Court should not generally direct revaluation in a routine manner but in cases where negligence manifest on the face of the record, directions can be issued – Petition allowed.

संविधान – अनुच्छेद 226 – परीक्षा – अंकन – याचिका की पोषणीयता – लोक सेवा आयोग (पी.एस.सी.) द्वारा कतिपय रिक्तियों/पदों हेतु लिखित परीक्षा संचालित की गई थी – याची द्वारा निवेदन किया गया तथा प्रत्यर्थी द्वारा सम्यक् रूप से स्वीकार किया गया था कि एक विशिष्ट प्रश्न के उत्तर का मूल्यांकन नहीं किया गया था तथा अंक प्रदान नहीं किये गये हैं – यह भी निवेदन किया गया था कि वह अभ्यर्थी जिसने 1199 अंक प्राप्त किये, उसका चयन किया गया है और उक्त चूक के कारण याची ने 1197 अंक प्राप्त किये तथा उसे अनुपूरक सूची में रखा गया था – सुनवाई की अगली तिथि को विषय विशेषज्ञ को उस विशिष्ट उत्तर के मूल्यांकन हेतु बुलाया गया था जिसके द्वारा याची को 15 में से 7 अंक प्रदान किये गये थे – प्रत्यर्थी को याची के परिणाम में 7 अंक शामिल करने के लिए एवं उसे योग्यता क्रम सूची में समुचित स्थान देने और उचित पद हेतु तद्नुसार उसका विचार करने के लिए निदेशित किया गया – आगे अभिनिर्धारित – संविधान के अनुच्छेद 14 व 16 के अंतर्गत, विचार किये जाने का अधिकार, अभ्यर्थी का मूलभूत अधिकार है जिसमें निष्पक्ष विचार किये जाने का अधिकार शामिल है, जिसका वर्तमान प्रकरण में, प्रत्यर्थी द्वारा अनुचित मूल्यांकन के कारण अतिलंघन किया गया है – मूल्यांकन बारीकी से किया जाना चाहिए – न्यायालय को सामान्यतः पुनर्मूल्यांकन का निदेश आमतौर पर नहीं देना चाहिए परंतु ऐसे मामलों में जहां अभिलेख को देखकर उपेक्षा प्रकट होती है, निदेश जारी किये जा सकते हैं – याचिका मंजूर।

Cases referred :

1965 (3) SCR 536, 1989 (2) SCC 691, 2005 (2) MPLJ 221, 2000 (1) MPHT 486, 2010 (6) SCC 759, 1993 Supp (1) SCC 632, (1997) 6 SCC 721, (1991) 2 SCC 179, 1993 Supp (1) SCC 594, (1994) 1 SCC 175, (2002) 7 SCC 258, (2005) 2 SCC 65, (1984) 4 SCC 27.

Arvind Shrivastava, for the petitioner.
Prashant Singh, P.L. for the respondents.

Short Note

*(72)

Before Mr. Justice G.S. Ahluwalia

M.Cr.C. No. 4447/2014 (Gwalior) decided on 6 January, 2017

SANJAY ...Applicant
Vs.
STATE OF M.P. ...Non-applicant

***Criminal Procedure Code, 1973 (2 of 1974), Section 360 and Public Gambling Act (3 of 1867), Section 13 – Conviction* – Applicant seeking benefit u/S 360 of CrPC and praying to be released on probation – Held – While extending benefit of Section 360 Cr.P.C., nature of the offence is to be seen and that whether the offence committed is against the society at large – Gambling has become a menace to the peaceful society which adversely affects the financial position of the family of the persons involved in it – If a person looses money in gambling then it can be safely said that the money which could have been utilized for upbringing the children of the family or for looking after elder persons of the family has been misused – It affects the society at large – Benefit of Section 360 CrPC cannot be granted – Petition dismissed.**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 360 एवं सार्वजनिक द्यूत अधिनियम (1867 का 3), धारा 13 – दोषसिद्धि – आवेदक का दण्ड प्रक्रिया संहिता की धारा 360 के अंतर्गत लाभ चाहते हुए तथा परिवीक्षा पर मुक्त किये जाने हेतु प्रार्थना की जाना – अभिनिर्धारित – दण्ड प्रक्रिया संहिता की धारा 360 का लाभ देते समय, अपराध की प्रकृति देखी जानी चाहिए तथा यह भी कि क्या जो अपराध कारित हुआ है वह व्यापक रूप से समाज के विरूद्ध है – द्यूत शांतिपूर्ण समाज के लिए एक खतरा बन चुका है जो कि उसमें सम्मिलित व्यक्तियों के परिवार की आर्थिक स्थिति पर विपरीत प्रभाव डालता है – यदि एक व्यक्ति द्यूत में रूपये गंवाता है तब यह सुरक्षित रूप से कहा जा सकता है कि जिन रूपयों का उपयोग परिवार

के बच्चों की परवरिश या परिवार के बुजुर्गों की देखरेख में किया जा सकता था उनका दुरूपयोग हुआ है – यह व्यापक रूप से समाज को प्रभावित करता है – दण्ड प्रक्रिया संहिता की धारा 360 का लाभ प्रदान नहीं किया जा सकता – याचिका खारिज।

Case referred :

AIR 2008 SC (Supp.) 261.

Pradeep Katare, for the applicant.
Prakhar Dhengula, P.L. for the non-applicant/State.

Short Note

****(73)***

Before Mr. Justice R.S. Jha

W.P. No. 6783/2016 (Jabalpur) decided on 20 June, 2016

SHEKHAR CHOUDHARY ...Petitioner
Vs.
UNION OF INDIA ...Respondent

Cantonments Act (41 of 2006), Sections 20(2), 20(3) & 45 – Withdrawal of Resignation – Procedure **– Petitioner, Vice-President of the Board submitted his resignation on 04.03.2016 which was later withdrawn on 06.04.2016 but even after such withdrawal, in a special meeting held on 07.04.2016, resignation was accepted taking resort to Section 20(3) of the Act of 2006 by conducting voting u/S 45 of the Act – Held – There is no provision in the Act of 2006 which provides a separate procedure for withdrawing the resignation and therefore general principles of withdrawing a notice of resignation are applicable, by simply giving an intimation in writing to that effect – In the instant case, there is no requisition as envisaged u/S 20(3) of the Act of 2006 moved by the members for removal of vice-president – It is clear that before the resignation of the petitioner was accepted by the board, the same was withdrawn by him and this fact was taken note of in the resolution of the special meeting of the Board itself – Thus, at the time of passing of the resolution, notice of resignation stood withdrawn and did not remain in existence – Impugned resolution, accepting the resignation of petitioner is quashed – Petition allowed.**

छावनी अधिनियम (2006 का 41), धाराएँ 20(2), 20(3) व 45 – त्यागपत्र वापस

लिया जाना – प्रक्रिया – याची, बोर्ड के उपाध्यक्ष, ने 04.03.2016 को त्यागपत्र प्रस्तुत किया जिसे बाद में 06.04.2016 को वापस लिया गया, परंतु उक्त वापसी के पश्चात् भी, 07.04.2016 को की गई विशेष बैठक में, अधिनियम 2006 की धारा 45 के अंतर्गत मतदान संचालित कर, अधिनियम की धारा 20(3) का अवलंब लेते हुए त्यागपत्र स्वीकार किया गया था – अभिनिर्धारित – 2006 के अधिनियम में कोई उपबंध नहीं जो त्यागपत्र वापस लेने का कोई पृथक उपबंध करता हो और इसलिए इस आशय की साधारण रूप से लिखित में सूचना देकर त्यागपत्र का नोटिस वापस लेने के सामान्य सिद्धांत लागू होते हैं – वर्तमान प्रकरण में, ऐसी कोई अपेक्षा नहीं जैसा कि 2006 के अधिनियम की धारा 20(3) के अंतर्गत, उपाध्यक्ष को सदस्यों द्वारा हटाये जाने हेतु अनुध्यात है – यह स्पष्ट है कि बोर्ड द्वारा याची का त्यागपत्र स्वीकार किये जाने से पूर्व, उसे उसके द्वारा वापस लिया गया था और इस तथ्य को स्वयं बोर्ड की विशेष बैठक के संकल्प में ध्यान में लिया गया था – अतः, संकल्प पारित करते समय, त्यागपत्र का नोटिस वापस हो गया और अस्तित्व में नहीं रहा – याची का त्यागपत्र स्वीकार करने का आक्षेपित संकल्प अभिखंडित – याचिका मंजूर।

K.C. Ghildiyal with *Suyash Thakur*, for the petitioner.
Indira Nair with *Rajas Pohankar*, for the respondents No. 3 & 4.
Jafar Khan, for the respondent No. 5.
Aseem Dixit and *Shweta Yadav*, for the respondents No. 6 & 8.
Shivendra Pandey, for the respondent No. 7.

Short Note

****(74)***

Before Mr. Justice Vivek Rusia

W.P. No. 4019/2016 (Indore) decided on 1 August, 2016

SURENDRA KUMAR ...Petitioner
Vs.
STATE OF M.P. & anr. ...Respondents

Constitution – Article 226 – Maintainability of Petition – Impleadment of Parties – **In respect of a dispute regarding sale of land, Petitioner (purchaser) seeking direction to Respondent/State for registering FIR against the sellers u/S 420, 467, 468, 471 and 120-B IPC and u/S 22-A of Registration Act – Held – Petitioner wanted a direction from this Court against the sellers without impleading them as parties – Petition is liable to be dismissed on this ground alone – Further held – Petitioner is having remedy to approach the Magistrate**

u/S 156 CrPC or to resort the remedy available under civil law – Writ Petition not maintainable – Petition dismissed.

संविधान – अनुच्छेद 226 – याचिका की पोषणीयता – पक्षकार बनाया जाना – भूमि के विक्रय से संबंधित एक विवाद के संबंध में, याची (क्रेता) भा.दं.सं. की धारा 420, 467, 468, 471 व 120–बी तथा रजिस्ट्रीकरण अधिनियम की धारा 22–ए के अंतर्गत विक्रेताओं के विरूद्ध प्रथम सूचना प्रतिवेदन पंजीबद्ध करने हेतु प्रत्यर्थी/राज्य को निदेश चाहता है – अभिनिर्धारित – याची ने विक्रेताओं के विरूद्ध उन्हें पक्षकार बनाये बिना इस न्यायालय से निदेश चाहा – याचिका अकेले इस आधार पर ही खारिज किये जाने योग्य है – आगे अभिनिर्धारित – याची के पास दं.प्र.सं. की धारा 156 के अंतर्गत मजिस्ट्रेट के समक्ष जाने अथवा सिविल विधि के अंतर्गत उपलब्ध उपचार का अवलंब लेने का उपचार है – रिट याचिका पोषणीय नहीं – याचिका खारिज।

Cases referred :

(2016) 6 SCC 277, (2014) 2 SCC 1, (2015) 6 SCC 287, (2006) 1 SCC 627, (2016) 6 SCC 273.

Rishi Tiwari, for the petitioner.
Rohit Mangal, for the respondent/State.

I.L.R. [2017] M.P., 1015
SUPREME COURT OF INDIA
Before Mr. Justice Ranjan Gogoi, Mr. Justice Prafulla C. Pant & Mr. Justice A.M. Khanwilkar
C.A. No. 6673/2014 decided on 26 October, 2016

SATYA PAL ANAND ...Appellant
Vs.
STATE OF M.P. & ors. ...Respondents

A. Cooperative Societies Act, M.P. 1960 (17 of 1961), Section 64 and Registration Act (16 of 1908), Section 69 - Jurisdiction - Alternate Remedy - **Plot allotted to appellant's mother by a Cooperative Society through registered deed in 1962 - Allottee expired in 1988 - In 2001, Society, unilaterally cancelled the allotment vide an extinguishment deed on the ground of violation of bye-laws of society in not raising any construction over the plot - In 2004, Society allotted the same plot to a third party vide an registered deed - Later, though vide a compromise, appellant was paid Rs. 6.5 Lacs, he filed an application u/S 64 of the Act of 1960 challenging society's action - Dispute, pending adjudication, in 2006, same plot was again transferred vide registered deed to other persons *(respondent no. 6 &7 herein)* - In 2008, appellant also filed application before Sub-Registrar for cancellation of all 3 deeds of 2001, 2004 and 2006 which was dismissed - Appellant's application u/S 69 of the Act of 1908 before Inspector General (Registration) was also dismissed on ground of limited jurisdiction - Appellant's petition before High Court was also dismissed - Challenge to - Held - Party may have several remedies for same cause of action, he must elect his remedy and cannot be permitted to indulge in multiplicity of actions - Looking to conduct of appellant that he is pursuing multiple proceedings for same relief despite having an alternative and efficacious statutory remedy to which he has already resorted to, High Court rightly dismissed the petition - Appeal dismissed. (Para 14)**

क. सहकारी सोसाइटी अधिनियम, म.प्र. 1960 (1961 का 17), धारा 64 एवं रजिस्ट्रीकरण अधिनियम (1908 का 16), धारा 69 – अधिकारिता – वैकल्पिक उपचार – सहकारी सोसाइटी द्वारा 1962 में रजिस्ट्रीकृत विलेख के जरिए अपीलार्थी की माता को भूखंड आबंटित किया गया – वर्ष 1988 में आबंटिती की मृत्यु हुई –

2001 में, सोसाइटी ने, भूखंड पर कोई निर्माण खड़ा नहीं किये जाने से सोसाइटी की उप–विधियों के उल्लंघन के आधार पर निर्वापन विलेख द्वारा एकपक्षीय रूप से आबंटन रद्द किया – 2004 में, सोसाइटी ने उसी भूखंड को रजिस्ट्रीकृत विलेख द्वारा तृतीय पक्षकार को आबंटित किया – बाद में, यद्यपि समझौते द्वारा अपीलार्थी को रू. 6.5 लाख अदा किये गये थे, उसने सोसाइटी की कार्रवाई को चुनौती देते हुए 1960 के अधिनियम की धारा 64 के अंतर्गत एक आवेदन प्रस्तुत किया – विवाद, न्यायनिर्णयन हेतु लंबित रहते, 2006 में वही भूखंड पुनः एक रजिस्ट्रीकृत विलेख द्वारा अन्य व्यक्तियों को *(इसमें प्रत्यर्थी क्र. 6 व 7)* हस्तांतरित किया – 2008 में, अपीलार्थी ने 2001, 2004 व 2006 के सभी तीन विलेखों के रद्दकरण हेतु सब–रजिस्ट्रार के समक्ष आवेदन भी प्रस्तुत किया, जिसे खारिज किया गया – अपीलार्थी के 1908 के अधिनियम की धारा 69 के अंतर्गत महानिरीक्षक (रजिस्ट्रीकरण) के समक्ष प्रस्तुत आवेदन को भी सीमित अधिकारिता के आधार पर खारिज किया गया था – उच्च न्यायालय के समक्ष अपीलार्थी की याचिका भी खारिज की गई थी – को चुनौती – अभिनिर्धारित – पक्षकार के पास समान वाद हेतुक के लिए कई उपचार हो सकते हैं, उसे अपना उपचार चुनना चाहिए तथा उसे विभिन्न कार्रवाईयों में लिप्त होने की अनुमति नहीं दी जा सकती – अपीलार्थी के आचरण को देखते हुए कि उसके पास वैकल्पिक एवं प्रभावकारी कानूनी उपचार जिसका अवलंब वह पहले ही ले चुका है, होने के बावजूद वह समान अनुतोष हेतु विभिन्न कार्यवाहियों में लगा है, उच्च न्यायालय ने उचित रूप से याचिका खारिज की – अपील खारिज।

B. ***Cooperative Societies Act, M.P. 1960 (17 of 1961) - Extinguishment Deed*** **- Held - If a member of Society fail to comply with stipulations of allotment, it would be open to Society to cancel such allotment including membership of that member and in such event it is necessary for the Society to execute an Extinguishment deed in respect of the such allotment deed - Mere cancellation of membership**

ख. सहकारी सोसाइटी अधिनियम, म.प्र. 1960 (1961 का 17) – निर्वापन विलेख – अभिनिर्धारित – यदि सोसाइटी का कोई सदस्य, आबंटन की शर्तों का अनुपालन करने में विफल होता है, सोसाइटी उस सदस्य की सदस्यता के साथ साथ उक्त आबंटन रद्द करने के लिए स्वतंत्र रहेगी और इस स्थिति में, सोसाइटी के लिए उक्त आबंटन विलेख के संबंध में एक निर्वापन विलेख निष्पादित करना आवश्यक है – मात्र सदस्यता का रद्दकरण पर्याप्त नहीं है।

C. ***Registration Act (16 of 1908), Section 35 - Powers & Functions of Registrar*** **- Held - Role of Sub-Registrar stands discharged, once document is registered - No express provision in the Act of 1908 which empowers Registrar to recall such registration -**

Power to cancel registration is a substantive matter - Further held - Powers of Inspector General (Registration) is limited to do superintendence of registration offices and make rules in that behalf, even he don't have powers to cancel registration of any document which is already registered - Function of the Registering Officer is purely administrative and not quasi judicial thus he cannot decide whether document presented for registration is executed by person having title as mentioned in instrument. (Para 21)

ग. रजिस्ट्रीकरण अधिनियम (1908 का 16), धारा 35 – रजिस्ट्रार की शक्तियां एवं कार्य – अभिनिर्धारित – एक बार दस्तावेज रजिस्ट्रीकृत हो जाने पर सब–रजिस्ट्रार की भूमिका निर्वहित हो जाती है – 1908 के अधिनियम में कोई प्रकट उपबंध नहीं जो रजिस्ट्रार को उक्त रजिस्ट्रीकरण वापस लेने के लिए सशक्त करता हो – रजिस्ट्रीकरण रद्द करने की शक्ति एक सारभूत मामला है – आगे अभिनिधारित – महानिरीक्षक (रजिस्ट्रीकरण) की शक्तियां रजिस्ट्रीकरण कार्यालयों का पर्यवेक्षण करने एवं इस संबंध में नियम बनाने तक सीमित है, यहां तक कि उसे भी किसी ऐसे दस्तावेज का रजिस्ट्रीकरण रद्द करने की शक्तियां नहीं जो पहले से रजिस्ट्रीकृत है – रजिस्ट्रीकरण अधिकारी का कार्य शुद्ध रूप से प्रशासनिक है तथा अर्ध–न्यायिक नहीं है अतः वह यह विनिश्चित नहीं कर सकता कि क्या रजिस्ट्रीकरण हेतु प्रस्तुत किया गया दस्तावेज, लिखत में उल्लिखित अनुसार स्वत्वधारी व्यक्ति द्वारा निष्पादित किया गया है।

D. Registration Act (16 of 1908), Section 32 & 34 - Presence of Parties **- Held - Section 32 does not require presence of both parties to the document when it is presented for registration and in this view of the matter, presentation of Extinguishment Deed by authorized person of Society for registration cannot be faulted u/S 34 of the Act of 1908 - Requirement of presence of both the parties is not mandatory. (Para 24 & 27)**

घ. रजिस्ट्रीकरण अधिनियम (1908 का 16), धारा 32 व 34 – पक्षकारों की उपस्थिति – अभिनिर्धारित – धारा 32, रजिस्ट्रीकरण हेतु प्रस्तुत किये जाते समय दस्तावेज के दोनों पक्षकारों की उपस्थिति की अपेक्षा नहीं करती और मामले के इस दृष्टिकोण पर, 1908 के अधिनियम की धारा 34 के अंतर्गत, रजिस्ट्रीकरण हेतु सोसाइटी के प्राधिकृत व्यक्ति द्वारा निर्वापन विलेख के प्रस्तुतिकरण में त्रुटि नहीं निकाली जा सकती – दोनों पक्षकारों की उपस्थिति की अपेक्षा, आज्ञापक नहीं है।

E. Practice - Writ Jurisdiction **- Held - Remedy of writ cannot be used for declaration of private rights of the parties or**

enforcement of their contractual rights and obligations. (Para 16)

ङ. *पद्धति – रिट अधिकारिता* – अभिनिर्धारित – रिट के उपचार का उपयोग, पक्षकारों के व्यक्तिगत अधिकारों की घोषणा या उनके संविदात्मक अधिकारों एवं बाध्यताओं के प्रवर्तन हेतु नहीं किया जा सकता।

Cases referred:

(2010) 15 SCC 207, AIR 2007 Andhra Pradesh 57[FB], AIR 2010 Madras 18, AIR 2000 Kar. 46, AIR 1961 SC 787, AIR 1990 Madras 251, AIR 1964 SC 72, (1979) 2 SCC 297, (2005) 6 SCC 211, (1986) 2 SCC 679, (1989) 2 SCC 691, AIR 1955 SC 233, (2001) 5 SCC 289, AIR 1965 SC 1812, (1991) 3 SCC 67, AIR 1986 SC 1571, (2011) 8 SCC 161, (2011) 6 SCC 47, (2006) 7 SCC 416, AIR 1994 SC 853.

JUDGMENT

The Judgment of the Court was delivered by : **A.M. KHANWILKAR, J. :-** This appeal has been placed before a three Judges' Bench in terms of order dated August 25, 2015, consequent to the difference of opinion between the two learned Judges of the Division Bench.

2. Justice Dipak Misra took the view that, in the fact situation of the present case the Writ Petition filed by the appellant challenging the order passed by the Sub-Registrar (Registration) and the Inspector General (Registration) was rightly dismissed by the High Court. However, His Lordship opined that a question would still arise for consideration, namely, whether in absence of any specific Rule in the State of Madhya Pradesh, the general principle laid down in the case of *Thota Ganga Laxmi & Anr. vs. Government of Andhra Pradesh & Ors.*[1] would be applicable?

3. Justice V.Gopala Gowda on the other hand allowed the appeal on the finding that the Sub-Registrar (Registration) had no authority to register the Extinguishment Deed presented by the respondent-Society dated 9th August 2001 and his action of registration of that document was void *ab initio*. For the same reason, the subsequent deeds in respect of the property in question registered by the Sub-Registrar dated 21st April, 2004 and 11th July 2006 were also without authority and void ab initio. His Lordship held that, the High Court should have declared the above position and set aside registration of the subject documents and also the orders passed by the Sub-Registrar

1. (2010) 15 SCC 207

(Registration) and Inspector General (Registration). His Lordship allowed the appeal filed by the appellant with compensation amount to be paid by the respondents quantified at Rs.10 Lakh.

4. Briefly stated, Plot No.7-B at Punjabi Bagh, Raisen Road, Bhopal was allotted to the appellant's mother Smt. Veeravali Anand by Punjabi Housing Cooperative Society Ltd. (hereinafter referred to as the "Society"), vide a registered deed dated 22nd March 1962. Smt. Veeravali Anand expired on 12th June 1988. After her death, the Society through its Office Bearer executed a Deed of Extinguishment on 9th August 2001, unilaterally, cancelling the said allotment of plot to Smt. Veeravali Anand because of violation of the Bye-laws of the Society in not raising any construction on the plot so allotted within time. On the basis of the said Extinguishment Deed, the Society executed and got registered a deed dated 21st April, 2004 in favour of Mrs. Manjit Kaur (Respondent No.5) in respect of the same plot. The appellant objected to the said transaction. However, a compromise deed was executed between the Society and Mrs. Manjit Kaur (Respondent No.5) on the one hand and the appellant on the other hand -whereunder the appellant received consideration of Rs.6.50 Lakh (Rupees Six Lakh Fifty Thousand) - Rs.4.50 Lakh (Rupees Four Lakh Fifty Thousand) by a demand draft and Rs.2/- Lakh by a post-dated cheque). Notwithstanding the compromise deed, the appellant filed a dispute under Section 64 of the Madhya Pradesh Cooperative Societies Act, 1960 (hereinafter referred to as the "Act of 1960"), before the Deputy Registrar, Cooperative Societies bearing Dispute No. 81 of 2005. The appellant challenged the Society's action of unilaterally registering the Extinguishment Deed dated 9th August 2001 and allotting the subject plot to Mrs Manjit Kaur vide deed dated 21st April, 2004; and prayed for a declaration that he continues to be the owner of the subject plot allotted by the Society to his mother, having inherited the same. In the said dispute, the appellant filed interim applications praying for restraint order and for appointment of a Receiver. It is not necessary to dilate on those facts to consider the issues on hand. Suffice it to note that the said dispute is still pending adjudication.

5. During the pendency of the said dispute, the Society permitted transfer of the subject plot in favour of Mrs. Meenakshi and Mr. S.C. Sharma (Respondent Nos. 6 & 7) vide registered Deed dated 11th July 2006. Since the appellant was perseverating the dispute and resorting to multiple proceedings in relation to the subject plot, the respondents issued a notice on 12th July 2007 asking the appellant to refund the consideration amount

accepted by him in furtherance of the compromise deed dated 6th July 2004. The appellant did not pay any heed to that demand and instead continued with the multiple proceedings resorted to by him before the Authority under the Act of 1960, including criminal proceedings. The appellant also moved an application before the Sub-Registrar (Registration) calling upon him to cancel the registration of Extinguishment Deed dated 9th August 2001 and the subsequent two deeds dated 21st April 2004 and 11th July 2006 respectively. This application was filed on 4th February 2008 by the appellant. The Sub-Registrar (Registration) by a speaking order rejected the said application on 28th June 2008 mainly on two counts. Firstly, a dispute was pending between the parties with regard to the same subject matter. Secondly, he had no jurisdiction to cancel the registration of a registered document in question. For, his jurisdiction was limited to registration of the document when presented by the executant before him for that purpose. The appellant then approached the Inspector General (Registration) by way of an application under Section 69 of the Registration Act, 1908 (hereinafter referred to as the "Act of 1908"). The Inspector General (Registration) vide order dated 19th September 2008 rejected the said application on the ground that powers conferred on him were limited to the general superintendence of the Registration Offices and making Rules.

6. The appellant thereafter approached the High Court of Madhya Pradesh, Judicature at Jabalpur, by way of Writ Petition No.13505/2008 under Article 226 of the Constitution of India to challenge the order passed by the Inspector General (Registration) dated 15th September 2008 as also the order passed by the Sub-Registrar (Registration) dated 28th June 2008. The appellant further prayed for a declaration that the Extinguishment Deed dated 9th August 2001 as well as the subsequent two deeds dated 21st April, 2004 and 11th July 2006 are void *ab initio* with a further direction to the Inspector General (Registration) and the Sub-Registrar (Registration) to record the cancellation of those documents. This Writ Petition was dismissed by the Division Bench of the High Court primarily on the ground that the appellant had already resorted to a remedy (a dispute) before the appropriate Forum under the Act of 1960, which was pending; and the declaration, as sought, can be considered in those proceedings after recording of the evidence and production of other material to be relied on by the parties therein. Accordingly, the High Court held that since an alternative remedy before a competent Forum was available and was pending between the parties, it was not feasible to invoke the writ

jurisdiction under Article 226 of the Constitution of India. Indeed, the High Court adverted to the reported cases relied on by the parties to buttress their stand. The High Court took note of the decision of the Full Bench of the Andhra Pradesh High Court in the case of *Yanala Malleshwari vs. Ananthula Sayamma*[2] and the decision of Madras High Court in *E.R.Kalaivan vs. Inspector General of Registration, Chennai & Anr.*[3] The High Court held that the arguments of the appellant deserve to be negatived in light of the majority view of the Full Bench of Andhra Pradesh High Court and that the dictum in the case before the Madras High Court was distinguishable. The High Court also referred to the decision of the Karnataka High Court in *M.Ramakrishna Reddy vs. Sub-Registrar, Bangalore*[4]. In para 15 and 16, the High Court observed thus:

> *"15. In view of aforesaid discussion we are of the view that after registration of the extinguished deed or other documents by the Sub-Registrar, if any application is moved by any of the affected party of such document stating that the same was not registered by practicing the fraud with his right then Sub-Registrar in the lack of any specific provision in this regard could neither entertain nor adjudicate such application under the provisions of Section 17, 18 or 69 or some other provisions of the Act. Section 69 of the Act only confers the superintending power of registration offices and to make rules to the Inspector General respondent No.2. It does not give any rights to cancel the earlier registered documents or modifying any entries in the index or in other record at the instance of any of party. So, Section 17(1)(b) read with 69 of the Act is also not helping to the petitioner in this writ petition. Consequently, it is held that Sub-Registrar as well as Inspector General have not committed any fault in dismissing the application of the petitioner with direction to approach the competent forum for adjudication of his dispute.*
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> *16. Apart the above the alleged dispute and allegations*

2. AIR 2007 Andhra Pradesh 57 [FB] 3. AIR 2010 Madras 18
4. AIR 2000 Kar.46.

of the alleged fraud could not be adjudicated by this Court under the writ jurisdiction. The same could be adjudicated by the Civil Court under the common law after recording the evidence of the parties and on appreciation of the same in a duly constituted suit."

The High Court then adverted to the decision in the case of *Government of U.P. vs. Raja Mohammad Amir Ahmad Khan*[5]. It held that since the Registering Officer registered the document presented to him for registration, his function is exhausted. He would then become *functus officio* and no power to impound the document under Section 33 of the Act. This decision of the High Court is the subject matter of challenge in the present appeal.

7. When this appeal came up for hearing before the Division Bench of the two learned Judges, as aforesaid, His Lordship Justice Dipak Misra found that the High Court did not commit any error in dismissing the Writ Petition filed by the appellant. His Lordship, however, adverted to all the relevant provisions of the Act of 1908 and also analysed the decision of the Full Bench of the Andhra Pradesh High Court in *Malleshwari's* case (supra) and also of the Madras High Court in *Kalaivan* (supra) and of the Karnataka High Court in *M.R.Reddy* (supra). Finally, His Lordship considered the decision of this Court in *Thota Ganga Laxmi* (supra) and noted two aspects. That, in that case, the Court had opined that a unilateral cancellation deed cannot be registered with reference to Rule 2(k)(i) of the Rules framed by the State of Andhra Pradesh under Section 69 of the Act of 1908. His Lordship was of the view that the dictum of the Court in *Thota Ganga Laxmi* (supra) must be considered in the context of a specific Rule framed by the State of Andhra Pradesh, which had come into force after the pronouncement by the Full Bench in the case of *Malleshwari* (supra). His Lordship then observed that the principle stated in the case of *Thota Ganga Laxmi* (supra) cannot be made applicable to the case on hand in absence of a specific Rule in that regard in the State of Madhya Pradesh. Further, on a careful reading of the provisions of the Act of 1908, there is no prohibition to register a document of cancellation of a deed of extinguishment; and that the procedure under Section 35 of that Act cannot be construed to confer a quasi judicial power on the Registering Authority. His Lordship also referred to the decision of the Madras High Court in *Park View Enterprises vs. State of Tamil Nadu*[6] wherein it has been

5. AIR 1961 SC 787 6. AIR 1990 Madras 251

observed that the function of the Sub-Registrar for the purposes of registration is purely administrative and not quasi-judicial. He cannot decide whether a document which is executed by a person has had title as is recited in the given instrument. His Lordship found it difficult to agree with the general principle stated in the case of *Thota Ganga Laxmi* (supra) that the Registering Authority cannot register a unilateral deed of cancellation or extinguishment, in absence of any specific Rule in that behalf. Therefore, His Lordship opined that the general observation in that case required reconsideration by a larger Bench. Having said this, His Lordship also noted that the validity of the action taken by the Society in execution of the extinguishment deed dated 9th August 2001, cancelling the deed in favour of the appellant's mother dated 22nd March 1962 was the subject matter of a dispute filed by the appellant wherein all relevant issues could be answered appropriately. For, that Authority is competent to consider the validity of action of the Society to unilaterally cancel the allotment of the plot made in favour of the appellant's mother. His Lordship also adverted to the other proceedings between the parties including the order passed by this Court in SLP (Civil) No. 13255/2012 dated July 12, 2013, taking note of the Inspection Reports submitted by the Sub-Registrar dated 13th March 2007 mentioning that two duplex were constructed and two more were near completion standing on the subject plot on the date of inspection. His Lordship also adverted to the factum of compromise deed entered by the appellant with the respondents and having received consideration in that behalf from the subsequent purchaser and yet the appellant was pursuing remedy before the Sub-Registrar for cancellation of the Extinguishment Deed.

8. His Lordship Justice V.Gopala Gowda, however, formulated a question in para 12 of the judgment as to whether the appellant was entitled to seek relief of cancellation of the registered documents dated 9th August 2001, 21st April 2004 and 11th July 2006, registered in respect of the immovable property in question. His Lordship, inter-alia, following the exposition in *Thota Ganga Laxmi* (supra) found that the Registrar could not have permitted registration of Extinguishment Deed dated 9th August 2001, unilaterally cancelling the allotment of the subject plot made to the appellant's mother. His Lordship held that the Extinguishment Deed was a nullity, in law. His Lordship then considered the dictum in *Kalaivan's* case of the Madras High Court and opined that it aptly applied to the facts of the present case and held that as the Extinguishment Deed was unilaterally registered it ought to be rescinded. His Lordship proceeded to examine the issue in the light of Section

62 of the Indian Contract Act, 1872. It provides that if the parties to a contract agree to substitute a new contract for it, or to rescind or alter, the original contract need not be performed. Thus, for any novation, rescission and alteration of the contract, it can be made only bilaterally and with amicable consent of both the parties. His Lordship then adverted to the scope of Clause 43(1) of the Bye-laws of the Society as amended in the year 1991 and opined that the said Clause can have no retrospective effect for cancellation of the allotment of the plot in the name of appellant's mother vide Extinguishment Deed dated 9th August 2001. The latter is only a subterfuge. Reference is then made to Section 31 of the Specific Relief Act, 1963 to hold that unilateral cancellation of the deed would be in violation of the said provision read with Article 59 of the Limitation Act, 1963, which requires cancellation of any instrument within 3 years. In the present case, the deed in favour of the appellant's mother was executed on 22nd March 1962 and registered on 30th March 1962 concerning the subject plot; and for which reason extinguishment of the said deed after lapse of 39 years was impermissible in law. On this finding, it has been held that the Sub-Registrar had no authority under the Act of 1908 nor by virtue of Section 31 of the Specific Relief Act, 1963 read with Article 59 of the Limitation Act, 1963 to unilaterally cancel the said deed; and consequently, registration of the Extinguishment Deed by the Sub-Registrar amounts to playing fraud on the power vested in the Authority under law. Exercise of power of registering a document by the Sub-Registrar, in the present case, was ultra vires the relevant provisions and the Constitution of India. Reference is then made to the decision of the Constitution Bench of this Court in *Pratap Singh vs. State of Punjab*[7] to hold that the respondent-Society had no authority to re-allot the subject plot to respondent No.5 by cancelling the registered deed which has become absolute and been acted upon by the parties. As a consequence of this conclusion, His Lordship held that the deed executed in favour of respondent No.5 or for that matter respondent Nos.6 and 7 was also void *ab initio*; and also because respondent No.5 could not be allotted the subject plot as her husband was already allotted another plot by the same Society. His Lordship then went on to observe that the appellant has got a valid Constitutional right over the said plot of land as guaranteed under Article 300A of the Constitution of India and could not be deprived of that property without authority of law. His Lordship was of the view that merely because the Extinguishment Deed could be challenged by

7. AIR 1964 SC 72

approaching the Civil Court cannot denude the appellant of the relief, as sought in the Writ Petition, qua the Extinguishment Deed dated 9th August 2001 which was void ab initio; and for the same reason order could be passed against respondent No.5 to 7 - as the deeds in their favour rested on the Extinguishment Deed. For that, His Lordship adverted to the dictum in the case of *Arunachalam vs. P.S.R.Sadhanantham & Anr*[8] and *Ganga Kumar Shrivastav vs. State of Bihar*[9]. Further, having noticed that the septuagenarian appellant had been litigating for last 14 years because of the untenable action of the Society and also of the Sub-Registrar, affecting his valuable Constitutional right under Article 300A of the Constitution of India, His Lordship was of the opinion that the relief claimed by him in the Writ Petition deserved to be granted. As regards the observation made by this Court dismissing the Special Leave Petition No.13255/2012 vide order dated 17th July 2013, His Lordship held that the same will be of no avail much less to denude the appellant of the reliefs due to him. His Lordship then held that the compromise executed by the appellant on 6th July 2004 also cannot denude the appellant of the relief - because it is an admitted position that the respondent No.5 through Advocate had sent a legal notice dated 12th July 2007 to rescind the said agreement and called upon the appellant to refund the amount of Rs.6.50 Lakh received by him with interest. His Lordship also adverted to the decisions of this Court in *CAG vs.K.S.Jagannathan*[10]; *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust vs. V.R. Rudani*[11] and *Hari Vishnu Kamath vs. Ahmad Ishaque*[12] to hold that the High Court failed to exercise its discretionary power which has resulted in grave miscarriage of justice and entailing in denial of the valuable right guaranteed under Article 300A of the Constitution of India to the appellant. Accordingly, His Lordship held that the impugned judgment of the Division Bench of the High Court as well as the impugned instruments i.e. Extinguishment Deed dated 9th August 2001 and the subsequent deeds dated 21st April, 2004 and 11th July 2006 respectively, are quashed and set aside. Further direction is given to respondent Nos. 6 and 7 to vacate the subject property and hand over possession thereof to the appellant forthwith. His Lordship was of the view that the appellant was entitled to further relief of compensation amount of Rs.10,00,000/- (Rupees Ten Lakhs) to be paid to the appellant for his

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8. (1979) 2 SCC 297
9. (2005) 6 SCC 211
10. (1986) 2 SCC 679
11. (1989) 2 SCC 691
12. AIR 1955 SC 233

suffering and the injustice caused to him by the respondents for the last 14 years.

9. The appellant appeared in person. He adopted the view taken by His Lordship Justice V. Gopala Gowda as his argument. He placed reliance on the decisions noted hereinabove and adverted to in the two separate judgments given by Their Lordships. In substance, his argument was that the respondent-Society could not have unilaterally executed the Extinguishment Deed dated 9th August 2001 in relation to the subject plot. That action of the respondent-Society was in violation of the governing laws and void *ab initio*. Further, the Sub-Registrar had no authority to register such a document and in any case unilaterally. Hence, the act of registration of Extinguishment Deed was also void *ab initio*. As a consequence, the Society had no authority, in law, to execute the subsequent deed in favour of respondent No.5 or to put her in possession of the subject plot and the respondent No.5 in turn could not have executed the deed in favour of respondent Nos. 6 and 7. In other words, the deeds executed between the respondent No. 4 - Society and respondent No. 5 and also respondent Nos. 6 and 7 were void *ab initio*. That declaration must follow and the High Court was duty bound to allow the Writ Petition filed by him, as the action of the respondent No.4-Society was replete with fraud on the Statute and also on the Constitutional right guaranteed to the appellant. In all fairness to the appellant, it must be mentioned that he has additionally relied on *Suo Motu Proceedings against R.Karuppan, Advocate*[13], *R.S.Maddanappa (D) by LRs. vs. Chandramma & Anr.*[14], *Rattan Chand Hira Chand vs. Askar Nawaj Jung (D) by Lrs. & Ors*[15], *Central Inland Water Transport Corporation Ltd. & Anr. vs. Brojo Nath Ganguly & Anr.*[16], *Indian Council for Enviro-Legal Action vs. Union of India & Ors*[17], *Trishala Jain & Anr. vs. State of Uttaranchal & Anr.*[18], *Hamza Haji vs. State of Kerala & Anr.*[19] *and S.P.Chengalvaraya Naidu (D) By LRs. vs. Jagannath (D) by Lrs.& Ors.*[20], during the arguments. Besides the oral arguments, the appellant has filed written submissions on 11th July 2016 and additional written submissions on 12th August 2016 which make

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13. (2001) 5 SCC 289
14. AIR 1965 SC 1812
15. (1991) 3 SCC 67
16. AIR 1986 SC 1571
17. (2011) 8 SCC 161
18. (2011) 6 SCC 47
19. (2006) 7 SCC 416
20. AIR 1994 SC 853

reference to several reported cases. The decisions referred to in the written submissions are essentially multiplying the cases on the contention already answered in favour of the appellant by His Lordship Justice V.Gopala Gowda.

10. The respondents, on the other hand, contend that the Writ Petition has been justly rejected by the High Court on the ground that the appellant was pursuing remedy for the same reliefs in substantive proceedings by way of a dispute filed under Section 64 of the Act of 1960 before the competent Forum. Besides the said proceedings, it was open to the appellant to take recourse to other appropriate remedy before the Civil Court, to the extent necessary. The High Court in exercise of powers under Article 226 of the Constitution of India not only exercises an equitable jurisdiction but also an extraordinary jurisdiction. The High Court in any case is not expected to enter upon the plea of declaring agreements and documents executed between private parties as illegal or for that matter void *ab initio*, which remedy is available before the cooperative Forum or the Civil Court. It was contended that if this contention is accepted, it may not be necessary to answer the other issue noted in the judgment of Justice Dipak Misra as the same can be considered in an appropriate proceedings, if and when the occasion arises. Alternatively, it was contended that the dictum of this Court in *Thota Ganga Laxmi's* case (supra) must be understood as applicable to the express procedure prescribed for registration of an Extinguishment Deed or cancellation deed in the State of Andhra Pradesh in terms of statutory Rules. Inasmuch as, in absence of any express provision about the procedure for registration of such document, that requirement cannot be considered as mandatory. For, it is not possible to hold that no Extinguishment or cancellation deed can ever be executed by the party to the earlier concluded contract, considering the express provision in that behalf in Section 17(1)(b) of the Act of 1908 read with other enabling provisions in the same Act or other substantive law. According to the respondents, the questions posed in the judgment of Justice V. Gopala Gowda would be relevant and can be conveniently answered in the substantive proceedings already resorted to by the appellant, by way of a dispute under Section 64 of the Act of 1960. The answer to the said questions may require adjudication of disputed facts and also application of settled legal position. It is not a pure question of law. Being disputed question of facts, the High Court was right in refusing to interfere and exercise its writ jurisdiction.

11. The counsel for the State in particular submitted that the legal position

is well-settled. That, the Sub-Registrar is not expected to decide the title or rights of the parties to the agreement nor is expected to examine the document to ascertain whether the same is legal and permissible in law or undertake an analytical analysis thereof. If the document registered by the Sub-Registrar is illegal or there is any irregularity, that must be challenged by invoking an appropriate proceedings before a Court of competent jurisdiction. If any cause of action accrues to a member of the Society, in relation to the business of the Society, can be pursued before the cooperative Forum. The appellant has already invoked such remedy.

12. The respondent Nos. 6 and 7 additionally submit that they are purchasers of the subject plot for consideration. They have acted to their detriment in good faith by going ahead with the construction on the plot with the permission of the Society and after obtaining approvals from the Municipal Authorities. They have spent their fortune in doing so. Besides supporting the stand taken by the other respondents, they submit that in the fact situation of the present case no relief in equity is warranted in favour of the appellant. Thus, the Writ Petition filed by the appellant has been justly dismissed with liberty to pursue appropriate remedy.

13. Having considered the rival submissions, including keeping in mind the view taken by the two learned Judges of this Court on the matters in issue, in our opinion, the questions to be answered by us in the fact situation of the present case, can be formulated as under:

> *"(a) Whether in the fact situation of the present case, the High Court was justified in dismissing the Writ Petition?*
>
> *(b) Whether the High Court in exercise of writ jurisdiction under Article 226 of the Constitution of India is duty bound to declare the registered Deeds (between the private parties) as void ab initio and to cancel the same, especially when the aggrieved party (appellant) has already resorted to an alternative efficacious remedy under Section 64 of the Act of 1960 before the competent Forum whilst questioning the action of the Society in cancelling the allotment of the subject plot in favour of the original allottee and unilateral execution of an Extinguishment*

Deed for that purpose?

(c) Even if the High Court is endowed with a wide power including to examine the validity of the registered Extinguishment Deed and the subsequent registered deeds, should it foreclose the issues which involve disputed questions of fact and germane for adjudication by the competent Forum under the Act of 1960?

(d) Whether the Sub-Registrar (Registration) has authority to cancel the registration of any document including an Extinguishment Deed after it is registered? Similarly, whether the Inspector General (Registration) can cancel the registration of Extinguishment Deed in exercise of powers under Section 69 of the Act of 1908?

(e) Whether the Sub-Registrar (Registration) had no authority to register the Extinguishment Deed dated 9th August 2001, unilaterally presented by the Respondent Society for registration?

(f) Whether the dictum in the case of Thota Ganga Laxmi (supra) is with reference to the express statutory Rule framed by the State of Andhra Pradesh or is a general proposition of law applicable even to the State of Madhya Pradesh, in absence of an express provision in that regard?"

Regarding Issue Nos. (a) to (c):

14. The answer to the first three questions will have to be given in the backdrop of the factual matrix of the present case. Indisputably, the appellant entered into a compromise deed and accepted the consideration amount of Rs.6.50 Lakh. Despite that, he chose to file a dispute under Section 64 of the Act of 1960 before the Deputy Registrar, Cooperative Societies challenging the action of the Society in unilaterally executing and causing registration of the subject Extinguishment Deed dated 9th August 2001 and also the allotment of the subject plot to third party. Pending that dispute, he filed an application before the Sub-Registrar (Registration) for the same relief of cancellation of registration of the Extinguishment Deed and the subsequent deeds in favour

of third parties. In addition, the appellant resorted to criminal complaint with reference to the same Extinguishment Deed and the subsequent deeds in favour of third parties. In this backdrop, the High Court declined to entertain the Writ Petition filed by the appellant, which was essentially to challenge the same Extinguishment Deed and subsequent deeds. It is a well established position that the remedy of Writ under Article 226 of the Constitution of India is extra-ordinary and discretionary. In exercise of writ jurisdiction, the High Court cannot be oblivious to the conduct of the party invoking that remedy. The fact that the party may have several remedies for the same cause of action, he must elect his remedy and cannot be permitted to indulge in multiplicity of actions. The exercise of discretion to issue a writ is a matter of granting equitable relief. It is a remedy in equity. In the present case, the High Court declined to interfere at the instance of the appellant having noticed the above clinching facts. No fault can be found with the approach of the High Court in refusing to exercise its writ jurisdiction because of the conduct of the appellant in pursuing multiple proceedings for the same relief and also because the appellant had an alternative and efficacious statutory remedy to which he has already resorted to. This view of the High Court has found favour with Justice Dipak Misra. We respectfully agree with that view.

15. The other view of Justice V. Gopala Gowda, however, is that it was the duty of the High Court to answer the matters in issue because of the unilateral registration of the Extinguishment Deed by the Society without authority and a nullity. Ordinarily, if the party had not resorted to any other remedy provided by law and had straightway approached the High Court to question the action of the statutory Authority of registering a document improperly and in particular in disregard of the prescribed procedure, that would stand on a different footing. In the present case, however, the appellant not only entered into a compromise deed with the Society and the subsequent purchaser but also resorted to statutory remedy. Having entered into a compromise deed, it is doubtful whether the appellant can be heard to complain about the irregularity in the registration of the Extinguishment Deed, if any. It is noticed that the appellant has not disputed the execution of the compromise deed, nor has he paid any heed to the notice given by the other party to refund the amount accepted by him in furtherance of the compromise deed. No Court can be party to a speculative litigation much less the High Court in exercise of writ jurisdiction. Having said this it must necessarily follow that the Writ Petition filed by the appellant deserved to be dismissed, as was rightly dismissed by the High Court.

16. As the Writ Petition is liable to be dismissed with liberty to the appellant to pursue other statutory remedy already invoked by him, examining any other contention at his instance would be awarding premium to a litigant who does not deserve such indulgence. The fact whether the compromise deed entered into by the appellant was voluntary and at his own volition or under duress, is essentially a question of fact. That cannot be adjudicated in writ jurisdiction. Depending on the answer thereto, the other issues may become relevant and would arise for consideration. The only relief that can be granted and which has already been clarified by the High Court in the impugned judgment, is to keep all questions open to enable the appellant to pursue the statutory remedy already invoked by him. It is open to the appellant to contend in those proceedings that the Extinguishment Deed could not have been unilaterally executed by the Society. That plea can be examined by the statutory Forum provided for that purpose. The decision of the Society to cancel the allotment of a plot to its member or to rescind his membership and to allot the plot to another member, is undoubtedly the business of the Society. Any cause of action in that behalf, indeed, can be pursued before the Competent Forum by the aggrieved member or his legal representative. That will require examination of the governing cooperative laws and the Bye-laws of the Society - to ascertain whether it is open to the Society to cancel the allotment of a plot to its members including to cancel the membership of such person. If that action of the Society is held to be just and permissible in law, the appellant may not be entitled to any other relief much less the declaration as sought. Further, remedy of writ cannot be used for declaration of private rights of the parties or enforcement of their contractual rights and obligations. In our considered opinion, it would be unnecessary if not inappropriate to examine any other contention at the instance of this appellant as we agree with the view taken by the High Court in summarily dismissing the Writ Petition with liberty to the appellant to pursue statutory remedy. At best, further observation or clarification would suffice to the effect that the competent Forum before whom the dispute has been filed by the appellant shall consider all contentions available to the parties, uninfluenced by the factum of registered Extinguishment Deed. In that, if the competent Forum was to hold that it was open to the Society to cancel the allotment and membership of the concerned member and thereafter to allot the same plot to another person enrolled as a member of the society, no other issue would arise for consideration. On the other hand, if the competent Forum was to answer the relevant fact in favour of the appellant,

only then the argument of the effect of unilateral registration of the Extinguishment Deed followed by compromise deed voluntarily executed by the appellant may become available to the Society and to the subsequent purchasers/allottees of the subject plot. At their instance, those issues can be examined on the basis of settled legal position. Neither the observation or the opinion recorded by one of the dissenting Judge of this Court need any further dissection nor would it be appropriate to enlarge the scope of the proceedings before this Court on those aspects. This would subserve the twin requirements. Firstly, to avoid an exposition on matters and questions which do not arise for our consideration in the fact situation of the present case at this stage; and secondly, also provide an opportunity to the parties to pursue all contentions and other remedies as may be permissible in law.

17. The exposition of the Constitution Bench of this Court in *Pratap Singh* (supra) adverted to in the dissenting opinion would be attracted in cases where the State Authority acts in bad faith or corrupt motives. Merely because some irregularity has been committed in registration of Extinguishment Deed unilaterally presented by the Society for registration or in respect of the subsequent deeds registered at the instance of third party without notice to the appellant, that, by itself, will not result in registration of those documents due to corrupt motives of the State Authority. Moreso, in the present case, the appellant having entered into a compromise deed with the Society and third party (subsequent allottees) in respect of the subject plot, it is doubtful whether it is open to the appellant to question the act of unilateral execution and registration of the stated Extinguishment Deed being irregular much less void and nullity. Indisputably, the respondents-Society is a Cooperative Housing Society Limited and is governed by its Bye-Laws. According to the counsel for the Society, the member is obliged to erect a house on the plot allotted to him within specified time, failing which must suffer the consequence including of cancellation of allotment of plot and removal of his membership. At the time of allotment, the member executes an agreement whereunder he/she undertakes to abide by the conditions specified for erecting a house on the plot allotted to him/her in the manner prescribed therein. Whether the Society is justified in proceeding against the defaulting member by cancelling the allotment of plot as well as membership, is an issue falling within the purview of the business of the Society. The member is bound by the stipulation contained in the agreement executed by him/her and in particular the Bye-laws of the Society. Any action by the Society for breach thereof is just or otherwise can be questioned before

the statutory Forum under the Act of 1960. Those are matters which can and must be answered in the proceedings resorted to by the appellant before the statutory Forum.

18. The aforementioned reported decision has noted the subtle distinction between *ultra vires* act of the Statutory Authority and a case of a simple infraction of the procedural Rule. The question, whether the Society was competent to unilaterally cancel the allotment of a plot given to its member and to cancel the membership of such member due to default committed by the member, is within the purview of the business of the Society. Any cause of action in that regard must be adjudicated by the procedure prescribed in that behalf. It is not open to presume that the Society had no authority in law to take a decision in that behalf. The right of the appellant qua the plot of land would obviously be subject to the final outcome of such action. The appellant being the legal representative of the original allottee, cannot claim any right higher than that of his predecessor qua the Housing Society, which is the final authority to decide on the issue of continuation of membership of its member. The right of the member to remain in occupation of the plot allotted by the Society would be entirely dependent on that decision.

19. Reference made to the other decisions of this Court with regard to the scope of Article 136 of the Constitution of India in the case of *Arunachalam vs. P.S.R. Sadhanantham and Anr. and Ganga K. Shrivastav vs. State of Bihar* (supra) will be of no avail in the fact situation of the present case. Similarly, The other decisions adverted to in the dissenting opinion under consideration in the case of *CAG vs. K.S. Jagannathan* and *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust vs. V.R. Rudani* (supra), *Hari Vishnu Mamath* (supra) will be of no avail in the fact situation of the present case. Suffice it to observe that the High Court had, in our opinion, justly, summarily dismissed the writ petition with liberty to the appellant to pursue statutory remedy under the provisions of the Act of 1960 or by way of a civil suit. Thus understood, it may not be necessary or appropriate to dwelve upon the other issues regarding the merits of the controversy which may have to be adjudicated by the competent Forum.

Regarding issue Nos. (d) to (f)

20. It is common ground that the deed regarding allotment of plot to a member of the Society required registration. The allotment of the subject plot in favour of the appellant's mother was accordinglv registered in the office of the Sub-Registrar

(Registration). The subject plot was allotted to the appellant's mother consequent to her admission as a member of the Society. As the allotment of the plot by the Society creates and transfers rights in an immovable property, the deed of allotment was required to be registered. But if the member failed to comply with the stipulation of allotment, it would be open to the Society to cancel such allotment and including the membership of that member. In that event, it may become necessary for the Society to execute an Extinguishment Deed qua such allotment deed operating in favour of the concerned member. For, mere cancellation of membership may not be enough. The Society could extinguish the right, title or interest in the immoveable property belonging to the Housing Society, by executing an Extinguishment Deed for that purpose.

21. The role of the Sub-Registrar (Registration) stands discharged, once the document is registered (see *Raja Mohammad Amir Ahmad Khan* (supra). Section 17 of the Act of 1908 deals with documents which require compulsory registration. Extinguishment Deed is one such document referred to in Section 17(1)(b). Section 18 of the same Act deals with documents, registration whereof is optional. Section 20 of the Act deals with documents containing interlineations, blanks, erasures or alterations. Section 21 provides for description of property and maps or plans and Section 22 deals with the description of houses and land by reference to Government maps and surveys. There is no express provision in the Act of 1908 which empowers the Registrar to recall such registration. The fact whether the document was properly presented for registration cannot be reopened by the Registrar after its registration. The power to cancel the registration is a substantive matter. In absence of any express provision in that behalf, it is not open to assume that the Sub-Registrar (Registration) would be competent to cancel the registration of the documents in question. Similarly, the power of the Inspector General is limited to do superintendence of registration offices and make rules in that behalf. Even the Inspector General has no power to cancel the registration of any document which has already been registered.

22. The procedure for registration of documents is spelt out, inter alia, in part VI of the Act of 1908. Section 32 of the said Act reads thus:

PART VI

OF PRESENTING DOCUMENTS FOR REGISTRATION

*"32. **Persons to present documents for registration.-***

Except in the cases mentioned in 24[sections 31, 88 and 89], every document to be registered under this Act, whether such registration be compulsory or optional, shall be presented at the proper registration office-

(a) by some person executing or claiming under the same, or, in the case of a copy of a decree or order, claiming under the decree or order, or

(b) by the representative or assignee of such a person, or

(c) by the agent of such a person, representative or assign, duly authorised by power-of-attorney executed and authenticated in manner hereinafter mentioned."

23. If the document is required to be compulsorily registered, but while doing so some irregularity creeps in, that, by itself, cannot result in a fraudulent action of the State Authority. Non-presence of the other party to the Extinguishment Deed presented by the Society before the Registering Officer by no standard can be said to be a fraudulent action *per se*. The fact whether that was done deceitly to cause loss and harm to the other party to the Deed, is a question of fact which must be pleaded and proved by the party making such allegation. That fact cannot be presumed. Suffice it to observe that since the provisions in the Act of 1908 enables the Registering Officer to register the documents presented for registration by one party and execution thereof to be admitted or denied by the other party thereafter, it is unfathomable as to how the registration of the document by following procedure specified in the Act of 1908 can be said to be fraudulent. As aforementioned, some irregularity in the procedure committed during the registration process would not lead to a fraudulent execution and registration of the document, but a case of mere irregularity. In either case, the party aggrieved by such registration of document is free to challenge its validity before the Civil Court.

24. Admittedly, the documents in question do not fall within Sections 31, 88 and 89. Further, Section 32 does not require presence of both parties to the document when it is presented for registration. In that sense, presentation of Extinguishment Deed by the authorized person of the Society for registration cannot be faulted with reference to Section 34 of the Act of 1908. That provision stipulates the enquiry to be done by the Registering Officer before

registration of the document. The same reads thus:

> ***"34. Enquiry before registration by registering officer.-*** *(1) Subject to the provisions contained in this Part and in sections 41, 43, 45, 69, 75, 77, 88 and 89, no document shall be registered under this Act, unless the person executing such document, or their representatives, assigns or agents authorised as aforesaid, appear before the registering officer within the time allowed for presentation under sections 23, 24, 25 and 26:*
>
> *PROVIDED that, if owing to urgent necessity or unavoidable accident all such persons do not so appear, the Registrar, in cases where the delay in appearing does not exceed four months, may direct that on payment of a fine not exceeding ten times the amount of the proper registration fee, in addition to the fine, if any, payable under section 25, the document may be registered.*
>
> *(2) Appearances under sub-section (1) may be simultaneous or at different times.*
>
> *(3) The registering officer shall thereupon-*
>
> > *(a) enquire whether or not such document was executed by the person by whom it purports to have been executed;*
> >
> > *(b) satisfy himself as to the identity of the persons appearing before him and alleging that they have executed the document; and*
> >
> > *(c) in the case of any person appearing as a representative, assignee or agent, satisfy himself of the right of such person so to appear.*
>
> *(4) Any application for a direction under the proviso to sub-section (1) may be lodged with a Sub-Registrar, who shall forthwith forward it to the Registrar to whom he is subordinate.*

(5) Nothing in this section applies to copies of decrees or orders."

Even this provision does not require presence of both parties to the document when presented for registration before the Registering Officer. Section 35 of the Act of 1908 provides for procedure of admission or denial of execution respectively. The same reads thus:

"35. Procedure on admission and denial of execution respectively

(1) (a) If all the persons executing the document appear personally before the registering officer and are personally known to him, or if he be otherwise satisfied that they are the persons they represent themselves to be, and if they all admit the execution of the document, or

(b) If in the case of any person appearing by a representative, assignee or agent, such representative, assignee or agent admits the execution, or

(c) If the person executing the document is dead, and his representative or assignee appears before the registering officer and admits the execution,

the registering officer shall register the document as directed in sections 58 to 61, inclusive.

(2) The registering officer may, in order to satisfy himself that the persons appearing before him are the persons they represent themselves to be, or for any other purpose contemplated by this Act, examine any one present in his office.

(3)(a) If any person by whom the document purports to be executed denies its execution, or

(b) if any such person appears to the registering officer to be a minor, an idiot or a lunatic, or

(c) if any person by whom the document purports to be executed is dead, and his representative or assignee denies its execution,

the registering officer shall refuse to register the document as to the person so denying, appearing or dead:

PROVIDED that, where such officer is a Registrar, he shall follow the procedure prescribed in Part XII:

28[PROVIDED FURTHER that the State Government may, by notification in the Official Gazette, declare that any Sub-Registrar named in the notification shall, in respect of documents the execution of which is denied, be deemed to be a Registrar for the purposes of this sub-section and of Part XII.]"

Section 36 of the Act of 1908 provides for procedure when appearance of the executant or witness is insisted upon. The same reads thus:

PART VII

OF ENFORCING THE APPEARANCE OF EXECUTANTS AND WITNESSES

***"36. Procedure where appearance of executant or witness is desired.**-If any person presenting any document for registration or claiming under any document, which is capable of being so presented, desires the appearance of any person whose presence or testimony is necessary for the registration of such document, the registering officer may, in his discretion, call upon such officer or court as the State Government directs in this behalf to issue a summons requiring him to appear at the registration-office, either in person or by duly authorised agent, as in the summons may be mentioned, and at a time named therein."*

25. The Andhra Pradesh High Court, in the case of *Yanala Malleshwari* (supra) was called upon to consider whether a person can nullify the sale by executing and registering a cancellation deed and whether the Registering Officer like District Registrar and/or Sub-Registrar appointed by the State Government is bound to refuse registration when a cancellation deed is presented. The fact remains that if the stipulation contained in Sections 17 and

18 of the Act of 1908 are fulfilled, the Registering Officer is bound to register the document. The Registering Officer can refuse to register a document only in situations mentioned in Sections such as 19 to 22, 32 and 35. At the same time, once the document is registered, it is not open to the Registering Officer to cancel that registration even if his attention is invited to some irregularity committed during the registration of the document. The aggrieved party can challenge the registration and validity of the document before the Civil Court. The majority view of the Full Bench was that if a person is aggrieved by the Extinguishment Deed or its registration, his remedy is to seek appropriate relief in the Civil Court and a Writ Petition is not the proper remedy.

26. Section 35 of the Act does not confer a quasi-judicial power on the Registering Authority. The Registering Officer is expected to reassure that the document to be registered is accompanied by supporting documents. He is not expected to evaluate the title or irregularity in the document as such. The examination to be done by him is incidental, to ascertain that there is no violation of provisions of the Act of 1908. In the case of *Park View Enterprises* (supra) it has been observed that the function of the Registering Officer is purely administrative and not quasi-judicial. He cannot decide as to whether a document presented for registration is executed by person having title, as mentioned in the instrument. We agree with that exposition.

27. In absence of any express provision in the Act of 1908 mandating the presence of the other party to the Extinguishment Deed at the time of presentation for registration, by no stretch of imagination, such a requirement can be considered as mandatory. The decision in the case of *Thota Ganga Laxmi* (supra) is with reference to an express provision contained in the Andhra Pradesh Rules in that behalf. That Rule was framed by the State of Andhra Pradesh after the decision of Full Bench of the High Court. Therefore, the dictum in this decision cannot have universal application to all the States (other than State of Andhra Pradesh). It is apposite to reproduce paragraphs 4 and 5 of the said judgment which read thus:

> "4. In our opinion, there was no need for the Appellants to approach the civil Court as the said cancellation deed dated 4.8.2005 as well as registration of the same was wholly void and non est and can be ignored altogether. For illustration, if 'A' transfers a piece of land to 'B' by a registered sale deed, then, if it is not disputed that 'A' had the title to the land, that

title passes to 'B' on the registration of the sale deed (retrospectively from the date of the execution of the same) and 'B' then becomes the owner of the land. If 'A' wants to subsequently get the sale deed cancelled, he has to file a civil suit for cancellation or else he can request 'B' to sell the land back to 'A' but by no stretch of imagination, can a cancellation deed be executed or registered. This is unheard of in law.

5. In this connection, we may also refer to Rule 26(i)(k) relating to Andhra Pradesh under Section 69 of the Registration Act, which states:

"(i) The registering officer shall ensure at the time of preparation for registration of cancellation deeds of previously registered deed of conveyances on sale before him that such cancellation deeds are executed by all the executant and claimant parties to the previously registered conveyance on sale and that such cancellation deed is accompanied by a declaration showing natural consent or orders of a competent civil or High Court or State or Central Government annulling the transaction contained in the previously registered deed of conveyance on sale:

Provided that the registering officer shall dispense with the execution of cancellation deeds by executant and claimant parties to the previously registered deeds of conveyances on sale before him if the cancellation deed is executed by a Civil Judge or a Government Officer competent to execute Government orders declaring the properties contained in the previously registered conveyance on sale to be Government or Assigned or Endowment lands or properties not register able by any provision of law.

A reading of the above rule also supports the observations we have made above. It is only when a sale deed is cancelled by a competent Court that the cancellation deed can be registered and that too after notice to the concerned parties. In this case, neither is there any declaration by a competent Court nor was there any notice to the parties. Hence, this rule also makes it

clear that both the cancellation deed as well as registration thereof were wholly void and non est and meaningless transactions."

28. No provision in the State of Madhya Pradesh enactment or the Rules framed under Section 69 of the Act of 1908 has been brought to our notice which is similar to the provision in Rule 26(k)(i) of the Andhra Pradesh Registration Rules framed in exercise of power under Section 69 of the Act of 1908. That being a procedural matter must be expressly provided in the Act or the Rules applicable to the concerned State. In absence of such an express provision, the registration of Extinguishment Deed in question cannot be labelled as fraudulent or nullity in law. As aforesaid, there is nothing in Section 34 of the Act of 1908 which obligates appearance of the other party at the time of presentation of Extinguishment Deed for registration, so as to declare that such registration of document to be null and void. The error of the Registering Officer, if any, must be regarded as error of procedure. Section 87 of the Act of 1908 postulates that nothing done in good faith by the Registering Officer pursuant to the Act, shall be deemed invalid merely by reason of any defect in the procedure. In the present case, the subject Extinguishment Deed was presented by the person duly authorized by the Society and was registered by the Registering Officer. Once the document is registered, it is not open to any Authority, under the Act of 1908 to cancel the registration. The remedy of appeal provided under the Act of 1908, in Part XII, in particular Section 72, is limited to the inaction or refusal by the Registering Officer to register a document. The power conferred on the Registrar by virtue of Section 68 cannot be invoked to cancel the registration of documents already registered.

29. In the dissenting opinion, reference has been made to the decision of the Division Bench of the Madras High Court in the case of *E.R. Kalaivan* (supra). It was a case where the Registering Officer refused to register the deed of cancellation presented before him on the ground that the cancellation deed was sought to be registered without there being a consent from the purchaser. The aggrieved person approached the Inspector General of Registration who in turn issued a circular dated 5.10.2007 addressed to all the Registering Officers in the State, that the deed of cancellation should bear the signatures of both the vendor and the purchaser. The validity of this circular was challenged by way of Writ Petition before the High Court. In the present case, our attention has neither been invited to any express provision in the Act

of 1908, Rules framed by the State of Madhya Pradesh nor any circular issued by the Competent Authority of the State of Madhya Pradesh to the effect that the Extinguishment Deed should bear the signatures of both the vendor and the purchaser and both must be present before the Registering Officer when the document is presented for registration. Absent such an express provision, insistence of presence of both parties to the documents by the Registering Officer, may be a matter of prudence. It cannot undermine the procedure prescribed for registration postulated in the Act of 1908.

30. The moot question in this case is : whether the action of the Society to cancel the allotment of the plot followed by execution of an Extinguishment Deed was a just action? That will have to be considered keeping in mind the provisions of the Act of 1960 and the Bye-laws of the Society which are binding on the members of the Society. The interplay of the provisions of the Contract Act and the Specific Relief Act and of the Co-operative Laws and the Bye Laws of the Society permitting cancellation of allotment of plot or the membership of the concerned member will have to be considered in appropriate proceedings. Whether the decision of the Society to cancel the allotment of plot made in favour of its member is barred by the law of Limitation Act, is again a matter to be tested in the proceedings before the Cooperative Forum where a dispute has been filed by the appellant, if the appellant pursues that contention.

31. In our considered view, the decision in the case of *Thota Ganga Laxmi* (supra) was dealing with an express provision, as applicable to the State of Andhra Pradesh and in particular with regard to the registration of an Extinguishment Deed. In absence of such an express provision, in other State legislations, the Registering Officer would be governed by the provisions in the Act of 1908. Going by the said provisions, there is nothing to indicate that the Registering Officer is required to undertake a quasi judicial enquiry regarding the veracity of the factual position stated in the document presented for registration or its legality, if the tenor of the document suggests that it requires to be registered. The validity of such registered document can, indeed, be put in issue before a Court of competent jurisdiction.

32. In the present case, the document in question no doubt is termed as an Extinguishment Deed. However, in effect, it is manifestation of the decision of the Society to cancel the allotment of the subject plot given to its member due to non fulfillment of the obligation by the member concerned. The subject

document is linked to the decision of the Society to cancel the membership of the allottee of the plot given to him/her by the Housing Society. In other words, it is the decision of the Society, which the Society is entitled to exercise within the frame work of the governing cooperative laws and the Bye-laws which are binding on the members of the Society. The case of *Thota Ganga Laxmi* (supra), besides the fact that it was dealing with an express provision contained in the Statutory Rule, namely Rule 26 (k)(i) of the Andhra Pradesh Registration Rules 1960, was also not a case of a deed for cancellation of allotment of plot by the Housing Society. But, of a cancellation of the registered sale deed executed between private parties, which was sought to be cancelled unilaterally. Even for the latter reason the exposition in the case of *Thota Ganga Laxmi* (supra) will have no application to the fact situation of the present case.

33. Taking any view of the matter, therefore, we are of the considered opinion that, the High Court has justly dismissed the writ petition filed by the appellant with liberty to the appellant to pursue statutory remedy resorted to by him under the Act of 1960 or by resorting to any other remedy as may be advised and permissible in law. All questions to be considered in those proceedings will have to be decided on its own merits.

34. Accordingly, we dismiss this appeal in the above terms with no order as to costs.

Appeal dismissed.

I.L.R. [2017] M.P., 1043
WRIT APPEAL
Before Mr. Justice Hemant Gupta, Chief Justice &
Mr. Justice Alok Verma
W.A. No. 133/2017 (Indore) decided on 28 April, 2017

KASHIRAM (DECEASED) THROUGH
LRs DURGASHANKAR & anr. ...Appellants
Vs.
STATE OF M.P. & ors. ...Respondents

A. Nagariya Kshetro Ke Bhoomihin Vyakti (Pattadhriti Adhikaron Ka Pradan Kiya Jana) Adhiniyam, M.P. (15 of 1984), Section 3 and Nagariya Kshetro Ke Bhoomihin Vyakti (Pattadhriti Adhikaron Ka Pradan Kiya Jana) Rules (M.P.) 1998, Rule 7 - Cancellation of

Patta - Alternate Accommodation **- House of the appellant was coming in alignment of LIG link road - Patta given to the father of appellant was cancelled and for the purpose of resettlement, appellants were allotted a flat in a different location - Challenge to - Held - As per clause 4 of the allotment letter, if land is required in public interest, then pattedar will be relocated - In the instant case, appellants seeking allotment of plot of 2000 Sqfts with construction of double storied house for them - As a 'settled person' on a 'public land', they have a right for alternative accommodation but not as per the size and in the area desired by the appellant - Alternate accommodation is to provide shelter over the head of the settlers but not to provide a source of income or an investment for settlers - Further held - Allotment of patta was made in 1998 in favour of appellant's father and wife and cannot be said to be an honest act of allotment of settlement of his near relations - Family of appellant no.1 does not appears to fall in category of 'landless persons' and 'urban poor' - Allotment lacking in bonafides - Process adopted by appellants for allotment of alternate accommodation is not fair and reasonable - Appeal dismissed. (Paras 5, 16 &17)**

क. नगरीय क्षेत्रों के भूमिहीन व्यक्ति (पट्टाधृति अधिकारों का प्रदान किया जाना) अधिनियम, म.प्र. (1984 का 15), धारा 3 एवं नगरीय क्षेत्रों के भूमिहीन व्यक्ति (पट्टाधृति अधिकारों का प्रदान किया जाना), नियम (म.प्र.) 1998, नियम 7 – पट्टे का रद्दकरण – वैकल्पिक स्थान – अपीलार्थी का मकान एल.आई.जी. लिंक रोड के संरेखण में आ रहा था – अपीलार्थी के पिता को दिया गया पट्टा रद्द किया गया था और पुनर्स्थापन के प्रयोजन हेतु अपीलार्थीगण को भिन्न स्थान पर एक फ्लैट आवंटित किया गया था – को चुनौती – अभिनिर्धारित – आबंटन पत्र के खंड 4 के अनुसार, यदि लोकहित में भूमि की आवश्यकता है तब पट्टेदार को पुनर्स्थापित किया जाएगा – वर्तमान प्रकरण में, अपीलार्थीगण उनके लिए द्वि मंजिला मकान के निर्माण के साथ 2000 वर्गफुट के भूखंड का आबंटन चाह रहे हैं – 'सार्वजनिक भूमि' पर 'बसे हुए व्यक्ति' के रूप में उन्हें वैकल्पिक स्थान का अधिकार है किंतु अपीलार्थी द्वारा चाहे अनुसार आकार एवं क्षेत्र में नहीं – वैकल्पिक स्थान, अधिवासियों के सर पर छत उपलब्ध कराने के लिए है न कि अधिवासियों के लिए आय का स्त्रोत या निवेश उपलब्ध कराने के लिए – आगे अभिनिर्धारित – 1998 में अपीलार्थी के पिता व पत्नी के पक्ष में पट्टे का आबंटन किया गया था और उसके नजदीकी रिश्तेदारों के व्यवस्थापन के आबंटन को ईमानदार कृत्य नहीं कहा जा सकता – अपीलार्थी क्र. 1 का परिवार, 'भूमिहीन व्यक्ति' एवं 'नगरीय गरीब' की श्रेणी में आना प्रतीत नहीं होता – आबंटन में सद्भाविकता का अभाव है – वैकल्पिक स्थान के आबंटन हेतु अपीलार्थीगण द्वारा अपनायी गई प्रक्रिया उचित एवं युक्तियुक्त नहीं है – अपील खारिज।

B. Nagariya Kshetro Ke Bhoomihin Vyakti (Pattadhriti Adhikaron Ka Pradan Kiya Jana) Adhiniyam, M.P. (15 of 1984), Section 3 - Aims and Objects - **Held - Act of 1984 was enacted to settle land in favour of landless persons in any urban area - Cut-off date has been extended from time to time in terms of Section 3 of the Act of 1984 - Leasehold rights conferred u/S 3(3) are not transferable by sub-lease, sale, gift or mortgage or by any other manner except by way of inheritance. (Para 8)**

ख. नगरीय क्षेत्रों के भूमिहीन व्यक्ति (पट्टाधृति अधिकारों का प्रदान किया जाना) अधिनियम, म.प्र. (1984 का 15), धारा 3 – लक्ष्य एवं उद्देश्य – अभिनिर्धारित – 1984 के अधिनियम को किसी नगरीय क्षेत्र में भूमिहीन व्यक्ति के पक्ष में भूमि की व्यवस्था हेतु अधिनियमित किया गया था – 1984 के अधिनियम की धारा 3 के निबंधनों के अनुसार समय समय पर अंतिम तिथि बढ़ायी गई है – धारा 3(3) के अंतर्गत प्रदत्त पट्टाधृति अधिकार, उत्तराधिकार के द्वारा छोड़कर, उपपट्टा, विक्रय, दान अथवा बंधक द्वारा या किसी अन्य ढंग से अंतरणीय नहीं है।

C. Words and Phrases - 'Landless Person' - **Held - A 'landless person' is a person who does not own either in his own name or in the name of any member of his family any house or land in an urban area where he is actually residing - Patta can be given to those persons who are 'urban poor', who do not have any means to purchase land and construct houses in the urban locality. (Para 9)**

ग. शब्द और वाक्यांश – 'भूमिहीन व्यक्ति' – अभिनिर्धारित – 'भूमिहीन व्यक्ति' वह व्यक्ति है जिसका नगरीय क्षेत्र में, जहां वह वास्तविक रूप से निवासरत है किसी मकान या भूमि का, उसके स्वयं के नाम से या उसके परिवार के किसी सदस्य के नाम से स्वामित्व नहीं – पट्टा उन व्यक्तियों को दिया जा सकता है जो 'नगरीय गरीब' है जिनके पास नगरीय स्थान में भूमि क्रय करने एवं मकान निर्माण करने के लिए कोई साधन नहीं है।

Cases referred :

(2017) 1 SCC 667, W.A. No. 325/2010 order passed on 23.04.2014.

Durgashankar Gandharv, appellant No. 1 in person.

Madhuban Dubey, for the appellant No. 2.

Mini Ravindran, Aniket Naik and *Lokendra Joshi*, for the respondent Nos. 5, 6 & 7.

ORDER

The Order of the Court was delivered by : **HEMANT GUPTA, Chief Justice. :-** Challenge in the present appeal is to an order passed by the learned Single Bench on 30.1.2017, whereby writ petition filed by the appellants seeking a direction to respondent No.5 to allow the appellants to continue in possession of the land bearing Survey No.394, 395, 397 as per Master Plan 2021, Layout No.RI-1 in respect of which they have been given Patta (permission); to cancel the allotment of land measuring 3.19 Hectares, made on 5.12.2014 and to direct the construction of 2000 square foot – two storied building in lieu of demolition of the house of the appellants. The appellants have also made grievance in alleging that the road alignment has been changed so as to give undue advantage to respondent No.7, who is building a commercial complex over his land; and, other ancillary reliefs.

2- The learned Single Bench referred to an order passed by the Hon'ble Supreme Court reported in (2017) 1 SCC 667 [*Ravindra Ramchandra Waghmare Vs. Indore Municipal Corporation and others*], wherein challenge to an action taken by Municipal Corporations, Bhopal and Indore under Section 305 of the MP Municipal Corporation Act, 1956 remained unsuccessful.

3- In the return it has been pointed out that permission was granted to the father of the appellant under the MP Nagariya Kshetro Ke Bhoomihin Vyakti (Pattadhriti Adhikaron Ka Pradan Kiya Jana) Adhiniyam, 1984 (hereinafter called 'Act of 1984'); MP Nagriya Kshetro Ke Bhumihin Vyakti (Pattadhurti Adhikaron Ka Praday Kiya Jana) Niyam, 1998. It is pointed out that Annexure 23 is the permission is as per Rule 7 of 1998, which is a temporary patta and in case of cancellation of such temporary patta, alternative accommodation is to be given. The patta in favour of the appellants was cancelled on 24.9.2012 and vide resolution dated 209 dated 30.9.2012, it has been resolved to allot flats, to ousted persons including the present appellants, constructed under the Jawaharlal Nehru National Urban Renewal Mission in Scheme No.134. The appellants were allotted Flat No.E-207, in Block E. The petitioner/appellant did not respond to said communication and did not take any positive measures in this regard.

4- First some undisputed facts. Originally the writ petition was filed by appellant No.1; claiming right through his father Kashiram and by his wife, the Appellant/petitioner No.2. Appellant No.1 is now said to be a practicing

Advocate, but in the year 1998 when temporary patta, was given, he was a Naib Tehsildar.

5- Annexure 23 is the letter of allotment dated 22.7.1998, allotting land for a period of 30 years under the Act of 1984. Clause 4 of the said allotment is that if the land is required in public interest, then pattedar will be relocated.

6- In Writ Petition No.509/2013 filed by the appellants earlier, the learned Single Bench has recorded a following finding on 13.08.2012, as under:-

> "Undisputedly, the house allotted was constructed on the piece of land. It was allotted to one Kashiram who was the father of Durgashankar, presently an Advocate and at the relevant time he must be Patwari and was promoted as Tehsildar. There is nothing on record to demonstrate that in what category Patta was allotted to the father of the petitioner under the MP Nagariya Kshetro Ke Bhoomihin Vyakti (Pattadhriti Adhikaron Ka Pradan Kiya Jana) Adhiniyam, 1984 (hereinafter called 'Act of 1984') and the MP Nagriya Kshetro Ke Bhumihin Vyakti (Pattadhurti Adhikaron Ka Praday Kiya Jana) Niyam, 1998. However, since the fact remains that the house of the petitioner has been removed under the provisions of the Act and if the possession is taken under the provisions of the Act and if the possession is taken then the alternative arrangement has to be made, therefore the authorities are directed to look into the matter and do the needful within a period of 6 months in accordance with law."
>
> *(Emphasis supplied)*

7- It is said order which the appellant seeks to enforce by way of the present writ petition, now in appeal.

8- The Act of 1984 was enacted to settle land in favour of landless persons in any urban area. The cut-off date has been extended from time to time in terms of Section 3, of the Act of 1984. The lease hold rights conferred under sub-section (3) of Section 3 are not transferable by sub-lease, sale, gift or mortgage or any other manner except by way of inheritance.

9- A 'Landless person' who is entitled for allotment of land under the

Act of 1984 means a person who does not own either in his own name or in the name of any member of his family any house or land in an urban area where he is actually residing. As per the policy, patta can be given to those persons who are 'urban poor'; who do not have any means to purchase land and construct houses in the urban locality.

10- The father of appellant No.1 claiming to be 'unauthorized occupant' of the public land claims to have right for settlement of land. Land measuring 529 square feet was allotted to the father of appellant No.1 and similar piece of land was allotted to wife of the appellant No.1. As per the appellants, the allotment was made in the year 1984 but the letter of allotment was issued on 22.7.1998. The appellants have attached certain documents alongwith the memorandum of appeal.

11- The appellants also rely upon an order passed by a Division Bench of this Court on 23.4.2014 in Writ Appeal No.325/2010 *[Om Prakash Dhangar and others Vs. Principal Secretary, Department of Revenue, State of MP and others]* and other connected matters, wherein directions were sought to the State to modify the Nazul Maintenance Khasra Numbers in accordance with the Revenue Book Circular (IV-1)(a).

12- A perusal of Annexure A/5 shows that the Collector has passed an order on 24.9.2012 that the houses of 13 holders of settlement were coming in the alignment of LIG Link road. All the settlers agreed to shift in view of the larger public interest of construction of road. It was decided that about 60-80 houses are available in Scheme Nos.103 and 134 respectively, which can be allotted to the persons whose land was falling within road alignment, who were to be resettled. After consider the respective contentions, the Collector passed an order that no further settlement shall be made on the Nazul land falling in the road alignment and that all settlers who fall within the road alignment shall remove the encroachments. It was also directed that 13 settlers whose houses are coming in way of construction of road from LIG to Ring Road, shall be given alternate accommodation in Scheme No. 103 or 134, in accordance with the Rules.

13- The appellants have also attached communication dated 22.9.2012 – Annexure 32, wherein the appellants were informed that the houses constructed on the land allotted is required to be removed and that for an alternative land the appellants should appear in the Office of Collector on 24.9.2012. On 24.9.2012 vide Annexures A-34 and A-35, the appellants were informed that

flats are available in Scheme No.103 or Scheme No.134. The appellants were called upon to appear in the office for the said purpose. Still further, the appellants have attached the reply submitted on behalf of respondent No.5 on 17.7.2016, wherein allotment of Flat No.E-207 to appellant No.2 vide letter of allotment dated 4.10.2013 which was changed to Flat No.E-214, on 26.11.2014 – Annexures R/2 and R/3 .

14- The Executive Engineer of Indore Development Authority has filed an affidavit today wherein it has been interalia mentioned that the Flats were allotted to the appellants as per Resolution dated 30.11.2012, but the appellants have not undertaken any action for completion of formalities till date. Hence, possession of these flats could not be handed over.

15- With this background, we need to examine the stand of the appellant for allotment of alternate site.

16- Appellant No.1 was working as Patwari, as recorded by this Court in the order-dated 13.8.2012 in Writ Petition No.509/2013. It has also been recorded that there is nothing on record to demonstrate that in what category patta was allotted to the father of the petitioner i.e. appellant No.1. Though appellant No.1 denies that he was never posted at Indore, but the fact that the allotment of patta was made in favour of his father and wife in the year 1998 cannot be said to be an honest act of allotment of settlement of his near relations. It appears that the family of the Appellant no.1 does not fall in the category of 'landless person' and 'urban poor'. The allotment was lacking in bona-fides.

17- Even if, it is assumed that the allotment was proper, but in view of the finding recorded by the Collector on 24.8.2012 that 13 settlers have willingly agreed to remove the construction to facilitate widening of road with a condition that the suitable alternate arrangement was to be made. As per appellants themselves, an offer for allotment was made and later allotment was made in the year 2013-2014. As a 'settled person' on a 'public land', the settlers have a right to be accommodated in the alternative accommodation, but not to be accommodated as per the size and in the area desired by the appellants. The stand of the appellants is that they cannot accept alternative accommodation offered as they cannot satisfy the condition of the category 'Below Poverty Line'. Be it as it may, the fact remains alternative accommodation is to provide shelter over the head of the settlers, but not to provide a source of income or an investment for the settlers. It appears that

the appellants have sought a direction for allotment of a Plot of 2000 square feet, with a further direction that the respondents should construct double storied house for them, means that it is not a shelter over their head which the appellants are looking, but an investment for financial gains. The entire process adopted by the appellants for allotment of alternate accommodation cannot be said to be fair and reasonable, which may warrant consideration in the present intra court appeal.

18- Accordingly, **the appeal stands dismissed.**

Appeal dismissed.

I.L.R. [2017] M.P., 1050
WRIT PETITION

Before Mr. Justice S.K. Seth & Mr. Justice Rajendra Mahajan
W.P. No. 3130/2010 (Jabalpur) decided on 29 April, 2016

RAMHIT LODHI ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

A. Constitution - Article 226 - Habeas Corpus - Compensation - It was alleged that respondent no.4 (Petitioner's brother-in-law) **was taken by the police authorities for interrogation and thereafter he never returned home and was missing - CID enquiry and Judicial enquiry ordered whereby enquiry reports revealed that Respondent No.5 arrested the corpus and police authorities placed some other person before the SDM and it also revealed that arrest memo and bail bonds did not bear signatures of the corpus - FIR was registered against the police officer and compensation of Rs. 5,80,000 was ordered to be given to wife of corpus subject to an undertaking to be given by her that if corpus is found alive, compensation amount will be returned back - Petition disposed of. (Paras 2.5, 2.6, 5, 6 & 7)**

क. संविधान – अनुच्छेद 226 – बंदी प्रत्यक्षीकरण – प्रतिकर – यह अभिकथन किया गया था कि प्रत्यर्थी क्र. 4 (याची की पत्नी का भाई) को पुलिस प्राधिकारियों द्वारा पूछताछ हेतु ले जाया गया था और उसके बाद वह कभी घर वापस नहीं आया और लापता था – सी.आई.डी. जांच एवं न्यायिक जांच के आदेश दिये गये जिसके जांच प्रतिवेदन से यह प्रकट हुआ कि प्रत्यर्थी क्र. 5 ने बंदी को गिरफ्तार किया एवं पुलिस प्राधिकारियों ने उपखंड मजिस्ट्रेट के समक्ष किसी अन्य

व्यक्ति को प्रस्तुत किया एवं यह भी प्रकट होता है कि गिरफ्तारी ज्ञापन और जमानत पत्र में बंदी के हस्ताक्षर मौजूद नहीं – पुलिस अधिकारी के विरूद्ध प्रथम सूचना प्रतिवेदन दर्ज किया गया था एवं बंदी की पत्नी को उसके द्वारा इस वचनबंध के दिये जाने की दशा में कि यदि बंदी जीवित पाया जाता है तो प्रतिकर राशि वापस लौटा दी जायेगी, रू. 5,80,000 का प्रतिकर आदेशित किया गया था – याचिका निराकृत।

***B. Motor Vehicles Act (59 of 1988), Second Schedule - Compensation Amount - Quantum - Determination* - No documentary or oral evidence regarding age, education, ownership of any agricultural land, income of corpus at the time of incident has been produced by the petitioner - Holding the age group of 35-40 years, applying the Second Schedule of Motor Vehicles Act, 1988, multiplier of 15 was applied and Amount of Rs. 4,80,000 granted towards loss of dependency, Rs. 50,000 towards loss of consortiums, Rs. 20,000 towards loss of love and affection to children and Rs. 30,000 towards loss of estate, a total amount of Rs. 5,80,000 was awarded. (Para 5)**

ख. मोटर यान अधिनियम (1988 का 59), द्वितीय अनुसूची – प्रतिकर राशि – मात्रा – अवधारण – याची द्वारा घटना के समय बंदी की आयु, शिक्षा, किसी कृषि भूमि के स्वामित्व, आय के संबंध में कोई दस्तावेजी या मौखिक साक्ष्य प्रस्तुत नहीं किये गये – 35–40 वर्ष के आयु वर्ग की धारणा करते हुए, मोटर यान अधिनियम, 1988 की द्वितीय अनुसूची लागू करते हुए, 15 का गुणक अपनाया गया एवं रू. 4,80,000 की राशि आश्रित की हानि के प्रति प्रदान की गयी, रू. 50,000 सहकार की हानि के प्रति, रू. 20,000 बच्चों के लिए प्यार और स्नेह के प्रति, रू. 30,000 संपदा की हानि के प्रति, रू. 5,80,000 की कुल राशि अधिनिर्णीत की गई थी।

Cases referred:

AIR 1993 SC 1960, 2004 (2) MPLJ 506 M.P., 2007 ACJ 283 Orissa, 2009 ACJ 1298.

Sankalp Kochar, for the petitioner.
Ajay Shukla, G.A. for the respondent Nos. 1 to 3.
Nishant Datt, for the respondent No. 5.

JUDGMENT

The Judgment of the Court was delivered by : **RAJENDRA MAHAJAN, J. :-** This writ petition was initially filed by the petitioner in the nature of habeas corpus under Article 226 of the Constitution of India

for the production or release of respondent No.4. Later on, this petition has been converted for grant of compensation to his legal representatives in pursuance of the order dated 15.04.2016 of this Court.

2. Background facts are as follows:

2.1 The petitioner had filed on 06.03.2010 this writ petition under Article 226 of the Constitution of India seeking issuance of a writ in the nature of habeas corpus with the averments and allegations that respondent No.4 Kamlesh @ Kammu Lodhi is the brother of his wife. On 29.11.2009 at around 10:00 p.m., Head Constable Rana Singh, who is respondent No.5 herein, of Police Station Maihar (for short P.S. Maihar) with other policemen came to the house of respondent Kamlesh in village Dhanwahi and took him with them to P.S. Maihar on the pretext of his interrogation in a criminal case. On 30.11.2009, his wife Gomti Bai approached P.S. Maihar seeking information about his whereabouts. She was told by the policemen present there that her husband had been released. However, he had not showed up in his home for the next three weeks. Thereupon, Gomti Bai started worrying about his safety and well being. On 23.12.2009, she met respondent No.2, the Superintendent of Police, Satna and sought information regarding her husband. Upon his advice, on 24.12.2009 she met respondent No.3, the S.H.O. P.S. Maihar. He told her that her husband was arrested on 02.12.2009 by the policemen of P.S. Maihar and the same day he was produced before the Court of Sub Divisional Magistrate, Maihar (for short the S.D.M., Maihar). The said Court released him on bail. Thereafter, she discerned information from the local lawyers regarding the proceedings conducted against her husband on 02.12.2009. Whereupon, she came to know that her husband was produced before the S.D.M. Maihar on 02.12.2009 and the same day he was released on bail upon his executing a personal bond in a sum of Rs.40,000/-. Thereafter, she further

discovered that the proceedings of the S.D.M. Court Maihar, the arrest memo and the other documents prepared by the police did not bear the signatures of her husband and someone impersonating respondent Kamlesh signed the aforesaid documents. On 26.12.2009, she again met the police personnel of P.S. Maihar. They gave her a document saying that a missing person report is lodged upon the disappearance of her husband, whereas neither she nor any members of her family lodged the missing person report of her husband. Thus, the police personnel of P.S. Maihar lodged the missing person report of her husband suo motu. Thereafter, she made several representations to the respondents authorities regarding the search of her husband, but all in vain. She apprehended that police personnel of P.S. Maihar might have liquidated him and in order to cover up their evil acts, they had produced an impersonator before the S.D.M. Court Maihar. Under the circumstances, the petitioner prays to issue a writ in the nature of habeas corpus directing the respondent Nos. 1 to 3 to produce corpus of respondent Kamlesh.

2.2 Respondent Nos. 1 to 3 filed a joint reply on 07.04.2014 in which they denied all the allegations made in the petition. Their reply in brief is that respondent Kamlesh was arrested on 02.12.2009 in Istgasa No.185/09 of P.S. Maihar registered against him under Sections 41 (2) and 109 of the Cr.P.C. On the same day, his arrest was duly conveyed to his wife Gomti Bai and thereafter he was produced before the Court of S.D.M. Maihar. The said Court has registered the Istgasa as Case No.161/09 the parties being *State Vs. Kamlesh*. In that case, the S.D.M. Maihar released respondent Kamlesh after he had executed a personal bond (Muchalka) of Rs.5,000/- for his presence in the case on due dates. On 26.02.2009, Gomti Bai herself made a complaint regrading (sic:regarding)

disappearance of her husband/ respondent Kamlesh. Thereupon, a missing person report being No. 103/09 is registered and information of the same is conveyed to all the concerned and also declared a reward of Rs.2,500/-, later on which was raised to Rs. 5,000/- for providing information about his location. It is further stated in the reply that P.S. Maihar has registered two cases at Crime Nos. 109/89 and 146/08 on 30.05.1989 and 25.02.2008 respectively against respondent Kamlesh for the offences punishable under Section 379 of the IPC. Thus, he has criminal antecedents. In the latter case, the concerned Court has issued perpetual arrest warrant against him. In order to evade the arrest in the case, respondent Kamlesh has holed up somewhere. It is also stated in the reply that the conduct of respondent Rana Singh is found to be suspicious. Thereafter, he was thoroughly interrogated, but no evidence is available that he suffered custodial death. All out efforts are being made out to trace him out.

2.3 Respondent No.5 Rana Singh in his short reply denied all the allegations levelled against him in the writ petition. His defence is that on 02.12.2009, he arrested respondent Kamlesh in Istgasa No.185/09 of P.S. Maihar and on the same day he produced him before the S.D.M. Court, Maihar. On the same day, the Court has released him on bail after his furnishing a personal bond. He has no knowledge where respondent Kamlesh has gone after being released.

2.4 This Court ordered the C.I.D. enquiry and judicial enquiry in the matter on various dates.

2.5 As per the enquiry report submitted by the C.I.D., respondent No.5 Rana Singh rounded respondent Kamlesh up from his house. However, his corpus was not traced out despite all out efforts. Thereupon, a criminal case at Crime No.299/12 in P.S. Maihar is

got registered against respondent Rana Singh for the offences punishable under Sections 177, 182, 205, 365, 201 and 120-B of the IPC. Upon completion of the investigation, the charge-sheet is filed against him in the Court of J.M.F.C. Maihar. Thereupon, criminal case No.1119/13 is registered in which trial is going on.

2.6 Upon the order of this Court, the judicial enquiry was conducted by the C.J.M. Satna. On 17.12.2011, he submitted his report in which he gave two findings in Para 27 of the report on the basis of the evidence collected in the course of enquiry. First- on 29.11.2009 at about 10:00 p.m. respondent Rana Singh arrested respondent Kamlesh from his residence at village Dhanwahi in Crime No.212/09 of P.S. Maihar registered under Sections 457 and 380 on suspicion. Second- in Istgasa No.185/09 of P.S. Maihar, on 02.12.2009 respondent Kamlesh was not arrested as claimed by the police authorities and in place of him some other person showing him respondent Kamlesh was produced before the Court of S.D.M. Maihar. The arrest memo and bail bond did not bear signatures of the deceased.

2.7 Upon the aforesaid reports, this Court on 15.04.2014 passed an order for consideration of granting of compensation to the legal representatives of respondent Kamlesh keeping in view the exposition of the apex Court in the case of *Smt. Nilabati Behera alias Lalita Behera Vs. State of Orissa and others* (AIR 1993 SC 1960).

2.8 In the light of the aforesaid order, the petitioner further amended the petition and made the averments that deceased was an agriculturist, he owned four acres of land in village Dhanwahi and that by doing farming thereon he used to earn Rs. 7,000/- to 8,000/- per

month. Thus, his notional income Rs.54,000/- per year be presumed as per existing wages fixed by the Collector for unskilled labourer. At the time of alleged incident, he was about 35 years old and his wife Gomti Bai aged 38 years and his two children Chhotu and Neelu aged 20 and 21 years respectively are dependent upon him. The answering respondents be ordered to pay them a total compensation of, at least, Rs. 12 lacs under the heads such as loss of dependency, loss of estate, loss of consortium, pain and suffering and loss of love and affection. It is also submitted that the multiplier of sixteen be applied for calculation of loss of dependency.

2.9 In view of the above amendments made in the petition, the respondent Nos. 1 to 3 filed a rejoinder in which they have averred that the possibility of respondent Kamlesh being alive cannot be ruled out as his corpus is still not traced out. At the time of alleged incident, the age of respondent Kamlesh was between 38 to 40 years and he was unemployed man having criminal background. These facts may be considered while awarding the compensation.

3. Now, the point for consideration before us is that how much compensation respondent Kamlesh's wife Gomti Bai and his two sons are entitled to get and from which respondents?

4. In the matters of *Ramesh Singh Pawar Vs. M.P. Electricity Board* (2004 (2) MPLJ 506 M.P.) and *Nirmala Nayak and others Vs. The Grid Corporation of India and others* (2007 ACJ 283 Orissa), the deceased died of electrocution and their legal representatives claimed compensation under torts. In these cases, the compensation was assessed with the aid of second schedule of the Motor Vehicles Act, 1988. It is also pertinent to mention here that it is also prayed in the petition that the compensation amount be determined on the basis of multiplier system. Hence, we proceed to decide the compensation as per the aforesaid schedule.

5. The petitioner has not produced any documentary or oral evidence with regard to the age and income of deceased at the time of alleged incident.

The documents of his education and ownership of the agricultural lands are not produced, though in the petition it is claimed that he was owner of a total of four acres of agricultural lands situated in village Dhanwahi. For want of evidence on the aforesaid points, we assess his income as an ordinary unskilled manual labourer. Taking note of the facts that respondent Kamlesh was a resident of village Dhanwahi and that in the villages manual jobs are not available during the whole year, we determine his monthly income Rs.4,000/- and thus his annual income would be Rs.12x4000=48,000/-. As per the averments made in the petition, the age of Kamlesh's wife Gomti Bai is 38 years and the age of his two children are 20 and 21 years respectively. Taking a clue on the basis of the age of them, we fix that at the time of alleged incident respondent Kamlesh was in the age group of 35 to 40 years. The Supreme Court in the case of *Sarla Verma Vs. D.T.C.* (2009 ACJ 1298) has approved the multiplier of fifteen in the aforesaid age group of a person in case of his/her death in a vehicular accident. After deducting 1/3 of living expenses of respondent Kamlesh, we award in the head of loss of dependency a total compensation of Rs.4,80,000/- (48,000 x 2/3 x 15). Taking into consideration, the age of Gomti Bai and her two sons and the annual income of respondent Kamlesh as decided, we award under the heads namely loss of consortium Rs.50,000/-, loss of love and affection to the children Rs.20,000/- and loss of estate Rs.30,000/-. Thus, we hold that respondent Kamlesh's wife Gomti Bai and his two sons are entitled to get a total compensation of Rs. 5,80,000/-.

6. In the light of discussions supra, it is ordered that:-

6.1 Respondent Nos. 1, 2, 3 and 5 jointly and severely pay to respondent Kamlesh's wife Gomti Bai and his two sons a total compensation of Rs. 5,80,000/- within two months from the date of this judgment, failing which they would pay them 6% annual simple interest on the aforesaid amount from the date of this judgment till the date of payment.

6.2 Of the total compensation, each son of respondent Kamlesh is entitled to get Rs.50,000/- and the remaining compensation shall go to the share of respondent Kamlesh's wife Gomti Bai.

6.3 In order to secure Gomti Bai's future financially, she is entitled to get Rs.1,00,000/- in cash and the remaining

amount of her share will be deposited for ten years in F.D.R. of nationalized bank fetching maximum rate of interest. She is entitled to withdraw the accrued interest thereon every month. However, she is not entitled to get premature payment and any loan against the deposit.

6.4 The compensation shall be payable to respondent Kamlesh's wife Gomti Bai only when she furnishes an undertaking and one solvent surety of Rs.8,00,000/- to the effect that in case respondent Kamlesh is found alive, then she will return the total compensation with 6% annual simple interest within three months from the date of order of this Court.

7. The disbursement of compensation and other incidental proceedings will be held under the supervision of the District Judge Satna.

Order accordingly.

I.L.R. [2017] M.P., 1058
WRIT PETITION
Before Mr. Justice Vivek Rusia
W.P. No. 6444/2015 (Indore) decided on 12 August, 2016

SARITA RATHORE (SMT.) ...Petitioner
Vs.
SMT. JAYA KUNWAR ...Respondent

Civil Procedure Code (5 of 1908), Section 10 **- Eviction suit against the petitioner/defendant - Stay application which was filed by the defendant on the ground that in respect of the same property, there is an agreement of sale between the parties and for which defendant has instituted a civil suit which is pending, was dismissed - Held - Suit of specific performance was filed prior to filing of the suit for eviction - Defendant is in possession by way of part performance and no more as tenant - Fate of the subsequent eviction suit is depended on the fate of the suit of specific performance - If defendant succeed in his suit and decree is executed then he would become the owner of the property and in such event, respondent/plaintiff would not be entitled for a decree in his suit for eviction - Proceeding of eviction suit is liable to be stayed**

- Application filed by the defendant u/S 10 CPC is allowed - Petition allowed. (Para 12)

सिविल प्रक्रिया संहिता (1908 का 5), धारा 10 – याची/प्रतिवादी के विरूद्ध बेदखली का वाद – रोक हेतु आवेदन, जिसे प्रतिवादी द्वारा इस आधार पर प्रस्तुत किया गया था कि उसी संपत्ति के संबंध में, पक्षकारों के मध्य विक्रय का करार है और जिसके लिए प्रतिवादी ने सिविल वाद संस्थित किया है जो लंबित है, खारिज किया गया – अभिनिर्धारित – विनिर्दिष्ट पालन हेतु वाद को बेदखली का वाद प्रस्तुत करने के पूर्व प्रस्तुत किया गया था – प्रतिवादी भागिक पालन के जरिए कब्जाधारक है और न कि किराएदार के रूप में – पश्चात्वर्ती बेदखली के वाद की नियति, विनिर्दिष्ट पालन के वाद के भाग्य पर निर्भर है – यदि प्रतिवादी अपने वाद में सफल होता है और डिक्री निष्पादित की जाती है तब वह संपत्ति का स्वामी बन जाएगा और ऐसी स्थिति में, प्रत्यर्थी/वादी बेदखली के अपने वाद में डिक्री का हकदार नहीं होगा – बेदखली के वाद की कार्यवाही रोके जाने योग्य है – प्रतिवादी द्वारा सि.प्र.सं. की धारा 10 के अंतर्गत प्रस्तुत आवेदन मंजूर – याचिका मंजूर।

Case referred :

(2010) 2 SCC 619.

V.K. Jain, for the petitioner.
None, for the respondent, though served.

(Supplied: Paragraph numbers)

ORDER

VIVEK RUSIA, J. :- The respondent was served prior to 09.12.2015, which is evident from order-sheet dated 09.12.2015. Thereafter, on 16.03.2016 also, he did not appear it seems that despite service of notice, he is not appearing before this Court.

Heard.

The petitioner/defendant has filed the present petition being aggrieved by order dated 05.08.2015, passed by First Civil Judge, Class-II, Ujjain, by which application under Section 10 of the CPC filed by the petitioner/defendant has been rejected.

2. The respondent being a plaintiff filed a suit for eviction against the defendant/present petitioner. The present petitioner took a defence that there is an agreement of sale between them of the same property and for which he has already instituted a suit No.15-A/2012, which is pending before the

Second Civil Judge, Class-II, therefore, the present proceedings are liable to be stayed under Section 10 of the CPC.

3. Earlier, application filed under Section 10 of the CPC was allowed vide order dated 20.12.2013 and the learned civil Judge stayed the proceedings of the present Civil Suit No.41-A/2012. The said order was challenged by way of writ petition by a plaintiff before this Court in W.P.No.715/2014. By order dated 16.05.2014, this Court has set aside the order dated 20.12.2013 and remitted the matter back to trial Court to reconsider the application afresh in light of the judgment of the Supreme Court in case of *Joseph Kantharaj and Anr. Vs. Attharunnisa Begum S,* reported in (2010) 2 SCC 619.

4. After the decision of the High Court, the learned trial Court again considered the application under Section 10 of the CPC and vide order dated 06.08.2015 has rejected the same, hence, the present petition, by the defendants.

5. Shri V.K. Jain, learned counsel for the petitioner/defendant submits that though the petitioner was initially inducted as a tenant in the suit premises, but later on he entered with an agreement of sale with the plaintiff by an agreement dated 25.08.2004. Under the said agreement, the total sale consideration amount was Rs.8.00 lac & out of which Rs.6.00 lac was paid on the date of agreement and the balance amount was agreed to be paid at the time of execution of the sale deed. When the plaintiff did not executed the sale deed then the defendant has no option but to file a suit for specific performance. The said suit was filed on 14.02.2012, which was registered as C.S.No.15/2013. After receiving the notice of the suit, now the plaintiff has filed the suit for eviction which is registered as C.S.No.41-A/2012.

6. Shri Jain, learned counsel for the petitioner submits that in the light of judgment passed in the case of *Joseph Kantharaj and Anr.* (Supra), the learned trial Court did not considered the application under Section 10 of the CPC and rejected the same on the ground that the subject matter of both the suits are different.

7. I have heard learned counsel for the petitioner.

8. The Hon'ble Supreme Court in para 9 and 10 of its judgment passed in the case of *Joseph Kantharaj and Anr.* (Supra) has held that while deciding the application under Section 10 of the CPC, the Court has to decide

matter, prima-facie, whether the agreement is genuine and the defence is bona-fide; than should defer the proceedings of the suit filed for eviction.

9. Para 9 and 10 of the aforesaid Judgment is reproduced as under:

"9. There can be no dispute about the general proposition laid down by the High Court in Haji Iqbal Shariff. But the High Court ignored the fact that though the first appellant had admitted that he was earlier the tenant under the previous owner, he had also specifically pleaded that the previous owner had executed an agreement of sale and permitted him to continue in possession in part performance of the said agreement of sale and that therefore he ceased to be a tenant from the date of agreement, namely 11.6.1997, that the relationship of landlord and tenant between him and the previous owner had come to an end, and that as on the date of sale by Anthony Swamy in favour of the respondent, he was in possession in part performance of the agreement of sale and not as a tenant. In fact the first appellant also filed a suit for specific performance in the year 1999 which is pending. If there was an agreement of sale dated 11.6.1967 and delivery of possession in part performance, as alleged by the first appellant, then he did not become a tenant under the Respondent and the decision in Haji Iqbal Shariff relied on by the High Court would be inapplicable.

10. We may however clarify that a mere assertion by a tenant that he is in possession in part performance of an agreement of sale, or the mere filing of a suit for a specific performance, by itself will not lead to deferment of the eviction proceedings under section 43 of the New Act. But where the respondent in an eviction proceeding under the Rent Act denies the relationship of landlord and tenant contending that he is not in possession as a tenant and produces and relies upon an agreement of sale in his favour which confirms delivery of possession in past performance, and a specific performance suit is pending and there is no lease deed, or payment of rent from the date of such agreement of sale, or no

acknowledgment of attornment of tenancy, section 43 of the new Act may apply. But a word of caution. Courts dealing with summary proceedings against tenants under Rent Acts for eviction, should be wary of defendants coming forward with defences of agreement of sale, lest that becomes a stock defence in such petitions. Unless the court is satisfied prima facie that the agreement is genuine and defence is bonafide, it should not defer the proceedings for eviction under the Rent Acts."

10. In the present case, the defendant has entered into an agreement for sale of the suit property and under the said agreement, the total sale consideration amount of Rs.8.00 lac was paid by him and out of which only Rs.6.00 lac was required to paid on the date of execution of the sale deed and when the sale deed did not got executed by the plaintiff, he filed a suit for specific performance.

11. After receiving of the notice only, than the plaintiff has filed the suit, therefore, it is not a case of where after filing the suit for eviction, the defendant created defence by filing the suit of specific performance. Whereas, the suit of specific performance was filed prior to filing of the suit for eviction.

12. The defence taken by the defendant appears to be bona-fide and the agreement to sell is also prima-facie, appears to be genuine agreement. The trial Court while rejecting the application did not consider this aspect and has only considered that the subject matter of both the suits are different but they are between the same parties. Now the defendant is in possession by way of part performance and no more as tenant and as per law laid down by the Hon'ble Supreme Court, the fate of the subsequent eviction suit is depended on the fate of suit for specific performance. If defendant succeed in his suit and decree is executed he would become the owner of the suit property. In such event, defendant would not be entitled to get decree in his suit for eviction. Hence, to apply this 'test' the proceeding of eviction suit is liable to be stayed.

13. Therefore, the impugned order dated 05.08.2015 is liable to be set aside and the application filed under Section 10 of the CPC is allowed.

14. The proceeding of C.S.No.41A/2012 shall remain stayed.

15 Accordingly, the petition **stands allowed.**

Petition allowed.

I.L.R. [2017] M.P., 1063

WRIT PETITION

Before Mr. Justice S.C. Sharma

W.P. No. 2706/2015 (Indore) decided on 12 September, 2016

THE MALWA VANASPATI & CHEMICALS CO. LTD. ...Petitioner

Vs.

STATE OF M.P. & anr. ...Respondents

A. Land Acquisition Act (1 of 1894), Section 11 & 16 - Acquisition of Land - Power of Collector to take Possession - Applicability - **In the year 1944, Petitioner, through permission from erstwhile Maharaja Holkar State, acquired some land for the purpose of starting a public limited company - Land was acquired, possession was taken and compensation was paid by petitioner to land owners - During a period when company faced crisis, they sold certain piece of land and in respect of this transfer, on a complaint, Collector ordered to take back the whole property from petitioner - Challenge to - Held - State has not pointed out any statutory provision of law which empowers the Collector to dispossess the petitioner company - Collector has no jurisdiction to pass such order u/S 16 of the Land Acquisition Act - Order u/S 16 can only be passed when land of a person is acquired by passing an award by the Collector u/S 11 of the Act - This provision does not empower the State Government to forcibly dispossess the titleholder from his property against whom no such award has been passed and who has received the possession in 1946 after due acquisition and has paid compensation to the land owners directly, who is recorded as Bhumiswami and is in settled possession as lawful owner since pre-independence - Petitioner is entitled to possess and utilize the property - Order passed by Collector is set aside - Petition allowed. (Paras 19, 23, 24)**

क. भूमि अर्जन अधिनियम (1894 का 1), धारा 11 व 16 – भूमि का अर्जन – कलेक्टर की कब्जा लेने की शक्ति – प्रयोज्यता – वर्ष 1944 में, याची ने पब्लिक लिमिटेड कंपनी आरंभ करने के प्रयोजन हेतु तत्कालीन होलकर राज्य के महाराजा से अनुमति द्वारा कुछ भूमि अर्जित की – भूमि अर्जित की गई, कब्जा लिया गया और भूमि स्वामियों को याची द्वारा प्रतिकर अदा किया गया था – जब कंपनी संकट का सामना कर रही थी, उस अवधि के दौरान उन्होनें भूमि के कतिपय टुकड़े का विक्रय किया और इस अंतरण के संबंध में एक शिकायत पर कलेक्टर ने याची से संपूर्ण संपत्ति वापस लेने के लिए आदेशित किया – को चुनौती – अभिनिर्धारित – राज्य ने विधि का कोई कानूनी

उपबंध नहीं दिखाया जो कलेक्टर को याची कंपनी को कब्जा रहित करने के लिए सशक्त करता हो – कलेक्टर को भूमि अर्जन अधिनियम की धारा 16 के अंतर्गत उक्त आदेश पारित करने की कोई अधिकारिता नहीं – धारा 16 के अंतर्गत आदेश केवल तब पारित किया जा सकता है जब कलेक्टर द्वारा अधिनियम की धारा 11 के अंतर्गत अवार्ड पारित करके किसी व्यक्ति की भूमि अर्जित की गई है – यह उपबंध राज्य सरकार को ऐसे स्वत्वधारक को उसकी संपत्ति से बलपूर्वक बेकब्जा करने के लिए सशक्त नहीं करता जिसके विरूद्ध ऐसा कोई अवार्ड पारित नहीं किया गया है एवं जिसने सम्यक् अर्जन के पश्चात्, 1946 में कब्जा प्राप्त किया है तथा प्रत्यक्ष रूप से भूमिस्वामियों को प्रतिकर अदा किया है जो भूमिस्वामी के रूप में अभिलिखित है एवं स्वतंत्रता पूर्व से विधिपूर्ण स्वामी के रूप में जिसका स्थापित कब्जा है – याची, संपत्ति का कब्जा लेने एवं उपभोग करने का हकदार है – कलेक्टर द्वारा पारित आदेश अपास्त – याचिका मंजूर।

B. Revenue Book Circular, Part I no.4 - Applicability - **Held - Petitioner cannot be thrown out of his property by an executive action - Petitioner is in possession of land since 1946 as Bhumiswami and is not guilty of transgression of law of the land in the present case - Revenue Book Circular has no application in the present case.**

(Para 16 & 18)

ख. राजस्व पुस्तिका परिपत्र, भाग I क्र. 4 – प्रयोज्यता – अभिनिर्धारित – याची को कार्यपालिक कार्यवाही द्वारा उसकी संपत्ति से बाहर नहीं फेंका जा सकता – वर्तमान प्रकरण में, याची के पास 1946 से भूमिस्वामी के रूप में भूमि का कब्जा है और देश–विधि के उल्लंघन का दोषी नहीं है – राजस्व पुस्तिका परिपत्र की वर्तमान प्रकरण में प्रयोज्यता नहीं।

C. Constitution - Article 300-A - Right to Property - **Held - A title holder of property who is recorded as *Bhumiswami* cannot be thrown out of his property and is deprived of his constitutional rights guaranteed under Article 300-A of the Constitution, without there being any statutory provision reflected in the impugned order on the basis of which said property could be declared property of State Government.**

(Para 15)

ग. संविधान – अनुच्छेद 300–ए – संपत्ति का अधिकार – अभिनिर्धारित – आक्षेपित आदेश में बिना ऐसे किसी कानूनी उपबंध के, जिसके आधार पर उक्त संपत्ति को राज्य सरकार की संपत्ति घोषित किया जा सके, संपत्ति के ऐसे स्वत्वधारक को जो *भूमिस्वामी* के रूप में अभिलिखित है उसकी संपत्ति से बाहर नहीं फेंका जा सकता एवं संविधान के अनुच्छेद 300–ए के अंतर्गत प्रत्याभूत उसके संवैधानिक अधिकारों से वंचित नहीं किया जा सकता ।

D. Practice - Validity of Order - **Held - It is well settled proposition of law that validity of an order has to be judged only on the basis of contents of order and not by any reason supplemented in the return/affidavits filed by the State in support of the order. (Para 23)**

घ. पद्धति – आदेश की विधिमान्यता – अभिनिर्धारित – यह विधि की सुस्थापित प्रतिपादना है कि एक आदेश की विधिमान्यता का निर्णय केवल आदेश की अंतर्वस्तु के आधार पर किया जाना होता है और न कि राज्य द्वारा आदेश के समर्थन में प्रस्तुत रिटर्न/शपथपत्रों में अनुपूरक किसी कारण द्वारा।

Cases referred :

1997 RN 141, AIR 1931 Privy Council 248, AIR 1956 SC 479, AIR 1989 SC 997.

(Supplied: Paragraph numbers)

ORDER

S.C. SHARMA, J. :- The petitioner before this Court is a Company registered under the Companies Act, 1956 in the name and style of "Malwa Vanaspati & Chemicals Company Ltd.," has filed this present petition through its Director.

2. The erstwhile Maharaja Holkar State vide order dated 28/11/1944 has accepted the petitioner Company's offer to float a public limited Company for production of vegetable Ghee and the development of such other allied industry and an order was published in the Holkar Gazette called as Huzur Shree Shankar Order. Order No. 493 was published on 28/11/1944 (Annexure P/1). It has been further stated that subsequently a Notification was issued under the provisions of Indore Land Acquisition Act, 1919 on 11/02/1946 u/S.4 proposing to acquire 41.38 acres of land. The notification was published in Holkar Gazette on 11/2/1946 (Annexure P/2). Thereafter on 14/2/1946 a declaration u/S. 6 of the Indore Land Acquisition Act was published by the Holkar State in respect of 41.38 acres of land. Again on 24/3/1946 a Notification was issued u/S.4 of the Indore Land Acquisition Act intending to acquire 1.10 acres of land and the Holkar State issued a Notification u/S. 6 on 2/4/1946 in respect of the same land. The petitioner Company was placed in possession on 1/4/1946 in respect of the land measuring 4.33 acres. The petitioner has filed possession letter and payment of receipt of compensation as Annexure P/6 and P/7. The land was acquired and handed over to the

petitioner Company, the compensation was paid and the petitioner became absolute title holder of the property.

3. That a part of the land of the petitioner Company was acquired by Madhya Bharat Government which was the successor Government of the Holkar State. A notification was issued on 24/2/1956 u/S.4 of the Land Acquisition Act, 1894 for acquiring 2.38 acres and the Notification No.54 dated 27/2/1956 is on record. The petitioner Company was paid compensation being land owner by the Madhya Bharat Government. The petitioner Company right from the date the land has been handed over to the petitioner Company, is recorded as owner of the land. The petitioner Company got their name mutated in all revenue records. Copies of the Khasra entries for the year 1951-1952 are also on record as Annexure P/9. It has been further stated that the petitioner Company also submitted an application under the provisions of M.P. Land Revenue Code for diversion of the land from agricultural to non-agricultural purpose and a diversion order was passed on 26/10/1983. It has also been stated that proceedings under the Urban Land Ceiling & Regulation Act were also initiated against the petitioner Company acknowledging the petitioner as owner of the land. The matter was contested by the petitioner Company, however, as the Urban Land Ceiling Act was repealed, the proceedings came to an end.

4. The petitioner Company has further stated that they are paying property tax in respect of the Company's building and factory to the Indore Municipal Corporation, Indore. The petitioner Company after commencement of their commercial production in the year 1950, on account of bad market conditions, suffered losses and in the year 2003 the Company became a Sick Unit. The petitioner Company has availed financial assistance from various Banks and ultimately took financial assistance from an Asset Reconstruction Company to repay the secured debts of Banks and Financial Institutions and subsequently took financial assistance from private parties to repay the dues of the Asset Reconstruction Company. The petitioner Company, in order to clear the various loans and also keeping in view the need of the hour and keeping in view the Indore Master Plan, as the land use is Industrial / Commercial, applied to Collector, Indore to issue a No Objection Certificate. The Land Acquisition Officer, on the basis of the application submitted by the petitioner Company, sought opinion from the Tehsildar, Nazul and a report was submitted by the Tehsildar Nazul on 8/11/2012. The petitioner Company also applied for issuance of No Objection Certificate from the Nazul Department and the Nazul

Officer on 4/12/2012 issued a letter to the petitioner as to why they want a No Objection Certificate. The petitioner Company promptly submitted a reply on 20/12/2012 stating that they are the land owners and wants to develop the land as per the Master Plan and, therefore, as a map has to be sanctioned from the Town & Country Planning Department, a No Objection Certificate is certainly required from the Tehsildar Nazul.

5. It has also been brought to the notice of this Court by the learned senior counsel that on 16/8/2013, Tehsildar Nazul submitted his report on the basis of application submitted by the petitioner Company, that the petitioner Company is Bhumiswami continuously since 1992 – 1993 . In the month of February 2014 a small piece of land was sold to certain persons. The buyers got their name mutated in the revenue records on 2/4/2012, however, on 2/8/2014, the Mutation Officer has suo-motu cancelled the mutation and against the order cancelling the mutation, the buyers have preferred a revision before the Board of Revenue which is pending. It has been further stated by the petitioner Company that on 31/10/2014, the respondent No.2 – Collector, Distt., Indore has directed the District Registrar not to register any document in respect of the land belonging to the petitioner Company. The petitioner Company submitted letters of request for obtaining copy of letter dated 31/10/2014, however, the documents was not given to the petitioner Company. On the contrary, a letter dated 18/11/2014 was received by the petitioner Company by which the petitioner Company was directed to furnish the sale deeds in respect of the land sold by the petitioner Company. Reference was also made to some complaint dated 7/6/2014. The petitioner Company submitted its reply on 26/11/2014 and again demanded the copies of the documents. It has been further stated that vide order dated 2/12/2014, the Collector Indore has decided some complaint dt. 7/6/2014 without providing an opportunity to the petitioner Company and has also directed the authorities to take possession of the land admeasuring 41.38 acres. It was held by the Collector that the land vests in the Government with immediate effect (Annexure P/22). It has been further claimed that on 4/12/2014 the Collector took possession of the land, locks were placed over the main gate of the Factory and a panchnama was prepared on 4/12/2014. The petitioner Company being aggrieved by the alleged unilateral action of the Collector, came up before this Court by filing Writ Petition ie., W.P.No. 8953 / 2014 and this Court has set aside the order passed by the Collector dated 2/12/ 2014 and the Collector was directed to pass a fresh order after granting an

opportunity of hearing to the petitioner Company. This Court has passed an order on 28/1/2015. It has been further stated that the respondent Collector directed the petitioner Company to appear on 23/2/2015 and on 23/2/2015 the Collector himself was on Tour and the matter was posted for 2/3/2015. The petitioner Company demanded copies of relevant documents including the complaint dated 5/6/2014 and the documents were also provided to the petitioner Company. The petitioner Company also submitted its objections on 9/3/2015 requesting the Collector to inform the petitioner Company that under which provision of law the Collector is proceeding ahead in the matter. However, the respondent Collector has rejected the applications and again an order was passed on 9/3/2015. The petitioner Company again came up before this Court by filing Writ Petition ie., W.P. No. 1748/2015 which was again allowed directing the Collector to decide the applications afresh. The order was passed by this Court on 18/3/2015. Thereafter the petitioners have appeared before the Collector on 23/3/2015 and the Collector has disposed of the petitioner's application by order dated 25/3/2015. Thereafter the Collector after passing an order on 25/3/2015 has directed the Tehsildar to open the locks and to provide the documents to the petitioner Company and to prepare a Panchnama. The petitioner Company was not permitted to take out documents from their office, as stated in the Writ Petition, and a reply was filed by the petitioner Company to the complaint dated 5/6/2014 regarding maintainability of the proceedings and also in respect of the jurisdiction of respondent No.2. The respondent Collector, as argued by the petitioner Company, without granting proper opportunity of hearing to the petitioner Company finally closed the proceedings and has passed an order which is impugned in the present Writ Petition. The impugned order dated 1/4/2015 is under challenge before this Court by which the Collector has held that the land now vests with the State of Madhya Pradesh and therefore, possession of the land should be taken by the State Government. It has been further argued by the learned senior counsel that the impugned order has been passed by taking shelter of Sec. 16 of the Land Acquisition Act and by no stretch of imagination, Sec. 16 of the Land Acquisition Act is applicable in the peculiar facts and circumstances of the case. It has been argued that in the present case, no award u/S. 11 of the Act was passed by the Collector and the Land Acquisition Act has been repealed w.e.f. 1/1/2014 and, therefore, no action can be taken under the repealed Act. It has also been argued that the Company has directly paid compensation to the land owners and the land in question

has been vested with the petitioner Company and, therefore, by no stretch of imagination, the Collector could have taken an action u/S. 6 of the Land Acquisition Act. It has also been argued by the learned senior counsel that the Collector has also taken shelter of the Revenue Book Circular *Khand* 1 No.4 and the ground raised by the petitioner Company is that the instructions under the Revenue Book Circular are only executive instructions and have no statutory force of law. The Collector who was jurisdictionally incompetent to take action in the matter has passed an illegal order without any authority to do so and, therefore, the impugned order dated 1/4/2014 deserves to be set aside. Various other grounds have also been raised by the petitioner Company and it has been argued that the land in question is exclusively under the ownership of the petitioner Company. The petitioner Company is the title holder of the property. It is recorded as owner of the property in revenue records and, therefore, by taking shelter of some provision which is not applicable in the peculiar facts and circumstances of the case, the entire action of the Collector, Indore stands vitiated. The petitioner Company has also argued before this Court that the Company was facing financial crunch and they are left with no other choice except to sale the piece of land to satisfy its borrowers including the Banks as well as Asset Companies. The petitioner Company also wanted to develop the land as per the Master Plan, 2001 and, therefore, entire action of the Collector of taking away the land from the lawful title holder, without there being any provision of law, deserves to be quashed by this Court.

6. A rejoinder has also been filed in the matter and it has been stated that the petitioner Company continued with the managing activities upto 2012 and as the petitioner Company was facing financial crunch, part of the land has been sold. It has also been stated in the rejoinder that reference to Sec. 57 of the M. P. Land Revenue Code is improper and incorrect. It has been stated that the aforesaid statutory provision of law does not confer any jurisdiction over the Collector to take over possession of the land belonging to the petitioner Company. It has also been stated that the petitioner has become absolute Bhumiswami of the land and a Bhumiswami cannot be deprived of his land on a frivolous complaint filed by inter-meddler. It has been stated that the land was sold to dispose of dues of financial institutions to meet the statutory liabilities, to meet the liability of the labour and other institutions and no part of the sale proceeds has been diverted for personal benefit of any Director or shareholder of the Company. The petitioner Company has prayed for

quashment of the order dated 1/4/2015.

7. A detailed and exhaustive reply has been filed by the State of Madhya Pradesh and the stand of the State Government is that the erstwhile Maharaja of Holkar State under the Huzur Shree Shankar issued order dated 28/11/1944 accepted the proposal of the petitioner to float a Public Limited Company for production of vegetable ghee and development of other allied industries and thereafter the land was acquired for the purpose of setting up a factory and other production activity. The State Government has further stated that after sometime the petitioner Company has closed the production and the factory was also closed and no production activity is going on for the last 10 years. The respondent State has filed copies of tax returns of the petitioner Company and their contention is that no production is going on since long time. It has also been stated that the land was acquired under the Indore Land Acquisition Act, 1919 and the Act is akin to the provisions of the Land Acquisition Act, 1894 and as the purpose of acquisition was frustrated in midway and if such purpose is not fulfilled then the land can very well be reverted back and the same shall vest in the State Government, in the light of Sec. 57 of the Land Revenue Code. The respondents have further stated that no person is entitled to mortgage, sale, gift the land which has been acquired under the Land Acquisition Act without previous sanction of the State Government. The State has further stated that the petitioners have entered into various agreements without permission of the State Government and by taking action as per the provisions of the Land Acquisition Act, 1894 and the Land Acquisition Rules, 1963 they have taken action against the Company. However, the respondents State in paragraph 6 of the return has admitted that the petitioner Company has paid compensation to the land owners and thereafter the petitioner Company was placed in possession, however, it was acquired for the purpose of establishment of factory. It has been further stated that by covenant dated 7/10/1948 all the Princely State merged into the Union which was known as Madhya Bharat Union and on 19/7/1948 the State of Madhya Pradesh acceded to the domain of India and on 24/11/1949 the Raj Pramukh of Madhya Bharat issued a proclamation accepting the provisions of the Constitution of India and on 26/1/1950 the Constitution of India came into force and the United State of Gwalior, Indore and Malwa became part of Part – B State of Madhya Bharat. The Princely State of Indore became part of Madhya Bharat Union and the Madhya Bharat Union merged into the domain of India. The Indore Land Acquisition Act, 1990 stood repealed and the provisions of the Land

Acquisition Act, 1894 came into force in respect of the area in question. It has been stated that Part – 7 of the Land Acquisition Act 1894 deals with acquisition of land for Companies and the Rules framed in that regard are known as Land Acquisition (Companies) Rules, 1963.

8. The contention of the respondent State is that by virtue of the Land Acquisition (Companies) Rules, 1963 the respondent – Collector is competent to take possession of the land as the Company was not using the land for the purpose it was acquired and the land should be reverted back to the Government. The respondent State by taking shelter of the Land Acquisition Act, 1894 and the Land Acquisition (Companies) Rules, 1963, as stated in the return, that they have rightly passed the impugned order in respect of the land in question, as the purpose for which the acquisition was made, stood frustrated. It has also been stated that as the Company has sold the land to certain other individuals and has deviated from the purpose for which the land was acquired, the respondents have rightly passed the impugned order and no case for interference is made out in the matter. Apart from stating the aforesaid, it has been prayed that the Writ Petition be dismissed.

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

10. In the present case, the undisputed facts are the petitioner No.1 – Company is registered under the provisions of the Companies Act, 1956. The Government of His Highness The Maharaja Holkar in the light of the recommendations of the Commerce Minister dated 26/10/1944 read with the Opinion of the Cabinet dated 13/11/1944 was pleased to accept the offer for establishment of a Company for the purpose of setting up an industry. The petitioner Company made efforts for purchasing land from various land owners and pursuant to the order passed by the Holkar State, on 10/2/1946 the Holkar State issued a Notification u/S. 4 of the Indore Land Acquisition Act, 1919 for acquiring 41.3 acres of land and thereafter Notification was issued on 14/2/1946 u/S. 6 of the Indore Land Acquisition Act, 1919. Again a Notification was issued on 24/3/1946 u/S. 4 of the Land Acquisition Act in respect of 1.10 acres and a Notification u/S. 6 was issued in respect of the aforesaid land on 2/4/1946. The petitioner, as stated, paid the price of the land to the land owners directly and the petitioner was placed in possession of the land in question. The land vested absolutely in the petitioner Company and the petitioner Company is also in exclusive possession of the land.

11. That in 1956 the Railways acquired 2.3 acres of the petitioner's land

and as the petitioner is the title holder of the property and is recorded as Bhumiswami, was paid compensation by the Government. The petitioner Company was involved in the production of Vegetable Ghee and development of other allied activities, however, since 2003 the petitioner Company started running into losses and finally a Reference was registered with the B.I.F.R. While all this was going on, the creditors of the petitioner Company, most of them were Banks, started action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and the petitioner Company in order to pay liabilities of the Bank, borrowed funds from the Asset Reconstruction Company and paid off the liabilities of various Banks as well as Asset Reconstruction Company. Three sale deeds were executed and one lease was executed in favour of third parties. A complaint was made against the petitioner Company by one Dr. Manohar Dalal, Advocate.

12. The facts further reveals that the petitioner Company being exclusive title holder of the property is paying property tax in respect of the Company's building and factory to the Indore Municipal Corporation, Indore. The petitioner Company applied to the Collector, Indore for issuance of No Objection Certificate, as the Company was intending to sell part of the land to clear the dues. As the land is Industrial / Commercial an opinion was sought from the Tehsildar Nazul. The Tehsildar Nazul submitted report on 8/11/2012 and a No Objection Certificate was also granted from the Nazul Department on 4/12/2012 informing the petitioner as to why they want a No Objection Certificate. The petitioner Company submitted a reply stating that they want to develop the land as per the Master Plan and a Map has to be sanctioned from the Town & Country Planning Department, hence, No Objection certificate is required from the Tehsildar Nazul. On 16/8/2013 the Tehsildar Nazul submitted a report that the petitioner Company is a Bhumiswami and a small portion of the land has been sold to certain persons name. Name of the buyers have been mutated in the revenue records on 2/4/2012. Grievance of the petitioner Company started on 2/8/2014 when the Mutation Officer has suo-motu cancelled the mutation in respect of the buyers and the buyers have preferred a revision which is pending before the Board of Revenue.

13. On 31/10/2014, the Collector, Indore has directed the District Registrar not to register any document in respect of the land belonging to the petitioner Company. The petitioner Company submitted letters to the Collector demanding certain documents and submitted a reply also to the Collector and

based upon the complaint submitted by Dr. Manohar Dalal, Advocate, the Collector, Indore has passed an order dated 2/12/2014 taking possession of the land admeasuring 41.38 acres. The order passed by the Collector was challenged by the Company by filing a Writ Petition ie., W.P.No. 8953/2014 and this Court has set aside the order passed by the Collector and the Collector was directed to pass a fresh order after granting an opportunity of hearing to the petitioner. The Collector has passed a fresh order on 9/3/2015 and the petitioner Company has again preferred a Writ Petition ie., W.P.No. 1748/2015 which was allowed again directing the Collector to pass a fresh order. The Collector has again passed an order on 1/4/2015. The Collector has passed the impugned order by taking shelter of Sec. 16 of the Land Acquisition Act, 1894 and of Revenue Book Circular Part – I, No.4.

14. Section 16 of the Land Acquisition Act, reads as follows:

> 16. Power to take possession.- When the Collector has made an award under Section 11, he may take possession of the land, which shall thereupon vest absolutely in the Government free from all encumbrances.

15. This Court has carefully gone through Sec. 16 of the Land Acquisition Act. Section 16 of the Land Acquisition Act is not at all applicable in the circumstances of the case. It only provides that when a Collector passed an award u/S. 11, he can take possession of the land and the same vest absolutely in the Government free from all encumbrances. In the present case, no such award has been passed pursuant to which the Collector is taking possession of the land and, therefore, Sec. 16 has got no application in the facts and circumstances of the case. A title holder of the property who is recorded as Bhumiswami, is being thrown out of his property and is deprived of his constitutional right guaranteed under Article 300-A of the Constitution of India without there being any statutory provision reflected in the impugned order on the basis of which the property can be declared the property of the State Government. Similarly, shelter of the Revenue Book Circular has also been taken by the Collector. Part I, No.4 of the Revenue Book Circular reads as under :

> राजस्व पुस्तक परिपत्र खण्ड क्रमांक 4
>
> भू–अर्जन अधिनियम (क्रमांक 1 सन् 1894) के अंतर्गत अर्जित भूमि की व्यवस्था जिसकी आवश्यकता सार्वजनिक प्रयोजनों के लिये

नहीं हो

अनुदेश – निजी रूप से खरीदी गई या अनिवार्य अर्जन द्वारा प्राप्त की गई और सार्वजनिक प्रयोजन के लिये ली गई कृषि कार्य या चारागाह की भूमि की व्यवस्था के लिये जिसकी अब उस प्रयोजन के लिये शासन को आवश्यकता न हो, निम्नलिखित हिदायतें जारी की जाती हैं––

(1) यदि राज्य शासन के किसी विभाग को उस भूमि या उसके किसी भाग की आवश्यकता उस प्रयोजन के लिये न हो, जिसके लिये वह अर्जित की गई थी, किन्तु किसी अन्य सार्वजनिक प्रयोजन के लिये उसकी आवश्यकता हो तो विभागाध्यक्ष राज्य शासन की सहमति प्राप्त कर उक्त प्रयोजन के लिये उसका उपयोग करने की अनुमति दे सकेगा। विभागाध्यक्ष राज्य शासन को अपनी रिपोर्ट करते समय उसे कलेक्टर और आयुक्त (कमिश्नर) के जरिये भेजेगा।

(2) ऐसे मामलों, जहाँ, उस भूमि या उसके किसी भाग की किसी सार्वजनिक प्रयोजन के लिये आवश्यकता न हो, तो वह विभागाध्यक्ष जिसके कब्जे में वह भूमि हो इस तथ्य की सूचना कलेक्टर को देगा, जो उसे राज्य शासन के ऐसे अन्य विभाग को अन्तरित कर सकेगा, जिसे सार्वजनिक प्रयोजन के लिये उसकी आवश्यकता हो।

(3) यदि उस भूमि या उसके किसी भाग की शासन के किसी विभाग को आवश्यकता न हो, तो कलेक्टर सम्बन्धित स्थानीय निकायों से मालूम करेगा, कि क्या उन्हें किसी सार्वजनिक प्रयोजन के लिये उस भूमि की आवश्यकता है। यदि किसी स्थानीय निकाय को भूमि की आवश्यकता हो और वह शासन द्वारा भुगतान की गई पूरी कीमतें देने के लिये तैयार हो तो कलेक्टर बन्दोबस्त आयुक्त से परामर्श करने के पश्चात् मूल्य का भुगतान किये जाने पर निकाय को उसके अन्तरण की व्यवस्था करेगा बशर्ते वह उस निकाय की आवश्यकता को वास्तविक समझता हो।

(4) ऊपर दी गई हिदायतें (1) (2) या (3) के अन्तर्गत न आने वाले मामलों में वह भूमि उन व्यक्तियों को जिनसे वह अर्जित की गई थी या यदि पता चल सके तो उनके वारिसों को देने का प्रस्ताव करे, बशर्ते वे उस समय लागू विधि के अन्तर्गत अतिरिक्त क्षेत्र धारण कर सकने के हकदार हों।

(5) जिस मूल्य पर कलेक्टर भूमि देना प्रस्तावित करे वह मूलतः उसके लिये दिये गये मुआवजे की रकम के बराबर होगा, जिसमें से यदि भू–अर्जन अनिवार्य हुआ हो तो अनिवार्य भू–अर्जन की 15 प्रतिशत रकम कम कर दी जायगी। यदि आवश्यक हो तो भूमि राज्य शासन के कब्जे में रहने के दौरान कृषि या चराई के प्रयोजन के लिये भूमि की उपयुक्तता में होने वाले हास के कारण यह मूल्य घटाया जा सकेगा, किन्तु उस अवधि में बाजार मूल्य में हुई

वृद्धि के कारण, नीचे दी गई स्थिति को छोड़ मूल्य, बढ़ाया नहीं जाना चाहिये।

(6) वे भू–खण्ड जो अपने आकार या स्वरूप के कारण समीप की भूमि के धारणाधिकारियों या मौरूसी काश्तकारों के अतिरिक्त किसी अन्य के लिये अनुपयोगी हो, पहले ऐसे धारणाधिकारियों या मोरूसी आश्तकारों को देना प्रस्तावित किया जाना चाहिये भले ही हिदायम क्र. (4) के अन्तर्गत उन्हें पहले दिये जाने का हक प्राप्त हो, किन्तु ऐसे मामले में बाजार मूल्य माँगने में कोई आपत्ति नहीं है, यद्यपि निकट के धारणाधिकारियों या मौरूसी काश्तकार द्वारा समुचित कीमत लगाये जाने पर उसे बाहरी व्यक्ति की अपेक्षा प्राथमिकता दी जानी चाहिये।

(7) कलेक्टर, निस्संदेह भूमि को लागत मूल्य पर देने के सामान्य नियम को लागू करने के अपने विवेक पर निर्भर होगा और उसका उपयोग करेगा। विशेष मामले सामने आ सकते है और अपवाद भी न्यायोचित होंगे, उदाहरणार्थ जबकि पहले हकदार व्यक्ति मूल भू–धारी के दूर के वंशज या संबंधी हो, या जब भूमि का बाजार मूल्य इतना अधिक बढ़ जाये कि मामले को सामान्य नियमों के बाहर अन्य तरीके से निपटाया जाना आवश्यक हो।

(8) यदि हिदायत क्र. (4) और (6) में उल्लेखित व्यक्ति प्रस्ताव स्वीकार न करें तो वह भूमि शासन का अनुमोदन प्राप्त करने के बाद इस परिपत्र की कंडिका 4 के उपबन्धों के अधीन जैसा भी उचित प्रतीत हो, या नीलामी द्वारा बेची जा सकेगी या अन्य प्रकार से उसकी व्यवस्था की जा सकेगी।"

16. The aforesaid Revenue Book Circular has again got no application in the present case.

17. In the case of *Ramcharan and others Vs. State of Madhya Pradesh and others* reported in 1997 RN 141 it has been held that the Revenue Book Circular does not have the force of law, and it is only meant for guidance of the Revenue Authorities. The impugned order has been passed without there being any statutory provision / Authority.

18. In the case of *Eshugbayi Eleke Vs. Officer* reported in AIR 1931 Privy Council 248, it has been held by the Privy Council that all executive actions must be founded on statutory authority and the petitioner in the present case is in possession of the land since 1946 as Bhumiswami. He cannot be thrown out of his property by an executive action. The petitioner is not guilty of transgression of the law of the land in the matter. It has been argued by the learned counsel for the respondent State that the land in question was acquired by the Holkar State for establishment of industry with intention to give

employment and development of the city by invoking urgency clause and as the purpose has come to an end and as the land is being sold by the land owners, the State Government is well within its jurisdiction to initiate proceedings and to take back the possession of the land under the provisions of Revenue Book Circular. Learned counsel has also placed reliance upon Sec. 44 of the Land Acquisition Act, 1894 and Sec. 99 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013.

19. The undisputed facts of the case reveal that the petitioner Company is in peaceful and settled possession of the land in question right from 1946. The Company is the Bhumiswami. The petitioner's title was recorded by the State Government in the Revenue Records and the same is fortified by the fact that in 1956 part of the land was acquired by the State Government for the purposes of construction of Railway Line and the petitioner being the land owner was paid compensation. The petitioner Company is being deprived of its property by passing the impugned order and the respondent State has not been able to point out any statutory provision of law which empowers the Collector to pass the impugned order and to dispossess the petitioner Company.

20. In the case of *Eshugbayi Eleke* (supra), the Privy Council has held as under :

> Their Lordships are satisfied that the opinion which has prevailed that the Courts cannot investigate the whole of the necessary conditions is erroneous. The Governor acting under the Ordinance acts solely under executive powers, and in no sense as a Court. As the executive he can only act in pursuance of the powers given to him by law. In accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action; before a court of justice. And it is the tradition of British justice that judges should not shrink from deciding such issues in the face of the executive. The analogy of the powers of the English Home Secretary to deport aliens was invoked in this case. The analogy seems very close. Their Lordships entertain no doubt that under the legislation in question, if the Home Secretary deported a British subject in the belief that he was

an alien, the subject would have the right to question the validity of any detention under such order by proceedings in *habeas corpus*, and that it would be the duty of the Courts to investigate the issue of alien or not. The case of *Rex v. Governor of Brixton Prison* ([1916] 2 K.B. 742) turned first on the question whether the regulation under which the order was made was *ultra vires,* which was a question of law. It further turned on the question whether the Secretary of State was abusing the powers given to him under the order by using them to deport a mere criminal, who it was suggested, was no danger to the State.

21. In the case of *Bidi Supply Co. Vs. Union of India* reported in (AIR 1956 SC 479), the apex Court has held as under :

> "As said by Lord Atkin in Eshugbai Eleko's case the executive can only act in pursuance of the powers given to it by law and it cannot interfere with the liberty, property and rights of the subject except on the condition that it can support the legality of its action before the Court"

22. In the case of *State of U.P. Vs. Maharaja Dharmander Pratap Singh* reported in (AIR 1989 SC 997) the apex Court has held as under :

> "Possession can be resumed by Government only in a manner known to or recognised by law. It cannot resume possession otherwise than in accordance with law. Government is, accordingly prohibited from taking possession otherwise than in due course of law".

23. In the light of the aforesaid judgments, the only statutory provision relied upon in the impugned order is Sec. 16 of the Land Acquisition Act. The provision of is not at all attracted in the facts and circumstances of the case. The aforesaid provision is attracted only when the land of a person is acquired by passing an award and after acquisition, possession of the acquired land is taken and, therefore, the aforesaid provision does not empower the State Government to dispossess a title holder from his property against whom no such award has been passed and who has received the possession after due acquisition and has paid compensation to the land owners directly. It is a well settled proposition of law that validity of an order has to be judged only on

the basis of the contents of the order and not by any reason supplemented in the return / affidavits filed by the State in support of the order.

24. In the light of the aforesaid, this Court is of the considered opinion that the learned Collector was jurisdictionally incompetent to pass the impugned order by taking shelter of Sec. 16 of the Land Acquisition Act 1894 and Revenue Book Circular – Part – I, No.4 does not confer a power upon the Collector to forcibly dispossess the petitioner who is a title holder of the property and who is in settled possession as lawful owner since pre-independence. Not only this, the provision relied upon under the M.P. Land Revenue Code are not at all applicable in the facts and circumstances of the case. In fact, depriving the petitioner of its property by passing an executive order is contrary to the well settled principles of law and, therefore, as the petitioner Company is title holder of the property, owner of the property and recorded as Bhumiswami, is entitled to possess the property and to utilise the property. The impugned order is bad in law and is hereby quashed.

25. With the aforesaid, the present Writ Petition stands allowed and disposed of.

Petition allowed.

I.L.R. [2017] M.P., 1078
WRIT PETITION
Before Mr. Justice Rohit Arya
W.P. No. 3202/2010 (Gwalior) decided on 20 September, 2016

MAA SHEETLA SAYAPEETH MANDIR
VYAVASTHAPAN SAMITI/SHITLA MATA
KALYAN SAMITI ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

***A. Society Registrikaran Adhiniyam, M.P. (44 of 1973), Section 3(e), 20, 21 & 25 and Public Trusts Act, M.P. (30 of 1951), Section 36(1)(b) - Exemption* - On 16.03.2009, petitioner *Samiti* got itself registered under the Adhiniyam of 1973 - Later, on 03.07.2010, Registrar, Public Trust ordered for registration of petitioner Samiti as public trust - Challenge to - Held - Despite interim orders passed by this court on 24.06.2010, impugned order was passed on 03.07.2010,**

therefore for this reason alone, the same is hereby set aside - Further held - In absence of any documentary evidence relating to title, possession or any other right and interest of the society with regard to temple on record and looking to the undisputed fact that temple is constructed on forest land as mutated in revenue records, claim for temple as a private property is not sustainable and is hereby rejected - Further held - For the purpose of attracting provisions of Section 36(1)(b) of Public Trust Act, the public trust or society must be engaged in activities of management of its properties/estate/assets with its functional orientation amenable to regulatory measures as provided under the Adhiniyam of 1973 - In the instant case, there is no document produced on record to claim that said society is administered under the provisions of the Adhiniyam of 1973 - Contention of petitioner that society is immune from the applicability of Trust Act, u/S 36(1)(b) cannot be accepted and is hereby rejected - Public Trust Act is applicable in the present case - Registrar public Trust is directed to initiate the proceedings - Petition partly allowed. (Paras 4.1, 4.2 & 4.3)

क. सोसायटी रजिस्ट्रीकरण अधिनियम, म.प्र. (1973 का 44), धारा 3(ई) 20, 21 व 25 एवं लोक न्यास अधिनियम, म.प्र. (1951 का 30), धारा 36(1)(बी) – छूट – 16.03.2009 को याची *समिति* ने 1973 के अधिनियम के अंतर्गत स्वयं को रजिस्ट्रीकृत करवाया – बाद में, 03.07.2010 को रजिस्ट्रार, लोक न्यास ने याची *समिति* के लोक न्यास के रूप में रजिस्ट्रीकरण हेतु आदेशित किया – को चुनौती – अभिनिर्धारित – 24.06.2010 को इस न्यायालय द्वारा अंतरिम आदेश पारित किये जाने के बावजूद, 03.07.2010 को आक्षेपित आदेश पारित किया गया था, इसलिए इस एकमात्र कारण से उक्त को एतद्द्वारा अपास्त किया गया – आगे अभिनिर्धारित – अभिलेख पर मंदिर के संबंध में सोसाईटी के हक, कब्जे या अन्य किसी अधिकार एवं हित से संबंधित किसी दस्तावेजी साक्ष्य की अनुपस्थिति में तथा इस अविवादित तथ्य को देखते हुए कि मंदिर का निर्माण वन भूमि पर किया गया है जैसा कि राजस्व अभिलेखों में नामांतरित है, व्यक्तिगत संपत्ति के रूप में मंदिर हेतु दावा कायम रखने योग्य नहीं है एवं एतद् द्वारा खारिज किया गया – आगे अभिनिर्धारित – लोक न्यास अधिनियम की धारा 36(1)(बी) के उपबंधों को आकर्षित करने के प्रयोजन हेतु, लोकन्यास या सोसाईटी को विनियामक उपायों के अध्यधीन रहते हुए अपने कार्यशील अभिविन्यास के साथ अपनी संपत्तियों/संपदा/आस्तियों के प्रबंधन के क्रियाकलापों में लगा हुआ होना चाहिए, जैसा कि 1973 के अधिनियम के अंतर्गत उपबंधित है – वर्तमान प्रकरण में, यह दावा करने के लिए अभिलेख पर कोई दस्तावेज प्रस्तुत नहीं है कि उक्त सोसाईटी, 1973 के अधिनियम के उपबंधों के अधीन प्रशासित है – याची का तर्क कि सोसाईटी, धारा 36(1)(बी) के अंतर्गत न्यास

अधिनियम की प्रयोज्यता से उन्मुक्त है, स्वीकार नहीं किया जा सकता और एतद् द्वारा अस्वीकार किया गया – वर्तमान प्रकरण में, लोक न्यास अधिनियम लागू होता है – रजिस्ट्रार लोक न्यास को कार्यवाहियां आरंभ करने के लिए निदेशित किया गया – याचिका अंशतः मंजूर।

***B. Words & Phrases - "administered under any enactment for time being in force"* - Held - In Section 36(1)(b) of the Public Trust Act, the legislature has consciously used the word 'administered' and has not used the word 'registered' - Word 'administration' means management of the affairs of an institution. (Para 4.3)**

ख. शब्द और वाक्यांश – "तत्समय प्रवृत्त किसी अधिनियमिति के अंतर्गत प्रशासित" – अभिनिर्धारित – लोक न्यास अधिनियम की धारा 36(1)(बी) में, विधान–मंडल ने शब्द "प्रशासित" शब्द का उपयोग सचेत रूप से किया है तथा शब्द "रजिस्ट्रीकृत" उपयोग नहीं किया है – शब्द "प्रशासन" का अर्थ है, संस्था के कार्यकलापों का प्रबंध।

Cases referred :

AIR 1970 SC 2097, 1976 JLJ 465, 1991 JLJ 93, 2010 (I) MPJR 40, (1987) 1 SCC 213, (2003) 2 SCC 111, AIR 2004 SC 4778.

K.S. Tomar with *S.S. Tomar,* for the petitioner.
Nidhi Patankar, G.A. for the respondents/State.

ORDER

Rohit Arya, J. :- A society vide Annexure P/2 shown to have been registered under the provisions of Society Registrikaran Adhiniyam, 1973 (for brevity "the Adhiniyam of 1973") on 16/3/2009 in the name of Shitla Mata Kalyan Samiti; the petitioner, has approached this Court with the grievance initially against the notice dated 10/5/2010, Annexure P/1, under Section 5 (2) of the Public Trust Act (hereinafter referred to as "the Trust Act") read with Rule 5 (1) of the Public Trust Rules, 1962 under the signatures of Registrar, Public Trust, Gwalior inviting objections on an application filed by the Ex-officio Tehsildar under Section 4 of the Trust Act for registration of public trust in the name of Mandir Maa Shitla Mata Nyas, Village Satau, District Gwalior. The notice was published in the Gazette as well on 28/5/2010 calling upon the interested persons to file objections on 11/6/2010 in the matter of enquiry as regards registration of the trust as contemplated under Section 5 of the Trust Act. During pendency of the petition, the findings recorded by the

Registrar, Public Trust, under Section 6 of the Trust Act and further order for registration of Public Trust on 3/7/2010 has been challenged.

2. Petitioner has contended that Shitla Mata temple is one of the oldest temple of the area and was originally constructed 400 years ago by the forefather of the petitioner-Late Shri Gajadhar Singh, which was initially installed at village Kharaua, Tehsil Gohad, District Bhind, but later on as Goddess Shitla Mata in his dreams expressed her wishes to shift her and install in the forest area away from his residence, therefore, by obeying the orders of Goddess Shitla Mata the forefathers of the petitioner installed the Deity Shitla Mata in Kho known as Shitla Mata Mandir, Kho. After the death of Gajadhar Singh, his son Ramanand Singh and then his son Mahant Har Govind Singh and thereafter present Mahant Nathuram is in charge of the Deity's worship and management. As such, it is a private temple and property of Mahant Nathuram since Samvat 1669 (year 1612). Now in the interest of temple and the Deity it was decided in the year 2009 to get the society registered under the Adhiniyam of 1973 in the name of Shitla Mata Kalyan Samiti, Satau, Tehsil Gwalior, District Gwalior. Accordingly, the society is registered vide registration certificate dated 16/3/2009.

With the aforesaid pleadings, it is submitted that the society being administered under the Adhiniyam of 1973, the provisions of the Trust Act are not applicable to it in the light of provisions contained under Section 36 (1) (b) of the Trust Act and, therefore, the impugned notice issued under Section 5 of the Trust Act and published in the Gazette calling upon the objections for registration of trust in the name of Mandir Maa Shitla Mata Nyas is patently illegal and contrary to the provisions of the Trust Act.

The order dated 3/7/2010 passed by the Registrar, Public Trust, recording the findings under Section 6 of the Trust Act and further direction for registration of the public trust is without jurisdiction and illegal. The said order is also patently illegal and contemptuous, as despite interim order passed by this Court on 24/6/2010 staying further proceedings of registration of the society as public trust pursuant to notice dated 10/5/2010, the same has been passed.

3. The respondents have filed counter affidavit. It is contended that temple of Maa Shitla is located on survey nos.397, 398, 399 and 400. The same is recorded as forest land in the revenue records. The temple is situated on survey

no.398. As such, it is the public property. Petitioner without disclosing the fact that the temple is on the Government land and not on the private land manipulated issuance of the registration certificate, Annexure P/2, under the provisions of the Adhiniyam of 1973. Petitioner though submitted reply on 11/6/2010 in response to the notice dated 10/5/2010 published in the Gazette, but did not submit any document much less title document in respect of Shitla Mata Mandir showing his ownership or any right and interest therein. Even the registration certificate allegedly obtained by them and annexed as Annexure P/2 was not submitted. Reply to the aforesaid objection was also submitted by the applicant-Ex Officio Tehsildar on 1/7/2010, wherein the facts were reiterated that the temple is in the Government land and as such, it is a public property. Offerings and belongings of the Deity is also public property. The public trust was constituted to save the property and the public money, to ensure development of the temple and to checkmate misuse, misappropriation and encroachment in the vicinity of the temple. As such, the process for constitution of public trust was in pure public interest. Moreover, Shitla Mata Mandir though is claimed to have been managed by the forefathers of the petitioner for last 400 years, but without any proof of ownership or right and interest in the temple and the society is allegedly registered in the year 2009 only.

It is also pointed out that due to large scale encroachment in the area, a Public Interest Litigation has also been filed pending consideration before this Court vide Writ Petition No.1331/2009 (Rajkumar Mishra vs. State of M.P. and others), wherein directions have been issued to the Collector for enquiry, investigation and removal of encroachment in the same vicinity/area.

4. It appears that the Registrar, Public Trust, upon consideration of application filed under Section 4 of the Trust Act with documents and objections submitted by petitioner on 11/6/2010 has passed a detailed order on 3/7/2010.

4.1. Before further proceeding with the contentions advanced as regards the non-applicability of the provisions of the Trust Act and that the impugned notice dated 10/5/2010 issued under Section 5 of the Trust Act is without jurisdiction, this Court considers it apposite to address on the propriety in passing the order dated 3/7/2010 in the teeth of the interim order passed by this Court on 24/6/2010 in presence of counsel for the petitioner as well as respondents/State.

It appears that neither the petitioner nor the counsel for respondents/State notified the authority about the interim order passed on 24/6/2010, as

there is no documentary evidence in that behalf on record *albeit* petitioner in the amended petition has stated that the interim order was brought to the notice of the authority, to which there is no reply. The amendment application was filed on 28/6/2011 and the same was pressed at belated stage, which was allowed on 15/3/2016. There appears to be no contempt proceedings initiated.

Be that as it may. This Court cannot be oblivious of the fact that the impugned order is passed during the currency of interim order passed by this Court and, therefore, for this reason alone the impugned order dated 3/7/2010 deserves to be and is accordingly set aside.

4.2. Now turning to the question of applicability of the Trust Act and legality and validity of the impugned notice dated 10/5/2010, Annexure P/1, issued under Section 5 of the Trust Act, it is considered appropriate to consider the material placed before this Court in the writ petition in support of the claim of right and title since Samvat 1669 (year 1612) over the Shitla Mata Mandir as a private property. Except a photocopy of the alleged resolution signed by some persons for registration of the society, photocopy of the registration certificate dated 16/3/2009 and byelaws of the society, there is no documentary evidence as regards title, possession or any other right and interest of the society in relation to Maa Shitla Temple on record. It appears that, no document was filed before the Registrar, Public Trust, alongwith the reply dated 11/6/2010 also. There is no denial to the fact specifically pleaded by respondents/State in page nos.4 and 5 of the counter affidavit that location of Shitla Mata Temple is in survey nos.397, 398, 399 and 400 and the temple is constructed on survey no.398; forest land mutated in revenue record. Under these circumstances, in the opinion of this Court, the claim of the petitioner that Shitla Mata Mandir is a private property is not sustainable and is hereby rejected.

4.3. Therefore, the question arises "whether a skeleton society constituted on papers having no title and right over the Shitla Mata Mandir can claim to be running the temple and, therefore, the affairs of the society can be said to be administered under the provisions of the Adhiniyam of 1973. Therefore, the same is exempted from the purview of Trust Act in view of Section 36 (1) (b) of the Trust Act?" For this purpose it is expedient to refer to provisions of Section 36 of the Adhiniyam of 1973:-

"36. Exemption.-(1) Nothing contained in this Act shall

apply to-

(a) xxxxx

(b) a public trust administered under any enactment for the time being in force, and"

The legislature has consciously used the phrase "**administered** under any enactment for time being in force" and has not used the word "registered". The meaning attributed to the word administered takes its colour from the meaning of the word "administration", means management of the affairs of an institution: *S.K. Singh v. V.V. Giri,* AIR 1970 SC 2097 referred to. The word "administered" defined in Black's Law Dictionary and is understood in legal parlance as management. As such, for attracting the provisions of Section 36 (1) (b) of the Trust Act, the public trust or society must be engaged in the activities of management of its properties/estate/assets with its functional orientation amenable to regulatory measures as provided for under the Adhiniyam of 1973.

Careful perusal of the provisions of the Adhiniyam of 1973 suggests that through various provisions not only the registration of the society, but its constitution, working, financial conditions are regulated by the Madhya Pradesh Societies Registrikaran Adhiniyam, 1973 (hereinafter referred to as "the Act"). Section 3 (e) defines a Society to mean "a society registered or deemed to have been registered under this Act". The Act contains many provisions which give extensive powers of control to the Registrar over the affairs of a society. Section 11 empowers the Registrar to amend memorandum, regulations and byelaws of a society if he considers that the amendment is necessary in the interest of the society. Section 20 deals with property of the society. Section 21 provides that a society cannot acquire or transfer any immovable property without the prior permission of the Registrar. Section 25 provides as to what books of account are to be kept by a society. Section 26 empowers the Registrar to seize records, registers or the books of account of a society. The Registrar can also taken possession of funds and property of the society through a duly authorised person. Section 28 provides for filing of RETURNS and authorises the Registrar to order a special audit. Section 32 empowers the Registrar to hold an enquiry into the constitution, working and financial position of a society. The decision of the Registrar is binding on the society. The Act also authorises the State Government under section 33 to supersede society

in case of mismanagement and to remove the Governing Body and appoint a person to manage the affairs of a society. As such, a society registered under the Adhiniyam of 1973 is required to maintain complete record not only as regards its members, but also its property, it has to file annual return, audit, inspections etc. There is no document in the aforesaid context placed on record to claim that the said society is administered under the provisions of the Adhiniyam of 1973. There is no document placed on record or even before the Registrar, Public Trust, with its objection dated 11/6/2010 in the context of and with reference to obligation of the society of having assets, i.e. immovable and movable properties and complaisance of various provisions of the Act in the matter of management of such assets, as detailed above, so that society may be said to be administered by the provisions of the Act. Under these circumstances, the contention of learned counsel for the petitioner that it is immune from the applicability of the provisions of Trust Act under Section 36 (1) (b) of the Trust Act cannot be countenanced and the same is hereby rejected.

Learned counsel for the petitioner has cited judgments viz. *Shankar Singh and others vs. Sanstha Sonabai Shravikashram, Khurai and another,* 1976 JLJ 465, *Digamber Jain Hitopadeshini Sabha, Bina and another v. Shri Narendra Kumar Bukharia and others,* 1991 JLJ 93 and *Julious Prasad vs. State of M.P. and others,* 2010 (I) MPJR 40 in support of his contentions, but looking to the aforesaid facts, the judgments, so cited, are distinguishable and are of no assistance to the petitioner, as in all these cases there was no dispute as regards ownership, right and interest of the public trust registered as a society and the dispute related to transaction of the property and in that context the Court has upheld the claim of immunity of the society from applicability of the provision under Section 36 (1) (b) of the Trust Act. In this context it may be noted that the reliance upon the decision in a case without semblance of factual situation is not only misplaced, but also misdirected, as the ratio of a judgment neither can be understood nor applied without factual context. The Hon'ble Supreme Court in the case of *Ambica Quarry Works vs. State of Gujarat and others,* (1987) 1 SCC 213 has observed that:

> *"The ratio of any decision must be understood in the background of the facts of that case. It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it."*

In the case of *Bhavnagar University vs. Palitana Sugar Mills Pvt. Ltd.*, (2003) 2 SCC 111 it has been observed that:

> *"It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision."*

Further, in the case of *Bharat Petroleum Corporation Ltd. and another vs. N.R. Vairamani and another,* AIR 2004 SC 4778 the Hon'ble Supreme Court has held that:

> *"a decision cannot be relied on without disclosing the factual situation."*

Now, as this Court has upheld the applicability of the Trust Act, hence, maintainability of the application filed under Section 4 of the Trust Act by the Ex-officio Tehsildar for registration of the trust Mandir Maa Shitla Mata Nyas, village Satau, District Gwalior and issuance of notice under Section 5 (1) of the Trust Act inviting objections by the respondent no.2-Registrar, Public Trust, are hereby upheld. Consequently, the Registrar, Public Trust, is directed to initiate the proceedings *de novo* from the stage of notice under Section 5 of the Trust Act dated 10/5/2010. Petitioner, if so chooses, may submit title documents and other related or relevant documents in support of the objections raised on 11/6/2010 within two weeks. Thereafter, the authority shall proceed to decide the objection in accordance with law and pass necessary orders.

Accordingly, with the aforesaid observations and directions, the writ petition stands allowed in part and disposed of.

Petition partly allowed.

I.L.R. [2017] M.P., 1086
WRIT PETITION
Before Mr. Justice Rohit Arya

W.P. No. 110/2016 (Gwalior) decided on 22 September, 2016

RAJENDRA SINGH KUSHWAH ...Petitioner

Vs.

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

A. Service Law - Dismissal from Service - Police Regulations, Para 64 **- Petitioner, head constable alongwith three other constables were assigned a duty of custody of an accused who was**

taken to hospital - Accused fled away - Joint enquiry by the department - One Naresh Singh (constable) was found negligent and responsible for the incident whereby he was dismissed from service - Petitioner was not found guilty by enquiry officer - Disciplinary Authority disagreed with the appreciation of evidence by Enquiry Officer and again issued notice to petitioner and ordered punishment of dismissal to petitioner - Appellate Authority modified the punishment to compulsory retirement - Petitioner's mercy appeal was also dismissed - Challenge to - Held - Disciplinary authority gave a reasoning that petitioner, being head constable did not exercise proper supervision and control on other constables which led to escape of accused - Further held - For the act of negligence and omission of Naresh, punishment imposed on petitioner of compulsory retirement depriving him of his service tenure is a disproportionate penalty moreso in view of the fact that during his service tenure, he has earned 170 awards - Matter remanded back to appellate authority for imposition of lesser punishment - Petition partly allowed. (Para 16)

क. सेवा विधि – सेवा से पदच्युति – पुलिस विनियम, कंडिका 64 – याची, प्रधान आरक्षक को तीन अन्य आरक्षकों के साथ एक अभियुक्त जिसे चिकित्सालय ले जाया जा रहा था, की अभिरक्षा का कर्तव्य सौंपा गया था – अभियुक्त भाग गया – विभाग द्वारा संयुक्त जांच – नरेश सिंह (आरक्षक) को घटना के लिए उपेक्षावान एवं उत्तरदायी पाया गया जिसके लिए उसे सेवा से पदच्युत किया गया था – जांचकर्ता अधिकारी द्वारा याची को दोषी नहीं पाया गया था – जांचकर्ता अधिकारी द्वारा साक्ष्य के मूल्यांकन से अनुशासनिक प्राधिकारी असहमत थे और याची को पुनः नोटिस जारी किया तथा याची को पदच्युति का दण्ड आदेशित किया – अपीली प्राधिकारी ने दण्ड को अनिवार्य सेवानिवृत्ति में परिवर्तित किया – याची की दया अपील भी खारिज की गई थी – को चुनौती – अभिनिर्धारित – अनुशासनिक प्राधिकारी ने कारण दिया कि याची ने प्रधान आरक्षक होने के नाते, अन्य आरक्षकों पर उचित पर्यवेक्षण एवं नियंत्रण का प्रयोग नहीं किया जिसके परिणामस्वरूप अभियुक्त निकल भागा – आगे अभिनिर्धारित – नरेश के उपेक्षा पूर्ण कृत्य एवं लोप के लिए याची को सेवाकाल से वंचित रखते हुए उस पर अनिवार्य सेवानिवृत्ति का दण्ड अधिरोपित किया जाना अननुपातिक शास्ति है और अधिक भी है, इस तथ्य को दृष्टिगत रखते हुए कि उसके सेवाकाल के दौरान उसने 170 पुरस्कार अर्जित किये हैं – लघुतर दण्ड के अधिरोपण हेतु अपीली प्राधिकारी को मामला प्रतिप्रेषित किया गया – याचिका अंशतः मंजूर।

B. Disciplinary Authority - Appreciation of Evidence **- Held - Appreciation and assessment of material brought on record by**

department and delinquent is within the exclusive domain of disciplinary authority and cannot be faulted unless conclusions drawn by the authority suffer from the vices of (i) Jurisdiction; (ii) perversity of approach when relevant materials are ignored and irrelevant materials are considered while recording findings; (iii) conclusions drawn by authority are such which no man of common prudence shall arrive at, and (iv) conclusions are lacking in bonafides applying principles of Wednesbury reasonableness. (Para 12)

ख. अनुशासनिक प्राधिकारी – साक्ष्य का मूल्यांकन – अभिनिर्धारित – विभाग द्वारा एवं अपचारी द्वारा अभिलेख पर लायी गई सामग्री का मूल्यांकन एवं निधारण, अनन्य रूप से अनुशासनिक प्राधिकारी के कार्यक्षेत्र के भीतर है और उसमें त्रुटि नहीं निकाली जा सकती जब तक कि प्राधिकारी द्वारा निकाले गये निष्कर्ष निम्न दोषों से ग्रसित न हो (i) अधिकारिता; (ii) दृष्टिकोण की विपर्यस्तता, जब निष्कर्ष अभिलिखित करते समय सुसंगत सामग्री को अनदेखा किया और असंगत सामग्री को विचार में लिया गया है; (iii) प्राधिकारी द्वारा निकाले गये निष्कर्ष ऐसे है जिन पर कोई सामान्य प्रज्ञावान व्यक्ति नहीं पहुंचता तथा (iv) वेडनसबरी युक्तियुक्तता के सिद्धांत को लागू करते हुए, निष्कर्षों में सद्भावना का अभाव है।

C. Constitution - Article 226 & 227 - Jurisdiction of Court **- Held - Jurisdiction of this Court under Article 226 and 227 of Constitution in such matters is required to be exercised with care, caution and circumspection, as this Court cannot sit in appeal over the judgment of disciplinary authority. (Para 12)**

ग. संविधान – अनुच्छेद 226 व 227 – न्यायालय की अधिकारिता – अभिनिर्धारित – ऐसे मामलों में संविधान के अनुच्छेद 226 व 227 के अंतर्गत इस न्यायालय की अधिकारिता का प्रयोग सावधानी से, सतर्कता से एवं समझदारी से किया जाना चाहिए क्योंकि यह न्यायालय, अनुशासनिक प्राधिकारी के निर्णय पर अपील के रूप में सुनवाई नहीं कर सकता।

Cases referred :

2009 (2) MPLJ 458, 2010 (4) MPLJ SN 4, 2009 (2) MPLJ 632, (2010) 5 SCC 783, (2010) 9 SCC 496, (2014) 2 SCC 108, AIR 1998 SC 2713, (2001) 2 SCC 386.

D.P. Singh, for the petitioner.
Sudha Shrivastava, P.L. for the respondent Nos. 1 to 4/State.

ORDER

ROHIT ARYA, J. :- Petitioner taking exception to the order (Annexure P/1) dated 5/12/2014 passed by the disciplinary Authority-respondent no.4 imposing major penalty of dismissal from service; order dated 22/4/15 (Annexure P/2) passed by the appellate Authority-respondent no.3 substituting the penalty of compulsory retirement for dismissal from service, as well as, to the rejection of mercy appeal by respondent no.2 vide order dated 17/7/15, has filed the instant petition under Articles 226 and 227 of the Constitution of India.

2. Facts necessary for disposal of this petition are in narrow compass.

3. Petitioner, while serving as a Head Constable, on 8/5/2014 was assigned the duty of custody of accused Pradeep Rathore with the assistance of other three constables namely Kanti Raj (Constable No. 37), Naresh Singh (Constable No. 166) and Wasim Akhtar (Constable No. 1890). On the aforesaid day, at about 9 am, accused Pradeep Rathore was taken to J.A. Hospital for admission from Central Jail, Gwalior. The accused had undergone surgical operation on 9/5/14 and thereafter was shifted to General Ward. The petitioner and said three constables continued to be in charge of custody of the accused. On 13/5/2014, during the period 3 am to 6 am, accused Pradeep Rathore fled away from the General Ward. As a result, apart from registration of case against Pradeep Rathore as Crime Case No. 328/14 for the offences punishable under sections 224 and 225 of the IPC, respondent no.4 took a decision to initiate disciplinary proceedings against the petitioner and the three constables. Accordingly, charge-sheet was issued to all the four persons and reply was solicited. Upon consideration of the reply, on 10/7/14, the disciplinary Authority decided to appoint Presenting Officer and Inquiry Officer for enquiry. Thereafter, a joint enquiry was held. The Enquiry Officer found that at the relevant time, Naresh Singh (Constable No. 166) was on duty and due to his lapse or negligence, the accused had fled away. He had not informed either the fellow constables or the Head Constable before going to respond the call of nature, during which period, the accused had fled away i.e. between 3 am to 6 am. Under these circumstances, neither the other two constables, nor the petitioner/head constable could be held responsible for the act of fleeing away of accused Pradeep Rathore. Consequently, the Enquiry Officer did not find the charge levelled against the petitioner as proved, as well as, the other two constables but found the charges proved against Naresh Singh.

Thereafter, he was dismissed from service.

4. The disciplinary Authority, however, upon appreciation of the evidence and other material placed on record, concluded that findings recorded by the Enquiry Officer were not on correct appreciation of evidence and, therefore, opined that the findings are erroneous and consequently recorded its disagreement thereupon and issued notice (Annexure P/9) dated 30/9/14 to the petitioner and other two constables. Reply thereto was submitted by the petitioner on 6/10/14. Upon consideration of the reply, the impugned punishment order was passed dismissing the petitioner from service, which has been modified by the appellate Authority substituting penalty of compulsory retirement for the same.

5. Learned counsel for the petitioner has raised following contentions:-

(i) Before the proceedings were initiated under Rule 18 of the M.P. Civil Services (Classification, Control and Appeal) Rules, 1966 (for short "the Rules of 1966"), neither the Governor nor the competent Authority has passed any order for joint enquiry. Therefore, the enquiry so held stands vitiated. In this regard, learned counsel has referred to judgments in the cases of *Jagdish Vs. State of M.P. & Others* (2009(2) MPLJ 458), *Jeevanram Vs. State of M.P. & Others* (2010 (4) MPLJ SN 4) and the order passed in W.P. No. 4962/2007 (*Vinay Sharma Vs. State of MP &Ors*).

(ii) The disagreement note suggests that the disciplinary Authority had already made up its mind and notices so issued in fact and in effect tantamount to post-decisional hearing. Hence, the impugned punishment based thereupon is bad in law. In this regard, learned counsel has relied upon *Nilu Vs. M.P. State Electricity Board* (2009 (2) MPLJ 632).

(iii) Petitioner has been subjected to discrimination in the matter of punishment, as on identical charges, other two constables namely Kanti Raj (Constable No.37) and Wasim Akhtar (Constable No. 1890) have been let off with penalty of with-holding one increment with

cumulative effect, though Naresh Singh (Constable No. 166) has been visited with penalty of dismissal. In this regard, learned counsel has relied upon judgment of the Apex Court in the case of *State of Uttar Pradesh and others Vs. Raj Pal Singh* (2010) 5 SCC 783.

(iv) The appellate Authority has not applied its mind to the facts in hand while passing the impugned order (Annexure P/2). In this regard, learned counsel has relied upon judgment of Hon'ble the Supreme Court in the case of *Kranti Associates (P) Ltd. v. Masood Ahmed Khan,* (2010) 9 SCC 496 .

(v) Even otherwise, by applying the Wednesbury principles of reasonableness and doctrine of proportionality, the punishment of compulsory retirement is disproportionate to the allegations leveled against the petitioner. The Authorities have not taken into consideration the measure, magnitude and degree of misconduct and further that no element of motive or *mens rea* or moral turpitude was involved. In this regard, reliance has been placed upon judgment of the Apex Court in the case of *Chennai Metropolitan Water Supply And Sewerage Board and Others Vs. T.T. Murali Babu* ((2014)2 SCC 108).

6. *Per contra* Ms. Sudha Shrivastava, learned Panel Lawyer has made the following submissions:-

(i) Respondent no.4 is un-disputedly the disciplinary Authority and competent to impose major penalties including dismissal. On the orders of respondent no.4, charge-sheets have been issued to the petitioner and other three constables. The replies submitted by them have been considered by respondent no.4 and it was decided by him to institute enquiry by appointing Enquiry Officer and Presenting Officer vide order dated 10/7/14. As such, there is no lack of authority in respondent no.4 in the matter of ordering such enquiry

for common proceedings under Rule 18 of the Rules of 1966 as the provision contained therein authorizes the Authority competent to impose penalty of dismissal to order for joint enquiry. Hence, no exception can be taken to the joint enquiry held against the petitioner and other three constables. Even otherwise, there is no prejudice caused to the petitioner in the matter of enquiry held against him along with the three constables, as full opportunity was afforded and enquiry was held strictly in accordance with the procedure prescribed under Rule 14 of the Rules of 1966.

(ii) The disagreement note prepared by the disciplinary Authority and notice issued to the petitioner no where indicated any proposed punishment so that it can be said that the Authority had expressed its mind to impose punishment and, therefore, contention advanced by learned counsel for the petitioner that the aforesaid notice was only a formality and tantamount to post-decisional hearing is misconceived and misdirected. In fact the disagreement note reflects proper application of mind and appreciation of evidence placed on record. Thereafter sufficient opportunity was given to the petitioner to respond to the views of disciplinary Authority on disagreement.

(iii) The petitioner was holding the post of Head Constable, a higher Officer having control and supervision over the constables attached with him for the purpose of ensuring safe custody of accused Pradeep Rathore during his stay at J.A. Hospital, where he had undergone surgical operation. It was the duty of the petitioner not only to have a watch on the movement of accused Pradeep Rathore, but also to ensure full and effective co-ordination among the constables in the matter of periodical duty assigned for effective check on custody of the accused. Petitioner since was found lacking in

his duty being an Officer-in-charge and had not taken reasonable precautions which led to escape of the accused, therefore, major penalty has been imposed upon him. Petitioner cannot claim discrimination with constables Kanti Raj (Constable No. 3) and Wasim Akhtar (Constable No. 1890), who otherwise were newly recruited constables on compassionate grounds and did not have much experience in service. Therefore, no plea of parity can be raised.

(iv) The disciplinary Authority and the appellate Authority both have applied their mind to the entire record, as well as, the contention raised by the petitioner and thereafter passed the impugned orders. Petitioner has not pointed out any such plea which has not been considered in the impugned orders, warranting interference under Article 226; an equitable jurisdiction with limited scope of judicial review.

(v) Considering the gravity of charges amounting to dereliction of duty and serious misconduct, the punishment of compulsory retirement, by no stretch of imagination, can be said to be disproportionate. Consequently, it is submitted that the petition *sans* merit and be dismissed.

7. Heard, counsel for the parties.

8. It is not in dispute that respondent no.4-Senior Superintendent of Police is the disciplinary Authority and competent to impose penalty of dismissal in relation to Head Constables and Constables. Respondent no.4 has served the charge-sheet upon the petitioner and other three constables and upon consideration of the reply has taken a decision to constitute enquiry against the petitioner, as well as, three constables and, accordingly, appointed the Presenting Officer and the Enquiry Officer. As such, the joint enquiry held against the petitioner cannot be faulted with, disputing the authority of respondent no.4. The judgment relied upon by the counsel for the petitioner in the case of *Jagdish* (Supra) is clearly distinguishable on facts. In that case, though the appointing Authority in relation to the petitioner therein i.e. Excise Officer was the State Government, but the Excise

Commissioner had taken a decision to hold the joint enquiry and, therefore, he was not found to be competent to inflict the penalty of dismissal and, accordingly, the order of joint enquiry was quashed. The other judgment cited by the petitioner in the case of *Vinay Sharma* (Supra) is also of no assistance to the petitioner as the facts are again distinguishable.

The Enquiry Officer did not find the charges proved against the petitioner, as well as, Constables Kantiraj and Wasim Akhtar while the same were found proved against Constable Naresh Singh. The disciplinary Authority/respondent no.4 while disagreeing with the findings of the Enquiry Officer has given reasons for the same. It be noted that respondent no.4 had not indicated the proposed penalty in the notice served upon the petitioner along with copy of the enquiry report. Law in this regard is well settled. The Hon'ble Supreme Court and various High Courts have taken exception to the notice issued by disciplinary Authority upon disagreement with the enquiry report, if the notice indicated the punishment likely to be imposed, christening the same as "post-decisional hearing". Under these circumstances, the principles of natural justice were found to have been violated. In this regard, learned counsel has placed reliance on the judgments rendered in the case of *Punjab National Bank Vs. Kunj Behari Mishra* (AIR 1998 SC 2713) and Nilu (Supra). However, such is not the case in hand, as there is no mention of proposed penalty in the notice served upon the petitioner. Consequently, the contention that the impugned notice tantamount to post-decisional hearing cannot be countenanced and the same is, accordingly, rejected.

9. Now, the question arises as to whether the complaint of petitioner that he has been subjected to hostile discrimination in the matter of imposition of penalty, violating his fundamental rights under Articles 14 and 16 of the Constitution of India, is justified and/or further whether the penalty imposed is disproportionate to the charges levelled against him ?

10. Before addressing upon the aforesaid question, it is apposite to consider the charge levelled against the petitioner. The same are quoted below:-

1– बंदी प्रदीप राठौर की सुरक्षा में लापरवाही बरतने के फलस्वरूप अभिरक्षा से भागने का अवसर देकर अपने कर्त्तव्यों के प्रति घोर लापरवाही एवं उदासीनता प्रदर्शित करना ।

2– उपरोक्तानुसार कृत्य कर सिविल सेवा आचरण नियमों एवं पुलिस रेग्युलेशन के पैरा –64 का उल्लंघन करना ।

11. As such, the allegation is that of negligence and dereliction of duty in violation of Para 64 of the Police Regulations. Identical charges were framed against the other three constables namely Kanti Raj, Naresh Singh and Wasim Akhtar, a joint enquiry was held and a common set of evidence was placed. However, conclusion arrived at by the disciplinary Authority in relation to petitioner was dismissal from service for the reason that petitioner being Head Constable did not exercise proper supervision and control on the other constables which led to escape of the accused. Naresh Singh who was on duty between 3 to 6 am near the bed where the accused was handcuffed had gone to respond the call of nature without intimating the other Constables. Therefore, he was held guilty of the charge and penalty of dismissal was inflicted. Whereas, the other two constables namely Kantiraj and Wasim Akhtar were visited with penalty of with-holding of one increment with cumulative effect, purportedly for the reason that they were recently recruited on compassionate grounds and were having lesser experience in service. However, the punishment of dismissal from service in respect of the petitioner has been converted into compulsory retirement by the appellate Authority.

12. In the matters relating to departmental enquiries, the disciplinary Authority is in *seisin* with the entire material placed on record such as preparation of charges, service of charge-sheet, enquiry held and punishment imposed. Therefore, the appreciation and assessment of material brought on record by the department and the delinquent is within the exclusive domain of the disciplinary Authority and the same cannot be faulted unless the conclusions so drawn by the disciplinary Authority suffer from the vices of (i) Jurisdiction; (ii) perversity of approach when relevant materials are ignored and irrelevant materials are considered while recording the finding; (iii) the conclusions so arrived at by the disciplinary Authority are such which no man of common prudence shall arrive at and (iv) the conclusions otherwise are lacking in bonafides applying the principles of Wednesbury reasonableness. Moreover, the jurisdiction of this Court, under Articles 226 and 227 of the Constitution in such matters is required to be exercised with care, caution and circumspection, as this Court cannot sit in appeal over the judgment of the disciplinary Authority.

13. Now, turning to the facts in hand, admittedly petitioner was a Head Constable and was required to exercise effective control and co-ordination amongst the other three constables to ensure safe custody of the accused

while he was hospitalized. Petitioner cannot seek parity with constables Kantiraj and Wasim Akhtar for the reasons stated above. Hence, the complaint of discrimination is devoid of merit and substance and the same cannot be countenanced. The judgment cited by the learned counsel in the case of *Raj Pal Singh* (Supra) is of no assistance to the petitioner being distinguishable on facts.

However, the question whether the penalty as imposed is disproportionate to the charges framed against the petitioner on the touchstone of doctrine of proportionality is required to be addressed.

14. The doctrine of proportionality is a well recognized concept of judicial review in our jurisprudence. It is true that it is within the discretionary domain and exclusive power of the Authority making a decision to quantify the punishment once charge of misconduct is proved, but such discretionary power becomes vulnerable and exposed to judicial intervention if exercised in a manner which is found to be out of proportion to the charges found proved i.e. if the punishment is in excess to the gravity of offence. Considerations like measure, magnitude and degree of misconduct are some of the relevant factors on which the punishment imposed is tested under the principles of doctrine of proportionality. The aforesaid principle of law clearly suggests that the proportionality is concerned with the way in which the disciplinary Authority has ordered its priorities while making decision. Attributions of relevance and importance to the factors that weighed with the Authority while passing the decision, precisely provide the factual matrix to the Courts to assess the decision as primary review while applying the principle of proportionality; in other words, it is a balancing test. The balancing test means scrutiny of excessive and onerous penalties manifesting imbalance of relevant considerations.

15. The Hon'ble Supreme Court in the case of *Om Kumar and others Vs. Union of India* ((2001)2 SCC 386) has lucidly explained the distinction between scope of interference in judicial review of administrative action where challenge is made on the ground of discrimination under Article 14 of the Constitution and where challenge is made to an administrative action as arbitrary, irrational or unreasonable. The Courts apply the principle of primary review known as doctrine of proportionality where the administrative action is challenged under Article 14 as being discriminatory and in such case the question before the Courts is to consider the correctness of the level of discrimination applied and whether it is excessive and whether it has nexus

with the objective intended to be achieved by the administrator. In paragraph 28 of the aforesaid judgment, the Hon'ble Apex Court has elucidated the concept of proportionality as under:-

> "28. By 'proportionality', we mean the question whether, while regulating exercise of fundamental rights, the appropriate or least restrictive choice of measures has been made by the legislature or the administrator so as to achieve the object of the legislation or the purpose of the administrative order, as the case may be. Under the principle, the Court will see that the legislature and the administrative authority 'maintain a proper balance between the adverse effects which the legislation or the administrative order may have on the rights, liberties or interests of persons keeping in mind the purpose which they were intended to serve'. The legislature and the administrative authority are, however, given an area of discretion or a range of choices but as to whether the choice made infringes the rights excessively or not is for the Court. That is what is meant by proportionality."

In paragraphs 66 to 68, the concept of primary and secondary review and the applicability of Wednesbury test therein has been couched by the Apex Courts in the following words:-

> "66. It is clear from the above discussion that in India where administrative action is challenged under Article 14 as being discriminatory, equals are treated unequally or unequals are treated equally, the question is for the Constitutional Courts as primary reviewing Courts to consider correctness of the level of discrimination applied and whether it is excessive and whether it has a nexus with the objective intended to be achieved by the administrator. Here the Court deals with the merits of the balancing action of the administrator and is, in essence, applying 'proportionality' and is a primary reviewing authority.
>
> 67. But where, an administrative action is challenged as 'arbitrary' under Article 14 on the basis of Royappa (as in cases where punishments in disciplinary cases are challenged), the question will be whether the administrative order is 'rational' or 'reasonable' and the test then is the Wednesbury test. The

Courts would then be confined only to a secondary role and will only have to see whether the administrator has done well in his primary role, whether he has acted illegally or has omitted relevant factors from consideration or has taken irrelevant factors into consideration or whether his view is one which no reasonable person could have taken. If his action does not satisfy these rules, it is to be treated as arbitrary. In *G.B. Mahajan v. Jalgaon Municipal Council,* [1991] 3 SCC 91, at 111. Venkatachaliah, J, (as he then was) pointed out that 'reasonableness' of the administrator under Article 14 in the context of administrative law has to be judged from the stand point of Wednesbury rules. In *Tata's Cellular v. Union of India,* [1994] 6 SCC 651 (at PP. 679-680); *Indian Express Newspapers v. Union of India,* [1985] 1 SCC 641 at 691), *Supreme Court Employees' Welfare Association v. Union of India and Anr.,* [1989] 4 SCC 187, at. 241 and *U.P. Financial Corporation v. GEM CAP (India) Pvt. Ltd,* [1993] 2 SCC 299, at 307, while Judging whether the administrative action is 'arbitrary' under Article 14 (i.e. Otherwise then being discriminatory, this Court has confined itself to a Wednesbury review always.

68. Thus, when administrative action is attacked as discriminatory under Article 14, the principle of primary review is for the Courts by applying proportionality. However, where administrative action is questioned as 'arbitrary' under Article 14, the principle of secondary review based on Wednesbury principles applies."

16. Now, bearing in mind the aforesaid principles of law and looking to the factual matrix in hand, it is clear that petitioner-Head Constable and three constables were subjected to departmental enquiry on identical charges. The enquiry officer found the charges proved only against constable Naresh Singh while the petitioner and other two constables namely Kanti Raj and Wasim Akhtar were exonerated of the charges. Charges against constable Naresh were found proved for the reason that he was on duty between 3 am to 6 am and supposed to sit beside the bed where the accused was handcuffed, but he did not inform the other two constables or the petitioner before going to respond

to the call of nature. Due to paucity of space to sit in the ward, other constables and petitioner were in the Verandah. Under these circumstances, the accused had fled away. Therefore, for the act of omission of constable Naresh Singh, petitioner was not held responsible by the enquiry officer. The disciplinary Authority dismissed Naresh Singh from services and let off the other two constables with lesser penalty of with-holding of one increment with cumulative effect on the ground that they were newly recruited on compassionate grounds. The disciplinary Authority, as a matter of fact, did not attribute any motive or element of *mens rea* to the petitioner facilitating the accused to escape. Instead what weighed with the disciplinary Authority is that the petitioner was a Head Constable and was required to have supervisory control over the constables. Under such circumstances, lapse was attributed to the petitioner and, accordingly, disciplinary Authority has imposed the punishment of dismissal from service upon him, which has been later converted to compulsory retirement. In the opinion of this Court, the Authority ought to have considered the measure, magnitude and degree of misconduct and the fact that constable Naresh was to sit near the bed where the accused was handcuffed. Further, from 9th to 13th May, 2014, during which period the accused had remained hospitalized, no lapse or negligence was attributed to the petitioner. Therefore, for the act of negligence and omission of Naresh, the punishment imposed on the petitioner of compulsory retirement depriving him of his service tenure has attributes of disproportionate penalty, moreso in view of the fact that during his service tenure the petitioner is reported to have earned as many as 170 awards. As such, the penalty imposed upon the petitioner has shocked the conscience of this Court. Therefore, though this Court can exercise the jurisdiction for substitution of lesser penalty to strike a balance and equity in view of Article 14, it is considered apposite to remand the case to the appellate Authority for imposition of lesser penalty upon the petitioner ensuring that he completes his service tenure and retires on reaching the age of superannuation in normal course.

17. Consequently, the order passed by the appellate Authority is quashed. Matter is remanded to the appellate Authority to pass a fresh order within four weeks from receipt of certified copy of this order, after providing audience to the petitioner, in the light of observations made here-in-above.

Accordingly, the petition stands partly allowed.

Petition partly allowed.

I.L.R. [2017] M.P., 1100
WRIT PETITION
Before Mr. Justice S.K. Seth
W.P. No. 15305/2016 (Jabalpur) decided on 8 February, 2017

HINDUSTAN STEEL WORKS CONSTRUCTION LTD. & anr. ...Petitioners
Vs.
M/S. KANDARP CONSTRUCTION (INDIA) PVT. LTD. ...Respondent

(Alongwith W.P. No. 15086/2016)

Civil Procedure Code (5 of 1908), Section 10 - Stay of Proceeding **- Petitioner through a NIT allotted work of construction of stadium and road to the respondent company which was not completed by the respondent by the stipulated period of 12 months, as a result of which the contract rescinded and bank guarantee of respondent was revoked - Respondent filed a suit before the Civil Court at Lucknow - Subsequently, another suit was filed by the respondent at the Civil Court Sagar - Petitioner moved an application u/S 10 CPC to stay the proceedings of subsequent suit at Sagar, which was dismissed - Challenge to - Held - The basic issue in both the suit is same and it is between the same parties, thus there is identity of whole cause of action in both the suits - It is also clear that in such a situation the subsequent suit shall be stayed and not the previous one - Impugned order set aside - Matter remanded back to trial Court to decide the application u/S 10 CPC afresh - Petition allowed. (Paras 8, 10 & 11)**

सिविल प्रक्रिया संहिता (1908 का 5), धारा 10 – कार्यवाही पर रोक – याची ने निविदा आमंत्रण सूचना के जरिए स्टेडियम एवं सड़क के निर्माण का कार्य प्रत्यर्थी कंपनी को आबंटित किया, जिसे प्रत्यर्थी द्वारा नियत 12 माह की अवधि तक पूर्ण नहीं किया गया, जिसके परिणामस्वरूप संविदा विखंडित की गई और प्रत्यर्थी की बैंक गारंटी का प्रतिसंहरण किया गया था – प्रत्यर्थी ने लखनऊ के सिविल न्यायालय के समक्ष वाद प्रस्तुत किया था – तत्पश्चात्, प्रत्यर्थी द्वारा सागर सिविल न्यायालय में अन्य वाद प्रस्तुत किया था – याची ने सागर के पश्चात्वर्ती वाद की कार्यवाहियों पर रोक हेतु धारा 10 सि.प्र.सं. के अंतर्गत आवेदन पेश किया जिसे खारिज किया गया था – को चुनौती – अभिनिर्धारित – दोनों वादों में मूल विवाद्य समान है तथा वह समान पक्षकारों के बीच है, अतः दोनों वादों में संपूर्ण वाद हेतुक की समरूपता है – यह भी स्पष्ट है कि ऐसी स्थिति में पश्चात्वर्ती वाद रोका जाएगा और न कि

पूर्वतर वाद – आक्षेपित आदेश अपास्त – धारा 10 सि.प्र.सं. के अंतर्गत आवेदन का नये सिरे से विनिश्चय करने हेतु विचारण न्यायालय को मामला प्रतिप्रेषित किया गया – याचिका मंजूर।

Cases referred :

(2005) 2 SCC 256, (2013) 4 SCC 333.

Sanjay K. Agrawal, for the petitioners.
Amit Singh, for the respondent.

ORDER

S.K. Setii, J. :- This order shall also govern the disposal of connected Writ Petition No. 15086/2016 as it involves same facts between the same parties. For the sake of convenience, we have noticed the facts from W.P. No. 15305/2016.

2. This petition under Article 227 of the Constitution of India is directed against an order dated 16.8.2016 passed in Civil Suit No. 24-A/2015 by the First Additional Judge of the Court of District Judge, Sagar. By the order impugned, the trial Court has rejected the application filed by the petitioners/ defendants under Section 10 of the CPC.

Relevant facts lie in a narrow compass.

3. Dr. Hari Singh Gour University, Sagar entered into a Memorandum of Understanding (MOU) with Hindustan Steel Works Construction Limited for construction of Abdul Gani Khan Stadium and part of boundary wall at Dr. Hari Singh Gour University, Sagar. The Hindustan Steel Works Construction Limited floated an NIT for construction of various items and called offers from the eligible contractors. Pursuant to the NIT, the rate quoted by M/s. Kandarp Corporation (India) Limited was found to be most competitive and suitable, therefore, Hindustan Steel Works Construction Limited allotted the work for construction of Abdul Gani Khan Stadium and part of boundary wall and up-gradation of existing road at Dr. Hari Singh Gour University, Sagar.

4. Hindustan Steel Works Construction Limited issued go ahead letter dated 30.9.2011 for deployment of resources and mobilization to take up the work. The Letter of Intent was issued on 14.10.2011 and clause 9 thereof stipulates that the respondent herein was to deposit Performance Guarantee

in terms of clause 40 of the NIT. The Letter of Intent further stipulates that the date of start of work shall be reckoned from 15 days from issue of go ahead letter dated 30.9.2011 and shall be completed in all respects within 12 months thereafter.

5. As per the stipulations contained in the Letter of Intent, respondent furnished Performance Guarantee and completed other formalities. Accordingly, Hindustan Steel Works Construction Limited released mobilization advance against the bank guarantee. After receiving the mobilization advance, the respondent could not complete the work within the stipulated period, therefore, Hindustan Steel Works Construction Limited issued termination notice on 23.6.2014 and the contract was rescinded. Hindustan Steel Works Construction Limited also revoked the bank guarantees furnished by the respondent in their favor. To prevent the invocation of bank guarantee, respondent filed a suit for declaration and permanent injunction in the Court of Civil Judge, Senior Division, Lucknow which was registered as Regular Suit No.0001079/2014. Subsequent to the filing of this suit, the respondent also filed a suit in the Court of Additional Judge to the Court of District Judge, Sagar for declaration and damages, alleging that Hindustan Steel Works Construction Limited wrongfully terminated the contract and invoked the bank guarantee.

6. Upon service of the summons of the second suit, Hindustan Steel Works Construction Limited filed an application under Section 10 of CPC to stay further proceedings in the subsequent suit instituted at Sagar. Learned trial Judge by the order impugned, without hearing counsel for plaintiff rejected the application under Section 10 filed by Hindustan Steel Works Construction Limited. Perusal of the order clearly shows that the application was dealt with in a very casual manner and without any application of mind to the provisions contained in Section 10 of CPC and passed the impugned order in a laconic manner.

7. A bare reading of Section 10 makes it clear that where a suit is instituted in a Court to which the Code applies, the Court shall not proceed with the trial of the suit, if-

(i) The matter in issue in the suit is directly and substantially in issue in a previously instituted suit between the same parties;

(ii) The previously instituted suit is pending-

(a) in the same court in which the subsequent suit is brought; or

(b) in any other court in India (whether superior, inferior or co-ordinate; or

(c) in any court beyond the limits of India established or continued by the Central Government; or

(d) before the Supreme Court.

(iii) Where the previously instituted suit is pending in any of the courts mentioned in clauses (ii) or (iii), such court is a court of jurisdiction competent to grant the relief claimed in the subsequent suit.

8. Thus, it is clear that where the subject matter of the suit is one and the same and the parties are also the same, under such circumstances, if there are two suits between the parties, it is the subsequent suit which has to be stayed and not the previous one. The object underlying Section 10 is to prevent courts of concurrent jurisdiction from simultaneously trying two parallel suits in respect of the same matter in issue. The idea is to avoid two parallel suits on the same issue by two courts and to avoid the recording of conflicting findings on issues which are directly and substantially in issue in a previously instituted suit. In this connection, one may profitably refer to *National Institute of Mental Health & Neuro Sciences Vs. C. Parameshwara* reported in (2005) 2 SCC 256 wherein it has been held "The fundamental test to attract Section 10 is, whether on a final decision being reached in the previous suit, such decision would operate as *res judicata* in the subsequent suit". Section 10 applies to cases where the matter in issue in the subsequent suit is also directly and substantially in issue in the first suit; that the parties in the subsequent suit are same or parties under whom they or any of them claim litigating; and, that the court in which the first suit is filed is competent to grant relief claimed in the subsequent suit.

9. This aspect of the matter was completely over-looked by the trial Court while rejecting the application under Section 10 of the Code of Civil Procedure filed by Hindustan Steel Works Construction Limited. In this connection, reference may be had to the law laid down by the Supreme Court in (2013) 4 SCC 333 *Aspijal and another Vs. Khushroo Rustom*

Dadyburjor, (especially paras 11 and 12).

10. We find force in the submission of Shri Agrawal that the basic issue in both the suits is whether the termination of the contract is bad in law and the other reliefs claimed in the suit are only consequential reliefs, thus there is an identity of whole cause of action in both the suits.

11. In view of the foregoing discussion, we are unable to sustain the order passed by the trial Court and as a result, it is hereby set aside and the matter is sent back to the trial Court to decide the application under Section 10 CPC afresh after due application of mind keeping in view the law laid down by the Supreme Court as aforesaid.

12. The writ petition stands allowed. The costs will follow the event.

13. Let a copy of this order be placed in the record of the connected Writ Petition No.15086/2016.

Petition allowed.

I.L.R. [2017] M.P., 1104
WRIT PETITION
Before Mr. Justice Prakash Shrivastava
W.P. No. 5386/2015 (Indore) decided on 13 February, 2017

SANJAY SHRIWAS ...Petitioner
Vs.
THE CHAIRMAN-CUM-MANAGING DIRECTOR, MP PASCHIM KSHETRA VIDYUT VITARAN CO. LTD. & anr. ...Respondents

Service Law - Compassionate Appointment - Amended Policy - Applicability **- Held - Record shows that on 02.06.2008 when petitioner's application for compassionate appointment came up for consideration, at that time there was a ban on compassionate appointment in the respondent Board, thus it was rightly denied - Later, amended compassionate appointment policy 2013 was introduced which was further amended in 2014, according to which petitioner was found ineligible - Since father of petitioner dies on account of heart attack therefore, in terms of clause 1.1(a) and 3.8 of policy, petitioner's case falls outside the purview of consideration under the new amended policy of 2013 - Further held -**

Compassionate appointment is not a vested right and is an exception to the general rule of appointment to public offices - Amended policy 2013 is not tailor made to favour any particular person nor any malafide is reflected - Petitioner's challenge to the amended policy 2013 cannot be accepted - Petitioner not entitled for compassionate appointment - Petition dismissed.

(Paras 6, 11, 13, 14, & 18)

सेवा विधि – अनुकंपा नियुक्ति – संशोधित नीति – प्रयोज्यता – अभिनिर्धारित – अभिलेख दर्शाता है कि 02.06.2008 को जब याची के अनुकंपा नियुक्ति हेतु आवेदन पर विचार किया गया, उस समय प्रत्यर्थी बोर्ड में अनुकंपा नियुक्ति पर रोक थी अतः उसे उचित रूप से नकार दिया गया था – बाद में, संशोधित अनुकंपा नियुक्ति नीति 2013 पुरःस्थापित की गई थी जिसे और आगे 2014 में संशोधित किया गया था, जिसके अनुसार याची को अयोग्य पाया गया था – चूंकि याची के पिता की मृत्यु दिल का दौरा पड़ने से हुई थी, इसलिए नीति के खंड 1.1(ए) व 3.8 के निबंधनों में, याची का प्रकरण 2013 की नई संशोधित नीति के अंतर्गत विचार की परिधि के बाहर है – आगे अभिनिर्धारित – अनुकंपा नियुक्ति निहित अधिकार नहीं है एवं लोक पद पर नियुक्ति के सामान्य नियम के लिए अपवाद है –संशोधित नीति 2013 किसी विशिष्ट व्यक्ति पर अनुग्रह करने के अनुकूल तैयार नहीं किया गया है, न ही कोई दुर्भावना प्रतिबिम्बित होती है – याची द्वारा संशोधित नीति 2013 को दी गई चुनौती को स्वीकार नहीं किया जा सकता – याची अनुकंपा नियुक्ति हेतु हकदार नहीं – याचिका खारिज।

Cases referred :

ILR (2010) MP 1876 (FB), W.P. No. 6286/2006 & W.A. No. 275/2008 (DB) orders passed on 14.01.2008, 2016 (1) MPLJ 418, AIR 2013 SC 3365, (1994) 4 SCC 138, AIR 2006 SC 2652, (1996) 5 SCC 268, AIR 2016 SC (Civil) 2475, (2007) 8 SCC 1.

C.M. Nair, for the petitioner.

M.S. Dwivedi, for the respondents.

ORDER

PRAKASH SHRIVASTAVA, J. :- This writ petition has been filed by petitioner claiming compassionate appointment and challenging amended compassionate appointment policy of 2013 with a further prayer to apply the policy dated 30th January, 1997 in the petitioner's case.

2. Sans unnecessary details the essential facts are that petitioner's father Dwarka Prasad Shrivas was working as Line Inspector with respondent end

had died while in harness due to heart attack on 2/9/06. Petitioner had made an application for compassionate appointment on 2/1/2007 and vide communication dated 2/6/08 he was informed that on account of ban on compassionate appointment the prayer in the application could not be granted. Thereafter the amended compassionate appointment policy 2013 was brought in force and petitioner had sent the notices dated 8/1/14 and 25/5/14 but compassionate appointment was not granted. Since the case of petitioner is not covered by the amended compassionate appointment policy therefore, he has challenged the policy also.

3. Countering the case of petitioner, reply has been filed by the respondent/Board contending that though petitioner had applied for compassionate appointment but since the board had put a ban on compassionate appointment hence petitioner was denied the same and petitioner's case is not covered under the new scheme of compassionate appointment. It is also stated that vide letter dated 2/6/08 petitioner's claim was rejected and notice sent by petitioner after the amended policy was duly replied on 31/1/14 informing about the ineligibility of petitioner.

4. Learned counsel for petitioner submits that since the petitioner had filed application under the scheme of compassionate appointment dated 30/1/1997 therefore, his case requires consideration under that scheme and that the conditions which are imposed by the amended scheme of 2013 are unreasonable and arbitrary.

5. As against this learned counsel for respondents has supported the impugned action and has submitted that the scheme which was prevailing at the time of consideration of petitioner's application is to be applied and new amended policy is not arbitrary or discriminatory in any manner.

6. Having heard the learned counsel for parties and on perusal of the record it is noticed that on 2/6/08 when the petitioner's application for compassionate appointment dated 2/1/07 came up for consideration at that time there was a ban on compassionate appointment in the respondent/Board. The ban was imposed vide order dated 1/9/2000 therefore, at that time respondents had rightly denied the compassionate appointment keeping in view the existing ban which was prevailing at the time of consideration of the application.

7. No error in the above action of the respondents is found because an

application for compassionate appointment is required to be considered in accordance with policy prevailing at the time of its consideration (See: *Bank of Maharashtra and another Vs. Manoj Kumar Deharia and Another* reported in ILR (2010) MP 1876 (FB)).

8. The petitioner's contention that he should be given appointment under 1997 policy has also no force in view of the above Full Bench Judgment because at that time policy of 1997 was not in force and in the similar circumstances writ petitions of other petitioners have been rejected vide order dated 14/1/08 passed in WP No. 6286/06 in the case of *Lokendra Ambia Vs. MP State Electricity Board and others,* Division Bench judgment in WA No. 275/08 in the matter of *Lokendra Ambia Vs. MP State Electricity Board and others* and in the matter of *Ankit Verma Vs. M.P. Madhya Kshetra Vidyut Vitran Company* reported in 2016(1) MPLJ 418.

9. The new scheme of compassionate appointment was introduced on 3rd June, 2013 which was amended on 29/12/14 by incorporating clauses 1.1(a) & 1.1(b) confining benefit of the scheme only to certain category of persons in respect of old cases prior to 10/4/12. Clauses 1.1 & 3.8 relevant for present controversy provide as under:

> 1.1. मध्यप्रदेश पश्चिम क्षेत्र विद्युत वितरण कंपनी में कार्यरत (1) मध्यप्रदेश राज्य विद्युत मंडल के ऐसे कार्मिक जो राज्य शासन की अधिसूचना दिनांक 10.04.2012 के द्वारा पश्चिम क्षेत्र कंपनी को अंतिम रूप से अंतरित एवं आमेलित हुए हैं एवं कंपनी में ही कार्यरत है या (2) पश्चिम क्षेत्र कंपनी द्वारा नियुक्त एवं जिनकी सेवायें कंपनी के द्वारा नियंत्रित है एवं कंपनी सेवाकाल में मृत्यु हुई हो, के आश्रितों को कंडिका 2 एवं 3 में वर्णित पात्रता की शर्तों के अनुसार अनुकंपा नियुक्ति दी जायेगी।
>
> 1.1 (अ) ऐसे कार्मिक, जिनकी मृत्यु दिनांक 15.11.2000 के पश्चात् किंतु 10.04.2012 के पूर्व म0प्र0रा0वि0 मण्डल/कंपनी का कार्य करते समय, आकस्मिक दुर्घटना, विद्युत दुर्घटना, हमलावारों द्वारा हत्या अथवा कार्य के दौरान वाहन दुर्घटना, के कारण हुई हो, के आश्रितों को कंडिका 2 एवं 3 में वर्णित पात्रता की शर्तों के अनुसार अनुकंपा नियुक्ति दी जावेगी।
>
> 1.1 (ब) दुर्घटना मृत्यु में अभिप्रेत है, कि कंपनी के कार्य करते समय आकस्मिक दुर्घटना, विद्युत दुर्घटना, हमलावरों द्वारा हत्या अथवा कार्य करते समय वाहन दुर्घटना के कारण हुई मृत्यु।
>
> 3.8 कंडिका 1 के दर्शाये अनुसार दिनांक 10.04.2012 के पूर्व एवं दिनांक

15.11.2000 के पश्चात् के दुर्घटना मृत्यु के प्रकरणों को छोड़कर, शेष अस्वीकृत, निराकृत एवं लंबित प्रकरणों पर विचार नहीं किया जाएगा।

10. As per clause 1.1(a) the dependents of the employee dying in harness due to sudden accident, electrocution, murder or vehicular accident while doing the work of company/board after 15/11/2000 and prior to 10/4/12 working in earlier MP State Electricity Board/company are eligible for compassionate appointment and as per clause 3.8 the cases except relating to accidental death after 15/11/2000 and prior to 10/4/12 either rejected, decided or pending, will not be considered.

11. Since the father of petitioner had died on account of heart attack therefore, in terms of clauses 1.1(a)and 3.8 of the policy petitioner's case falls outside the purview of consideration under the new amended policy of 2013.

12. The matter does not end here because the petitioner has challenged the new amended policy of 2013 itself on the ground of being arbitrary and unreasonable.

13. The compassionate appointment is an exception to the General Rule of appointment to public office As a general rule appointment to public office is to be made strictly in accordance with mandatory requirement of Articles 14 & 16 of the Constitution. The object of compassionate appointment is to remove the financial constraints of the bereaved family on loosing the bread earner and to enable the family of deceased employee to tide over the sudden crises.

14. Compassionate appointment is not a vested right (See. *MGB Gramin Bank Vs. Chakrawarti Singh* reported in AIR 2013 SC 3365, *Umesh Kumar Nagpal Vs. State of Haryana &others* reported in (1994) 4 SCC 138).

15. Since it is not a vested right therefore, respondent's option to change the policy of compassionate appointment is not closed. (See *Kuldip Singh Vs. Government, NCT Delhi* reported in AIR 2006 SC 2652).

16. It is no longer res integra that compassionate appointment is to be granted on consideration of several factors such as eligibility, financial condition of the company etc. as may be provided in the scheme and such a right is a legal right which is creation of terms of the applicable scheme.

17. Power to frame policy by executive decision or by legislation also

includes power to withdraw the same unless in the former case, it is done by malafide exercise of power or the decision or action taken is in abuse of power. The doctrine of legitimate expectation plays no role when the appropriate authority is empowered to take a decision by an executive policy or under law. The authority also has full range of choice within the limits of its executive or legislative power. (See: *P.T.R Exports (Madras) Pvt. Ltd. And others Vs. Union of India and others* reported in (1996) 5 5CC 268).

18. In the present case the amended policy reveals that benefit of compassionate appointment in the cases concerning the period prior to 10/4/2012 is restricted to only certain categories of persons. The justification for providing cut off date as 10/4/12 for such cases is given in para 1.1 of the scheme itself. Under Clause 1.1(a) of the amended policy, the new scheme has retrospective application for the period prior to 10/4/2012 only to the dependents of the employee dying in harness on account of accidental death in certain specified eventualities while doing the work of the Board/company. Such employees form separate class, therefore, the classification is reasonable having nexus with object sought to be achieved. The policy is not tailor made to favour any particular person nor malafides are reflected and it is also neither whimsical nor has been issued with ulterior motive. Hence the petitioner's challenge to the amended policy of 2013 for compassionate appointment cannot be accepted.

19. Keeping in view the above analysis, the petitioner cannot be granted the benefit of judgment of the Supreme court in the matter of *The Energy and Resources Institute Vs. Suhrid Sudarshan Shah and others* reported in AIR 2016 SC (Civil) 2475 and in the matter of *Reliance Energy Ltd. And another Vs. Maharashtra State Road Development Corporation Ltd. And others* reported in (2007) 8 SCC 1.

20. Hence I am of the opinion that the writ petition filed by petitioner is devoid of any merit and petitioner is not entitled for the relief of compassionate appointment since his case is not covered by the above policy of compassionate appointment.

The writ petition is accordingly dimissed.

C.c. as per rules.

Petition dismissed.

I.L.R. [2017] M.P., 1110
WRIT PETITION

Before Mr. Justice S.K. Seth & Mr. Justice Ashok Kumar Joshi
W.P. No. 21619/2015 (Jabalpur) decided on 23 February, 2017

GENERAL MANAGER, UNION OF INDIA & ors. ...Petitioners
Vs.
MOSES BENJAMIN ...Respondent

Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (1 of 1996), Section 47 and Indian Railway Medical Manual (IRMM), Volume 1, 2000 (III Edition), Para 504, 532(i) & 539(a) - Promotion - Colour Blindness **- Respondent, who qualified in written test conducted through Limited Departmental Competitive Examination (LDCE) for selection for the post of Assistant Commercial Manager (Group 'B' Post), was rejected on the ground that he was suffering from colour blindness - He filed application before the Central Administrative Tribunal whereby his application was allowed and petitioners were directed to convene a review viva-voce to consider the case of respondent against 30% quota, irrespective of his visual standards (colour blindness) - Challenge to - Held - Duties of ACM includes matter related to coach goods and claims etc and further looking to the organizational chart, it is clear that Group 'B' post of Assistant Commercial Manager is a commercial post and is not a technical/safety post and therefore rejection for promotion of petitioner to the post of ACM on the ground of colour blindness is bad in law - No error committed by the Tribunal - Petition dismissed with cost of Rs. 5000.** **(Paras 11, 12 & 13)**

निःशक्त व्यक्ति (समान अवसर, अधिकार संरक्षण और पूर्ण भागीदारी) अधिनियम, 1995 (1996 का 1), धारा 47 एवं भारतीय रेल चिकित्सा निर्देशिका (IRMM), भाग–1, 2000 (III संस्करण), कंडिका 504, 532(i) व 539(ए) – पदोन्नति – वर्णान्धता – प्रत्यर्थी, जिसने सहायक वाणिज्य प्रबंधक (समूह 'बी' पद) के पद हेतु चयन के लिए सीमित विभागीय प्रतियोगी परीक्षा (एल.डी.सी.ई.) द्वारा संचालित की गई लिखित परीक्षा में अर्हता प्राप्त की, उसे इस आधार पर अस्वीकार किया गया कि वह वर्णान्धता से ग्रसित था – उसने केन्द्रीय प्रशासनिक अधिकरण के समक्ष आवेदन प्रस्तुत किया जिसने उसके आवेदन को मंजूर किया तथा याचीगण को 30% कोटा के विरूद्ध प्रत्यर्थी के प्रकरण का विचार करने के लिए, उसके दृष्टि मानकों (वर्णान्धता) को विचार में लिए बिना पुनर्विलोकन साक्षात्कार संयोजित करने

के लिए निदेशित किया – को चुनौती – अभिनिर्धारित – सहायक वाणिज्य प्रबंधक के कर्तव्यों में रेल डिब्बा माल व दावों इत्यादि के संबंध में मामले शामिल होते हैं और इसके अतिरिक्त संगठन चार्ट को देखते हुए यह स्पष्ट है कि समूह 'बी' का सहायक वाणिज्य प्रबंधक का पद एक वाणिज्यिक पद है और न कि तकनीकी/सुरक्षा पद और इसलिए वर्णान्धता के आधार पर याची को सहायक वाणिज्य प्रबंधक के पद पर पदोन्नति के लिए नामंजूरी, विधि की दृष्टि में अनुचित है – अधिकरण द्वारा कोई त्रुटि कारित नहीं की गई – याचिका, रू. 5000 के खर्च के साथ खारिज।

N.S. Ruprah, for the petitioners.
Ajay Pratap Singh, for the respondent.
Manoj Sharma, for the proposed interveners.

ORDER

The Order of the Court was delivered by :

S.K. Seth, J. :- Petitioners herein is challenging the order dated 9th September, 2015 passed in O.A. No. 200/00088/2014 and O.A. No. 857/2012 whereby the Central Administrative Tribunal Jabalpur Bench has allowed the original applications filed by the respondent and directed petitioners to convene a review viva-voce to consider the case of respondent who qualified in the written test for the selection for the post of ACM (Group B post) in the Commercial Department through Limited Departmental Compipetative (sic:Competitive) Examination (LDCE) against 30% quota irrespective of his visual standards (colour blindness) as found by the Chief Medical Superintendent-in-charge, Jabalpur on 24.08.2012. It was further directed that if selected, the applicant shall be given an appointment forthwith. It was further directed that in the event of the respondent being appointed the petitioners shall endeavor to provide reasonable accommodation to the respondent without assigning duties in the safety category.

2. The facts relevant for the disposal of writ petition are as under :-

3. Respondent was appointed as a Commercial Clerk on 1.12.1994. Subsequently, he was promoted in the ministerial cadre as Enquiry-cum-Reservation clerk and later as Chief Commercial Inspector, a group C post. It is not disputed that the next promotion is Assistant Commercial Manager (ACM) a group B post.

4. Petitioners vide Notification dated 24.11.2011 proposed to conduct a Limited Departmental Competitive Examination (LDCE) to empanel 2 employees in unreserved category against 30% vacancies assessed for the

post of ACM for promotion of the Group B service in the commercial department.

5. Respondent took part in the examination and he qualified for viva-voce. He received a communication dated 24.7.2012 directing him to undergo the prescribed medical examination for Class II Grade B Commercial Department in terms of para 539(a) and 532(i) IRMM Volume 1 2000 (III Edition).

6. Respondent was found unsuitable in the medical examination because of the colour blindness. He, therefore, made representation against his rejection by the Medical Board and sought a review of the examination as per relaxed standard for the post of ACM for non safety posts in the Headquarters. However, vide order dated 29.12.2012, his request was rejected. His request for considering him under the provisions of Section 47 of the Persons with Disabilities Equal Opportunities Protection of Rights and Full Participation) Act, 1995 was also rejected. His request for relaxation under para 504 of the Indian Railway Medical Manual (IRMM) was also rejected on the ground that no special reasons exist for relaxing the conditions in his case. Hence, he filed O.A. No. 857/2012 in the Central Administrative Tribunal, Jabalpur Bench claiming the following relief :-

> "(i) That, respondents be directed to modify/revise communication dated 24.7.2012 AnnexureA-1 and so also set aside communication dated 20.09.2012 filed as Annexure-A -8 and to take prescribed medical exam for class-II, Group B Commercial Department (ACM) in relaxed standard in non-technical category in terms of para 530 (b) and 532(2) of IRMM vol. 2000 (III Edition) as applicable for non-safety category post and not connected with train working in view of Railway Board's letter dated 10.08.2010 Annexure-A-28 and review Medical report be sent to respondents - C.P.O. And applicant be allowed to be called for viva-voce test by respondents and promoted to suitable post in Group B in view of Rly. Board letter dated 28.01.2000 Annexure-A-23 consequent upon medical report.
>
> (ii) That respondents further be directed to consider case of applicant for medical exam. In relaxed standard in non-

technical category as permitted vide para 532(4) of IRMM and allow the applicant to take viva-voce and complete all formalities for issue of promotion order.

(iii) That, respondents may be directed to grant protection of Section 47(2) of Act of 1995 and complete all formalities for issuance of appointment order for the post of A.C.M."

7. Subsequently, respondent filed another O.A. No. 88/2014 claiming the following reliefs:-

"(i) That, respondents be directed to modify/ revise communication dated 30.01.2014 and 31.01.2014 filed as AnnexureA-1 and Annexure-A-5 respectively so far relates to the applicants and direct the respondents to take prescribed medical exam for class-II, Group B Commercial Department (ACM) in relaxed standard in non-technical category in terms of para 530(b) and 532(2) of IRMM vol. 2000(III Edition) as applicable for non-safety category post and not connected with train working in view of Railway Board's letter dated 10.08.2010 Annexure-A-28 an letter dated 31.7.2013 Annexure-A-7 etc. and applicant be allowed to be called for viva-voce test by respondents and promoted to suitable post in Group B in view of Rly. Board letter dated 28.01.2000 Annexure-A-23 consequent upon medical report. Also Railway Board circular dated 16.06.1997 filed as Annexure A-8 and letter dated 31.10.1991 filed as Annexure-A-32 being arbitrary in nature, be quashed.

(ii) That respondents further be directed to consider case of applicant for medical exam for non-safety category posts in relaxed standard in non-technical category as permitted vide para 532(4) Annexure-A-18 of IRMM and Boards's letter dated 9.4.2007 Annexure-A-31 allow the applicant to take viva-voce and complete all formalities for issue of promotion order.

(ii-a) That this Hon'ble Tribunal may be consequently pleased to set aside communication dated 14.02.2014 Annexure-A-35 issued on wrong application of medical classification being

arbitrary and contrary to rules. So also to consequently modify communication dated 20.02.2014 Annexure-a-37, so far relates to applicant.

(iii) That, respondents may be directed to grant protection of Section 47(2) of Act of 1995 and complete all formalities for issuance of appointment order for the post of A.C.M.

(iv) Any direction, order deemed fit in given facts and circumstances may also kindly be passed in favour of the applicant with costs of application."

8. Petitioners herein opposed both original applications by filing returns/ replies and according to them once a candidate is selected to the post of ACM which is a Group B post in the Commercial Department, the next promotion is to Group A post and IRTS where Group A Officers are posted in the Commercial and Traffic Department after merging both the categories. Therefore, according to petitioners, when a Group C employee gets selected as an ACM in Commercial Department in Group B, his next promotion is in Group A posts which are technical and safety category posts, hence the medical examination for promotion to the Group B Commercial Department is carried out as per para 530 (a) and 532(i) of the IRMM Volume 1, 2000. According to petitioners, provision of Section 47 of the PWD Act was not attracted to the facts and circumstances of the case in hand in view of newly inserted para 213 IREM Vo.1.

9. Learned Tribunal heard rival submissions and on careful consideration of various documents filed by parties before it, found that Group B post of ACM in Commercial Department is a non-technical category and for arriving at this conclusion the Tribunal noticed the Railway Board Circular dated 10.08.2010, which, for the sake of convenience is reproduced herein below:-

GOVERNMENT OF INDIA
MINISTRY OF RAILWAYS
(RAILWAY BOARD)

No. 2004-E(SCT)/25/20New-Delhi, dated 10.08.2010

The General Manager (P)
North Central Railway,
Allahabad.

Sub:- Selection for promotion from Group C to Group B classification of post of ACm regarding.

Ref:- N.C. Railway letter No. 797-E(Gaz./Selection/10 & 89/F&C/NCR/07-09 dated 08.04.2010 and 30.07.2010.

Please refer to your Railway's letter quoted above on the above mentioned subject in this connection it is advised that the post of ACM shall not be treated as safety category post if the selection has been conduced stream wise. Board's letter of even number dated 11.01.2007 is applicable only in those case when there is a combined selection covering both the streams viz. Operating and Commercial.

Necessary action may be taken accordingly.

(S.Sarkar)
Joint Director Estt. (Res.)
Railway Board."

10. The Tribunal further held that petitioners were not right in contending that Group B post of ACM is a safety post or technical post and it was held as under :-

"15 :- Thus the documents produced by both sides clearly reveal that the A.C.Ms in the Commercial Department are not doing any technical work connected with the traffic/ running of trains except commercial matters of the running of the Railways.

11. In its order Tribunal also noticed that the duties of the A.C.Ms posted at Divisional and Headquarters Office include all matters relating to coach goods and claims etc. and the duties assigned by the higher officials with reference to Annexure-A-15 and Annexure-A-16 filed in O.A. No. 857/2012. The Tribunal further found that the organizational chart and the subject dealt in the Commercial Department with the following matters :-

(a) Rate and fares;

(b) Claims for refund and for compensation;

(c) Prevention of Claims;

(d) Marketing & Sales;

(e) Passenger amenities;

(f) Inter-model co-ordination;

(g) Traffic Surveys;

(h) Research and Development;

(g) Catering and Vending;

12. Thus, keeping in view the organizational chart and the subjects dealt with, in our considered opinion, the Tribunal has rightly found that the Group B post of ACM is the Commercial Post and is not a technical/ safety post and therefore, the Tribunal has rightly held the rejection of the respondents on the ground of color blindness for his promotion to the post of ACM (Commercial) was bad in law. The Tribunal has exhaustly dealt with the law points which do not call for repetition or interference by us.

13. We, found that the Tribunal while allowing the application did not commit any error so as to warrant interference by us. There is no merit and substance in the petition, same is accordingly dismissed with costs of Rs. 5000/- and all interim orders stand vacated.

14. Ordered accordingly.

Petition dismissed.

I.L.R. [2017] M.P., 1116
WRIT PETITION

Before Mr. Justice S.A. Dharmadhikari

W.P. No. 250/2017 (Gwalior) decided on 27 April, 2017

UDAYRAJ ...Petitioner

Vs.

DINESH CHANDRA BANSAL ...Respondent

A. ***Constitution - Article 227 - Consolidation of Suits -*** **Petition against rejection of application u/S 151 CPC filed by petitioner for consolidation of suits - Held - Evidence recorded in one civil suit cannot be utilized for the purpose of other civil suit except with the express consent of the parties and in the present case, no such consent given by the parties - Further held - It is settled that each case must be decided on the evidence recorded in it and evidence recorded in another**

case cannot be taken into account in arriving at a decision of another case - No jurisdictional error in the impugned order calling interference under Article 227 of Constitution - Petition dismissed. (Para 6)

क. संविधान – अनुच्छेद 227 – वादों का समेकन – याची द्वारा धारा 151 सि.प्र.सं. के अंतर्गत वादों के समेकन हेतु प्रस्तुत आवेदन की खारिजी के विरूद्ध याचिका – अभिनिर्धारित – पक्षकारों की अभिव्यक्त सहमति के सिवाय एक सिविल वाद में अभिलिखित साक्ष्य का उपयोग अन्य सिविल वाद के प्रयोजन हेतु नहीं किया जा सकता और वर्तमान प्रकरण में, पक्षकारों द्वारा ऐसी कोई सहमति नहीं दी गई है – आगे अभिनिर्धारित – यह सुस्थापित है कि प्रत्येक प्रकरण का विनिश्चय, उसमें अभिलिखित किये गए साक्ष्य पर किया जाना चाहिए और अन्य प्रकरण में अभिलिखित साक्ष्य को दूसरे प्रकरण के विनिश्चय पर पहुँचने के लिए विचार में नहीं लिया जा सकता – संविधान के अनुच्छेद 227 के अंतर्गत हस्तक्षेप किये जाने के लिए आक्षेपित आदेश में अधिकारिता की कोई त्रुटि नहीं – याचिका खारिज।

***B. Practice - Civil - Consolidation of Suits - Provision and Purpose* - Held - Though the consolidation of suits is not specifically provided in Civil Procedure Code as applicable to the State of M.P, it may be achieved by invoking Section 151 of CPC - Basic purpose for directing consolidation of suits is to firstly avoid conflicting judgments and secondly to save valuable time, energy and money by clubbing the cases together, involving common questions. (Para 6)**

ख. पद्धति – सिविल – वादों का समेकन – उपबंध एवं प्रयोजन – अभिनिर्धारित – यद्यपि म.प्र. राज्य हेतु यथाप्रयोज्य सिविल प्रक्रिया संहिता में वादों का समेकन विनिर्दिष्ट रूप से उपबंधित नहीं, इसे सि.प्र.सं. की धारा 151 के अवलंब द्वारा प्राप्त किया जा सकता है – वादों का समेकन निदेशित किये जाने हेतु मूल प्रयोजन प्रथमतः अंतर्विरोधी निर्णयों से बचना है और द्वितीयतः समान प्रश्न से अंतर्ग्रसित प्रकरणों को एक साथ संयोजित कर मूल्यवान समय, उर्जा व धन बचाना है।

Cases referred :

AIR 1984 SC 38, 2009 (5) MPHT 243 (DB), 1975 JLJ 432.

Rajendra Jain, for the petitioner.
Anand Bharadwaj, for the respondent.

ORDER

S.A. DHARMADHIKARI, J. :- Heard with the consent of both the parties.

In this petition under Article 227 of the Constitution of India, the petitioner has assailed the order dated 07.12.2016 passed in Civil Suit

No.130-A/2015 pending before the 10th Additional District Judge, Gwalior, whereby application filed by the petitioner under Section 151 of C.P.C. seeking consolidation of suits has been rejected.

(2) The brief facts leading to filing of this case and relevant fact for the purpose of writ petition are that the respondent/plaintiff Dinesh Chandra Bansal has instituted a Suit bearing No.41-A/2012 seeking declaration and permanent injunction to the effect that he is the owner of the suit land situated in Survey No.346/1066 area 0.627 hectare. Subsequently, another Civil Suit bearing No.32- A/2014 (new number 44-A/15) was instituted by the present petitioner/ plaintiff therein seeking declaration and permanent injunction as well as declaring the sale deed dated 11.06.2008 and agreement dated 05.07.2017 be null and void. In this suit, the declaration has been sought not only in respect of the land situated in Khasra No.346/1066 but also in survey No.331 area 0.596 and Suvey No.430/2 area 1.735. The petitioner preferred an application under Section 151 of C.P.C. with the prayer to consolidate the aforesaid two suits and be decided analogously. The Court of 10th Additional District Judge, Gwalior, rejected the application under Section 151 vide order dated 07.12.2016 which has been assailed on behalf of Udayraj in the present writ petition.

(3) The learned counsel for the petitioner submitted that the dispute in both the suits is in respect of the same land and the parties are also same, therefore, in such a situation, the learned Court below ought to have allowed the application and consolidated both the suits. The learned trial Court erred in coming to the conclusion that both the suits are in different stages. In Civil Suit No.44-A/15 no evidence has been recorded whereas in Suit No.130-A/15 virtually the evidence has been recorded, therefore, both the suits cannot be consolidated.

(4) On the other hand, the learned counsel for the respondent Shri Anand Bharadwaj vehemently opposed the prayer and took this Court through the plaint of both the suits and pointed out that the suits are not of identical nature. The relief claimed are also different and the purpose are also different. He further submitted that both the suits cannot be tried together since they are at different stages. No jurisdictional error has been committed by the Court below in rejecting the application calling interference by this Court. In the circumstances, the writ petition deserves to be dismissed in view of the law laid down by the Apex Court in the case of *Mohd. Yunus Vs. Mohd.*

Mustaquim and others, AIR 1984 S.C. 38. The counsel for the respondents has further relied on the judgment rendered by the Division Bench of this Court in the case of *Parwati Bai Vs. Kriparam and others,* 2009 (5) M.P.H.T.243 (DB) in support of his contention.

(5) Heard the learned counsel for the parties.

(6) Though, the consolidation of suits is not specifically provided in Code of Civil Procedure as applicable to the State of M.P., it may be achieved by invoking Section 151 of C.P.C. The basic purpose for directing consolidation of suits is to firstly avoid conflicting judgments and secondly to save valuable time, energy and money by clubbing the cases involving common question together. In the present case, the evidence in Civil Suit No.130-A/15 is already recorded in Civil Suit No.130-A/15 cannot be utilized for the purpose of Civil Suit No.44-A/15 except with the express consent of the parties concerned. Admittedly, in the present case no such consent has been given by the parties. It is a settled question of law as held by the Apex Court in the case of *Mitthulal and another Vs. State of M.P.,* 1975 JLJ 432 that each case must be decided on the evidence recorded in it and evidence recorded in another case cannot be taken into account in arriving at a decision of another case. Thus, the Court below while rejecting the application under Section 151 CPC has not committed any jurisdictional error. No fault can be found with the order passed by the Court below. Accordingly, no case is made out for exercising the inherent power under Article 227 of the Constitution of India. The petition stands dismissed. No order as to costs.

Petition dismissed.

I.L.R. [2017] M.P., 1119
APPELLATE CIVIL
Before Mr. Justice Alok Verma
S.A. No. 826/2004 (Indore) decided on 2 November, 2016

MANJULA BAI ...Appellant
Vs.
PREMCHAND & ors. ...Respondents

A. ***Accommodation Control Act, M.P. (41 of 1961), Sections 12(1)(a), 12(1)(e) & 12(1)(f) - Arrears of Rent* - Owner of suit property Birdi Bai during her lifetime through a registered document endowed the property to a Charitable Trust but later she revoked the document**

by another document dated 03.11.79 - Appellant/plaintiff (daughter-in-law of Birdi Bai) filed a eviction suit against the tenants on the ground that in respect of the suit property, her mother-in-law executed a will in her favour on 24.10.79 and because of *bonafide* requirement and on the ground that tenants have not paid arrears of rent within stipulated period despite service of notice u/S 12(1)(a) of the Act of 1961 - Trial Court held plaintiff to be the owner of suit property and landlord of respondent and decreed the suit in her favour - Respondents filed appeal whereby the same was allowed holding that once public trust is created, it cannot be dissolved by the creator of trust and thus plaintiff was not the landlord of respondents - Challenge to - Held - Issue relating to revocation of trust cannot be again considered in this appeal as the same has been decided between the trust and appellant in F.A. No. 22/1997 and has attained finality in favour of appellant and accordingly by way of the will, appellant is owner of the property and also the landlord of respondents - Further held - Both the Courts below recorded a finding of alternate accommodation of respondents and the fact that they are living there - Appellant entitled to a decree of eviction on this ground - Respondents directed to hand over vacant possession of suit property to appellant - Appeal allowed. (Paras 4, 5, 31, 33 & 40)

क. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धाराएँ 12(1)(ए), 12(1)(ई) व 12(1)(एफ) – भाड़े का बकाया – वाद संपत्ति की स्वामी बिरडी बाई ने अपने जीवन काल के दौरान एक रजिस्ट्रीकृत दस्तावेज के माध्यम से संपत्ति एक पूर्त न्यास को दान की परंतु बाद में अन्य दस्तावेज दिनांकित 03.11.79 के द्वारा इस दस्तावेज को प्रतिसंहृत किया – अपीलार्थी/वादी (बिरडी बाई की बहू) ने इस आधार पर किरायेदारों के विरूद्ध बेदखली का वाद प्रस्तुत किया कि वाद संपत्ति के संबंध में, उसकी सास ने उसके पक्ष में दिनांक 24.10.79 को एक वसीयत निष्पादित की थी एवं वास्तविक आवश्यकता के कारण एवं इस आधार पर कि अधिनियम 1961 की धारा 12(1)(ए) के अंतर्गत नोटिस की तामीली होने के बावजूद किरायेदारों ने नियत अवधि के भीतर भाड़े के बकाया का भुगतान नहीं किया है – विचारण न्यायालय ने वादी को वाद संपत्ति की स्वामी एवं प्रत्यर्थीगण की भू–स्वामी अभिनिर्धारित किया एवं उसके पक्ष में वाद डिक्रीत किया – प्रत्यर्थीगण ने अपील प्रस्तुत की जिस पर यह अभिनिर्धारित करते हुए उक्त को मंजूर किया गया था कि एक बार लोक न्यास सृजित किया जाता है, वह न्यास के सृजनकर्ता द्वारा विघटित नहीं किया जा सकता एवं इस प्रकार वादी प्रत्यर्थीगण की भू–स्वामी नहीं थी – को चुनौती – अभिनिर्धारित – न्यास के प्रतिसंहरण से संबंधित विवाद्यक को इस अपील में पुनः विचार में नहीं लिया जा सकता क्योंकि उक्त को, न्यास एवं अपीलार्थी के

मध्य एफ.ए.क्र. 22/1997 में विनिश्चित किया जा चुका है एवं अपीलार्थी के पक्ष में अंतिमता प्राप्त कर ली है एवं तद्नुसार वसीयत के माध्यम से, अपीलार्थी संपत्ति की स्वामी है और प्रत्यर्थीगण की भू–स्वामी भी है – आगे अभिनिर्धारित – दोनों निचले न्यायालयों ने प्रत्यर्थीगण के वैकल्पिक स्थान का निष्कर्ष एवं यह तथ्य कि वे वहां निवास कर रहे हैं अभिलिखित किया – अपीलार्थी इस आधार पर बेदखली की डिक्री का हकदार है – प्रत्यर्थीगण को वाद संपत्ति का रिक्त कब्जा अपीलार्थी को अंतरित करने हेतु निदेशित किया गया – अपील मंजूर।

B. Public Trusts Act, M.P. (30 of 1951), Section 12 - Notice to Registrar - **Held - Notice is only to be given when there is likelihood of affecting any entry in the register - In the instant case, Trust was never registered during the lifetime of Birdi Bai till it was revoked, so there is no question of affecting any entry in the register, therefore application by respondent for issuing notice to Registrar has no force and is dismissed. (Para 18)**

ख. लोक न्यास अधिनियम, म.प्र. (1951 का 30), धारा 12 – रजिस्ट्रार को नोटिस – अभिनिर्धारित – नोटिस केवल तब दिया जाता है जब रजिस्टर में कोई प्रविष्टि प्रभावित होने की संभावना है – वर्तमान प्रकरण में, न्यास को बिरड़ी बाई के जीवन काल के दौरान से उसके प्रतिसंहरण होने तक कभी रजिस्ट्रीकृत नहीं किया गया था, इसलिए रजिस्टर में किसी प्रविष्टि को प्रभावित करने का कोई प्रश्न नहीं है, अतः प्रत्यर्थी द्वारा, रजिस्ट्रार को नोटिस जारी किये जाने हेतु आवेदन में कोई बल नहीं है एवं खारिज किया गया।

C. Civil Procedure Code (5 of 1908), Order 41 Rule 27 - Public Documents - **Held - In the instant appeal, respondents filed application for taking additional document on record - Since all the proposed documents are public documents and are not disputed by the appellant, therefore no further evidence is required to consider them while disposing this appeal, application is allowed. (Para 20)**

ग. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 41 नियम 27 – सार्वजनिक दस्तावेज – अभिनिर्धारित – वर्तमान अपील में, प्रत्यर्थीगण ने अभिलेख पर अतिरिक्त दस्तावेज लेने हेतु आवेदन प्रस्तुत किया – चूंकि सारे प्रस्तावित दस्तावेज सार्वजनिक दस्तावेज हैं एवं अपीलार्थी द्वारा विवादित नहीं है, इसलिए, इस अपील का निपटारा करते समय उन पर विचार किये जाने हेतु कोई अतिरिक्त साक्ष्य अपेक्षित नहीं, आवेदन मंजूर।

D. Practice - Application for intervention - **Held - In the instant appeal, Trust filed an application to intervene on the ground**

that as a changed circumstances, trust has now been registered - Held - Order of Registrar was held to be void and illegal and this issue has already been decided in favour of appellant on the ground that Trust was already revoked by the deed executed by Birdi Bai during her lifetime and such revocation was upheld by this Court in F.A. No. 22/1997 - Hence, Trust is not in existence and thus there is no change in circumstances, trust is not allowed to intervene in this appeal - Application dismissed. (Para 25)

घ. पद्धति – मध्यक्षेप हेतु आवेदन – अभिनिर्धारित – वर्तमान अपील में, न्यास ने इस आधार पर मध्यक्षेप हेतु एक आवेदन प्रस्तुत किया कि परिवर्तित परिस्थितियों के अनुसार, न्यास अब रजिस्ट्रीकृत हो चुका है – अभिनिर्धारित – रजिस्ट्रार का आदेश शून्य और अवैध अभिनिर्धारित किया गया था एवं यह विवाद्य इस आधार पर पहले ही अपीलार्थी के पक्ष में विनिश्चित किया जा चुका है कि न्यास पहले ही बिरडी बाई द्वारा उसके जीवन काल में निष्पादित किये गये विलेख द्वारा प्रतिसंहृत किया जा चुका था एवं ऐसे प्रतिसंहरण की इस न्यायालय द्वारा एफ.ए. क्र. 22/1997 में पुष्टि की गई – इस कारण से, न्यास अस्तित्व में नहीं है एवं इसलिए परिस्थितियों में कोई परिवर्तन नहीं है, न्यास को इस अपील में मध्यक्षेप की मंजूरी नहीं दी गई – आवेदन खारिज।

Cases referred:

(2007) 4 SCC 221, (2000) 6 SCC 359, 1985 M.P.W.N. 339 (SC), (1998) 5 SCC 588, (2015) 8 SCC 615, M.L.R. 1954 Civil 475.

D.S. Kale, for the appellant.
V.K. Jain, for the respondents.
P.C. Nair and *Kiran Pal*; for the intervenor.

JUDGMENT

ALOK VERMA, J. :- This second appeal arises out of judgment and decree passed by the learned 2nd Additional District Judge, Indore in Civil Appeal No.32/2004 dated 19.08.2004 whereby the learned Additional District Judge admitted the appeal and set aside the judgment and decree passed by the learned 11th Civil Judge, Class-I, Indore in Civil Suit No.70-A/2013 dated 19.04.2004.

2. The admitted facts in this case are that the respondents are a tenant in a portion of House No.13 (old No.19) Sitlamata Bazar, Indore on ground floor. The suit property belonged to one Birdi Bai. Birdi Bai during her lifetime

executed a registered document and endowed her property including the property, suit property of which is a part, to a charitable trust known as "Birdi Bai Shankarlal Patni, Digambar Jain, Charitable Trust" (hereinafter referred to as "the Trust"). It is also admitted that Birdi Bai revoked this document by another document dated 03.11.1979, subsequently, Birdi Bai expired.

3. The appellant filed a suit before the trial court below averting that Birdi Bai was mother-in-law of the appellant. She executed a will dated 24.10.1979 in favour of the plaintiff and due to which the property belonged to Birdi Bai including the house and the suit property devolved upon the plaintiff. The respondents have been a tenant in the suit property. Their tenancy was for residential purpose and rent of the accommodation was Rs.121/- per month. Their tenancy started from 11th of each month. The suit was filed on the ground that the respondents did not pay the arrears of land after receiving notice under Section 12(1)(A) of M.P. Accommodation Act within the specified period of two months. The plaintiff needs the accommodation for residence of herself and members of her family. The respondents challenged title of the plaintiff and also created nuisance. The respondents changed use of the suit property. It was given to them for residential purposes but they converted it into non residential purpose and running a factory in a suit premises. The respondents had acquired the sufficient accommodation for their residence and were not living in the suit property. It was prayed that on these grounds eviction decree be passed in favour of the plaintiff.

4. The respondents did not admit the facts stated by the plaintiff. According to them, the plaintiff was not the owner of the suit premises. Birdi Bai created a charitable trust on 08.01.1971 and she had no power to withdraw the same, and accordingly, the deed of withdrawal executed on 03.11.1979 was bad in law. When the respondents became tenant of the trust, he was permitted to start commercial activity from the premises, and therefore, by consent of the trust, the tenancy was converted into tenancy for non commercial purpose. On 11.10.1973, deed of tenancy was executed in favour of the trust. The learned trial court found that the plaintiff is the landlord of the suit premises. According to learned Civil Judge, Civil Suit No.69-A/1986 was decreed in favour of the plaintiff by judgment and decree dated 18.09.1996 in which the plaintiff was declared owner of the suit property. It was also taken into consideration by the learned Civil Judge that though the first appeal was pending before this Court against the order passed in Civil Suit No.69-A/1986, still, there was a judicial order in faovur of the appellant, and therefore, the Civil

Judge proceed to hold that the plaintiff is the owner and landlord of the respondents. The remaining grounds taken by plaintiff were also accepted by the Civil Judge and decree was passed in favour of the plaintiff.

5. Against the findings given by the Civil Judge, an appeal was filed by the respondents before the learned 2nd Additional District Judge, Indore. The learned Sessions Judge opined that once public trust is created, it cannot be desolved (sic:dissolved) by the creator of the trust. The property endowed upon the trust got vested into the trust and also taking into consideration that the order passed by the learned 4th Civil Judge was challenged before the High Court and appeal was pending and on this ground, it was held that the plaintiff was not landlord of the respondents. So far as decree under Section 12(1)(A) of M.P. Accommodation Act is concerned, the learned appellate court opined that delay was condoned by trial court, and therefore, there is no question of grant of decree on this point and eviction of the respondents was not allowed on this ground. In respect of bonafide need the trial court observed that though it was proved that the appellant required the suit premises for her bonafide use still as she was not proved to be an owner of the suit property. This ground was also not allowed. Similarly, according to learned appellate court, no ground is made out on the ground of disclaimer. On change of nature of tenancy from residential to non residential, the appellate court observed that trust permitted the respondents to start commercial activity from the premises, and therefore, this ground was also not made out. The appellate court found that it was proved that the respondents acquired a suitable accommodation for themselves and they were not residing in the suit premises, however, looking to the fact that the appellant was not held to be a landlord, this ground was also not allowed and on this premise, the appeal was dismissed.

6. In light of above factual background, this appeal was admitted for consideration of following substantial questions of law :

(i) Whether the lower appellate court was justified in reversing the judgment and decree passed by the trial court in favour of the appellant ?

(ii) Whether the lower appellate court was justified in holding that the appellant/plaintiff had acquired no right, title and interest in the suit-property as a landlady in view of the Trust created by Virdibai which was successfully challenged by the appellant in a subsequent civil suit ?

(iii) Whether a valid Trust was created by Virdibai in respect of the suit-property ?

7. Before considering the merit of the case, first I would proceed to dispose of various applications which are pending in this case and which the Court ordered that they would be disposed of at the time of final hearing.

8. The application I.A. No.6133/2013 filed by the respondents. This application is field (sic:filed) for framing additional substantial questions of law for consideration in this appeal.

9. According to the counsel for the respondents, the Trust which was created by late Birdi Bai as owner of the suit property and the Trust was the landlord of the present respondents. However, the Trust was not made party in this case. According to him, the present appellant claims her title over the suit property on the basis of a will supposedly executed by Birdi Bai on 24.10.1979. However, this will was challenged before three different courts and the will was not found valid. The order passed by various courts were not challenged by the present appellant.

10. According to the respondents, following is the list of orders passed by various courts.

(i) Order dated 13.06.1988 passed by 6th Civil Judge, Class-II, Indore in Civil Suit No.244-A/1972.

(ii)Order dated 24.07.1981 passed by the learned 1st Civil Judge, Class-II, Indore in Civil Suit No.106-A/1977.

(iii)Order dated 19.08.2004 passed by learned 2nd Additional District Judge, Indore in Civil Appeal No.32/2004.

11. A gift deed was executed by Birdi Bai on 21.01.2015 in which it was clearly mentioned that Birdi Bai had no sons or daughters. It was also mentioned that Birdi Bai donated the property to the Trust. Further, a direction was issued by this Court in Civil Revision No.918/1980 by order dated 14.07.1983 and the trial court was directed to decide the question of valid legal representative regarding the suit property. It was held by the trial court that the present appellant is not the legal representative of said Birdi Bai and the Trust was the legal representative, and therefore, the respondents proposed that substantial questions of law may be framed to consider that whether the present appellant can be treated as landlord and owner of the property in

light of various judgments and orders passed by the different courts as stated above and also Trust to be decided whether Birdi Bai had any authority to revoke the public charitable trust created by her by a register (sic:registered) deed.

12. Learned counsel for the appellant opposes the application on the ground that these questions were not directly and substantially in issue and all the cases were against the other tenant where the question of ownership and representative was only decided as collateral purpose. He further submits that in light of order passed by this Court in F.A. No.22/1997 dated 18.11.2008, where the question of validity of revocation of Trust was directly under consideration of this Court in a suit filed between the present appellant and the Trust. In this order, the order passed by the learned 4th Additional District Judge in Civil Suit No.69-A/1986 dated 18.09.1996 was affirmed and it was held that the Trust was validly revoked by the appellant, and therefore, in light of this judgment the question in respect of revocation had already been settled and cannot be agitated again in this appeal.

13. After taking into consideration the rival contentions of both the counsel, I find that the proposed questions of law are squarely covered by three substantial questions of law framed in this appeal by this Court, and therefore, no framing of additional substantial questions of law is required. The issues raised by the respondents can be considered while deciding the substantial questions of law framed in this appeal, and accordingly, this application has no force, and therefore, dismissed.

14. I.A. No.440/2011 is filed by the respondents under Section 12 of M.P. Public Trust Act. By this application, it is prayed that as provided by Section 12 of M.P. Public Trust Act when a document purporting to create a public trust is filed before the Civil Court, a notice should be given to the Registrar, however, in this case, no notice was given, and therefore, it is prayed that a notice be issued to the Registrar.

15. The application has opposed by the counsel for the appellant.

16. As per the Section 12 of M.P. Public Trust Act which is reproduced below :-

> **"Section 12: Notice to Registrar in a proceeding in which a document purporting to create a Public trust in Produced.:- If, in any proceeding before a civil court**

or a revenue officer, any document purporting to create a public trust is produced on any question before such court or officer is likely to affect any entry in the register such court or officer shall give notice to the registrar of such proceedings and shall, if the registrar applies in that behalf, make him a party to such proceedings."

17. It is apparent that notice is only to be given when there is likelihood of affecting any entry in the register. In this case, however, a Trust was never registered.

18. As per the counsel for the appellant, appellant- Birdi Bai filed an application for registration of the Trust, however, she did not pursue an application and ultimately, it was dismissed in default. However, the respondents challenged this fact that whether any application was filed by Birdi Bai, the fact remains that for whatever reason it was the Trust was never registered during the lifetime of Birdi Bai till it was revoked and when it was not registered there is no question of affecting any entry in the register, and therefore, this application has no force, liable to be dismissed and dismissed accordingly.

19. I.A. Nos.8953/2009, 4720/2011 and 5586/2011 are filed under Order 41 Rule 27 for taking additional documents on record.

20. By I.A. No.8953/2009, certified copy of order passed by this Court in F.A. No.22/1997 is prayed to be brought on record by the appellant. By I.A. No.4720/2011 various documents which are public documents in nature or a gift deed executed in favour of Lokendra Kumar son of the present appellant were prayed to be brought on record. These documents were not challenged by the appellant, and therefore, the application is allowed and the documents are taken on record. By I.A. No.5586/2011, the respondents seeks to place certified copy on record the order passed by various courts as listed above while dealing with I.A. No.440/2011. These are all public documents and not disputed by the appellant, and therefore, all the three applications are allowed. The documents filed by the appellant/respondent are taken on record. It is further clarified that since there are public documents and not disputed, and therefore, no further evidence are required to consider them while disposing of this appeal.

21. I.A. No.5703/2013 is field (sic:filed) on behalf of intervenor/Trust.

The Trust earlier filed another application before this Court. This application bearing No.4306/2010 was dismissed by Court order dated 24.09.2010. The Court while dismissing the application observed as under :-

> **"After hearing the learned counsel for the parties and taking into consideration the fact that the present litigation is only between the plaintiff, who claims to be the landlord, and the tenant-respondents, the impleadment of the Trust is wholly unnecessary. As a matter of fact, the Trust being not a party in the proceedings before the Courts below, cannot be ordered to be impleaded as party, in the present appeal so as to contest the claim made by the present appellant. As a matter of fact, the impleadment of the aforesaid party, would raise such questions of title, which are totally irrelevant for the adjudication of the present appeal."**

22. Now this application is again filed by the Trust to intervene in the matter on the ground that on 21.12.1994, an application was filed by one of the trustees for registration of the Trust. This application was allowed by the Registrar Public Trust on 02.07.2010. By his order passed on 02.07.2010, the trust was allowed to be registered under Section 6 of M.P. Public Trust Act and under Section 7 of the Act, the necessary entries were ordered to be made in the relevant register. A certificate was also issued for registration of the Trust. The present appellant challenged this order for filing a civil suit under Section 8 of the Act which was dismissed.

23. Learned counsel appearing for appellant submits that due to the subsequent development that the trust was registered, this application is filed.

24. Learned counsel for the appellant opposes the application on the ground that the Trust was registered after special leave appeal filed by the Trust against the order passed by this Court in F.A. No.22/1997 was dismissed, and therefore, the order passed by the Registrar was null and void. He further pointed out that in the judgment passed by the learned 5th Additional District Judge in Civil Suit No.11-A/2013 which was filed by the present appellant against the Trust under Section 8 of the Act while deciding issue no.1 relating to legality of order passed by the Registrar dated 02.07.2010, the learned Court made following observations in para 26 of the judgment:-

"बिरदीबाई द्वारा प्रस्तुत किया गया आवेदन पूर्व में निरस्त हो चुका था इस संबंध में प्रतिवादी ने न्याय दृष्टांत प्रस्तुत किया है कि ट्रस्ट के पंजीयन हेतु प्रस्तुत किया गया आवेदन अनुपस्थिति में निरस्त नही किया जा सकता है और पंजीयक को यह निर्धारित करना है कि ट्रस्ट सार्वजनिक ट्रस्ट है अथवा व्यक्तिगत ट्रस्ट और उसी के आधार पर ट्रस्ट के पंजीयन हेतु आदेश देना है इस संबंध में ए आई आर 1977 एम पी 102 स्वामी इन्द्रदेवानंद वि0 रजिस्ट्रार पब्लिक ट्रस्ट प्रस्तुत किया है। क्योंकि ट्रस्ट के पंजीयन के पूर्व ट्रस्टडीड को सक्षम न्यायालय द्वारा निरस्त कर दिया है और उक्त ट्रस्टडीड के आधार पर बिना यह जांच करे कि ट्रस्टडीड निरस्त हो चुकी है, पंजीयन का आदेश दिया है। प्रतिवादीगण ने भी ट्रस्टडीड के संबंध में हुए आदेशों को पंजीयक के सामने प्रस्तुत नहीं किया है और इन तथ्यों को छिपाते हुए ट्रस्ट का पंजीयन कराया है । इस प्रकार से विखंडित की गई ट्रस्टडीड के आधार पर पंजीयन द्वारा ट्रस्ट का पंजीयन किया है, जिसे किसी भी दृष्टि में वैध नहीं माना जा सकता है । अतः वादप्रश्न क्र.1 का निराकरण हां में किया जाता है।"

25. It is apparent that this issue was decided in favour of the present appellant. The order was held to be void and illegal in light of the fact that the Trust was already revoked by the deed executed by Birdi Bai during her lifetime and the revocation of the Trust was upheld by this Court in F.A. No.22/1997. Accordingly, the Trust is not in existence, and accordingly, there is no change in circumstances, this application is accordingly dismissed. Two other applications filed by the intervenor/Trust I.A. Nos.6258/2016 and 6890/2016 under Order 41 Rule 27 and under Section 340 CPC respectively are also dismissed, as the Trust is not allowed to intervene in this case and has no right to file such application.

26. Now I shall proceed to consider merit of the case and first take a substantial question nos.2 and 3 into consideration.

27. It is apparent that these two questions were framed in respect of creation of Trust, its subsequent revocation by the owner/creator Birdi Bai and also whether a valid trust was created by her.

28. It is admitted in this case that Birdi Bai executed a deed by which she proposed to create a public trust. Subsequently, she revoked the trust by another deed. Prior to such revocation, she bequeath the suit property on the

present appellant allegedly executing a will in her favour. The question whether a public trust created by a register (sic:registered) deed can be revoked by its creator during his/her lifetime was directly and substantially in issue in a civil suit filed by the present appellant for declaration against the trust. The suit was decreed by 4th Additional District Judge, Indore by judgment dated 18.09.1996. Against the judgment and decree passed by the 4th Additional District Judge, first appeal was filed before this Court which was disposed of by co-ordinate Bench of this Court in F.A. No.22/1997 dated 11.11.2008. The Court observed as under :-

> **"In the present case, it is proved by the plaintiff, and is not even disputed at the hands of the defendants, that an application had been filed by Birdi Bai before the Additional Collector for registration of the trust. Vide an order dated October 20, 1976, Exhibit P-3, the Additional Collector had required the managing trustee (Birdi Bai) to remain personally present on the next date. However, Bridi Bai chose not to remain present. On account of the aforesaid default, the application filed by Birdi Bai was dismissed. Thereafter no process for registration of the public trust under the MP Act had ever been initiated or continued by Birdi Bai or any other person. At no stage, the aforesaid trust was ever registered as public trust nor its name entered in the Register of Public Trusts. Thus, once the procedure under Sections 4 to 7 of the M.P. Act had never been followed for registration of the public trust, obviously the question of coming into existence of such a trust would not even arise. Whereas the provisions of the Indian Trusts Act, being the general law, are required to be followed, but the provisions of the local Act i.e. the M.P. Act provide for a procedure and the manner in which the trust is to come into existence. Once, the procedure of the Local act had not been followed, then the trust, though intended to be formed through the deed Exihibit P-1, would be taken to have never come into existence. In such a situation, the provisions of the Section 78 of the Indian Trusts Act, 1882 would not even be attracted.**

The findings of fact with regard to the execution of the revocation deed Exhibit P-2 and the execution of the will Exhibit P-4 in favour of the plaintiff, though challenged at some stage by the defendants before the trial Court, have not been contested before this Court; during the course of first appeal. Consequently, the findings recorded by the trial Court on the aforesaid questions are affirmed.

No other point has been urged.

In these circumstances, I do not find any merit in the present appeal. The same is dismissed.

However, there shall be no order as to costs.

C.C. as per rules."

29. Learned counsel for the respondents places reliance on judgment of Hon'ble Apex Court in case of *A.V. Papayya Sastry and others vs. Govt. of A.P. and others;* (2007) 4 SCC 221. In this case, it was held that if a judgment is obtained by fraud it is not binding. The Hon'ble Apex Court held that such judgment and decree can be challenged in any court at any time and when a judgment is obtained by a fraud, this is an exception to Article 141 of the Constitution of India and doctrine of merger. He also places reliance on judgment of Hon'ble Apex Court in case of *Kunhayammed and others vs. State of Kerala and another;* (2000) 6 SCC 359. In this case, it was held that when an SLP dismissed by the Hon'ble Apex Court without passing a speaking order, its an exception to the Rule of merger and it does not constitute res-judicata and such order can be reviewed without considering the fact that an SLP filed against the order was dismissed. But going through the judgment, it is apparent that only when a review is filed, the principle laid down in the present case applies. However, for other proceedings which are collateral in nature the order passed by co-ordinate Bench of this Court in F.A. No.22/1997 attained finality and cannot now be looked into, and therefore, the argument of the counsel for the respondents that this Court can consider the issues relating to revocation of the trust cannot be accepted. This issue has been decided between the trust and the present appellant, and therefore, it cannot be re-agitated in this case. Further a judgment can be discarded on ground of that it was obtained by fraud only when in a subsequent suit, it was proved that it was obtained by fraud. Merely alleging fraud is not enough. The counsel

also cited judgment of Hon'ble Apex Court on the point that public trust once created cannot be revoked, in case of *Nachi Muthu Gounder vs. Raju Thevar;* 1985 M.P.W.N.339 (SC) and the case of *Sri Agasthyar Trust, Madras vs.Commissioner of Income Tax, Madras;* (1998) 5 SCC 588. These two judgments and principle laid down therein cannot be taken into consideration, as this issue has already been decided by this Court in F.A. No.22/1997.

30. Learned counsel for the respondents further places reliance on judgment of Honble Apex Court in case of *Jagdish Chand Sharma vs. Narain Singh Saini;* (2015) 8 SCC 615, in which it was held that the will has to be proved strictly in accordance with provision of Section 68 of Evidence Act. However, the trust is a third party to the will, revocation of the trust by Birdi Bai was held to be proper. Once the deed, by which the trust was created, was revoked, it applied retrospectively from the date when the trust was created, and accordingly, when the will was executed, the property belonged to Birdi Bai. The ownership of the appellant can only be seen for collateral purpose of her being landlord, in the present case no detailed inquiry is required.

31. Learned counsel for the respondents further submits that in cases filed against the other tenants the will was declared to be invalid and this order was never challenged by the present appellant. However, those were also cases filed on the basis of defendant being tenants and any finding by the Court will not be a binding in the present case because that was between other party and also in those cases also the ownership of the appellant was considered only for the collateral purpose. Accordingly, it is apparent that the trust was validly revoked and on the basis of the will, present appellant became owner of the property.

32. The substantial questions of law Sr. No. 2 and 3 framed by this Court are answered accordingly.

33. The substantial question no.1 is whether the lower court was justified in reversing the judgment passed by the trial court. The first appellate court below mainly reverted the judgment passed by the trial court on the ground that the property belonged to the trust, and therefore, the appellant was not the landlord of the defendant and owner of the suit property. However, now the circumstances have been changed. The revocation of the trust was held valid by co-ordinate Bench of this Court as stated above, and therefore, the

trust is not in existence. On the basis of will, the appellant has became owner of the property. So far as the respondents are concerned, and therefore, it is to be seen whether the present respondents are bound by the finding given by the co-ordinate Bench of this Court in F.A. No.22/1997. On this point, the learned counsel for the appellant places reliance on judgment of co-ordinate Bench of this Court in case of *Bhagwati Bai vs. Khanjuram;* M.L.R. 1954. Civil 475. In this judgment, it was held that when there is a judgment in favour of the landlord in respect of his ownership, the tenant cannot challenge the finding given in that judgment. In this case also ownership was decided in another suit as mentioned above, and therefore, the respondents are bound by the findings of the court. In this view of the matter, when the appellant became owner of the property, she also became landlord, as it is not disputed that at same point of time, rent was also given to her in any way. Once the question of ownership is settled between the present appellant and the trust by virtue of her being owner of the property, she became landlord of the tenants.

34. In this view of the matter, it is held that the appellant is the landlord of the respondents and the finding given by the first appellate court below was erroneous, and therefore, liable to be set aside.

35. Now, we may consider other grounds on which the decree was passed by the trial court. The first ground is under Section 12(1)(A) of M.P. Accommodation Control Act which relates to default in payment of rent. The appellate court found that by order dated 13.07.1989, trial court condoned the delay in payment of arrears of rent, and thereafter, so far as rent relating to subsequent months was concerned, it was also paid according to provision of the Act, and therefore, no ground is made out for passing a decree under Section 12(1)(A) of the Act.

36. After going through the record of the trial court, I find that findings of the appellate court on this point is reasonable and proper. The record does not show that after 13.07.1989, when delay was condoned, there was any default in payment of rent in accordance with provision of Section 13 of the M.P. Accommodation Control Act.

37. The next ground is whether the finding given by the courts below in respect of bonafide need of the appellant was proper. On this point also both the courts below found that the suit accommodation was required bonafide

by the appellant for her own use and for use of her family members. The first appeal was only allowed because the appellate court found that the appellant was not the owner of the suit property. Accordingly, when it has been established that the present appellant is the owner and the landlord of the present appellant, it is held that on the ground of bonafide requirement the appellant is entitled to receive vacant possession of the suit premises.

38. The appellate court below found that it is not proved that the respondents tried to create an adverse title over the suit property because he only challenged the title of the appellant on the ground that it is not the appellant but the Trust was the owner of the property. Under these circumstances, it cannot be said that he created an adverse title over the suit property. In this situation, the finding given by the appellate court below appears just and proper and no interference is required.

39. The next question relates to change need of the premises, according to the appellant, the premise was given to him for residential purpose which the respondents converted into the composite tenancy for residential as well as for non residential purpose. Defence of the present appellant was that he obtained a permission to do so from the Trust, however, now since the Trust was not found the landlord of the present appellant. Learned counsel for the appellant argued that such permission was a nullity, and therefore, this ground is also proved. However, in considered opinion of this Court, there was genuine dispute between the present appellant and the Trust, and therefore, at various points of time, the respondents considered the Trust as well as the plaintiff as their landlord, and therefore, in bonafide belief that the public Trust was entitled to provide him the required permission if the change in use of the premises was made after obtaining permission from the Trust, no ground is made out and therefore, it is held that on this ground, the appellant is not entitled to obtain any decree for eviction.

40. The next ground is that the respondents obtained alternative accommodation at 65-B, Prikanko Colony, Annapurna Road, Indore and at 21, Dravid Nagar, Indore and they are living there. This finding was given by both the courts below and again no decree was granted by the appellate court because appellant was not held to be landlord and owner of the property.

41. On the basis of aforesaid discussion, it is apparent that the appellant is entitled to get the decree for eviction on the ground of bonafide requirement

by the appellant under Sections 12(1)(e) and 12(1)(i) for obtaining suitable accommodation for their residence.

42. Accordingly, this appeal is allowed. The judgment and decree passed by the first appellate court below is set aside.

It is ordered and decreed that the respondents shall hand over vacant possession of the suit property to the appellant within two months from date of this judgment. The respondents shall pay rent @ Rs.121/- per month till vacant possession of the suit premises is delivered to the appellant. Any amount deposited against the arrears of rent or by way of rent for the current months during pendency of the suit shall be paid to the appellant.

Cost of the appeal shall be born by the respondents throughout. Counsels fee as per schedule if certified.

Decree be drawn accordingly.

Appeal allowed.

I.L.R. [2017] M.P., 1135
APPELLATE CIVIL
Before Mr. Justice Anand Pathak
S.A. No. 514/2004 (Gwalior) decided on 16 January, 2017

CHIRONJI BAI & ors. ...Appellants
Vs.
NARAYAN SINGH & ors. ...Respondents

Civil Procedure Code (5 of 1908), Order 32 Rule 3(A), Evidence Act (1 of 1872), Section 44 and Limitation Act (36 of 1963), Article 6, 8, 59 & 60 - Limitation to file a Suit **- In 1982, plaintiffs filed a suit after 17 years of consent decree praying to set aside the consent decree passed in the year 1965, the same been obtained by fraud - Trial Court decreed the suit in favour of plaintiffs on the basis of Article 59 of the Limitation Act, treating the suit within limitation from the date of knowledge of passing of consent decree passed in 1965 and holding that plaintiffs came to know about the same in the year 1982 - Defendant filed an appeal whereby the appellate Court reversed the judgment and decree on the ground of Section 6 and 8 of the Limitation Act - Appellants/Plaintiff filed this second appeal - Held - If plaintiff no. 1**

and 2 were not aware of consent decree or were aggrieved by the said decree then they should have come out with the case pleading misconduct/gross negligence as provided under Order 32 Rule 3(A) of CPC or under Section 44 of the Evidence Act for fraud or collusion but record of the case shows that there is no such pleadings/submissions made by appellants - Further held - Plaintiffs filed suit after 17 years of consent decree - Conjoined reading of Section 6, 7 and 8 of Limitation Act shows that litigant is entitled to a fresh period of limitation i.e three years from the date of cessation of disability - Suit has not been filed within three years after attaining the majority and therefore barred by time - Appellate Court rightly dismissed the appeal - Second Appeal dismissed. (Paras 14, 15, 18, 20 & 21)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 32 नियम 3(ए), साक्ष्य अधिनियम (1872 का 1), धारा 44 एवं परिसीमा अधिनियम (1963 का 36), अनुच्छेद 6, 8, 59 व 60 – वाद प्रस्तुत करने के लिए परिसीमा – 1982 में, वादीगण ने सहमति डिक्री के 17 वर्ष पश्चात् वर्ष 1965 में पारित सहमति डिक्री को उसे कपट द्वारा अभिप्राप्त किये जाने के आधार पर अपास्त करने की प्रार्थना के साथ एक वाद प्रस्तुत किया – विचारण न्यायालय ने परिसीमा अधिनियम के अनुच्छेद 59 के आधार पर, वाद को 1965 में पारित सहमति डिक्री के पारित किये जाने का ज्ञान होने की तिथि से परिसीमा के भीतर मानते हुए तथा यह धारणा करते हुए कि उक्त के बारे में वादीगण को वर्ष 1982 में पता चला था, वादीगण के पक्ष में वाद डिक्रीत किया – प्रतिवादी ने अपील प्रस्तुत की जिसमें अपीली न्यायालय ने परिसीमा अधिनियम की धारा 6 व 8 के आधार पर निर्णय और डिक्री को उलटा दिया – अपीलार्थीगण/वादी ने यह द्वितीय अपील प्रस्तुत की – अभिनिर्धारित – यदि वादी क्र. 1 व 2 सहमति डिक्री से अवगत नहीं थे या उक्त डिक्री से व्यथित थे तब उन्हें कदाचार/घोर उपेक्षा जैसा कि सि.प्र.सं. के आदेश 32 नियम 3(ए) के अंतर्गत उपबंधित है, अभिवाक् करते हुए अथवा कपट या दुस्संधि हेतु साक्ष्य अधिनियम की धारा 44 के अंतर्गत प्रकरण लेकर आना चाहिए था परंतु अभिलेख दर्शाता है कि अपीलार्थीगण द्वारा ऐसे कोई अभिवचन/निवेदन नहीं किये गये – आगे अभिनिर्धारित – वादीगण ने सहमति डिक्री के 17 वर्ष पश्चात् वाद प्रस्तुत किया – परिसीमा अधिनियम की धारा 6, 7 व 8 को एक साथ पढ़ने पर दर्शित होता है कि मुकदमेबाज परिसीमा की नई अवधि का हकदार है अर्थात्, अक्षमता समाप्त होने की तिथि से तीन वर्ष – वयस्कता प्राप्त करने के पश्चात् तीन वर्षों के भीतर वाद प्रस्तुत नहीं किया गया है और इसलिए समय द्वारा वर्जित है – अपीली न्यायालय ने अपील उचित रूप से खारिज की – द्वितीय अपील खारिज।

Cases referred:

(2002) 2 SCC 62, (2004) 8 SCC 706, (2009) 3 SCC 687, (2010) 2

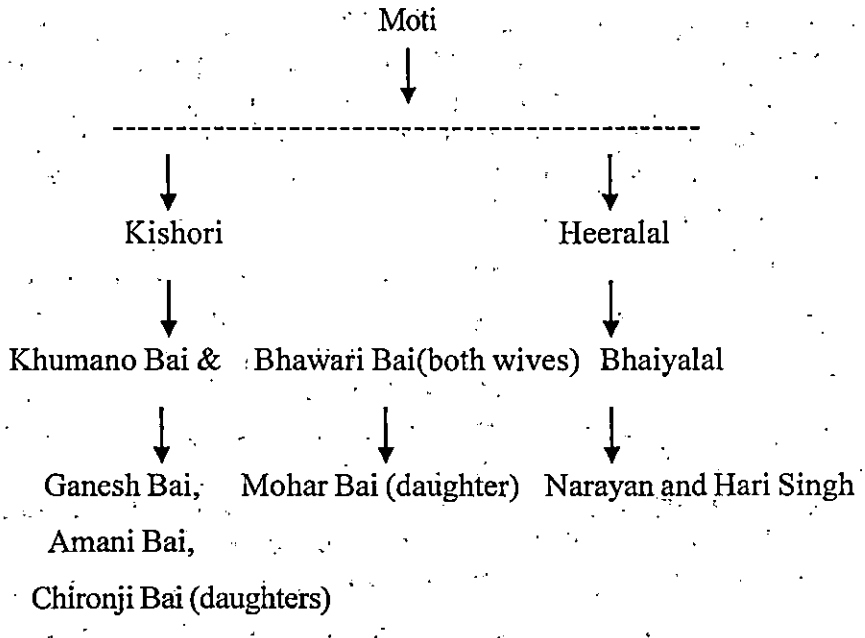
SCC 194, 1994 (6) SCC 585, (2009) 6 SCC 194, (1995) 4 SCC 163, (2007) 14 SCC 792.

Sarvesh Sharma, for the appellants/plaintiffs.
Sanjay Mishra, for the respondents No. 1 & 2/defendants.

JUDGMENT

ANAND PATHAK, J. :- Appellants/plaintiffs have preferred this appeal under Section 100 of CPC challenging the judgment and decree of reversal dated 12th May, 2004 passed by Third Additional District Judge, Vidisha in Civil Appeal No. 60-A/2003; whereby, the judgment and decree dated 15/9/2003 passed by First Civil Judge, Class-II, Vidisha in Civil Suit No.175-A/2003 has been set aside.

2. Plaintiffs have preferred a suit for declaration, possession, partition and permanent injunction in respect of suit property and for setting aside of judgment and decree dated 9/10/1965 passed in Civil Suit No. 116-A/1965. The genealogy tree of the plaintiffs is demonstrated as under:-



According to plaintiffs, plaintiff No 3-Khumanobai is wife of Kishori and plaintiffs No. 1 and 2 Chironjibai and Smt. Amnibai are daughters of Kishori and Khumanobai.

3. Plaintiffs have filed a suit while pleading that the defendant Bhaiyalal has obtained a decree dated 9/10/1965 from Civil Judge, Class-II, Vidisha by playing fraud to the Court, therefore, the proceedings including judgment and decree, undertaken before the trial Court in Civil Suit No. 116-A/1965 are liable to be set aside alongwith other reliefs.

4. The defendants filed the written statement and contested the claims made by the plaintiffs. According to respondents/defendants, plaintiff No. 3 Smt. Khumano Bai was a party to the decree passed in year 1965 and according to defendants, plaintiffs had the knowledge of the fact about the passing of decree in past. Defendants have pleaded that the plaintiffs No. 1 and 2 were minors at the time of execution of decree in year 1965 because they were parties in litigation of year 1965. Details of plaintiff Amni Bai has not been disclosed in specific terms regarding her majority status, therefore she had to be treated as major. Similarly, plaintiff Chironjibi has already admitted to be an adult in plaint itself. Therefore, question of status regarding minority is to be dealt with in respect of Amni Bai only. Defendants have prayed for dismissal of the suit on the ground of limitation as well as on the point of adverse possession and further pleaded that in earlier suit of year 1965, judgment and decree passed was a consent decree, wherein, the present plaintiffs Khumanobai, Amnibai and Chironjibai have specifically given the consent and on their consent, a consent decree had been passed. After that, mutation had taken place in year 1966. Therefore, relief as sought cannot be given to plaintiffs.

5. Trial Court had framed as many as 17 issues. After the issues were framed, evidence was led by the parties and after appreciation of evidence, trial Court decreed the suit in favour of plaintiffs on the basis of Article 59 of the Limitation Act treating the suit to be in limitation from the date of knowledge of passing of consent decree in year 1965. The suit was filed on 29/9/1982 and cause of action has been explained in the suit when the plaintiffs came to know about the passing of judgment and decree dated 9/10/1965, in the year 1982 just before filing of the suit. Trial Court not only decreed the suit but awarded mesne profits and decree for restoration of possession of plaintiffs.

6. Being aggrieved, the respondent No. 1/defendant has filed first appeal under Section 96 of the CPC before the first appellate Court and tried to resort to Article 60 of the Limitation Act for setting aside of the decree.

7. Appellate Court reversed the judgment and decree passed by the trial Court and dismissed the suit on the ground of Section 6 and 8 of the Limitation Act. According to appellate Court, the defendant Bhaiyalal has not obtained the judgment and decree on the basis of any misrepresentation and came to the conclusion that the proceedings have not been initiated within stipulated period of three years, therefore, the judgment and decree passed by the trial Court has been set aside.

8. After passing of the judgment and decree by the first appellate court, the plaintiffs have preferred the instant second appeal under Section 100 of CPC and on 17/4/2013, the appeal was admitted on following substantial question of Law:-

> "Whether, learned lower appellate Court is justified in reversing the judgment and decree passed by learned trial Court on the ground that the suit is time barred despite the fact that the judgment and decree passed in Civil Suit No. 116-A/1965 was passed against the minors."

9. Learned counsel for the appellants submits that the defendant No. 1 has obtained the judgment and decree against the present plaintiffs by way of filing a suit on 19/8/1965 and caused the appearance of the defendants (plaintiffs in the present case), therefore, a lawyer was appointed by him (on behalf of present plaintiffs) and caused to file written statement admitting the pleadings and submissions filed by the said plaint and on the basis of consent given by the then defendants (present plaintiffs) the decree has been passed. According to him, the said decree has been obtained through misrepresentation to the plaintiff No. 2 Khumanobai about filing of some different proceedings before the revenue Court and on that pretext defendant No. 1 obtained the signatures of plaintiff No. 2 Khumanobai and other plaintiffs.

10. According to counsel, only Khumanobai was major at that point of time and Chironjibai and Amnibai were minors at the time of filing of suit/ written statement, therefore, the said judgment and decree was never applicable over them and therefore, they filed the suit for setting aside the same. He referred to the evidence led by the parties in this regard, specifically the evidence of Bhaiyalal (DW/1); wherein, in para 15, the said witness has accepted that he facilitated the signature of Khumanobai over the written statement filed in the suit of year 1965. He further referred to the evidence of DW/2 Imrat Singh, wherein; in para 5 witness has accepted that daughters

were minors at the relevant point of time. According to counsel for appellant, the evidence of DW/1 and DW/2 reflects that the daughters of plaintiff No. 3 Khumanobai were minors at the time of consent decree which was obtained through misrepresentation and therefore, is not binding over them in any manner. He further submits that when their claim over ancestral land was challenged by the defendant No. 1 in year 1982 then they came to know about the basis for challenge and thereafter after due search, they came to know about the passing of judgment and decree in year 1965 and thereafter they preferred the civil suit for declaration and for setting aside the judgment and decree passed in civil suit No. 116-A/1965. Therefore, the suit is well within limitation and looking to the interest of minors they had the legal authority to prefer the suit when they came to know about this fact. Trial Court has rightly passed the judgment and decree decreeing the suit on the basis of Article 59 of the Limitation Act which prescribes the limitation as three years from the date of knowledge regarding passing of judgment and consent decree. He relied upon the judgment rendered by Hon'ble Supreme Court in the case of *Darshan Singh and Ors., Vs. Gujjar Singh (dead) by LRs., and Ors.,* (2002) 2 SCC 62, *Balvant N. Viswamitra and Ors., Vs. Yadav Sadashiv Mule (Dead) through LRs. & Ors.,* (2004) 8 SCC 706, *Varsha Plastics Private Ltd. & Anr. Vs. Union of Inida (sic:India) and Ors.* (2009) 3 SCC 687 and *Daya Singh and Anr. Vs. Gurdev Singh (Dead) by LRs. And Ors.,* (2010) 2 SCC 194.

11. Per contra, learned counsel for the respondents vehemently argued in support of impugned judgment of appellate Court and craved the indulgence of this Court over Order 32 Rule 3 (A) of CPC to plead that the decree against the minor can only be set aside when there is any adverse interest caused by the guardian or next friend to the minor. As no adverse interest has been caused by the plaintiff No. 3 being the mother of plaintiffs No. 1 and 2, therefore, decree passed in favour of defendant No. 1 in 1965 cannot be set aside. His further argument is that plaintiff No. 3 Khumanobai was admittedly major at the time of filing of the suit in year 1965 and knowing fully well the effect and operation of filing written statement in pending litigation, she had given authority to the counsel in this regard and now she cannot take a somersault and plead contrary to her action. She represented the interest of other minors, therefore, even if for a minute it is assumed that the plaintiffs No. 1 and 2 were minors at the time of passing of judgment and decree in

year 1965, even then, she has specifically represented the interest of other minors alleged to be existing at the time of passing of consent decree. According to him, the plaintiffs have filed documents vide Ex. P/1 to P/4 in which Ex. P/2 and P/3 are school certificates, credentials of which have been shaken in the cross-examination and therefore are of no use. He submits that Khumanobai was major at the time of passing of consent decree. Age status of Ganeshi Bai has not been explained by the plaintiffs in their plaint, therefore, it is deemed to be admitted that Ganeshi Bai was major. Now the only question which comes regarding minority status of plaintiffs No. 1 and 2 Chirongibai and Amnibai. On the basis of statement of PW/1 Chirongi Bai in para 9,23 to 26 and 40, respondent No. 1 has tried to point out the inconsistent stand take by her in respect of her age. She consistently scuffled between different periods. He also relied upon the evidence of PW/4 Bhaiyalal, who also according to respondents supported their case in respect of school certification. He submitted that school certificates have been obtained fraudulently just to lower the age status of Chirongibai. According to him, the suit is covered under Section 6 and 8 of the Limitation Act. He relied upon the judgment of Hon'ble Apex Court rendered in the matter of *Darshan Singh Vs. Gurdev Singh*, 1994 (6) SCC 585. Besides that, he also contended that the plaintiffs have nowhere sought relief of setting aside of decree obtained through fraud and nowhere alleged or pleaded regarding the fact that present defendant No. 1 has obtained the decree through fraud.

12. While relying upon the judgment rendered by Hon'ble Apex Court in the case of *Sneh Gupta Vs. Devi Sarup and Ors.*, (2009) 6 SCC 194 he pleaded that decree must be set aside within limitation; whereas, in the present case, decree has not been attempted to be set aside within limitation.

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

14. REGARDING SUBSTANTIAL QUESTION OF LAW AS FRAMED EARLIER

The consent decree was passed by the trial Court in Civli Suit No. 116-A/1965; wherein,the parties in the present lis (predecessors/successors) have accepted the compromise. If the plaintiffs No. 1 and 2 were not aware of the consent decree or were aggrieved by the said decree then they should have come-out with the case pleading misconduct/gross-negligence as provided in Order XXXII Rule 3 (A) of CPC. The said provisions gives a

protection umbrella in favour of the interest of minor, if his/her next friend of guardian/guardian ad litem have committed any misconduct or gross-negligence in a suit resulting in prejudice to the interests of the minor. For ready reference, Order XXXII Rule 3 (A) of CPC is reproduced as under:-

> "3-A. Decree against minor not to be set aside unless prejudice has been caused to his interests.- (1) No decree passed against a minor shall be set aside merely on the ground that the next friend or guardian for the suit of the minor had an interest in the subject-matter of the suit adverse to that of the minor, but the fact that by reason of such adverse interest of the next friend or guardian for the suit, prejudice has been caused to the interests of the minor, shall be a ground for setting aside the decree.
>
> (2) Nothing in this rule shall preclude the minor from obtaining any relief available under any law by reason of the misconduct or gross negligence on the part of the next friend or guardian for the suit resulting in prejudice to the interests of the minor."

15. Section 44 of the Evidence Act also provides a remedy, wherein, the daughters could have pleaded fraud or collusion against their mother, who happened to be the guardian ad litem in the earlier suit of 1965 but her no pleading of misconduct or gross negligence as provided under Order XXXII Rule 3 (A) or of fraud or collusion as per Section 44 of the Evidence Act are available in the record/submissions of appellants to reach to the conclusion that the mother Khumanobai, who happened to be the guardian of the other plaintiffs had committed fraud or obtained the consent decree with collusion. In absence of such pleadings, benefit of Order XXXII Rule 3 (A) of CPC or Section 44 of Evidence Act cannot be given to the plaintiffs.

16. In fact, plaintiff No. 3 is one of the parties/plaintiffs, has filed the suit alongwith her daughters, this fact itself establishes that the plaintiffs are having good relations inter se and therefore, on this count, plea of misconduct or gross-negligence/fraud/collusion goes.

17. Now the question of limitation in respect of the proceedings against the present respondent/defendant is concerned, it appears from the record that the plaintiffs have preferred the present suit after 17 years of consent decree. Sections 6,7 and 8 of the Limitation Act are worth consideration in

this regard. The compromise decree as discussed above even if void, was required to be set aside. Sections 6,7 and 8 of the Limitation Act are applicable in the present case and thus reproduced as under:-

> **"6.Legal disability.**-(1) Where a person entitled to institute a suit or make an application for the execution of a decree is, at the time from which the prescribed period is to be reckoned, a minor or insane, or an idiot,he may institute the suit or make the application within the same period after the disability has ceased, as would otherwise have been allowed from the time specified therefor in the third column of the Schedule.
>
> (2) Where such person is, at the time from which the prescribed period is to be reckoned, affected by two such disabilities, or where, before his disability has ceased, he is affected by another disability, he may institute the suit or make the application within the same period after both disabilities have ceased, as would otherwise have been allowed from the time so specified.
>
> (3) Where the disability continues up to the death of that person, his legal representative may institute the suit or make the application within the same period after the death, as would otherwise have been allowed from the time so specified.
>
> (4) Where the legal representative referred to in sub-section (3) is, at the date of the death of the person whom he represents, affected by any such disability, the rules contained in sub-sections (1) and (2) shall apply.
>
> (5) Where a person under disability dies after the disability ceases but within the period allowed to him under this section, his legal representative may institute the suit or make the application within the same period after the death, as would otherwise have been available to that person had he not died.
>
> Explanation: For the purposes of this section 'minor' includes a child in the womb.
>
> **7.Disability of one of several persons.**- Where one of several persons jointly entitled to institute a suit or make an

application for the execution of a decree is under any such disability, and a discharge can be given without the concurrence of such person, time will run against them all; but, where no such discharge can be given, time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others or until the disability has ceased.

Explanation I : This section applies to a discharge from every kind of liability, including a liability in respect of any immovable property.

Explanation II: For the purposes of this section, the manager of a Hindu undivided family governed by the Mitakshara law shall be deemed to be capable of giving a discharge without the concurrence of the other members of the family only if he is in management of the joint family property.

8. Special exceptions.- Nothing in section 6 or in section 7 applies to suits to enforce rights of pre-emption, or shall be deemed to extend, for more than three years from the cessation of the disability or the death of the person affected thereby, the period of limitation for any suit or application."

18. Section 8 is proviso to Section 6 and 7. A combined effect of Sections 6 and 8 read with third column of the appropriate article would be that a person under disability may sue after cessation of disability within the same period as would otherwise be allowed from the time specified therefore in the third column of the Schedule but special limitation as an exception has been provided in Section 8 laying down that extended period after cessation of the disability would not be beyond three years from the date of cessation of the disability or death of the disabled person. In each case, the litigant is entitled to a fresh period of limitation from the date of cessation of disability subject to the condition that in no case the period extended by this process under Section 6 or 7 shall exceed three years from the date of cessation of the disability. This is the legal position as per the mandate of Hon'ble Apex Court.

19. Looking to the present case, it appears that the present plaintiffs have filed a joint written statement (Ex. D/1) before the trial Court in earlier suit (116-A/1965). Plaintiff No. 3 Khumanobai and another daughter Ganeshibai

were major when they put their signatures over the written statement. Similarly, in respect of Amnibai, no cogent evidence has been produced by the plaintiffs showing her status as minor at the time of earlier suit of 1965. Although Amnibai not even entered into the witness box before the trial Court to substantiate her claim as a minor at the time of passing of decree of 1965. only plaintiff left was Chironjibai where she could have established her status as minor at the relevant point of time but in her deposition as PW/1 she has rather created a doubt through her deposition especially in paragraphs 9, 23, 24 and 40 which are mutually contradictory and inconsistent. Other document exhibited by the plaintiffs are also not sufficiently lucent to reach home the conclusions in respect of their submissions. Appellate Court had already dealt with in extenso regarding the same.

20. Even if, the date of birth of plaintiff No. 1 Chironjibai is taken to be as 9/12/1954, even then, she attained the majority on 9/12/1972 and therefore, she had the limitation available for her till 9/12/1975 but she filed the present suit on 29/9/1982 which is barred by time.

21. In the overall facts and circumstances of the case, Article 60 of the Limitation Act would apply here. Even otherwise, appellants/plaintiffs have not demonstrated sufficiently about their date of knowledge and have casually referred the date for making an attempt to show the suit within limitation. Even otherwise, in the present suit neither the decree passed in Civil Suit No. 116-A/1965 dated 9/10/1965 has been produced nor khasra entires/mutation order dated 5/7/1966 has been produced to substantiate the claim. The judgment of Hon'ble Apex Court as passed in the matter of *Darshan Singh and Ors. Vs. Gurdev Singh,* (1994) 6 SCC 585, *Asharfi Lal Vs. Koili (Smt.) Dead by Lrs,* (1995) 4 SCC 163, *Utha Moidu Haji Vs. Kuniningarath Kunhabdulla and Ors.,* (2007) 14 SCC 792 and *Sneh Gupta Vs. Devi Sarup and Ors.,* (2009) 6 SCC 194 support the case of the respondents/ defendants and categorically provides that the limitation is a statute of repose and if the suit is not filed within the period of limitation then the remedy would be barred. Similarly, Hon'ble Apex Court has held in these judgments while interpreting Section 6,7 and 8 of the Limitation Act as well as Order XXXII of CPC and Section 44 of the Indian Evidence Act that limitation is to be construed strictly in accordance with the provisions of Limitation Act. The relevant extract of Hon'ble Apex Court judgment in the case of *Sneh Gupta* (supra) is reproduced as under:-

"67. We are concerned herein with a question of limitation. The compromise decree, as indicated hereinbefore, even if void was required to be set aside. A consent decree, as is well known, is as good as a contested decree. Such a decree must be set aside if it has been passed in violation of law. For the said purpose, the provisions contained in the Limitation Act, 1963 would be applicable. It is not the law that where the decree is void, no period of limitation shall be attracted at all. In *State of Rajasthan Vs. D.R.Laxmi,* [(1996) 6 SCC 445], this Court held :

"10. The order or action, if ultra vires the power, becomes void and it does not confer any right. But the action need not necessarily be set at naught in all events. Though the order may be void, if the party does not approach the Court within reasonable time, which is always a question of fact and have the order invalidated or acquiesced or waived, the discretion of the Court has to be exercised in a reasonable manner. When the discretion has been conferred on the Court, the Court may in appropriate case decline to grant the relief, even if it holds that the order was void. The net result is that extraordinary jurisdiction of the Court may not be exercised in such circumstances. It is seen that the acquisition has become final and not only possession had already been taken but reference was also sought for; the award of the Court under Section 26 enhancing the compensation was also accepted. The order of the appellate court had also become final. Under those circumstances, the acquisition proceedings having become final and the compensation determined also having become final, the High Court was highly unjustified in interfering with and in quashing the notification under Section 4 (1)and declaration under Section 6.."

On the other hand,the judgments as cited by the counsel for appellants are not applicable in the present set of facts. The overall fact situation of the case and conduct of the parties (especially plaintiffs) suggest that judgments as cited by the respondents/defendants are applicable in the present case. Thus, from the above discussion it is apparent that neither the plaintiff No. 1 has filed the suit within three years after attaining the majority nor the plaintiff No. 3 Khumanobai filed the suit within three years after giving the consent in earlier suit No. 116-A/65. Therefore, the present suit is bared (sic:barred) by

limitation and has rightly been dismissed by the lower appellate Court. Plaintiffs could not prove their case on the basis of oral and documentary evidence.

22. The substantial question of law is answered accordingly.

23. Resultantly, the appeal fails and is hereby dismissed.

Appeal dismissed.

I.L.R. [2017] M.P., 1147
APPELLATE CIVIL
Before Mr. Justice Vijay Kumar Shukla
S.A. No. 358/2015 (Jabalpur) decided on 18 January, 2017

MADHAV GOGIA ...Appellant
Vs.
SMT. K. FATIMA KHURSHEED ...Respondent

Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(a) & 12(1)(f) and Civil Procedure Code (5 of 1908), Order 6 Rule 17 - Arrears of Rent - Bonafide Requirement - Amendment in Appeal - Permissibility **- Respondent/Plaintiff filed a suit for eviction against the Appellant/ Defendant seeking a decree u/S 12(1)(a) and 12(1)(f) - Trial Court decreed the suit in favour of plaintiff u/S 12(1)(a) of the Act of 1961 - Both the parties filed separate appeals, Plaintiff's appeal was registered as C.A. No. 145-A/2014 whereas Defendant's appeal was registered as C.A. No. 144-A/2014 - Appellate court allowed the appeal filed by respondent/ plaintiff and decree was passed in his favour u/S 12(1)(a) & 12(1)(f) of the Act of 1961 whereas appeal filed by the Appellant/Defendant was dismissed - Appellant/Defendant filed this present second appeal only challenging dismissal of his appeal No. 144-A/2014 - Later, an application under Order 6 Rule 17 CPC was filed by the appellant seeking amendment in the second appeal - Held - If application for amendment is allowed, that would mean that appellant is permitted to challenge the judgment and decree passed in C.A. No. 145-A/2014 after a period of one and half years and also by-passing the provisions of Limitation Act - Application for amendment rejected - Further held - Record shows that Trial Court has considered the documents produced and have recorded a finding after evaluation of evidence that documents do not prove that rent was deposited in accordance with law - Decree of eviction rightly passed - Appeal dismissed.**

(Paras 9, 11, 16 & 17)

स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(ए) व 12(1)(एफ) एवं सिविल प्रक्रिया संहिता (1908 का 5), आदेश 6 नियम 17 – भाड़े का बकाया – वास्तविक आवश्यकता – अपील में संशोधन – अनुज्ञेयता – प्रत्यर्थी/वादी ने अपीलार्थी/प्रतिवादी के विरूद्ध धारा 12(1)(ए) व 12(1)(एफ) के अंतर्गत डिक्री चाहते हुए बेदखली हेतु वाद प्रस्तुत किया – विचारण न्यायालय ने 1961 के अधिनियम की धारा 12(1)(ए) के अंतर्गत वादी के पक्ष में वाद डिक्रित किया – दोनों पक्षकारों ने पृथक अपीलें प्रस्तुत की. वादी की अपील सिविल अपील क्र. 145–ए/2014 के रूप में पंजीबद्ध की गई थी जबकि प्रतिवादी की अपील सिविल अपील क्र. 144–ए/2014 के रूप में पंजीबद्ध की गई थी – अपीली न्यायालय ने प्रत्यर्थी/वादी द्वारा प्रस्तुत अपील मंजूर की और 1961 के अधिनियम की धारा 12(1)(ए) व 12(1)(एफ) के अंतर्गत उसके पक्ष में डिक्री पारित की गई थी जबकि अपीलार्थी/प्रतिवादी द्वारा प्रस्तुत अपील खारिज की गई थी – अपीलार्थी/प्रतिवादी ने वर्तमान द्वितीय अपील केवल उसकी अपील क्र. 144–ए/2014 की खारिजी को चुनौती देते हुए प्रस्तुत की – बाद में, अपीलार्थी द्वारा सि.प्र.सं. के आदेश 6 नियम 17 के अंतर्गत एक आवेदन, द्वितीय अपील में संशोधन चाहते हुए प्रस्तुत किया – अभिनिर्धारित – यदि संशोधन हेतु आवेदन को मंजूर किया गया तो इसका अर्थ यह होगा कि एक वर्ष छह माह की अवधि पश्चात् एवं परिसीमा अधिनियम के उपबंधों को विचार में लिए बिना अपीलार्थी को सिविल अपील क्र. 145–ए/2014 में पारित निर्णय और डिक्री को चुनौती देने की अनुमति दी गई है – संशोधन हेतु आवेदन अस्वीकार किया गया – आगे अभिनिर्धारित – अभिलेख दर्शाता है कि विचारण न्यायालय ने प्रस्तुत किये गये दस्तावेजों को विचार में लिया और साक्ष्य के मूल्यांकन के पश्चात् निष्कर्ष अभिलिखित किया कि दस्तावेज साबित नहीं करते कि भाड़ा विधि अनुसार जमा किया गया था – बेदखली की डिक्री उचित रूप से पारित की गई – अपील खारिज।

Cases referred:

2005 (2) MPLJ 262, 2011(1) MPLJ 675, 2011 (2) MPLJ 445, 2001 (8) SCC 561, (2016) 1 SCC 332, (2014) 4 SCC 516, (2008) 14 SCC 632, (2009) 10 SCC 84, (2005) 12 SCC 1.

Amit Verma, for the appellant.
Dinesh Kaushal, for the respondent.

ORDER

V.K. Shukla, J. :- This is an appeal filed by the appellant/defendant challenging judgment and decree dated 19.02.2015 passed by the 9th Additional District Judge, Bhopal in Regular Civil Appeal No.144-A/2014, parties being Madhav Gogia Vs. Smt. K. Fatima Khursheed arising out of the judgment and decree dated 29.04.2014 passed by the learned Court of 9th

Civil Judge Class-I, Bhopal in Regular Civil Suit No.96-A/2012.

2. Heard on admission as well as I.A.No.10780/2016 and also on I.A.No.16270/2016 fled (sic:filed) under Order 6 Rule 17 of the CPC.

3. The learned counsel for the respondent vehemently opposes the application for amendment filed under Order 6 Rule 17 of the CPC.

4. The learned counsel for the respondent submits that the suit for eviction was filed by the respondent plaintiff on the ground of Section 12(1)(a) and 12(1)(f) of M.P. Accomodation (sic:Accommodation) Control Act, 1961 (hereinafter referred as "Adhiniyam"). The trial Court vide judgment and decree dated 29.04.2014 decreed the suit on the ground of Section 12(1)(a) but did not find prove the *bona fide* need under Section 12(1)(f) of the Adhiniyam. Being aggrieved by the judgment and decree, both the appellant/defendant and the respondent/plaintiff filed two separate appeals. The appeal filed by the plaintiff was registered as Civil Appeal No.145-A/2014 *Smt. K.Fatima Khursheet Vs. Madhav Gogia* and the appeal filed by the present appellant/ defendant was registered as Civil Appeal No.144- A/2014 *Madhav Gogia Vs. K. Fatima Khursheed.* Both the appeals were decided by the common judgment and decree dated 19.02.2015 by which the appeal filed by the appellant/defendant, Civil Appeal No.144-A/2014 has been dismissed and the appeal filed by the respondent plaintiff No.145-A/2014 has been allowed. Thus the decree for eviction has been passed on the ground of Section 12(1) (a) and as well as on the ground under Section 12(1)(f) of Adhiniyam. An objection has been raised that the present appeal was filed only against the judgment and decree passed in Civil Appeal No.144-A/2014 by which the appeal filed by the present appellant/defendant was dismissed and there was no challenge to the judgment and decree passed in Civil Appeal No.145-A/ 2014 by which the appeal filed by the plaintiff for passing a decree under Section 12(1)(f) was allowed.

5. From the cause title and also from the relief claimed in the appeal, it is crystal clear that the present appeal was filed on 17.03.2015, challenging the impugned judgment and decree passed in Civil Appeal No.144-A/2014 in the case of *Madhav Gogia Vs. Smt. K. Fatima Khursheed.* When this objection was raised, appellant filed an application for amendment under Order 6 Rule 17 read with Section 151 of the CPC seeking permission to amend the appeal and to permit him to challenge judgment and decree passed in Regular Civil Appeal No.145-A/2014. This application was filed on 30.11.2016

seeking permission to challenge the judgment and decree dated 19.02.2015 passed in Regular Civil Appeal No.145-A/2014.

6. The learned counsel for the appellant relies on judgment passed by this Court in the case of *Bhagchand Vs. Administrator, Municipal Corporation, Indore* reported in 2005(2) M.P.L.J. 262. The learned counsel for the respondent opposes the said application on the ground that the amendment under Order 6 Rule 17 can be allowed only in the pleadings and not for challenging the judgment and decree in the present appeal by seeking amendment in the relief clause. He further submits that the proposed amendment would amount to permitting the appellant to challenge the judgment and decree passed on 19.02.2015 after inordinate delay as the appeal would be barred by limitation and provisions of Indian Limitation Act cannot be by-passed under the guise of an application for amendment under Order 6 Rule 17 of the CPC. He relies on the judgment passed in the case of *Neelu Bai Vs. Phagumal* 2011(1) M.P.L.J. 675 and also *Faqir Mohammad Vs. Gulabchand* 2011(2) M.P.L.J. 445.

7. First the impugned question arises for consideration whether by way of amendment, the appellant can be permitted to challenge judgment and decree passed in Miscellaneous Civil Appeal No.145-A/2014 after a period of more than one and half years. The cause title and the prayer in the present appeal make it clear that the appellant has intended to challenge only the judgment and decree passed in Civil Appeal No.144-A/2014. The relief claimed in the appeal is reproduced as under:

> It is, therefore, prayed that the Hon'ble court be pleased to call for records of the courts below and set-aside the judgment and decree dated 19.02.2015, passed by learned Court of IX Additional District Judge, Bhopal (M.P.), (Shri Rajkumar Choubey) in Regular Civil Appeal No.144-A/2014, parties being *Madhav Gogia Vs. Smt. K. Fatima Khursheed* arising out of the judgment and decree dated 29.04.2014, passed by learned Court of IX Civil Judge Class-I, Bhopal (Shri Sushil Kumar) in Regular Civil Suit No.96-A/2012, parties being *Smt. K. Fatima Khursheed Vs. Madhav Gogia,* may grant any other relief, which this Hon'ble Court deems fit under the circumstances of the case and cost throughout be awarded to appellant/defendant in the interest of Justice.

8. The judgment passed in the case of *Bhagchand* (supra) relied by the appellant is of no help to him because the said ratio would not apply in the present case. In the said case the suit was filed for declaration and mandatory injunction. Supreme Court declared that the plaintiff is entitled to obtain possession of the said shop from the defendant. Both the defendants preferred separate appeals against the judgment and decree, decreeing the suit of the plaintiff. The appellate Court by common judgment allowed both the appeals and dismissed the suit of the plaintiff. The preliminary objection was raised by the respondent that single appeal which was filed by the appellant was not maintainable for the simple reason that both the defendants preferred separate appeals and a common judgment was passed but there being two decrees the plaintiff ought to have filed two separate appeals assailing each decree passed by the appellate Court. In the said judgment this Court held that it was not necessary to file two separate appeals because there was one suit and both the decrees were in the same case and passed on the same judgment filing on one second appeal by plaintiff is enough and it was not necessary to him to file two separate appeals. The preliminary objection was rejected.

9. In the present case, it is not the question whether the common appeal is maintainable or not. The question which has cropped up for consideration is that whether under the provisions of Order 6 Rule 17 of the CPC, the appellant can be permitted to amend the present appeal by seeking amendment to challenge the judgment and decree dated 19.02.2015 passed in Miscellaneous Appeal No.145-A/2014. Though it was decided by the common judgment and decree by the lower appellate Court but the appellant did not challenge the judgment and decree passed in Regular Civil Appeal No.145-A/2014. Thus judgment relied by the appellant is misplaced and is of no help to him.

10. Before adverting further to the question of application for amendment, relevant provisions of Order 6 Rule 17 of the CPC is reproduced as under:

> **Order 6 Rule 17- Amendment of pleadings:** The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties;
>
> Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the

conclusion that in spite of the diligence, the party could not have raised the matter before the commencement of trial.

11. From bare perusal of the application filed by the appellant under Order 6 Rule 17, he seeks permission to amend to challenge the judgment and decree passed in Regular Civil Appeal No.145-A/2014 by which the appeal filed by the respondent plaintiff was allowed on the ground of Section 12(1)(f) also. If the application for amendment is allowed, that would mean that the appellant is permitted to challenge the impugned judgment and decree dated 19.02.2015 passed in Regular Civil Appeal No.145-A/2014 after period of one and half years and also by-passing the provisions of Limitation Act. The Apex Court in the case of *Siddalingamma and another Vs. Mamtha Shenoy* 2001 (8) SCC 561, has held that the amendment in the plaint would relate back to the date of institution of suit. The same has been followed by the Apex Court in a recent judgment in the case of *Basant Balu Patel* 2016 (4) M.P.L.J. SCC 22. The delay has always been prime consideration for deciding the application for amendment when the proposed amendment is barred by limitation. The doctrine of relation back has been further elaborated in the case of *L.C.Hanumanthappa Vs. H.B.ShivaKumar* (2016) 1 SCC 332, wherein it has been held that the doctrine of relation back i.e. relating back the amendment to the date when the suit was originally filed. In the case of *Voltas Ltd. Vs. Rolta India Ltd.*(2014) 4 SCC 516, the Apex Court held as under in Para 29 which is quoted as under:

> Mr. Nriman, learned Senior Counsel, has also contended that the counterclaims filed before the learned arbitrator is an elaboration of the amount stated in the notice and, in fact, it is an amendment of the claim of the respondent which deserved to be dealt with by the learned arbitrator. In this context, we may refer with profit to the ruling in *K.Raheja Constructions Ltd. V. Alliance Ministries* wherein the plaintiff had filed a suit for permanent injunction and sought an amendment for grant of relief of specific performance. The said prayer was rejected by the learned trial Court. A contention was canvassed that the appellant had not come forward with new plea and, in fact, there were material allegations in the plaint to sustain the amendment of the plaint. The Court observed that having allowed the period of seven years to elapse from the date of

> filing the suit, and the period of limitation being three years under Article 54 of the Schedule to the Limitation Act, 1963 any amendment on the grounds set out, would defeat the valuable right of limitation accruing to the respondent.

12. The said principle has been reiterated in *South Konkan Distilleries Vs. Prabhakar Gajanan Naik* (2008) 14 SCC 632 and *Van Vibhag Karamchari Griha Nirman Sahkari Sanstha Maryadit Vs. Ramesh Chander.*

13. In *Revajeetu Builders and Developers Vs. Narayanaswamy and Sons* (2009) 10 SCC 84 while laying down some basic principles for considering the amendment, the Court has stated that as a general rule that Court should decline amendment if a fresh suit on the amendment claims would be barred by limitation on the date of application.

14 The Apex Court in case of *Union of India Vs. Pramod Gupta* (2005) 12 SCC 1. hold as under:

> 135. Delay and laches on the part of the parties to the proceedings would also be a relevant factor for allowing or disallowing an application for amendment of the pleadings. The High Court neither assigned sufficient or cogent reasons nor applied its mind as regards the relevant factors while allowing the said application for amendment. It has also not been taken into consideration that the application for amendment of pleadings might not have been maintainable in view of the statutory interdict contained in sub-section (2) of Section 25 of the Act, if the same was applicable.

15. In view of the aforesaid discussions and enunciation of law as discussed above, the I.A.No.16270/2016 under Order 6 Rule 7 of the CPC for amendment is rejected.

16 The learned counsel for the appellant submits that findings regarding the non-payment of arrears of rent is perverse. He submits that Courts below have not taken into consideration in proper prospective exhibits D-1 to D-4. From perusal of the para 13 of the lower appellate Court, it is found that the Court has taken into consideration the said exhibits D-1 to D-4 and has recorded a finding after evaluation of evidence on the record that those documents do not prove that the rent was deposited in accordance with law.

17. I do not find any perversity in the impugned judgment and decree so far the decree relates to passing of the decree under Section 12(1)(a). The said view is fortified by the judgment of this Court passed in the case of *Neelu Bai Vs. Phagumal* (supra), wherein this Court has held that if the tenant has not deposited the arrears of rent within two months from the service of the notice of payment of rent has contemplated under Section 13(1) of the Adhiniyam, the decree for eviction can be passed under Section 12(1)(a). The said view is further supported by the judgment of this Court passed in the case of *Faqir Mohammad* (supra).

18. This Court is of the considered opinion that the judgment of the trial Court based upon consideration of facts and those findings of fact have been affirmed by the first appellate Court no substantial question of law is involved, the question of interference by this Court does not arise and the appeal is **dismissed.**

19. Learned counsel for the appellant submitted that he may be granted three months time to vacate the premises. The said pryer is not opposed by the learned counsel for the respondent.

20. Considering the said prayer which is not opposed by the learned counsel for the respondent, the appellant is granted three months' time from today to vacate the premises (shop) in question.

Appeal dismissed.

I.L.R. [2017] M.P., 1154
APPELLATE CIVIL
Before Mr. Justice Prakash Shrivastava
M.A. No. 1828/2016 (Indore) decided on 17 February, 2017

DEVIKULAM DEVELOPERS (INDIA) PVT. LTD. ...Appellant
Vs.
SANJEEV LUNKAD & ors. ...Respondents

(Alongwith M.A. Nos. 1829/2016, 1830/2016, 1831/2016, 1832/2016, 1833/2016, 1834/2016, 1835/2016 & 1836/2016 and W.P. Nos. 7074/2016, 7076/2016, 7078/2016, 7079/2016, 7082/2016, 7083/2016, 7090/2016, 7092/2016 & 7099/2016)

A. Civil Procedure Code (5 of 1908), Order 22 Rule 10,

Order 1 Rule 10 & Order 6 Rule 17 - Assignment of Rights - Impleadment of Party - Amendment **- Plaintiff Sanjeev Lunkad filed suit for specific performance of contract - Evidence was over and final hearing was done, matter was reserved for judgment - At this stage, appellant filed applications under Order 22 Rule 10 and Order 1 Rule 10 CPC for adding them as co-plaintiff on the ground that plaintiff had executed deed of assignments in their favour - Application under Order 6 Rule 17 was also filed - Trial Court rejected the applications - Challenge to - Held - Assignee is not a party to contract of sale sought to be enforced in the present suit - Presence of appellant/assignee is not necessary for full and effective disposal of the suit - Since original Plaintiff himself is the shareholder and promoter director of the appellant/assignee company, such assignment made by plaintiff at final stage of suit, lacks *bonafides* - Applications rightly rejected - Further held - Application under Order 6 Rule 17 was filed belatedly at the final stage of the suit i.e. after 5 years of filing of suit without satisfying the test of due diligence, hence rightly rejected by Trial Court - Misc. Appeals and Writ Petitions dismissed. (Paras 8, 13, 16 & 17)**

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 22 नियम 10, आदेश 1 नियम 10 व आदेश 6 नियम 17 – अधिकारों का समनुदेशन – पक्षकार बनाया जाना – संशोधन – वादी संजीव लुंकड़ ने संविदा के विनिर्दिष्ट पालन हेतु वाद प्रस्तुत किया – साक्ष्य समाप्त हो चुके थे एवं अंतिम सुनवाई हो चुकी थी, मामला निर्णय हेतु सुरक्षित रखा गया था – इस प्रक्रम पर, अपीलार्थी ने इस आधार पर कि वादी ने उनके पक्ष में समनुदेशनों के विलेख निष्पादित किये थे, सिविल प्रक्रिया संहिता के आदेश 22 नियम 10 एवं आदेश 1 नियम 10 के अंतर्गत उन्हें सह–वादी के रूप में जोड़े जाने हेतु आवेदन प्रस्तुत किया – आदेश 6 नियम 17 के अंतर्गत भी आवेदन प्रस्तुत किया गया था – विचारण न्यायालय ने आवेदनों को नामंजूर किया – को चुनौती – अभिनिर्धारित – समनुदेशिती, ऐसे विक्रय की संविदा का पक्षकार नहीं है जिसका वर्तमान वाद में प्रवर्तन चाहा गया है – वाद के पूर्ण एवं प्रभावी निपटारे हेतु अपीलार्थी/समनुदेशिती की उपस्थिति आवश्यक नहीं है – चूंकि वास्तविक वादी स्वयं अपीलार्थी/समनुदेशिती कंपनी का अंशधारी एवं संप्रवर्तक निदेशक है, वाद के अंतिम प्रक्रम पर वादी द्वारा किया गया इस प्रकार के समनुदेशन में सद्भाविकता की कमी है – आवेदन उचित रूप से नामंजूर किये गये – आगे अभिनिर्धारित – आदेश 6 नियम 17 के अंतर्गत आवेदन, वाद के अंतिम प्रक्रम पर विलंबित रूप से अर्थात् वाद प्रस्तुत होने के पांच वर्षों के पश्चात् सम्यक् तत्परता की कसौटी को संतुष्ट किये बिना प्रस्तुत किया गया था, अतः विचारण न्यायालय द्वारा उचित रूप से नामंजूर किया गया – विविध अपीलें एवं रिट याचिकाएँ खारिज।

B. Transfer of Property Act (4 of 1882), Section 54 - **Held - Agreement of sale itself does not create any interest or charge in the property. (Para 15)**

ख. सम्पत्ति अन्तरण अधिनियम (1882 का 4), धारा 54 – अभिनिर्धारित – विक्रय का करार संपत्ति पर स्वयं कोई हित या भार सृजित नहीं करता।

C. Words & Phrases - 'Proper Party' and 'Necessary Party' - Explained - **Necessary party is one in whose absence an effective decree cannot be passed by Court and proper party is one whose presence enables the Court to completely, effectively and properly adjudicate the issues involved in case, though he may not be a person in whose favour or against whom a decree is to be made. (Para 9)**

ग. शब्द एवं वाक्यांश – 'उचित पक्षकार' एवं 'आवश्यक पक्षकार' – स्पष्ट किया गया – आवश्यक पक्षकार वह है जिसकी अनुपस्थिति में न्यायालय द्वारा प्रभावी डिक्री पारित नहीं की जा सकती एवं उचित पक्षकार वह है जिसकी उपस्थिति न्यायालय को प्रकरण में अंतर्वलित विवाद्यकों को पूर्ण, प्रभावी तथा उचित रूप से न्यायनिर्णीत करने हेतु सक्षम बनाती है, यद्यपि वह वो व्यक्ति नहीं हो सकता है जिसके पक्ष में या जिसके विरूद्ध डिक्री बनाई जानी चाहिए।

Cases referred:

(2005) 6 SCC 733, (1995) 3 SCC 147, (2012) 8 SCC 384, 2016 (2) JLJ 179, 2001(1) JLJ 202, 2001(1) JLJ 184, 2004 (3) MPLJ 246, AIR 1954 SC 75, (2013) 5 SCC 397, AIR 2012 SC 1440.

Mangesh Bhachawat, for the appellant.
R.T. Thanewala, for the petitioner.
A.K. Sethi with *S.J. Polekar,* for the respondents.

ORDER

Prakash Shrivastava, J. :- This order will govern the disposal of MA. Nos.1828/2016, 1829/2016, 1830/2016, 1831/2016, 1832/2016, 1833/2016, 1834/2016, 1835/2016, 1836/2016 and WP No.7074/2016 7076/2016, 7078/2016, 7079/2016, 7082/2016, 7083/2016, 7090/2016, 7092/2016 and 7099/2016.

2. The above Miscellaneous Appeals under Order 43 Rule 1(l) of the CPC are at the instance of assignee and the Writ Petitions under Art.227 of the Constitution are by the assigner (plaintiff) challenging the order of the trial

court dated 20th September, 2016 whereby their applications under Order 22 Rule 10, Order 1 Rule 10 read with Sec.151 and Order 6 Rule 17 of the CPC have been rejected. Since all the above cases involve same issue in almost similar fact situation and order under challenge are also similar, therefore, they are being decided by this common order.

3. In brief, assignor (plaintiff) Sanjeev Lunkad had filed the suits for specific performance of contract and at the final stage he had filed an application under Order 22 Rule 10 of the CPC in those suits on the ground that in the rights under the agreement were assigned to Devikulam Developers (India) Pvt. Ltd., therefore, the said party be allowed to added as co-plaintiff No.2. The assignee M/s Devikulam Developers Pvt. Ltd. had also filed an applications for impleadment on the ground that the rights were assigned in the meanwhile by the plaintiff. On account of this development amendment in the plaint was sought by the appellants under Order 6 Rule 17 of the CPC. These applications have been rejected by the trial Court.

4. Shri R.T.Thanewala, learned counsel for the petitioners and Shri M. Bhachawat, learned counsel for the appellants have submitted that in the sale agreement executed between the parties there is no prohibition for assignment, on the contrary the agreement reveals that the assignment was permissible and Section 15(b) of the Specific Relief Act also permits the impleadment of assignee unless prohibited by agreement of the parties. He further submits that the assignee is claiming the same rights which the assigner has and no period of limitation has been prescribed for assignment, therefore, the order cannot be sustained.

5. Shri A.K. Sethi, learned counsel for the contesting respondents has opposed the prayer and supported the impugned orders. He submits that under Order 1 Rule 10 of the CPC addition of the parties is permitted, whereas under Order 22 Rule 10 of the CPC substitution can be allowed, hence under Order 22 Rule 10 of the CPC addition of the parties cannot be claimed.

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

7. Trial court by the impugned order has rejected the applications under Order 1 Rule 10 CPC as also Order 22 Rule 10 CPC taking the view that no right was created on the basis of agreement of sale in view of Section 54 of Transfer of Property Act, therefore, no question or assignment of any right arises in the matter. It has further been found that applications were filed belatedly ie. five years after filing of the suit and no reason were assigned for

executing assignment deed at this stage and that the applications filed by petitioner/appellants were not bona-fide.

8. The record reflects that the respondent No.1 plaintiff Sanjeev Lunkad has filed the suit for specific performance of the contract to enforce the sale agreements. It has been pointed out that in the suits meanwhile evidence of the parties is over and final arguments have been heard and the cases have been reserved for judgment. At the advance stage in the suits, applications u/O.22 Rule 10 and u/O.1 Rule 10 etc. of the CPC were filed by the petitioners/ appellants for adding the appellants as co-plaintiff on the ground that the plaintiff had executed the deed of assignments in favour of the appellants.

9. The appellant assignee may be required to be impleaded only if he is a necessary or proper party in the suit. A necessary party is one in whose absence an effective decree cannot be passed by the court and a proper party is one whose presence enables the court to completely, effectively and properly adjudicate upon all the matters and issues involved in the case, though, he may not be a person in whose favour or against whom a decree is to be made.

10. The supreme court in the matter of *Kasturi Vs. Iyyamperumal and others* reported in (2005) 6 SCC 733 while considering the issue relating to addition of parties in a suit for specific performance of the contract has held that such an issue is to be decided keeping in view the scope of the suit and in such a suit the guiding principle is that the presence of such a party should be necessary to adjudicate the controversy involved in the suit. While holding so it has been laid down that:-

> (i) there must be a right to some relief against such party in respect of the controversy involved in the proceedings; (ii) no effective decree can be passed in the absence of such party.

It has further been held as under:

> 11. As noted hereinearlier, two tests are required to be satisfied to determine the question who is a necessary party, let us now consider who is a proper party in a suit for specific performance of a contract for sale. For deciding the question who is a proper party in a suit for specific performance the guiding principle is that the presence of such a party is necessary to adjudicate the controversies involved in the suit

for specific performance of the contract for sale. Thus the question is to be decided keeping in mind the scope of the suit. The question that is to be decided in a suit for specific performance of the contract for sale is to the enforceability of the contract entered between the parties to the contract. If the person seeking addition is added in such a suit, the scope of the suit for specific performance would be enlarged and it would be practically converted into a suit for title. Therefore, for effective adjudication of the controversies involved in the suit, presence of such parties cannot be said to be necessary at all."

13. From the aforesaid discussion, it is pellucid that necessary parties are those persons in whose absence no decree can be passed by the court or that there must be a right to some relief against some party in respect of the controversy involved in the proceedings and proper parties are those whose presence before the court would be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit although no relief in the suit was claimed against such person."

11. In the matter of *Anil Kumar Singh Vs. Shivnath Mishra Alias Gadasa Guru* reported in (1995) 3 SCC 147, Supreme Court, in a case where the party concerned was not party to the contract but sought to be impleaded as party defendant on the ground that he had acquired subsequent interest as co-owner by virtue of decree obtained from the court, has held that he is not entitled to be joined as defendant and is not a necessary or proper party under Order 1 Rule 10 CPC and had acquired the status of co-owner not obtaining by assignment or devolution of interest, hence Order 22 Rule 10 CPC is also not attracted. In that case, it has been held as under:

"9. Sub-rule(2) of Rule 10 of order 1 provides that the Court may either upon or without an application of either party, add any party whose presence before the Court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit. Since the respondent is not a party to the agreement of sale, it cannot be said that without his presence the dispute as to

specific performance cannot be determined. Therefore, he is not a necessary party."

12. In the matter of *Vidur Impex and Traders Private Limited and others Vs. Tosh Apartments Private Limited and others* reported in (2012) 8 SCC 384 the Supreme court has laid down the following principles governing the disposal of application for impleadment:

> **"41.** Though there is apparent conflict in the observations made in some of the aforementioned judgments, the broad principles which should govern disposal of an application for impleadment are:
>
> **41.1** The court can, at any stage of the proceedings, either on an application made by the parties or otherwise, direct impleadment of any person as party, who ought to have been joined as plaintiff or defendant or whose presence before the court is necessary for effective and complete adjudication of the issues involved in the suit.
>
> **41.2.** A necessary party is the person who ought to be joined as party to the suit and in whose absence an effective decree cannot be passed by the court.
>
> **41.3.** A proper party is a person whose presence would enable the court to completely, effectively ad properly adjudicate upon all matters and issues, though he may not be a person in favour of or against whom a decree is to be made.
>
> **41.4.** If a person is not found to be a proper or necessary party, the court does not have the jurisdiction to order his impleadment against the wishes of the plaintiff.
>
> **41.5.** In a suit for specific performance, the court can order impleadment of a purchaser whose conduct is above board, and who files application for being joined as party within reasonable time of his acquiring knowledge about the pending litigation.
>
> **41.6.** However, if the applicant is guilty of contumacious conduct or is beneficiary of a clandestine transaction or a

transaction made by the owner of the suit property in violation of the restraint order passed by the court or the application is unduly delayed then the court will be fully justified in declining the prayer for impleadment."

13. By examining the present case, in the light of the aforesaid judgment it is noticed that presence of Devikulam Developers Pvt. Ltd., the assignee, is not necessary for full and effective disposal of the suits because the interest of assignee is adequately represented through the original plaintiff since the original plaintiff himself is the shareholder and promoter director of the assignee company. It is also noticed that in the suit there is already a prayer to get the sale deed executed in favour of plaintiff or its nominee. Moreover, the assignment has been made by the original plaintiff at the final stage of the suit and the assignment has been found to be lacking in bona-fides. In some of the agreement under consideration the assignment clause exists but that alone cannot be the sole consideration to direct the impleadment of assignee ignoring all other relevant consideration. Order 22 Rule 10 of CPC is an enabling provision and assignee is not required to be impleaded mechanically in every case of assignment, but court is required to consider all the relevant circumstances while considering such a prayer in a suit for specific performance. Keeping in view the above relevant consideration, no fault can be found in the final conclusion reached by the trial court in the impugned order.

14. Shri Mangesh Bhachawat learned counsel for appellant has relied upon the judgments of this court in the matter of *Shri Penta Buildcon Pvt. Ltd. Vs. Laltobai and others* reported in 2016(2) JLJ 179; *Urmila Patel (smt.) and another Vs. Smt.Laxmibai and others* reported in 2001 (1) JLJ 202; *Sitaram Dua Vs. Saraswati Devi Sainy and others* reported in 2001(1) JLJ 184; *Gouri Shankar Vs. Naveen Chand (dead) through LRs. Smt. Snehlata Jain and another* reported in 2004(3) MPLJ 246 but these are the cases where the suit property was sold by owner pending the suit and since the interest in the property was transferred hence impleadment of purchaser was held to be necessary, but the present case stands on different footing.

15. There is a distinction between assignment of right to purchase a property by a purchaser in an agreement to sale and sale of property by the owner to third party after executing the sale agreement. In later cases the purchaser may be required to be impleaded as party in a suit for specific performance of the contract to fully adjudicate upon all the issues involved in

the matter. Hence, in such cases as held by the supreme court in the matter of *Durga Prasad and another Vs. Deep Chand and others* reported in AIR 1954 SC 75 and *Thomson Press (India) Limited Vs. Nanak Builders and Investors Private Limited and others* reported in (2013) 5 SCC 397 the impleadment of the purchaser may be permitted. That may not be so in the former case where the assignee is not a party to the contract of sale sought to be enforced in a suit for specific performance. The above view is supported by judgment of the supreme court in the matter of *Raheja Universl Limited Vs. NRC Limited & Ors.* reported in AIR 2012 SC 1440 para 44 wherein while considering Sec.54 of the Transfer of Property Act it has been held that the sale agreement itself does not create any interest or charge in the property.

16. Keeping in view of the above factual and legal position, I am of the opinion that trial court has not committed any error in rejecting the applications u/O 22 Rule 10 and u/O.1 Rule 10 CPC.

17. So far as application under Order 6 Rule 17 of the CPC is concerned, it was filed belated at the final stage of the suit without satisfying the test of due diligence, hence it has rightly been rejected keeping in view the proviso to Order 6 Rule 17 of the CPC.

18. Hence, I am of the opinion that no interference in the impugned order under challenge in the Misc.Appeals and Writ Petitions is required. Hence, the Misc Appeals and Writ petitions are dismissed.

19. The original order be kept in M.A. No.1828/2016 and a copy whereof be placed in the record of connected Miscellaneous Appeals and Writ petitions.

Appeal dismissed.

I.L.R. [2017] M.P., 1162

APPELLATE CRIMINAL

Before Mr. Justice Shantanu Kemkar & Mr. Justice Rajendra Mahajan

Cr.A. No. 2325/2006 (Jabalpur) decided on 7 April, 2016

ARCHANA NAGAR (KU.) ...Appellant

Vs.

STATE OF M.P. ...Respondent

(Alongwith Cr. A. No. 1398/2007)

A. Prevention of Corruption Act (49 of 1988), Section 7 &

13(1)(d) r/w 13(2) - Conviction - Testimony of Complainant **- Demand of illegal gratification by a police officer - Held - There are material contradictions and omissions between complainant's version and the prosecution witnesses - Rojnamcha entries also did not support the prosecution case - Complainant himself has a criminal background and has been twicely prosecuted, once u/S 456, 294 & 506 IPC and secondly u/S 392 & 397 IPC and from the record it appears that complainant came from jail to record his evidence in the present case and in such circumstances it is unsafe to rely upon his evidence - Voices in the audio cassette were inaudible - Looking to the evidence on record there is a strong possibility of false implication of accused by the complainant - Trial Court committed gross error in holding that prosecution has proved the case beyond reasonable doubt - Demand of illegal gratification by the accused is not proved - Conviction and sentence unsustainable in law and is hereby set aside. (Paras 31, 36, 37 & 41)**

क. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 7 व 13(1)(डी) सहपठित 13(2) – दोषसिद्धि – परिवादी का परिसाक्ष्य – एक पुलिस अधिकारी द्वारा अवैध परितोषण की मांग – अभिनिर्धारित – परिवादी के कथन और अभियोजन साक्षियों के बीच तात्विक विरोधाभास एवं लोप है – रोजनामचा प्रविष्टियां भी अभियोजन प्रकरण का समर्थन नहीं करती – स्वयं परिवादी की आपराधिक पृष्ठभूमि है और उसे दो बार अभियोजित किया गया है, एक बार धारा 456, 294 व 506 भा. दं.सं. के अंतर्गत और दूसरी बार धारा 392 व 397 भा.दं.सं. के अंतर्गत तथा अभिलेख से यह प्रकट होता है कि वर्तमान प्रकरण में परिवादी अपना साक्ष्य अभिलिखित कराये जाने हेतु कारागृह से आया था एवं ऐसी परिस्थितियों में उसके साक्ष्य पर विश्वास करना असुरक्षित है – ऑडियो कैसेट में आवाजें अश्रव्य है – अभिलेख पर साक्ष्य को देखते हुए परिवादी द्वारा अभियुक्त की मिथ्या आलिप्ति की प्रबल संभावना है – विचारण न्यायालय ने यह धारणा करने में घोर त्रुटि कारित की कि अभियोजन ने प्रकरण को युक्तियुक्त संदेह से परे साबित किया है – अभियुक्त द्वारा अवैध परितोषण की मांग साबित नहीं होती – दोषसिद्धि एवं दण्डादेश, विधि में कायम रखे जाने योग्य नहीं एवं एतद् द्वारा अपास्त।

B. Criminal Procedure Code, 1973 (2 of 1974), Section 313 - Admission of Offence by Accused **- Any admission made by an accused in his examination u/S 313 Cr.P.C. cannot be made sole basis for conviction of the offence with which he is charged - Acquitted accused in criminal appeal no. 1398/2007 filed by the State, cannot be convicted u/S 12 of the Act upon the admission made by him in his examination u/S 313 Cr.P.C. even if the admissions are taken to be true at their**

face value without taking into account the background facts - Trial Court rightly acquitted the accused - Criminal Appeal filed by the State against acquittal fails and is dismissed. (Para 46)

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 313 – अभियुक्त द्वारा अपराध की स्वीकृति – अभियुक्त द्वारा दं.प्र.सं. की धारा 313 के अंतर्गत, उसके परीक्षण में की गई किसी स्वीकृति को, उस अपराध हेतु दोषसिद्धि का एकमात्र आधार नहीं बनाया जा सकता जो उस पर आरोपित है – राज्य द्वारा प्रस्तुत दाण्डिक अपील क्र. 1398/2007 में दोषमुक्त अभियुक्त को उसके द्वारा दं.प्र.सं. की धारा 313 के अंतर्गत उसके परीक्षण में उसके द्वारा की गई स्वीकृति पर उसे अधिनियम की धारा 12 के अंतर्गत दोषसिद्ध नहीं किया जा सकता, यदि पृष्ठभूमि के तथ्यों को विचार में लिए बिना, स्वीकृतियों को उनके प्रकट मूल्य पर सत्य माना जाए तब भी – विचारण न्यायालय ने उचित रूप से अभियुक्त को दोषमुक्त किया – दोषमुक्ति के विरूद्ध राज्य द्वारा प्रस्तुत दाण्डिक अपील असफल होती है और खारिज की गई।

C. Evidence Act (1 of 1872), Section 65(b) - Evidentiary Value - **Prosecution has not attached a certificate of authenticity and correctness of transcriptions of conversations recorded in cassettes in terms of Section 65(b) of the Evidence Act - When the cassettes were played at the time of complainant's evidence for identification of voice of accused, the voices were inaudible - Transcription has no evidentiary value to support complainant's statement. (Para 31)**

ग. साक्ष्य अधिनियम (1872 का 1), धारा 65(बी) – साक्षिक मूल्य – अभियोजन ने साक्ष्य अधिनियम की धारा 65(बी) के निबंधनों के अनुसार, कैसेट में रेकॉर्ड की गयी बातचीत के प्रतिलेखन की प्रमाणिकता एवं सत्यता का प्रमाणपत्र संलग्न नहीं किया – परिवादी के साक्ष्य के समय, अभियुक्त की आवाज की पहचान हेतु जब कैसेट चलायी गई, आवाजें अश्रव्य थी – परिवादी के कथन के समर्थन के लिए, प्रतिलेखन का कोई साक्षिक मूल्य नहीं है।

D. Criminal Trial - Rojnamcha Entries - Credibility - **Held - There is no evidence on record to hold even remotely that entries are tampered with and ante-dated - Correctness of entries is not even challenged by the prosecution - In normal course, rojnamcha entries are reliable as they records day to day working of a particular police station until they are disproved by cogent evidence - Rojnamcha entries are not supporting the complainant's version and proves falsehood of the complainant's statement. (Para 37)**

घ. दाण्डिक विचारण – रोजनामचा प्रविष्टियां – विश्वसनीयता –

अभिनिर्धारित – अभिलेख पर दूरस्थ रूप से भी यह धारणा करने हेतु कोई साक्ष्य नहीं कि प्रविष्टियों के साथ छेड़छाड़ की गई है एवं पूर्व दिनांकित है – प्रविष्टियों की सत्यता को अभियोजन द्वारा चुनौती भी नहीं दी गई है – सामान्य क्रम में रोजनामचा प्रविष्टियां विश्वसनीय है क्योंकि वे एक विशिष्ट पुलिस थाने के प्रति दिन के कार्यकलाप अभिलिखित करती है, जब तक कि उन्हें प्रबल साक्ष्य द्वारा नासाबित नहीं किया जाता – रोजनामचा प्रविष्टियां परिवादी के कथनों का समर्थन नहीं करती तथा परिवादी के कथन को झूठ साबित करती है।

Cases referred:

2009 (6) SCC 587 = 2009 AIR SCW 3994, AIR 2015 SC 3549, 2016 (3) SCC 108, 2014 (13) SCC 55, 2015 (3) SCC 123, 1985 (Supp) SCC 611, AIR 1954 SC 15, AIR 1968 SC 609, 1985 CRL.L.J. 1501 H.P., 1987 (Supp) SCC 266, AIR 2002 SC 3582, AIR 2010 SC 3570, AIR 2010 SC 2839.

S.C. Datt with *Chandra Datt* and *Siddharth Datt*, for the appellant in Cr.A. No. 2325/2006.

*Pankaj Dubey, f*or the appellant in Cr.A. No. 1398/2007 and for the respondent in Cr.A. No. 2325/2006.

S.K. Gangrade, for the respondent in Cr.A. No. 1398/2007.

JUDGMENT

The Judgment of the Court was delivered by : **RAJENDRA MAHAJAN, J. :-** Since both the aforesaid criminal appeals have arisen out of the common impugned judgment dated 20.11.2006 passed by the First Additional Sessions Judge and Special Judge under the Prevention of Corruption Act, 1988 (for short the 'Act') Hoshangabad in Special Case No.06 of 2004, titled State of M.P. Vs. Kumari Archana Nagar and another, they are being decided by this common judgment.

2. Vide the impugned judgment, appellant Archana stood convicted under Sections 7 and 13 (1) (d) r/w 13 (2) of the Act and sentenced thereunder to suffer on first count rigorous imprisonment (for short the R.I.) for a term of 2 years with a fine of Rs.5,000/- (rupees five thousands) in default of payment of fine to further undergo R.I. for 6 months and second count R.I. for a term of 2 years with a fine of Rs.5,000/- (rupees five thousands) in default of payment of fine to further undergo R.I. for 6 months. However, the substantive jail sentences in the aforesaid Sections are directed to run concurrently. Feeling aggrieved thereby, appellant Archana has filed the appeal under Section 374

(2) of the Cr.P.C.

3. Vide the impugned judgment, respondent Maluk Chand stood acquitted of the charge under Section 12 of the Act. Feeling aggrieved thereby, the appellant S.P.E. Lokayukt has filed an appeal under Section 378 (1) of the Cr.P.C.

4. For convenience, in this judgment hereinafter appellant Archana and respondent Maluk Chand shall be referred to as accused Archana and acquitted accused Maluk Chand respectively.

5. The prosecution case is given in brief below:

(5.1) On 05.09.2003, complainant Yaswant Singh @ Lallu Singh (PW-10) made a complaint Ex.P-18 to the Superintendent of Police, Special Police Establishment, Lokayukt, Bhopal, Division Bhopal (for short the S.P.) stating that he is a permanent resident of village Dolriya and he is a farmer-cum-businessman by occupation. He does business of selling hardware in village Dolriya. On 15.08.2003 at Dev Isthan known as Bhangi Baba situated near village Dolriya (for short the place), he was talking to Gomti Bai (PW-4), a woman of his acquittance. At that time, accused Archana, the S.H.O. of Police Station Dolriya with one Constable, Bahadur Singh (not examined) came there on a motorcycle. She asked him as to why he was standing with her. She took them to the Police Station Dolriya (for short the Police Station). Thereafter, she made him sit in her government residence, which is on the campus of the police station. There, she got a letter written by him forcing him to admit there in that he had sexual intercourse with Gomti Bai several times in the past and that he had also intercourse with her today. Later on, she had gone to the police station. She came back after some time therefrom and told him that Gomti Bai has made a written complaint against him that he had raped her. She told him that if he wanted to avoid prosecution on her report, he had to pay her

Rs.20,000/-, otherwise she would put him behind the bars. He told her that there was no such incident as she said. He did not want to get himself entangled in an embarrassing situation and wanted to get out of it. He, therefore, offered her Rs.1,000/- to 2,000/-. But she had not agreed upon the aforesaid money and demanded from him Rs.7,000/- within 2 to 4 days. She also took his mobile phone of Nokiya company model No. 2100 saying that she would return it after getting Rs.7,000/- from him. Two days later, Constable, Bahadur Singh came to his shop and told him that accused Archana had called him. On the same day, he met her at her government residence. She told him that he had not paid her money so far. He replied that he had no money to give her. However, he would arrange the money in a week's time. She told him in a threatening tone that she would send him in jail upon the report of Gomti Bai. On 03.09.2003, she met him at a Petrol Pump. There, she told him that she had not so far received the money. She again threatened to put him behind the bars in case of non-payment of the money. Thereupon, he told her that on 04.09.2003, he would give her Rs.1,000/-. On 04.09.2003 at about 08.00 p.m., he met her at the police station. He secretly tape recorded their conversation. In the course of which, she told him that if he could not give her Rs.7,000/-, then he had to pay at least Rs.5,000/- within 2 to 3 days. Thereupon, he gave her Rs.1,000/-. He asked her to return his mobile phone. She told him that she would return him the mobile phone after getting the remaining amount.

(5.2) The complainant has also stated in the complaint that he does not want to give her Rs.5,000/- as bribe. On the other hand, he wants to get her caught red handed accepting the bribe from him. He has brought with him a cassette in which he had recorded the conversation to prove the veracity of his complaint.

(5.3) Deputy Superintendent of Police, K.S. Sisodiya (PW-9), prepared the transcription Ex.P-2 of the tape recorded conversation in the presence of P.R. Banvanshi (not examined), Inspector Navratan Singh (PW-2) and the complainant. Thereafter, he removed the cassette from the tape recorder, marked ANB on both the side of the cassette, seized it with seizure memo Ex.P-3 and duly sealed it in their presence.

(5.4) On the basis of the complaint Ex.P-18 and the transcription Ex.P-2, on 05.09.2003, K.S. Sisodiya registered an FIR Ex.P-37 at Crime No.159/2003 against accused Archana for the offence punishable under Section 7 of the Act.

(5.5) On 04.09.2003, the S.P. wrote a letter Ex.P-38 to the Collector Bhopal requesting him to make available services of two Gazetted officers as panch witnesses on 05.09.2003 at about 10:00 a.m. and they be directed to remain present in his office. Thereupon, the Additional Collector on his behalf wrote a letter Ex.P-21 to him informing that Ajay Kumar Shrivastava (PW-7) and D.C. Mishra, both are the Assistant Commercial Tax Officers posted in Bhopal, are appointed as panch witnesses and they are directed to remain present at the time and place mentioned in Ex.P-38.

(5.6) On 05.09.2003, K.S. Sisodiya prepared the exhaustive pre-trap panchnama/pre-raid proceedings Ex.P-19 in the presence of Ajay Kumar Shrivastava. As per the panchnama and record of the case, other panch witness D.C. Mishra did not turn up. In the panchnama, K.S. Sisodiya has mentioned the averments of complaint Ex.P-18, the details of Rs.3000/- to be given as bribe to accused Archana, their denominations and serial numbers, the names of members of the trap party with their official designations, proceedings of treatment of currency notes with phenolphthalein powder, demonstration of its reaction with solution of sodium

carbonate, necessary instructions given to the complainant as to the mode of giving bribe money to accused Archana, how he would send signals to the trap party after giving her bribe money, recording of their conversation on micro tape-recorder and as to how the trap would be arranged and executed.

(5.7) After completing the formalities, the trap party left Bhopal at 06:30 p.m. for village Dolriya in two vehicles. After reaching village Dolriya, the complainant made a call through his mobile phone to accused Archana and asked her as to where she would receive the money from him as per the deal. Thereupon, she told him to come over to her government residence. The complainant told K.S. Sisodiya that he would normally visit accused Archana's government residence riding on his motorcycle and if he went there on a motorcycle, she would not suspect any foul play on his part. Thereafter, he brought his motorcycle from his residence. At about 10:00 p.m., he reached accused Archana's government residence. He told her that he has brought the money. She talked on the walkie-talkie and directed the person on other side to send a constable at her government residence. A short while later, acquitted accused Maluk Chand came. She asked him to take money from the complainant. Thereupon, he received the money from him. A short while later, he came out of her government residence and narrated the trap party of the happening. Thereafter, the trap party proceeded towards accused Archana's government residence. On the way, the trap party saw accused Archana coming towards the Police Station. K.S. Sisodiya introduced himself and the members of the trap party and also apprised her the purpose of their meeting. Thereupon, she told him that she would talk to them at the police station. On being questioned by K.S. Sisodiya, she denied having received any money from the complainant. Meanwhile,

acquitted accused Maluk Chand came to the police station. The complainant told K.S. Sisodiya that acquitted accused Maluk Chand had received the money from him at the behest of accused Archana. K.S. Sisodiya got the hands of accused Archana and acquitted accused Maluk Chand washed with the solution of sodium carbonate in the presence of the members of the trap party and the panch witness. There was no change in the colour of the solution when accused Archana washed her hands. But, when the acquitted accused Maluk Chand washed his hands, the solution turned pink. In this regard, he prepared panchnama Ex.P-22 and P-23, which are of accused Archana and acquitted accused Maluk Chand respectively. He also transferred the wash into clean glass bottles which were sealed and labelled.

(5.8) K.S. Sisodiya searched the office room of accused Archana at the police station in the presence of panch witness Ajay Kumar Shrivastava and others. In the course of search, he found three letters Ex.P-13, P-15 and P-20, which are *prima facie* appeared to have been written by Gomti Bai (PW-4), Kanchhedi (PW-5) and the complainant himself respectively, in the drawer of her official table. He seized the aforesaid letters vide seizure memo Ex.P-25. Thereafter, K.S. Sisodiya proceeded to government residence of accused Archana with panch witness Ajay Kumar Shrivastava and others. He found her residence locked. Accused Archana unlocked it. He searched her residence and found one mobile phone of Nokiya company model No.2100 and a charger lying on a table. He seized the said articles vide seizure memo Ex.P-26 and sealed them as per procedure. Later, he went to acquitted accused Maluk Chand's government residence with the panch witness and others. Acquitted accused Maluk Chand opened his residence. He brought the bribe money from the kitchen and handed over to K.S.

Sisodiya. He tallied the serial numbers of the seized currency notes and found matched with those noted in the pre-raid proceedings/pre-trap panchanama Ex.P-19. Thereafter, he seized the currency notes with seizure memo Ex.P-27 and sealed them.

(5.9) On 06.09.2003 at about 02:40 a.m., he took from the complainant the tape recorder back, got the cassette played and prepared the transcription Ex.D-1 in the presence of the panch witness and the complainant. Thereafter, he duly seized the cassette and sealed it. In this regard, he prepared seizure memo Ex.P-30. He arrested accused Archana and acquitted accused Maluk Chand vide arrest-memos Ex.P-32 and P-33 respectively and immediately released them on bail. At last, on 06.09.2003 at about 03:00 a.m., he prepared the post-trap panchnama/post-trap proceedings Ex.P-31.

(5.10) On 05.09.2003, P.R. Vanbanshi, the member of the trap party, prepared a spot-map Ex.P-28 of the residence of acquitted accused Maluk Chand, wherefrom the bribe money was recovered in the presence of the panch witness.

(5.11) On 14.06.2003, K.S. Sisodiya seized a receipt Ex.P-34 of the purchase of mobile phone from the possession of the complainant vide seizure memo Ex.P-40.

(5.12) On 18.09.2003, he had sent the seized articles for forensic examinations to FSL Sagar through the office of S.P. with covering letter Ex.P-16. The FSL gave a report Ex.P-39. On various dates, he also recorded case diary statements of the prosecution witnesses.

6. Upon completion of investigation, on 06.05.2004, K.S. Sisodiya filed a charge-sheet against accused Archana and acquitted accused Maluk Chand in the trial Court.

7. The learned trial Judge framed charges against accused Archana under Sections 7 and 13 (1) (d) r/w 13 (2) of the Act and acquitted accused Maluk Chand under Section 12 of the Act. They denied the charges levelled against them and claimed to be tried. Thereupon, they were put on trial.

8. Upon the closer of prosecution evidence, the learned trial Judge confronted accused Archana under the provisions of Section 313 of the Cr.P.C. with the circumstances appearing against her. She admitted the following circumstances and denied the remainder.

(8.1) At the time of alleged offence, she was posted as Station House Officer, Police Station Dolriya.

(8.2) She resided in a government residence which is on the campus of the police station.

(8.3) On 05.09.2015, she met the members of the trap party.

(8.4) Her government residence was searched by K.S. Sisodiya in the presence of panch witness and others, wherefrom one mobile phone with charger was seized vide seizure memo Ex.P-26, which belongs to the complainant.

(8.5) Prosecution-sanction Ex.P-1 is granted under Section 19 (1) (b) and (c) of the Act by the Law and Legislative Department Government of Madhya Pradesh for her prosecution in the case.

9. Accused Archana has taken the defence in her examination under Section 313 of the Cr.P.C. that at the relevant time of the alleged offence her personal mobile phone and the land line phone of the police station had gone out of order. Thereupon, Rajendra Singh Rajput (DW-2) brought the complainant's mobile phone with charger for her temporary use. At the relevant time, she registered a case against Rakesh Rajput under Sections 376, 341, 506 and 34 of the IPC. The complainant and one Chandan Singh Parihar brought to bear pressure upon her not to arrest him. She refused to do so. Thereupon, they hatched a criminal conspiracy against her and got her implicated in the case. She examined in her defence Lachchhiram Yadav (DW-1) and Rajendra Singh Rajput (DW-2).

10. Acquitted accused Maluk Chand was also examined by the learned trial Judge under the provisions of Section 313 of the Cr.P.C. In the course of which, he admitted following circumstances appearing against him and denied the rest.

(10.1) At the relevant time of offence, he was posted as Constable at the police station.

(10.2) He occupied a government residence which is on the campus of the police station.

(10.3) For his prosecution in the case, prosecution-sanction Ex.P-1 is granted under Section 19 (1) (b) and (c) of the Act by the Law and Legislative Department Government of Madhya Pradesh.

11. Acquitted accused Maluk Chand has taken the defence in his examination under Section 313 of the Cr.P.C. that at the material time, he was present at the police station. Havaldar, Gendalal asked him to go to accused Archana's government residence. Thereupon, he went there and saw accused Archana and the complainant. She hinted him to take money from the complainant. Thereupon, he took the money from the complainant without visualizing at the very moment that the money being bribe money. He neither examined any witness nor produced any document in his defence.

12. Upon the evaluation of evidence on record qua accused Archana, the learned trial Judge has recorded following findings.

(12.1) The testimony of the complainant is reliable and trustworthy with regard to the demand for illegal gratification by accused Archana from him.

(12.2) Seizure of letters Ex.P-13, Ex.P-15 and Ex.P-20, which are either purportedly written by prosecution witnesses namely, Gomti Bai, Kanchhedi and the complainant or bear their signatures respectively, from a drawer of the table of accused Archana's office room at the Police Station, further proves that she demanded illegal gratification from the complainant.

(12.3) All the material times, accused Archana was keeping the complainant's mobile phone with her. There is no

evidence on record that she had taken the complainant's mobile phone for time being use as her own mobile phone had gone out of order. On the contrary, it is proved that she took the complainant's mobile phone as security so that he would not back out of the so called deal struck between them.

(12.4) Admissions made by acquitted accused Maluk Chand in his examination under Section 313 of the Cr.P.C. that he had taken the money from the complainant at the instance of accused Archana at her government residence and the seizure of bribe money from his government residence, lend credence that she had demanded bribe from the complainant.

(12.5) Evidence of defence witnesses is not reliable being interested witnesses.

(12.6) Merely on the basis of Rojnamcha Entries Ex.D-7 and Ex.D-8, it cannot be held that on 15.08.2003 accused Archana had not met the complainant at the place.

The learned trial Judge having considered the aforesaid findings collectively has held that the prosecution has proved beyond a shadow of reasonable doubt that accused Archana had demanded illegal gratification from the complainant threatening him that she would book him in a rape case upon the report of Gomti Bai and thus she abused her official position. Upon the ultimate conclusion, he convicted her under Sections 7 and 13(1) (d) r/w 13(2) of the Act and sentenced thereunder as stated in para 2 of this judgment.

13. On the analysis of evidence on record qua acquitted accused Maluk Chand, the learned trial Judge has given the following findings.

(13.1) There is no evidence on record that acquitted accused Maluk Chand had remained associated with accused Archana in demanding the bribe from the complainant at any point of time.

(13.2) On the night of 05.09.2013, acquitted accused Maluk Chand had gone to the government residence of accused Archana upon the direction of the person who

received her directions on the wireless set. At that time, he had no knowledge for what purpose she had sent him for.

(13.3) Acquitted accused Maluk Chand innocently took the money from the complainant at the instance of accused Archana without knowing that the money is none other than bribe money.

On the basis of aforesaid cumulative findings, the learned trial Judge has acquitted accused Maluk Chand of the charge under Section 12 of the Act.

14. Shri S.C. Datt, learned senior counsel appearing on behalf of accused Archana, has assailed correctness and legality of the conviction recorded against her on the following grounds.

(14.1) The S.P. wrote a letter Ex.P-38 on 04.09.2003 to the District Magistrate, Bhopal requesting him to make available the services of two Gazetted Officers as panch witnesses, whereas the complainant lodged the written complaint Ex.P-18 with the S.P. on 05.09.2003 and whereupon, the FIR Ex.P-37 was registered against accused Archana on 05.09.2003. This means that the complainant had not made any complaint to the S.P. on 04.09.2003. This is a material discrepancy which impacts adversely upon the prosecution case.

(14.2) The learned trial Judge has held 'proved' the demand of illegal gratification by accused Archana on the sole oral evidence of the complainant. However, his testimony is wholly unreliable and untrustworthy on the following reasons. There are material contradictions and the omissions between complaint Ex.P-18 and the complainant's deposition. For instances, he has stated in his complaint that on 15.08.2003 itself accused Archana had taken his mobile phone as security against the bribe money, whereas he has stated in paras 1 and 2 of his evidence that she had taken his mobile phone

2 to 3 days later by calling him at the police station when he told her that he could not so far arrange the money. He has stated in the complaint that accused Archana and Constable Bahadur Singh took him and Gomti Bai to the police station from the place where she saw him in the company of Gomti Bai, whereas he has stated in para 18 of his evidence that Constable Bahadur Singh took him on his motorcycle to the police station and accused Archana sent Gomti Bai and Kanchhedi Lal (PW-5) in a route-bus to the police station. He has stated in the complaint that at the place only accused Archana and Constable Bahadur Singh were present, whereas he has stated in para 18 of his evidence that Constable Devi Singh had also come to the place. If the para 7 of his evidence is read vis-a-vis his case diary statement Ex.D-4, it is manifest that he has substantially and materially improved his Court version.

(14.3) The complainant has admitted in para 49 of his evidence that the police had registered cases against him under Sections 392, 397, 456, 294 and 506 of the IPC. In para 52, he has admitted that one Beena Thakur filed an application under Section 125 of the Cr.P.C. against him for grant of maintenance in which he had been arrested by the police. As per order-sheet dated 18.09.2006 of the trial Court and the admissions made by the complainant in para 26 of his evidence, it is evident that he came from jail to record his statement in the trial Court. This evidence demonstrates that the complainant has a criminal background.

(14.4) As per the prosecution, the transcriptions of cassettes Articles A1 and L are Ex.P-2 and Ex.D-1 respectively. It has not attached a certificate in terms of Section 65 (b) of the Indian Evidence Act for the authenticity of the transcriptions. Hence, they are inadmissible in evidence as per the provisions of Section 65 (a) of the aforesaid Act. Moreover, the voices recorded in

both the cassettes were inaudible when they were played at the time of recording of the evidence of the complainant in the trial Court. In this connection, the trial Court has recorded its observations below the paras 32 and 52 of the deposition of the complainant. Thus, there is no supporting evidence on record to the oral evidence given by the complainant.

(14.5) Gomti Bai (PW-4) is a star witness. She has not supported the complainant's statement that on 15.08.2003 accused Archana and constable Bahadur Singh brought her and the complainant to the police station. Mangal Singh (PW-3) is the brother of Gomti Bai. He has stated that Gomti Bai has never told him the police took her and the complainant together to the police station. Thus, the star witness does not support the complainant's version.

(14.6) The complainant has stated in para 18 of his statement that on 15.08.2003 about 03:23 p.m., accused Archana took her and Gomti Bai from the place to the police station. As per the Rojnamcha Entries No.D-7 and D-8 on 15.08.2003 at about 12:40 p.m., accused Archana left the police station with police force with an objective to arrest accused Rakesh Rajput and she returned to the police station at about 05:50 p.m. after his arrest. These entries prove that accused Archana did not meet the complainant on the aforesaid date and time. The learned trial Judge ought to have placed reliance upon these entries because the Rojnamcha entries are the written record of every day activities of policemen of a police station and there is a presumption behind the Rojnamcha entries that they are truly recorded by the police personnel concerned unless and until this presumption is rebutted by any cogent and reliable evidence. There is no such evidence on record to prove that these entries are false. Moreover, on 15.08.2003 accused Archana could not anticipate even in her dream that in future the complainant would make

complaint against her over the demand of bribe money from him and that time the said entries would come to handy in her defence. Hence, the learned trial Judge has erred in law by not placing reliance upon the said Rojnamcha entries.

(14.7) Regarding the recovery of the complaint's mobile phone from the possession of accused Archana, there is strong evidence on record that at the relevant time, her personal mobile phone fell into disrepair. She, therefore, asked Rajendra Singh Rajput (DW-2), who was attached to the police station at the relevant time, to arrange a mobile phone for her time-being use. Thereupon, he brought the complainant's mobile phone and gave her. He has also given evidence in this regard and he is subjected to gruelling cross-examination. But there is nothing adverse to disbelieve his evidence. Even the complainant has admitted in para 23 of his statement that when accused Archana took her mobile phone, she told him that her personal mobile phone is out of order and she has sent it for repairing. No sooner did she get back her mobile phone after the repairing, she would return his mobile phone. In view of the aforesaid evidence on record, the learned trial Judge has given an absolutely erroneous finding that accused Archana had taken the complainant's mobile phone to ensure that the complainant would give her the bribe as settled between them.

(14.8) Panch witness/shadow witness Ajay Kumar Shrivastava (PW-7) has stated in paras 10 and 12 that the police personnel of the trap party first searched accused Archana's government residence and thereafter acquitted accused Maluk Chand's residence. Later, the trap party came back to the police station and it searched the office room of accused Archana at the police station and recovered letters Ex.P-13, Ex.P-15 and Ex.P-20 from the drawer of the table. The same evidence has been given by Navratan Singh (PW-2) in

para 8 of his statement. However, K.S. Sisodiya (P.W-9) has just given diametrically opposite evidence in paras 16 and 17. Thus, there is a strong possibility that when accused Archana went to her government residence with the trap party and came back to the police station with the trap party in the interregnum someone would have implanted the aforesaid letters to implicate her because the prosecution witnesses namely, Gomti Bai and Kanchhedi Lal disowned completely the authorships of letters Ex.P-13 and Ex.P-15. Consequently, the learned trial Judge has grossly erred in holding that the aforesaid letters are recovered from the exclusive possession of accused Archana and that the letters prove the demand of bribe by accused Archana from the complainant.

(14.9) The complainant has admitted in paras 24, 28 and 29 of his statement the following facts that a case against Rakesh Rajput under Section 376 of the IPC was registered at the Police Station Dolriya at the relevant time, that he belongs to his community, that Chandan Singh Parihar is residence of village Dolriya and he is a leader of BJP party, and that the complaint Ex.P-18 is not in his handwriting on the other hand he got it written by his advocate friend Pradeep Jaibar. It is mentioned in the Rojnamcha entry Ex.D-8 that accused Archana arrested said Rakesh Rajput on 15.08.2003 in Crime No.72/2003 under Sections 341, 376, 506 and 34 of the IPC. It is the defence of accused Archana that the complainant and Chandan Singh Parihar exerted pressure upon her not to arrest said Rakesh Rajput. But she had not give in to their pressure. Thereupon, the complainant lodged the complaint Ex.P-18 making false allegations against her that she has demanded bribe from him. If the said defence of accused Archana is read vis-a-vis the above admissions made by the complainant, it is clear like day time that when accused Archana did not bow down to their

pressure, the complainant made the false complaint against her. Thus, it is proved on the prosecution evidence itself that it is a case of false implication of accused Archana.

(14.10) Acquitted accused Maluk Chand has admitted in his examination under Section 313 of the Cr.P.C. in reply to a question No.78 that he took money from the complainant upon the direction of accused Archana at her residence. However, accused Archana had not been confronted with the aforesaid admission by the learned trial Judge in accordance with law. Hence, the learned trial Judge cannot use the admission, as a peace of evidence against her for holding that acquitted accused Maluk Chand had taken the bribe money from the complainant at her instance.

(14.11) Ajay Kumar Shrivastava's (PW-8) evidence is totally silent on the point that he overheard the conversation held between accused Archana and the complainant at the time of handing over the bribe money and saw acquitted accused Maluk Chand taking the bribe money from the complainant. Hence, his evidence has no evidentiary value.

(14.12) K.S. Sisodiya (PW-9) has not only arranged the trap, but also investigated the case. Hence, the investigation carried out by him cannot be said to be fair and impartial, which makes a dent in the prosecution case. On the basis of aforesaid submissions, Shri S.C. Datt, learned senior counsel for accused Archana, has contended that the prosecution has utterly failed to prove that accused Archana has demanded illegal gratification from the complainant. On the other hand, if her defence is analyzed in right perspective, it is proved that the complainant has falsely implicated her in the case as she arrested aforesaid Rakesh Rajput against his wishes.

15. In reply, Shri Pankaj Dubey, learned counsel for SPE Lokayukt, has

submitted that with an objective to maintain the complete secrecy of the operation against accused Archana, the written report Ex.P-18 was taken from the complainant on 05.09.2013, though he approached the S.P. on 04.09.2003 itself. Hence, the discrepancy as claimed by the learned counsel for accused Archana is logically explainable. He further submitted that there are minor contradictions between the averments of the complaint Ex.P-18 and the evidence of the complainant, which do not impinge upon the reliability of his evidence. Moreover, there is supportive evidence on record such as seizure of letters Ex.P-13, Ex.P-15 and Ex.P-20 from the drawer of official table of accused Archana and the complainant's mobile phone from her government residence and the admission made by acquitted accused Maluk Chand in his examination under Section 313 of the Cr.P.C. These supportive evidence lends credence to the complainant's testimony. Hence, the learned trial Judge has rightly relied upon the complainant's testimony. He submitted that it is true that the voices of the cassettes Articles A1 and L were inaudible when they were played before the trial Court at the time of recording the complainant's statement. But this factor itself does not weaken the prosecution case because of the availability of overwhelming evidence on record. Upon these submissions, he supported the conviction and sentence entered by the trial Court against accused Archana.

16. Shri Pankaj Dubey has assailed the acquittal of accused Maluk Chand of the charge under Section 12 of the Act on the ground that he has admitted in his examination under Section 313 of the Cr.P.C. that he had received the tainted money from the complainant at the instance of accused Archana at her government residence and the same was recovered from his government residence. His aforesaid admission is sufficient to convict him under Section 12 of the Act. Thus, the learned trial Judge has grossly erred in acquitting him of the aforesaid charge.

17. Per contra, Shri S.K. Gangrade, learned counsel for acquitted accused Maluk Chand, has submitted that there is no iota of evidence on record that acquitted accused Maluk Chand had ever associated with accused Archana in demanding bribe from the complainant overtly or covertly. He further submitted that there is no evidence on record to the effect that prior to taking the tainted money from the complainant at the instance of accused Archana, he had even the slightested knowledge that accused Archana had demanded bribe from the complainant and the money he is receiving at her instance being bribe money. In fact, he took innocently the money from the complainant

upon the direction of accused Archana as he was then subordinate to her. Thus, the trial Court has rightly acquitted him of the charge under Section 12 of the Act.

18. We have considered the rival submissions meticulously and carefully and gone through the evidence on record and rulings submitted by the learned counsel in support of their contentions.

19. The prosecution has examined as many as ten witnesses. Pramod Kumar Shrivastava (PW-1) has proved the fact of granting prosecution-sanctions against accused Archana and acquitted accused Maluk Chand. Since they have not challenged the legality and the validity of prosecution-sanctions granted against them for their prosecution in the case, there is no need of analyzing his evidence. Constable Virendra Singh (PW-6) took the seized articles to FSL Sagar for forensic test. Hence, his evidence as a carrier is formal. Anil Kumar Mehani (PW-8) has deposed that on 14.06.2003 the complainant had purchased from his mobile shop a mobile phone of Nokia company with accessories vide bill Ex.P-14. Accused Archana has not challenged the seizure of complainant's mobile phone from her residence. On the other hand, she has given the explanation in her defence as to why she had been keeping complainant's mobile phone at the relevant time? Hence, his evidence is of formal nature. The evidence of remaining prosecution witnesses requires close scrutiny by us.

20. Before entering into the merits of the case, it will be seen how the prosecution has to prove a trap case under the Act and what are the requirements of recording conviction under Sections 7, 12 and 13 of the Act?

21. The Supreme Court in *A. Subair Vs. State of Kerala* (2009 (6) SCC 587= 2009 AIR SCW 3994) has ruled that the prosecution has to prove the charge under Sections 7 and 13 of the Act beyond reasonable doubt like any other criminal offence and that the accused should be considered to be innocent till it is established otherwise by proper proof of demand and acceptance of illegal gratification, which are vital ingredients necessary to be proved to record a conviction.

22. A Three Judge Bench of the Supreme Court in *P. Satyanarayana Murthy Vs. Dist. Inspector of Police & another* (AIR 2015 SC 3549) has held that the proof of demand of illegal gratification is the gravamen of the

offences under Ss. 7 and 13 (1) (d) (i) & (ii) and in the absence thereof, unmistakably the charges therefor, would fail. Mere acceptance of any amount allegedly by way of illegal gratification or recovery thereof, *dehors* the proof of demand, *ipso facto,* would thus not be sufficient to bring home the charge under these two Sections of the Act. As a corollary, failure of the prosecution to prove the demand for illegal gratification would be fatal and mere recovery of the amount from the person accused of the offence under Ss. 7 and 13 of the Act would not entail his conviction thereunder. The similar view is taken by the Supreme Court in a catena of judgments including the recent judgment delivered by it in case of *Krishan Chander Vs. State of Delhi* (2016 (3) SCC 108).

23. The Supreme Court in *B. Jayaraj Vs. State of A.P.* (2014 (13) SCC 55) has held that in the absence of any proof of demand for illegal gratification, the use of corrupt or illegal means or abuse of position as a public servant to obtain any valuable thing or pecuniary advantage cannot be held to be proved. The proof of demand, thus, has been held to be an indispensable essentiality and of permeating mandate for an offence under Sections 7 and 13 of the Act. Qua Section 20 of the Act, which permits a presumption as envisaged therein, it has been held that while it is extendable only to an offence under Section 7 and not to those under Sections 13 (1) (d) (i) and (ii) of the Act, it is contingent as well on the proof of acceptance of illegal gratification for doing or forbearing to do any official act. Such proof of acceptance of illegal gratification, it was emphasised, could follow only if there was proof of demand. Axiomatically, it was held that in the absence of proof of demand, such legal presumption under Section 20 of the Act would also not arise.

24. There is no gainsaying the fact that the tainted money is not recovered from the possession of accused Archana. In the circumstances, the first point falls for our consideration is whether accused Archana has demanded illegal gratification from the complainant?

25. Upon perusal of the examination-in-chief of complainant Yaswant Singh (P.W-10), we find that it is almost reiteration of averments made by him in his written complaint Ex.P-18. Hence, there is no need to reproduce the same.

26. The complainant has stated in his complaint Ex.P-18 that on 15.08.2003 accused Archana and Constable Bahadur Singh saw him talking with Gomti Bai (P.W-4) at the place. Therefrom, they brought him and Gomti

Bai to the police station, whereas he has stated in his evidence that a short while later, Constable Devi Singh also came to the place. Constable Bahadur Singh took him to the police station on his motorcycle. Constable Devi Singh took Gomti Bai and Kanchhedi Lal (PW-5) by a bus. Thus, he has improved his version in his court statement. The complainant in his complaint Ex.P-18 and examination-in-chief has stated that on 15.08.2003 itself accused Archana took his mobile phone as security against the bribe money to be given by him, whereas he has stated in paras 1 and 23 of his evidence that accused Archana took his mobile phone from him two or three days later from 15.08.2003 and while taking his mobile phone, she told him that his mobile phone was out of order and that she had sent the same for repairs. She also told him that she would return his mobile phone after her own mobile phone being repaired. In our considered opinion, these are material contradictions, which affects the truthfulness of the complainant's evidence.

27. The complainant has stated in his complaint Ex.P-18 and examination-in-chief that on 15.08.2003 accused Archana made him sit in his government residence for three long hours. At that time, the mobile phone was with him. He has admitted that during the said period he had not made a call through his mobile phone to any person of his acquittance intimating that accused Archana has forcibly made him sit in her government residence. Upon reading of his entire evidence, we could say that his above conduct is very abnormal because he is schemer and wily as per evidence available on record. Had he been detained by accused Archana in her government residence for such a long hours, he would have informed politically influential persons of his area about his wrongful detention by accused Archana. There is no other evidence on record in this regard. In the circumstances, we are of the view that his aforesaid evidence is not reliable.

28. The complainant has stated in his complaint Ex.P-18 as well as in his evidence that accused Archana got a letter Ex.P-20 written by him after putting pressure upon him to the effect that he had sexual intercourse several times with Gomti Bai in past and he had sexual intercourse today itself (i.e.15.08.2003) with her. The language of the letter is not such that he has admitted to have committed rape upon Gomti Bai. As per evidence of Gomti Bai (PW-4), she is a 33 years old woman and mother of two growing children. She has denied in her statement having written the letter Ex.P-13. Moreover, the language of the letter Ex.P-13 is not such that the complainant committed

rape upon her. At the most upon the tenor of letter, it can be said that it is a case of consensual sex for which the complainant could not be prosecuted in the court of law for the charge of rape. Hence, we strongly doubt that accused Archana would blackmail the complainant upon the letter Ex.P-13 threatening him that she would register a rape case against him upon the said letter in case of non-payment of bribe by him.

29. The complainant in para 20 of his evidence has admitted that he had not met Gomti Bai again the period between 15.08.2003 to 05.09.2003, the date of lodging the written report Ex.P-18 with the S.P. Hence, the complainant's evidence against accused Archana that she got a report forcibly written by Gomti Bai against him is false.

30. As per the admissions made by the complainant in paras 49 and 52 of his cross-examination, he had been twice prosecuted. First time, under Sections 456, 294 and 506 of the IPC and second time, under Sections 392 and 397 of the IPC. As per the order-sheet dated 18.09.2006 of the trial Court, it appears that the complainant came from jail to record his evidence in the case. The aforesaid evidence amply proves that the complainant is having criminal background. The complainant has admitted in para 24 of his evidence that he got the report Ex.P-18 drafted by his advocate friend Pradeep Jaibar and the same is in the latter's handwriting. He also admitted in para 28 that he knows Rakesh Rajput as he is of his caste and at the relevant time, the police Dolriya had registered a case against him under Section 376 of the IPC. Taking into account the aforesaid attendant circumstances and criminal background of the complainant, we feel unsafe to rely upon his evidence.

31. Ex.P-2 and Ex.D-1 are the transcriptions of conversations recorded in the cassettes being marked as Articles A1 and L respectively. The prosecution has not attached a certificate of the authenticity and correctness of the transcriptions in terms of Section 65 (b) of the Indian Evidence Act. The learned trial Judge below the paras 34 and 52 of the complainant's deposition has observed thus: When both the cassettes were played at the time of recording of the complainant's evidence for the identification of accused Archana's voice and that of him. Their voices were inaudible. In view of the aforesaid reasons, the transcriptions have no evidentiary value as per the law laid down by the Supreme Court in *Sanjaysinh Ramrao Chavan Vs. Dattatray Gulabrao Phalke and others* (2015 (3) SCC 123) and *Ram*

Singh and others Vs. Col. Ram Singh (1985 (supp) SCC 611). Thus, we cannot place reliance upon the transcriptions to support the complainant's statement.

32. In her statement Gomti Bai (PW-4) has denied having met the complainant on 15.08.2003 at the place and wherefrom both of them were brought by the police to the police station and accused Archana got the letter Ex.P-13 written by her or the letter bears her signature. On account of her aforesaid evidence, the prosecution has declared her hostile and subjected her to grueling cross-examination, but failed to elicit any material evidence in support of the complainant's statement. Thus, his statement is not corroborated by Gomti Bai on any material point.

33. Mangal Singh (PW-3), the brother of Gomti Bai, has denied in his statement that he left Gomti Bai on 15.08.2003 at the place, because of his motorcycle broke down there, that he had taken it for repairs and that in his absence the police took Gomti Bai to the police station. Since this witness corroborates the statement made by Gomti Bai, it is again proved that Gomti Bai and the complainant were not brought to the police station by accused Archana and other policemen.

34. Kanchhedi Lal (PW-5) has deposed that he has a hut on the road-side near the place. He further deposed that nobody resides in the hut and that he does not know the complainant and Gomti Bai. He also denied that letter Ex.P-15 either in his handwriting or bears his signature. Thus, his evidence has no significance to the prosecution.

35. K.S. Sisodiya (PW-9) has stated in his evidence that vide seizure memo Ex.P-25, he seized letters Ex.P-13, Ex.P-15 and Ex.P-20 from the drawer of accused Archana's official table at the police station. He has stated in para 16 and 17 that first he seized the letters thereafter he searched the government residences of accused Archana and acquitted accused Maluk Chand, whereas panch witness Ajay Kumar Shrivastava (PW-7) in para 10 and 12 and Inspector Navratan Singh (PW-2) in para 8 of their statements have given just opposite evidence to that of K.S. Sisodiya as they have stated that K.S. Sisodiya first searched government residences of accused Archana and acquitted accused Maluk Chand and thereafter he searched the office room of accused Archana at the police station. There is evidence on record that the complainant had gone to his residence before going to the government residence of accused

Archana in the night of 05.09.2003. As already stated that Gomti Bai and Kanchhedi Lal have denied that the letters Ex.P-13 and Ex.P-14 are in their handwritings or bear their signatures. Under the circumstances, there is a strong possibility that when the government residences of accused Archana and acquitted accused Maluk Chand were being searched for recovery of the tainted money, someone on the side of prosecution has kept the aforesaid letters secretly in the drawer to implicate accused Archana. In view of the aforestated evidence and circumstances, we are of the view that it is unsafe to draw a conclusion on the basis of the letters that accused Archana had demanded illegal gratification from the complainant.

36. The complainant has admitted in para 23 of his statement that when he had given his mobile phone to accused Archana, she told him that her mobile phone had been in disorder and that she had sent it for repairs. In the light of aforesaid admission of the complainant, the recovery of his mobile phone from the government residence of accused Archana is not sufficient evidence to hold that she demanded bribe from the complainant keeping it as security.

37. Ex.D-7 and Ex.D-8 are the Rojnamcha entries dated 15.08.2003 of the police station, which is the material date in the case. There is no evidence on record to hold even remotely that these entries are tampered with and anti-dated. Moreover, their correctness is not challenged by the prosecution in the cross-examination of Constable Lachhi Ram (DW-1), who brought relevant Rojnamcha record in the trial Court for proving the entries. In normal course, Rojnamcha entries are reliable as they are records of day to day working of a particular police station until they are disproved by cogent evidence. Hence, the aforesaid entries are reliable. It is mentioned therein without any overwriting that accused Archana with police force in government vehicle bearing registration No. MP-03-1700 left the police station at 12:40 p.m. for the arrest of accused Rakesh Rajput against whom a criminal case at crime No.72/2003 is registered under Sections 341, 376, 506 and 34 of the IPC and she brought him in the state of arrest at police station at 05:50 p.m. As per the evidence of the complainant appearing in para 18, accused Archana met him on 15.08.2003 at the place at about 03:00 p.m. to 03:30 p.m. It has been held by us that the aforesaid entries are reliable. Hence, these entries lay bare the falsehood of the aforesaid statement of the complainant. In para 28, the complainant has admitted that he knows Rakesh Rajput as he belongs to

his caste. It is the defence of accused Archana that the complainant and one Chandan Singh Parihar, who is a leader of BJP party of Dolriya village, pressurized her not to arrest him. She refused to give in their pressure. Her refusal made them revengeful. In retaliation, the complainant has implicated her taking the advantage of his mobile phone being with her at the relevant time. In the facts and circumstances of the case, her defence appears to be most probable. Therefore, we hold that there exists a strong possibility of false implication of accused Archana by the complainant.

38. Upon the perusal of entire evidence on record, we have found that learned trial Judge had not confronted and sought her explanation over the admissions made by acquitted accused Maluk Chand in his examination under Section 313 of the Cr.P.C. Hence, the learned trial Judge has committed a grave error in law by using his admissions in establishing that she has demanded illegal gratification from the complainant. In this regard, reference can also be made to the decisions rendered in *Zwinglee Ariel Vs. State of M.P.* (AIR 1954 SC 15), *Narayan Swami Vs. State of Maharashtra* (AIR 1968 SC 609) and *Raju Paul Vs. State of H.P.* (1985 CRL. L.J. 1501 H.P.).

39. It is expected of a panch witness of a trap case under the Act to overhear the conversation between the bribe-giver and bribe-taker and to see on the sly the bribe-giver giving bribe money to bribe-taker. We find that the evidence of panch witness Ajay Kumar Shrivastava is totally silent on the aforesaid material points. On the other hand, it is evident that he remained seated throughout the material time in the government vehicle. Hence, his evidence has no evidentiary value at all.

40. Navratan Singh (PW-2) and K.S. Sisodiya (PW-9) are police officers. There is no denying the fact that they are connected with the investigation of the case, therefore, it is but natural that they would support the prosecution case. Despite that there is nothing in their evidence by which the inference may be drawn that accused Archana had demanded bribe money from the complainant.

41. In the aforesaid close analysis of evidence on record, we hold that the learned trial Judge has committed gross errors in law and on facts that the prosecution has proved beyond reasonable doubt the factum of demand of illegal gratification by accused Archana from the complainant on the basis of his sole oral evidence. Hence, the recovery of tainted money from the possession of acquitted accused Maluk Chand has no evidentiary value insofar as it relates

to accused Archana's case. Consequently, his conviction and sentence recorded by the learned trial Judge are unsustainable in law and liable to be set aside.

42. Now, the next question falls for our determination is whether the acquitted accused Maluk Chand has abetted accused Archana in demanding illegal gratification from the complainant at any material point of time?

43. As we have already held that the prosecution has failed to prove that accused Archana has demanded illegal gratification as a motive or reward from the complainant. Therefore, upon the said finding itself the charge against acquitted accused Maluk Chand under Section 12 of the Act would fail squarely (see-*G.V. Nanjundiah Vs. State (Delhi Administration)* 1987 (Supp) SCC 266).

44. The complainant in para 53 of his statement has honestly admitted that acquitted accused Maluk Chand had never talked him as to the demand of bribe on behalf of accused Archana. Having gone through the entire evidence on record, we find that there is no evidence on the issue that any material point of time acquitted accused Maluk Chand had associated with accused Archana in demanding bribe from the complainant or abetting him to give her bribe. The complainant in para 7 has stated that on the fateful night in his presence accused Archana asked the receiver of her directions on wireless set to send a person without naming to her government residence from the police station. This means that she had not called by name to send acquitted accused Maluk Chand to her government residence. It has not come in the evidence of the complainant that he had a little conversation with accused Archana in the presence of acquitted accused Maluk Chand. Therefore, it cannot be held through their conversation he had come to know that accused Archana had demanded bribe from the complainant and the money which he was to receive from the complainant at her instance being bribe money. Hence, we are of the view that from the factual aspect of the case, it is proved that acquitted accused Maluk Chand had innocently taken money from the complainant upon the direction of accused Archana. Hence, the commission of offence under Section 12 of the Act by acquitted accused Maluk Chand is not proved.

45. In the examination under Section 313 of the Cr.P.C. acquitted accused Maluk Chand in reply to question No.78 has stated that at the relevant time he was present at the police station. Havaldar, Gendalal told him that accused

Archana had directed him to send someone to her government residence. Thereupon, he went there. He took money from the complainant at her instance without knowing that it being bribe money. Hence, taking money by acquitted accused Maluk Chand upon the direction of accused Archana without knowing the background facts cannot be equated with the abetment as per the provisions of Section 12 of the Act.

46. It is a settled proposition of law that any admission made by an accused in his examination under Section 313 of the Cr.P.C. cannot be made sole basis for conviction of the offence with which he is charged. In this regard, reference may be had to the decisions rendered in *Mohan Singh Vs.Prem Singh* (AIR 2002 SC 3582), *Sanatan Naskar & Another Vs. State of West Bengal* (AIR 2010 SC 3570) and *Ashok Kumar Vs. State of Haryana* (AIR 2010 SC 2839). In view of the aforesaid legal position, acquitted accused Maluk Chand cannot be convicted under Section 12 of the Act upon the admissions made by him in his examination under Section 313 of the Cr.P.C. even if the admissions are taken on their face value true without taking into account the background facts.

47. In view of the discussions supra, we hold that no offence under Section 12 of the Act is proved against acquitted accused Maluk Chand. Hence, the learned trial Judge has rightly acquitted him of the said charge.

48. In the result:-

(i). The criminal appeal No.2325 of 2006 preferred by accused Archana is allowed and her conviction and sentence as recorded by the trial Court under Sections 7 and 13 (1) (d) r/w 13 (2) of the Act are set aside and she is acquitted of the aforesaid charges. Her bail bonds stand discharged. The trial Court is directed to return her amount of fine if it is found deposited.

(ii). The criminal appeal No.1398 of 2007 filed by the SPE (Lokayukt) against the order of acquittal of acquitted accused Maluk Chand passed by the learned trial Judge under Section 12 of the Act is dismissed confirming the order of acquittal. His bail bonds stand cancelled.

49. A copy of this judgment be placed on the record of criminal appeal No.1398 of 2007.

Order accordingly.

I.L.R. [2017] M.P., 1191
APPELLATE CRIMINAL

Before Mr. Justice Alok Verma & Mr. Justice Ved Prakash Sharma
Cr.A. No. 1426/2013 (Indore) decided on 6 February, 2017

MOHAMMAD NAYAN CHOUDHARY ...Appellant
Vs.
STATE OF M.P. ...Respondent

A. Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Sections 8/20 (C), 42, 50 & 57 - Conviction and Quantum of Sentence - **Appellant was convicted for offence u/S 8/20 (C) of the Act of 1985 and was sentenced to 15 years RI alongwith a fine of Rs. 1,50,000 - Challenge to - Held - As the search/seizure was made at a public place (bus stand), therefore Section 42 is not attracted - Section 50 is applicable in case of 'search of a person' and does not extend to search of a vehicle or a container or a bag or premises - In the instant case, cannabis (ganja) was recovered from gunny bags carried by appellant and therefore no personal search was in question, thus it cannot be said that there was a non-compliance of Section 50 of the Act of 1985 - Sufficient corroboration of evidence regarding compliance of Section 57 of the Act - Substances recovered from possession of appellant was cannabis (ganja), has been duly proved by testimony of Doctor and he, being an expert, his conclusion carries weight and in absence of any material anomaly deserves to be accepted - Trial Court rightly convicted the appellant - Further held - Considering the quantity of contraband (24 kgs) recovered from possession of appellant, sentence imposed appears to be disproportionate and on higher side - Sentence reduced from 15 years RI to 10 years RI and fine amount reduced from Rs. 1,50,000 to 1,00,000 - Appeal partly allowed.**
(Paras 14, 15, 16 & 21)

क. स्वापक औषधि और मन:प्रभावी पदार्थ अधिनियम (1985 का 61), धाराएँ 8/20(सी), 42, 50 व 57 – दोषसिद्धि एवं दण्डादेश की मात्रा – अपीलार्थी को 1985 के अधिनियम की धारा 8/20(सी) के अंतर्गत अपराध हेतु दोषसिद्ध किया गया था और रू. 1,50,000 अर्थदण्ड के साथ 15 वर्षों के सश्रम कारावास से दण्डादिष्ट किया गया था – को चुनौती – अभिनिर्धारित – चूंकि तलाशी/जब्ती सार्वजनिक स्थान (बस स्टैंड) पर की गई थी, इसलिए धारा 42 आकर्षित नहीं होती – धारा 50 'व्यक्ति की तलाशी' के प्रकरण में प्रयोज्य है और किसी वाहन या

कन्टेनर या बैग अथवा परिसर की तलाशी पर लागू नहीं होती – वर्तमान प्रकरण में, अपीलार्थी द्वारा थामें हुए बोरियों से गांजा बरामद किया गया था और इसलिए व्यक्तिगत तलाशी का प्रश्न नहीं था, अतः यह नहीं कहा जा सकता कि 1985 के अधिनियम की धारा 50 का अननुपालन हुआ था – अधिनियम की धारा 57 के अनुपालन के संबंध में साक्ष्य की पर्याप्त अभिपुष्टि – अपीलार्थी के कब्जे से बरामद किया गया पदार्थ, गांजा था, यह चिकित्सक के परिसाक्ष्य द्वारा सम्यक् रूप से साबित किया गया है, और उसके विशेषज्ञ होने के नाते, उसका निष्कर्ष महत्व रखता है तथा किसी तात्विक विषमता की अनुपस्थिति में स्वीकार किये जाने योग्य है – विचारण न्यायालय ने अपीलार्थी को उचित रूप से दोषसिद्ध किया – आगे अभिनिर्धारित – अपीलार्थी के कब्जे से बरामद विनिषिद्ध पदार्थ की मात्रा (24 कि.ग्रा.) को विचार में लेते हुए, अधिरोपित दण्डादेश अननुपातिक एवं उच्च पक्ष का प्रतीत होता है – दण्डादेश 15 वर्ष के सश्रम कारावास से घटाकर 10 वर्ष सश्रम कारावास एवं अर्थदण्ड की राशि को रू. 1,50,000 के घटाकर 1,00,000 किया गया – अपील अंशतः मंजूर।

B. Practice - Criminal Trial - Testimony of Police Officer & Newspaper Publication - Evidentiary Value **- Held - Testimony of Police Officer cannot be thrown overboard only on the ground that he is a police officer - If testimony of police officer, on due appreciation is found to be trustworthy and free from material contradictions and anomalies, nothing prevents in law in recording conviction of the basis of such evidence - Publication of news item in newspaper carries no evidentiary value in absence of testimony of reporter, news correspondent or editor of the newspaper. (Para 10 & 19)**

ख. पद्धति – दाण्डिक विचारण – पुलिस अधिकारी एवं समाचार पत्र प्रकाशन का परिसाक्ष्य – साक्ष्यिक मूल्य – अभिनिर्धारित – पुलिस अधिकारी के परिसाक्ष्य को केवल इस आधार पर अस्वीकार नहीं किया जा सकता कि वह एक पुलिस अधिकारी है – यदि सम्यक् मूल्यांकन पर, पुलिस अधिकारी का साक्ष्य विश्वसनीय एवं तात्विक विरोधाभासों एवं असंगतियों से मुक्त पाया जाता है, तब उक्त साक्ष्य के आधार पर दोषसिद्धि अभिलिखित करने के लिए विधि में कोई प्रतिषेध नहीं – समाचार पत्र के समाचार दाता, संवाददाता या संपादक के परिसाक्ष्य की अनुपस्थिति में समाचार पत्र में प्रकाशित समाचार कोई साक्ष्यिक मूल्य नहीं रखता।

Cases referred:

AIR 1994 SC 1733, AIR 1969 SC 1201, 2000 (10) SCC 312, 2002 (8) SCC Page-7, (1999) 8 SCC 257, (2000) 10 SCC 380, (2003) 7 SCC 465, AIR 2001 SC 2420.

Santosh Khoware, for the appellant.
Milind Phadke, G.A. for the respondent-State.

ORDER

The Order of the Court was delivered by :
VED PRAKASH SHARMA, J. :- This appeal preferred through Superintendent Jail, Indore is directed against judgment and order dated 18.03.2011 rendered by Special Judge (Narcotics), Indore in Special Case No.15/07, whereby appellant Mohd. Nayan Choudhary has been found guilt under Section 8/20(C) of Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'the Act') and sentenced to undergo 15 years R.I. and to pay a fine of Rs.1,50,000/- and to undergo 3 years R.I., in default of payment of fine.

02. The prosecution story, in a nutshell, is that on 24.09.2007 Sub-Inspector R.K. Mishra (P.W.12), Police Station Sanyogitaganj, Indore, received a secret information that a person wearing a grey/cream coloured T-shirt and grey pant having long hairs is coming to sell cannabis ***('Ganja')*** to some person. The information was recorded in daily diary at serial No.2127 at 2.50 p.m. (copy Ex.P/25-C). As the concerned C.S.P. could not be contacted on wireless, therefore, due to paucity of time memo Ex.P/3 under Section 42 of 'the Act' was prepared recording reasons for non-procurement of search warrant; a copy of the same was forwarded through Constable Shantilal (P.W.5) to C.S.P. Thereafter, R.K. Mishra (P.W.12) along with police force and two panch witnesses namely, Nikki (P.W.7) and Pushkar Raj Verma (P.W.10) arranged a trap near Navlakha Busstand. After around 15-20 minutes a person of the given features having a sack and bag with him alighted from bus coming from Mhow Rao. On interrogation, he revealed his name as Mohd. Nayan Choudhary S/o Rahim Choudhary. After giving him a notice under Section 50 of 'the Act', apprising him that he can opt for being searched before Magistrate or gazetted officer, on his consent as per memo Ex.P/8, a search was carried out of the gunny bag and other bag held by him. Green leaves, buds and flowers like material was found inside the bag, which on physical examination, vide memo Ex.P/11 was identified as cannabis. On weighment respectively, 14 kilogram and 10 kilogram of cannabis was found in the gunny bag and the other bag. After mixing the same, two samples of 250 gram each (A/1, A/2) were drawn. The appellant was arrested. FIR (Ex.P/37) was recorded at Police Station Sanyogitaganj in this regard. The samples and the remaining material were separately sealed in presence of

panch witnesses. A report with regard to arrest and seizure under Section 57 of 'the Act' was sent to the then C.S.P. Sample article A/1 was sent for chemical examination to FSL, Rao, Indore. Dr. Vishnu Kolhe (P.W.13), vide report Ex.P/23, confirmed that the same is cannabis. After usual investigation, a charge-sheet was laid before the competent Court.

03. On being charged for offence under Section 8/20(C) of 'the Act' the appellant abjured guilt and claimed to be tried. The appellant pleaded that on 22.09.2007 around 1.45 a.m., two unknown persons had taken him to Police Station Sanyogitaganj, Indore to hold a magic show as he was earlier holding such shows in ***'Nakhrali Dhani'***, a restaurant. It was further submitted on behalf of the appellant that a sum of Rs.6 lacs was due against the owners of ***'Nakhrali Dhani'*** regarding which she (sic:he) has lodged a report with the Labour Court and that due to non-payment of the amount due he left ***'Nakhrali Dhani'*** and started holding his shows at 'Hotel Sayaji' regarding which Manager - Ramanand Yogi of ***'Nakhrali Dhani'*** had told him that if he refuses to organise magic show at ***'Nakhrali Dhani'*** he would not be allowed to hold magic shows at any other place. Thereafter, on 22.09.2007 around 1.45 p.m., two persons had taken him to Police Station Sanyogitaganj, Indore, and he was put in confinement regarding which a news was also published in the newspaper Sanja (Ex.D/1) and Lokswami (Ex.D/2) that he was apprehended by the officials of the Crime Branch and was handed over to Police Station – Sanyogitaganj, Indore.

04. The learned trial Court on appreciation of evidence, adduced before it, found the charge levelled against him proved beyond reasonable doubt, accordingly, he was convicted and sentenced as stated herein above.

05. The conviction and sentence has been challenged in this appeal on the ground that the appellant has been falsely implicated in this case because of his dispute with owners of ***''Nakhrali Dhani'*** regarding non-payment of dues. It is further contended on behalf of the appellant that mandatory provisions of Section 42, 50, 52 & 57 of 'the Act' were not complied with in letter and spirit, therefore, the impugned judgment deserves to be set aside.

06. Per contra, learned counsel for the respondent/State has submitted that plea with regard to false implication is not based on any plausible material and that 24 kilogram of cannabis lying in two bags held by the appellant, was recovered by the police after complying with relevant provisions of 'the Act', therefore, the conviction and sentence does not call for any interference.

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

08. In view of the submission made by respective counsel for the parties, it is required to be seen whether the conviction recorded against the appellant is in accordance with the law and evidence available on record and further whether the sentence is as per law?

09. The plea with regard to false implication because of some dispute over non-payment of money by owner or Manager of ***'Nakhrali Dhani'***, ex facie appears to be an after thought because the appellant in his examination u/s. 313 of 'the Code' has not taken any such specific stand, rather in response to question No.45, he has simply stated that he has been falsely implicated because of some quarrel ("Kaha Suni") with police officers in connection with holding of 'programme'. So also, no specific suggestion in this regard has been given to R.K. Mishra (PW-12) who had laid trap and allegedly conducted seizure of cannabis from possession of the appellant.

10. As regards publication of news item in newspaper dated 24.9.2007 (Ex.D/1 and Ex.D/2), the same carries no evidentiary value in absence of testimony of reporter, newscorrespondent or editor of the newspaper. (See the decisions of apex Court in the case of *Quamarul Islam V/s. S.K. Kanta* : AIR 1994 SC 1733; and *Samant N. Balkrishna V/s. Jeorge Fernandez* : AIR 1969 SC 1201).

11. In *Quamarul Islam* (supra), Hon'ble the apex Court dealing with the issue of proof and evidential value of newspaper report has held as under:-

> " Newspaper reports by themselves are not evidence of the contents thereof. Those reports are only hearsay evidence. These have to be proved and the manner of proving a newspaper report is well settled. Since, in this case, neither the reporter who heard the speech and sent the report was examined nor even his reports produced, the production of the newspaper by the Editor and publisher, PW4 by itself cannot amount to proving the contents of the newspaper reports. Newspaper, is at the best secondary evidence of its contents and is not admissible in evidence without proper proof of the contents under the Indian Evidence Act."

12. In *Samant N. Balkrishna* (supra), Hon'ble the apex Court has observed thus:

> ".....A news item without any further proof of what had actually happened through witnesses is of no value. It is at best a second-hand secondary evidence. It is well known that reporters collect information and pass it on to the editor who edits the news item and then publishes it. In this process the truth might get perverted or garbled. Such news items cannot be said to prove themselves although they may be taken into account with other evidence if the other evidence is forcible..."

13. Though it has been contended on behalf of the appellant that Section 42 of 'the Act' was not complied with while effecting search and seizure, however, we can take note of the fact that in the instant case the search/ seizure was made at a public place (Bus stand), therefore, the provisions of Section 42 of 'the Act' were not attracted because Section 43 of 'the Act' pertaining to search at a public place will apply in such situation. In this regard, we can usefully refer to the pronouncement of the apex Court in *Ganga Bahadur Thapa vs. State of Goa,* 2000(10)SCC 312 and *Narayanswami Ravishankar vs. Asst. Directorate of Revenue Intelligence,* 2002(8) SCC Page-7. Even otherwise, from the record, we find that not only the secret information was recorded by RK Mishra (P.W.12) but copy of the relevant memo (Ex.P/3) was also sent by him to CSP which is corroborated by Shri Ashok Kumar Singh (P.W.4), who at the relevant time was posted as Reader to C.S.P.

14. As regards compliance of section 50 of 'the Act', the same is applicable in case of 'search of a person' and not where the search is made of some bag or purse held by the accused. In this connection, the law laid down by the apex Court in the case of *Kalema Tunba vs. State of Maharashtra*, (1999) 8 SCC 257, can usefully be referred wherein the apex Court has categorically laid down that if a person is carrying a bag or some other article with him and contraband article is found in the bag, it cannot be said that the contraband was found from the person of the accused. This view was reiterated by the apex Court in a number of subsequent decisions including in *Kamla vs. State of M.P.*, (2000) 10 SCC 380. The pronouncement of apex Court in *Madanlal vs. State of Himachal Pradesh,* (2003) 7 SCC 465, can also be usefully referred in this connection, wherein it has been ordained that Section 50 of 'the Act' does not extent to search of a vehicle or a container or a bag or premises.

15. In the case at hand, the cannabis is said to be recovered from gunny bag and other bag, allegedly, held by the appellant. No personal search was, as a matter of fact, conducted, therefore, question of compliance of Section 50 of 'the Act' did not arise. Hence, it cannot be complained that there was non-compliance of Section 50 of 'the Act'.

16. Again, as regards compliance of Section 57 of 'the Act', which requires that information with regard to search, seizure and arrest should forthwith be sent to superior officer, the testimony of R.K. Mishra (PW-12) reveals that a detailed report with regard to search, seizure and arrest vide memo (Exh. P/38) was sent to CSP, Sanyogitaganj, Indore (Para 7 of his statement). His testimony on this point finds corroboration from Ashok Kumar Singh (PW-4), who in Para 2 has deposed that report (Ex. P/38) was received by him on 24.9.2007 itself, which was delivered to him by a Constable. His testimony on this point further stands corroborated by Shantilal (PW-5), who has deposed in para 2 that he delivered copy of the report to the Reader of CSP. Nothing could be brought out by the defence during cross-examination of these witnesses that they are concealing true facts or putting distorted facts before the Court regarding compliance of Section 57 of 'the Act'. Therefore, it cannot be said that Section 57 of 'the Act' was not complied with in letter and spirit.

17. Though it has been contended before this Court that the contraband was recovered from 4 bags and that only one sample was sent for forensic examination, however, from the testimony of R.K. Mishra (PW-12), who conducted the search and seizure as also from perusal of search memo (Ex. P/10), it transpires that the appellant was found in possession of two bags in which leaves, buds, flowers, etc. Suspected to be of cannabis were lying. He has further deposed that after seizure, the contents of two bags were mixed and thereafter two samples of 250 gms. each were drawn from the same and duly sealed along with remaining material at the spot. Despite detailed and searching cross-examination, nothing could be elicited to discredit this witness on the aforesaid point.

18. The testimony of Dr. Vishnu Kolhe (PW-13) is clear and specific on the point that next day i.e. on 27.9.2007, sealed bag (Ex. P/1) along with draft (Ex. P/36) concerning Crime 930/2007, Police Station Sanyogitaganj, Indore was received in the forensic laboratory which was duly sealed and that, the contents of the packet on examination as per Ex. P/23, were found to be cannabis. Being an expert, his testimony on this point carries weight and

in absence of any material anomaly deserves to be accepted. Therefore, the finding recorded by learned trial Court that the substance recovered from possession of appellant was cannabis is unassailable.

19. Lastly, it has been contended that the independent witnesses viz. Nikki (PW-7) and Pushkarraj (PW-10) have not supported the prosecution version. In this connection, it is noteworthy that they have been discredit by the prosecution by contradicting with their statements (respectively Exh. P/18 and P/20) recorded u/s. 161 of 'the Code'. Apart this, the law is well settled that the testimony of a police officer cannot be thrown overboard only on the ground that he is a police officer. If the testimony of a police officer, on due appreciation, is found to be trustworthy and free from material contradictions and anomalies, nothing prevents in law in recording conviction on the basis of such evidence. In *P.P. Beeran v. State of Kerala*, AIR 2001 SC 2420, a case under the NDPS Act, the apex Court has held as under:

> "Indeed all the 5 prosecution witnesses who have been examined in support of search and seizure were members of the raiding party. They are all police officials. There is, however, no rule of law that the evidence of police officials has to be discarded or that it suffers from some inherent infirmity. Prudence, however, requires that the evidence of the police officials, who are interested in the outcome of the result of the case, needs to be carefully scrutinized and independently appreciated. The police officials do not suffer from any disability to give evidence and the mere fact that they are police officials does not by itself give rise to any doubt about their credit worthiness."placed reliance on the uncorroborated testimony of the Police Inspector in the case of possession of drug of small quantity. "

20. In view of the aforesaid, on careful examination of evidence available on record and thoughtful consideration of the submissions made by learned counsel for rival parties, this Court does not find any reason to disagree with the finding of conviction recorded by learned trial Court.

21. Considering the quantity of contraband recovered from possession of appellant, the sentence of 15 years RI appears to be disproportionate and on higher side. In our considered opinion, a sentence of 10 years' RI and a fine of Rs.1,00,000/- (One Lakh) will be just and proper in the facts and

circumstances of the case.

22. Resultantly, the appeal is partly allowed and the conviction as recorded by the trial Court is maintained, however, the sentenced imposed against the appellant is reduced from 15 years' RI to 10 years' RI and the fine is reduced from Rs.1.5 Lakhs to Rs. 1 Lakh. The appellant, in default of payment of fine, will suffer further six months' RI.

Appeal Partly allowed.

I.L.R. [2017] M.P., 1199
APPELLATE CRIMINAL

Before Mr. Justice N.K. Gupta & Mr. Justice Anand Pathak

Cr.A. No. 70/1999 (Gwalior) decided on 10 February, 2017

BHAGWANLAL & ors. ...Appellants
Vs.
STATE OF M.P. ...Respondent

(Alongwith Cr.A. No. 85/1999, Cr.A. No. 102/1999 & Cr.A. No. 125/1999)

Penal Code (45 of 1860), Sections 302/149, 148 & 304 Part II - Conviction - Life Imprisonment - Appreciation of Evidence - Common Object **- Looking to the evidence on record, it is proved beyond doubt that appellant Harkishan, Toran and Kallu assaulted deceased whereby he succumbed to injuries on spot - During pendency of this appeal, Kallu expired, thus his appeal abates - Toran gave lathi blows without any common intention to kill, his conviction modified to one u/S 323 IPC - Appellant Harkishan gave the fatal blow to deceased causing contusion on tempo-parietal region, doctor found that bones below the wound were broken and brain was also found damaged, thus deceased died due to head injury - Harkishan was responsible for death of deceased - Further held - In the present case, quarrel started on spur of moment thus it cannot be concluded that Harkishan intended to kill the deceased especially when no deadly weapon was used by him and there is no allegation against him of repeated assault - Harkishan wrongly convicted u/S 302, conviction modified to one u/S 304 Part II IPC - Appeal partly allowed. (Paras 18, 19, 20 & 22)**

दण्ड संहिता (1860 का 45), धाराएँ 302/149, 148 व 304 भाग II –

दोषसिद्धि – आजीवन कारावास – साक्ष्य का मूल्यांकन – सामान्य उद्देश्य – अभिलेख पर उपस्थित साक्ष्य को देखते हुए, यह संदेह से परे साबित होता है कि अपीलार्थी हरकिशन, तोरन एवं कल्लू ने मृतक पर हमला किया जिससे चोटों के कारण घटनास्थल पर ही उसकी मृत्यु हो गई – इस अपील के लंबित रहने के दौरान, कल्लू की मृत्यु हो गई, इस प्रकार उसकी अपील का उपशमन हुआ – तोरन ने मारने के किसी सामान्य उद्देश्य के बिना लाठी से वार किये, उसकी दोषसिद्धि भारतीय दण्ड संहिता की धारा 323 में उपांतरित की गई – अपीलार्थी हरकिशन ने मृतक पर घातक वार किया जिसके कारण टेम्पो–पैराइटल भाग पर नीलगू चोट कारित हुई, चिकित्सक ने यह पाया कि घाव के नीचे की अस्थियाँ टूटी हुई थी तथा मस्तिष्क भी क्षतिग्रस्त पाया गया था, इस प्रकार सिर की चोट के कारण मृतक की मृत्यु हो गई – मृतक की मृत्यु के लिए हरकिशन उत्तरदायी था – आगे अभिनिर्धारित – वर्तमान प्रकरण में, क्षणिक आवेश पर झगड़े की शुरूआत हुई, इस प्रकार यह निष्कर्ष नहीं निकाला जा सकता कि हरकिशन का आशय मृतक की हत्या करने का था विशेष रूप से जब उसके द्वारा कोई घातक आयुध का उपयोग नहीं किया गया था एवं उसके विरूद्ध बार–बार हमला करने का कोई अभिकथन नहीं है – हरकिशन को धारा 302 के अंतर्गत गलत रूप से दोषसिद्ध किया गया, दोषसिद्धि भारतीय दण्ड संहिता की धारा 304 भाग II में उपांतरित की गई – अपील अंशतः मंजूर।

Cases referred:

AIR 1976 SC 912, AIR 1976 SC 2263, AIR 2002 SC 2980, (2014) 5 SCC 697, AIR 1995 SC 2452, AIR 1983 SC 172, AIR 1987 SC 1265, AIR 1994 SC 474, AIR 2004 SC 387.

T.C. Bansal and *Rajmani Bansal,* for the appellants in Cr.A. Nos. 70/1999, 85/1999 & 125/1999.

Atul Gupta, for the appellants in Cr.A. No. 102/1999.

Anjali Gyanani, P.P. for the State.

JUDGMENT

The Judgment of the Court was delivered by : **N.K. Gupta, J. :-** All the appeals are connected with the common judgment dated 30/01/1999, passed by Sessions Judge, Guna (MP) in Sessions Trial No.111/1994, hence, the present appeals are hereby disposed off, by the present common judgment.

(2) The appellants have challenged judgment dated 30-01-1999, being aggrieved with their conviction of offence under Section 302 or 302 r/w 149 and Section 148 of IPC, whereas each of them have been sentenced to life

imprisonment with fine of Rs.1,000/- and three years' rigorous imprisonment respectively.

(3) Prosecution's case, in short, is that on 23-03-1994 at about 09:00 pm complainant Shivcharan (PW-1) along-with deceased- Bhaiyalal etc. were present at their field at Village Sakatpur. They were sitting near the well. At about 09:00 pm, appellants- Kallu, Harkishan and Jai Singh went to that field having a bullock cart. They tried to pass the bullock cart through the field of deceased Bhaiyalal and, therefore, Bhaiyalal went near the bullock cart and prohibited them to pass the bullock cart through his field. The appellant-Kallu gave a blow of "ballam" causing injury near the ear of deceased- Bhaiyalal. On shouting of Bhaiyalal, witnesses Shivcharan (PW-1), Radheshyam (PW-5) and Jamunalal (PW-8) went to the spot. When they asked the appellants as to why Kallu assaulted deceased-Bhaiyalal, then they started quarrel. On shouting of Kallu, other appellants, namely, Haricharnan, Kamal Singh, Laxman Singh, Lal Singh, Mangilal, Bhagwanlal, Toran and Ramcharan came to the spot. Bhagwanlal and Mangilal exhorted their companions and they started causing assault upon Jamunalal, Bhaiyalal, Radheshyam and others. Appellants-Toran Singh and Harkishan gave blows of sticks on the deceased Bhaiyalal, whereas the remaining appellants caused injuries to other victims like Shivcharan, Radheshyam and Jamunalal etc. Due to such assaults done by the appellants, Bhaiyalal had expired at the spot. Shivcharan could not visit the police station due to fear of the appellants, whereas the appellants ran away with the help of a tractor of Man Singh.

(4) On intimation given to the police, SHO Yudhisthir Singh Tomar (PW-12) from Police Station Vijaypur, (District Guna) visited village Sakatpur and complainant- Shivcharan (PW1) had lodged a Dehati Nalishi (FIR) Ex.P-1. He prepared the memo of position of the dead body of deceased Bhaiyalal as Ex.P-3 and the body of deceased Bhaiyalal was sent for postmortem, whereas the injured persons were sent for their medico-legal examination. Dr. S.O. Bhola (PW9) performed postmortem on the body of deceased- Bhaiyalal and gave a report Ex.P-25. He found only three injuries to deceased Bhaiyalal, one was on his left *pinna*, second was on back of left ear, which was bone deep, and third was a contusion on tempo-parietal region. On opening the body, he found that below the third injury there was a fracture of tempo-parietal bone and due to head injury, deceased- Bhaiyalal had died. Dr. Sudhir Kumar Jain (PW-13) examined victims Lalliram, Shivcharan(PW-1) and

Jamunalal (PW-8) and gave reports Ex.P/47-A to Ex.P/49-A. He found as many as ten injuries to victim Jamunalal. Dr.R.K.Jain (PW-7) examined victim-Jamunalal radio-logically and gave a report Ex.P-14. A fracture of fifth metacarpal bone was found to the victim Jamunalal.

(5) The SHO- Yudhisthir Singh Tomar (PW-10) picked up the blood stained and ordinary soil from the spot and seizure memo Ex.P-5 was prepared. He also prepared spot map Ex.P-27. He arrested various appellants and recorded their memo under Section 27 of the Evidence Act. Various weapons like *ballam*, *luhangi* and *lathis* (sticks) were recovered from various appellants. The seized articles were sent for Forensic Science analysis. However, till the decision of the case, no report of Forensic Science Laboratory was produced. Ultimately, the charge-sheet was filed before JMFC Raghogarh, Guna, who committed the case to the Court of Session.

(6) The appellants took a plea that they were the victims in the case and in defence, Dr. Somprakash Arora (DW-1) was examined to prove the injuries found to appellants-Harkishan, Kalluram and Toran. The document (FIR) Ex.D/5 was also referred to SHO Yudhisthir Singh Tomar (PW-12).

(7) The trial Court after considering the evidence adduced by the parties, convicted and sentenced the appellants, as mentioned above.

(8) We have heard the learned counsel for the parties at length.

(9) It is submitted by learned counsel for the appellants that it was a case where the complainant party did not give any explanation to the injuries caused to the appellants, namely, Harkishan, Kalluram and Toran. Therefore, it was a case of right of private defence and no appellants could be convicted of any offence. In support of this contention, learned counsel for the appellants have referred the judgments passed by the Apex Court in the cases of *"Puran vs. State of Rajasthan"* [AIR 1976 SC 912], *"Lakshmi Singh and Others vs. State of Bihar"* [AIR 1976 SC 2263] and *"Subramani and Others vs. State of Tamil Nadu"* [AIR 2002 SC 2980] and submitted that right of private defence cannot be weighed in golden scales. Before considering the right of private defence, as claimed by the appellants, the evidence of present case advanced by both the parties should be considered and the right of private defence shall be considered on the point relating to intention or voluntariness.

(10) According to witnesses-Shivcharan (PW-1), Ganga Vishan (PW-4),

Radheshyam (PW-5) and Jamunalal (PW8), initially deceased Bhaiyalal, Jamunalal and Radheshyam were present to watch the crops standing in the field and they were sitting near the well. In the meantime, appellants- Kallu, Harkishan and Jai Singh came with a bullock cart and started crossing the same through the field of deceased- Bhaiyalal and, therefore, Bhaiyalal went to stop them. Then, appellant- Kallu gave a blow of ballam to deceased-Bhaiyalal causing injury on *pinna* of his ear. Appellants- Toran and Harkishan also assaulted deceased - Bhaiyalal with lathis causing injuries on back of his right ear and head. When the witnesses- Radheshyam and Jamunalal had tried to stop the appellants, Kallu shouted and remaining appellants came to the spot and started assaulting deceased Bhaiyalal, complainant- Shivcharan (PW-1) and injured witnesses Radheshyam (PW-5) and Jamunalal (PW-8). These witnesses have categorically mentioned that Bhaiyalal sustained the injuries caused by appellants Kallu, Toran and Harkishan. The witnesses have given a description of overt act done by remaining appellants towards the injured witnesses Shivcharan (PW-1), Radheshyam (PW-5), Jamunalal (PW-8) and Lalliram. Injuries of these witnesses were proved by Dr. Sudhir Kumar Jain (PW-13). He proved MLC reports Ex.P.47-A to Ex.P.49-A respectively for the victims- Lalliram, Shivcharan and Jamunalal. Out of these victims, Jamunalal sustained ten injuries. It is unfortunate that the trial Court did not frame any charge of offence under Section 325 or 323 of IPC against the appellants relating to victim Jamunalal and others and, therefore, there is no use of making a detailed description of injuries caused to injured witnesses Shivcharan, Jamunalal and Lalliram. For consideration of offence under Section 148 of IPC, it would be sufficient to mention that Shivcharan, Jamunalal and Lalliram have sustained injuries in the incident caused by various accused persons lik e Kamal Singh, Haricharan, Jai Singh, Harkishan, Laxman and Ramcharan etc.

(11) The testimony of these witnesses is duly corroborated by the *Dehati Nalishi* Ex.P-1 lodged with SHO, Yudhisthir Singh Tomar (PW-12). Also, the version of these witnesses is duly corroborated by postmortem, Ex.P-25, proved by Dr. S.O. Bhola (PW-9) and MLC reports of various injured persons proved by Dr. Sudhir Kumar Jain (PW-13). Learned counsel for the appellants have contended that the counter FIR, Ex.D/5, was registered at Police Station Vijaypur at about 11:30 pm in the night of 23-03-1994 itself, whereas complainant- Shivcharan (PW-1) had lodged the FIR i.e. *Dehati Nalishi* of

the incident on the next day at about 06:30 am. However, contention of learned counsel for the appellants cannot be accepted because the witnesses have stated that when Bhaiyalal was killed and he was lying at the spot, they had no courage to visit Police Station Vijaypur and to lodge the FIR, however, they sent the intimation and appellant- Kallu, who sustained injuries along with appellants Harkishan and Toran, could visit to the Police Station by a tractor because there was nobody to stop them and, therefore, they were examined medically in the night itself. On the other hand, number of assailants were more and out of them, remaining were not the injured persons, hence, the reason given by the witness- Shivcharan can be accepted that due to fear he could not visit the Police Station in the night and on giving the intimation when SHO Yudhisthir Singh Tomar (PW-12) came to the spot he lodged a Dehati Nalishi. Under these circumstances, proper explanation has been given by complainant Shivcharan for the delay in lodging the FIR and, therefore, it cannot be said that the FIR was lodged with unnecessary delay or it cannot be said that FIR can be discarded on the ground of delay. Similarly, various injured persons are found to have sustained injuries on particular part of body where they claimed to get the assaults done by the appellants and, therefore, their version was duly corroborated by medical evidence. Hence, testimony of the witnesses Shivcharan, Ganga Vishan, Radheshyam and Jamunalal is acceptable and it is proved beyond doubt that appellants- Kallu, Toran and Harkishan assaulted deceased- Bhiayalal causing injuries to him and consequently, he died, whereas it is proved beyond doubt that the appellants, namely, Kallu, Harkishan, Jai Singh, Laxman Singh, Ramcharan, Haricharan, Kamal Singh, Toran etc. have assaulted various injured witnesses like Jamunalal, Lalliram and Shivcharan.

(12) Before considering the object of unlawful assembly etc. it is to be considered as to who killed deceased Bhaiyalal. According to witnesses Shivcharan (PW-1), Radheshyam (PW-5) and Jamunalal (PW-8), only three appellants assaulted deceased Bhaiyalal and hence, except these three appellants, there was no special role of other appellants in causing death of deceased Bhaiyalal. When the incident took place in a spur of moment while appellant- Kallu was taking bullock cart through the field of Bhaiyalal, then the incident was not pre-planned and remaining appellants came on the call of appellant- Kallu. They did not assault the deceased Bhaiyalal and, therefore, their common intention or common object cannot be presumed with appellants Kallu, Toran and Harkishan. Hence, it cannot

be said that they participated in the crime of murder. So far as the constitution of unlawful assembly is concerned, the learned counsel for the appellants have submitted that since the appellants had a right of private defence, then no unlawful assembly was constituted. If such contention is examined on the evidence advanced by the parties, then it would be apparent that appellant Kallu had lodged the FIR, Ex.D-5, that at about 09:00 pm deceased- Bhaiyalal and witnesses- Shivcharan, Radheshyam and Jamunalal went to the field of Kallu and started making quarrel as to why they were transporting their bullock cart from the field of Bhaiyalal. The FIR indicates that from the side of victims only four persons were blamed that they participated in the crime, whereas in *Dehati Nalish* Ex.P-1, complainant Shivcharan (PW1) has mentioned the role of as many as eleven persons, who are the appellants and participated in the crime. In comparison with eleven persons it was not possible for Bhaiyalal and other three persons to visit the field of Kalluram to take a revenge or to teach a lesson.

(13) For the sake of argument if it is accepted that in quarrel Bhaiyalal had died, then there is no description in the FIR Ex.D-5 as to how the dead body of deceased- Bhaiyalal was taken by other witnesses from the field of Kallu. If Bhaiyalal was aggressor and he was killed in the quarrel, then either his dead body should have been found in the field of Kallu or there must be some allegations made by Kallu as to how the dead body of deceased- Bhaiyalal was taken from his field. It is apparent that Bhaiyalal, Jamunalal, Shivcharan and Radheshyam were only four persons on that field whereas the appellants were more than ten in number. If Bhaiyalal etc. were aggressors, then they would have visited the field of Kallu with the planning of having deadly weapons, whereas the appellants have *luhangi* and *ballam* etc. with them. Hence, due to death of deceased- Bhaiyalal, Shivcharan etc. could not go to lodge the FIR in time and Kalluram had an opportunity to lodge the FIR first. Still by looking to the facts and circumstances that the dead body of deceased- Bhaiyalal was found near his field where he objected appellant Kallu when he was transporting a bullock cart from the field, SHO Yudhisthir Singh Tomar (PW-12) had collected blood-stained soil and plain soil from the spot which indicates that he found the blood on the soil near the dead body of deceased- Bhaiyalal and if Bhaiyalal was aggressor and he would have visited the field of appellant- Kalluram, then blood stained soil could not be obtained by SHO Yudhisthir Singh Tomar (PW-12) at the place where the incident was caused according to complainant- Shivcharan in his *Dehati Nalishi* Ex.P-1. Under

these circumstances, it is apparent that the appellants specially Kallu and Harkishan were aggressors.

(14) Learned counsel for the appellants mainly have argued that no explanation has been given about the injuries of Kalluram, Toran and Harkishan, hence, they had the right to private defence. If such contention is considered in the light of evidence advanced by the parties, then it would be apparent that deceased Bhaiyalal had sustained fatal injuries and he fell down and died, then it was not possible for Bhaiyalal to assault Toran etc. It is stated by witness Jamunalal (PW-8) in para 9 that appellants Toran, Harkishan and Kallu had sustained injuries in the incident because when Bhaiyalal was killed, Radheshyam and Shivcharan reiterated and they had beaten appellants- Kallu and Toran, etc. In this connection, the independent witness Ganga Vishan (PW-4) has accepted in para 8 of the evidence, on a suggestion given by defence counsel, that firstly the appellants assaulted the complainant party and, thereafter, the complainant party had also used the *lathis* in defence. Hence, it cannot be said that the prosecution did not give any explanation to the injuries caused to appellants Toran, Kallu and Harkishan. It is not settled view of the Apex Court that explanation is to be given in the FIR itself. Explanation about the injuries of the accused persons can be given by the witness when he was asked. Under these circumstances, due to differences of factual position of the case, the judgments passed by the Apex Court in the cases of *Lakshmi Singh* (supra), *Subramani* (supra) and *Puran* (supra) cannot be applied in the present case relating to murder of deceased- Bhaiyalal. Hence, the plea of right of private defence was not available to the appellants when they started beating deceased Bhaiyalal when he went to the spot to stop appellant Kallu from transporting the bullock cart through his field.

(15) So far as the right of private defence in generally is considered, it is accepted by various witnesses that when the witnesses started beating appellants Kallu and Toran, then on shouting of Kallu, various accused persons came to the spot and they started beating Jamunalal, Shivcharan and Lalliram. When Kallu shouted and other appellants came to the spot, at that time the incident which took place with deceased- Bhaiyalal was over and injured witnesses Jamunalal and Shivcharan were beating appellants Kallu and Harkishan. It would be apparent that from the side of the appellants only three persons were injured who were present at the spot in the beginning. No one, who came after the call of appellant- Kallu was found injured. When the remaining

appellants who came to the spot after the incident of Bhaiyalal which was over, then it cannot be said that they were the members of unlawful assembly to kill the deceased Bhaiyalal. It appears that at the time of first quarrel only three persons were present out of the appellants, namely, Toran, Kallu and Harkishan. Hence, when remaining appellants neither assaulted deceased Bhaiyalal nor they were part of unlawful assembly at the time of incident, then the remaining appellants cannot be convicted of offence under Section 302 of IPC either directly or with the help of Section 149 of IPC.

(16) As discussed above, when the remaining appellants came to the spot they found the witnesses Jamunalal and Shivcharan were beating appellant Kallu, Toran and Harkishan. Therefore, the overt act of remaining appellants falls within the purview of right of private defence as those have tried to save Toran, Kallu and Harkishan. Hence, the remaining appellants shall get the advantage of right of private defence that when they arrived to the spot they tried to save Kallu Toran Singh and Harkishan. Hence, no crime has been committed by them. Since, the trial Court did not frame the charge of offence under Section 325 or 323 of IPC relating to victim Jamunalal or victim Shivcharan etc. there is no need to consider the right of private defence of remaining appellants. However, since they came to save appellants- Kallu and Harkishan, etc., therefore, it cannot be said that they were the part of unlawful assembly constituted for voluntarily causing hurt to Jamunalal etc.

(17) The incident started when three-four persons were present in the beginning who have tried to pass the bullock carts through the field of Bhaiyalal and thereafter, when Jamunalal and Shivcharan had assaulted the appellant-Toran etc. then other appellants came to the spot on call of appellant- Kallu. Therefore, in the light of evidence, the remaining appellants were entitled to get the advantage of right of private defence and it is not proved beyond doubt that they participated in an unlawful assembly to cause the death of deceased- Bhaiyalal or to cause injuries to any of the victims including Jamunalal, Shivcharan etc. Hence, the trial Court has committed an error in convicting the remaining appellants for offence under Section 148 or 302 with the help of Section 149 of IPC. It is not proved beyond doubt that at the time of death of deceased- Bhaiyalal, there were five accused persons who participated in the crime. Dr. S.O. Bhola (PW-9) who performed the postmortem on the body of deceased- Bhaiyalal found only three injuries on his body and, therefore, at the most, three persons had assaulted deceased-

Bhaiyalal and, therefore, it cannot be said that any unlawful assembly was constituted. Under these circumstances, it is not proved beyond doubt that any unlawful assembly was constituted at the spot. Hence, none of the appellants can be convicted under Section 148 of IPC or the lower offence of same nature i.e. Section 147 of IPC. The trial Court has committed an error in convicting the appellants for offence under Section 148 of IPC.

(18) As discussed above, it is proved beyond doubt that appellants- Kallu, Toran and Harkishan assaulted deceased Bhaiyalal and he succumbed to the injuries at the spot. Therefore, mainly now it is to be considered as to whether these three appellants can be convicted of offence under Section 302 of IPC. It is true that initially it was the appellant- Kallu who tried to transport the bullock cart from the field of Bhaiyalal and Bhaiyalal prohibited him to do so. Therefore, when the incident took place in a spur of moment, initially intention of Kalluram would be to teach a lesson to deceased- Bhaiyalal so that he should not obstruct him. It is not alleged that after giving a blow to deceased- Bhaiyalal on the pinna of deceased Bhaiyalal, appellant Kallu gave a second blow and, therefore, it cannot be presumed that he intended to kill deceased- Bhaiyalal. Since the incident was not pre- planned and the intention of appellant Kallu was not to kill deceased- Bhaiyalal then his common intention cannot be presumed with appellant Harkishan who gave the fatal blow to the deceased Bhaiyalal on his head. Dr.SO Bhola (PW9) in his post mortem report Ex.P-25, has cleared the position that there was a lacerated wound on left pinna of ear found to deceased- Bhaiyalal. Though appellant Kalluram had used a ballam but it was not so sharp so that it can be said that the injury was caused by sharp-cutting or stabbing weapon. Hence, at the most, intention of appellant- Kallu may be considered that he voluntarily wanted to cause hurt to deceased Bhaiyalal to remove his obstruction and hence, the appellant- Kallu shall liable only for offence under Section 323 of IPC.In absence of his common intention with co-accused Harkishan and in absence of any unlawful assembly he cannot be convicted of offence under Section 302 of IPC either directly or with the help of Section 34 or 149 of IPC, however, he can be convicted of offence under Section 323 of IPC under the same head of charge of Section 302 of IPC because it is an inferior offence of the same nature. On the same analogy, appellant- Toran can not be convicted of offence under Section 302 of IPC either directly or with the help of Section 34 or 149 of IPC. He is also liable for offence under Section 323 of IPC for his act i.e. he voluntarily caused hurt

to the deceased Bhaiyalal.

(19) It is clearly mentioned by the witnesses that it was the appellant-Harkishan who gave a fatal blow to deceased Bhaiyalal causing a contusion on tempo parietal region and Dr.S.O.Bhola (PW-9) found that bones below the wound were broken and brain was also found damaged. The deceased Bhaiyalal died due to head injury. Hence, appellant Harkishan was responsible to cause death of deceased Bhaiyalal. But as discussed above, none of the appellants wanted to kill deceased Bhaiyalal. A quarrel started in the spur of moment when Kallu was obstructed by deceased Bhaiyalal to pass his bullock cart from the field of Bhaiyalal and, therefore, it cannot be said that appellant Harkishan had intended to kill deceased Bhaiyalal. Also, it would be apparent that there is no allegation against appellant- Harkishan that he repeated the assault to deceased- Bhaiyalal and hence, when he gave only a single blow to deceased Bhaiyalal then it cannot be said that he intended to kill him. However, by that single blow deceased Bhaiyalal sustained fatal injury and he had died. Appellant- Harkishan should know that by giving such a forceful blow he would kill the deceased Bhaiyalal and, therefore, he should be liable for his overt act that he gave a powerful blow to deceased Bhaiyalal on his head causing his death though he did not intend to kill deceased- Bhaiyalal.

(20) In this connection, the judgment passed by the Apex Court in the case of *"Manjeet Singh vs. State of Himachal Pradesh"* [(2014) 5 SCC 697] may be referred in which in similar circumstances the crime of Section 304 of IPC was found to be constituted. In this connection, the judgment passed by the Apex court in the case of *"Sarup Singh vs. State of Haryana represented by the Home Secretary"* [AIR 1995 SC 2452] may also be referred in which the accused was convicted of offence under Section 304 (Part-II) of IPC in similarly circumstances. Hence, appellant- Harkishan was also wrongly convicted of offence under Section 302 of IPC. Instead of that offence he should have been convicted of offence under Section 304(Part- II) of IPC.

(21) So far as the sentence is concerned, out of appellants, appellant- Kallu had died during pendency of the appeal and, therefore, his appeal has already turned abated whereas appellant- Toran remained in custody during the trial for 76 days and, thereafter a few days during pendency of the appeal and, therefore, he has already undergone in the custody for a period of six months approximately. Hence, for offence under Section 323 of IPC, it would be

appropriate to impose the jail sentence upon appellant Toran for the period in which he remained in custody.

(22) Learned counsel for the appellants have placed reliance upon the judgments passed by the Apex Court in the case of *''State of Punjab vs. Mann Singh and another''* [AIR 1983 SC 172], *State of Orissa vs. Bhagaban Barik''* [AIR 1987 SC 1265], *'Madhusudan Satpathy vs. State of Orissa''*, [AIR 1994 SC 474] and *''Bagdi Ram vs. State of Madhya Pradesh''*[AIR 2004 SC 387]. In all such cases, the accused was sentenced for approximately eighteen months' to three years' for offence under Section 304(Part- II) of IPC whereas in the judgment passed by the Apex Court in the case of *Manjeet Singh*(supra), has recorded seven years' rigorous imprisonment for offence under Section 304 of IPC. By considering various judgments passed by the Apex Court, it is apparent that the incident took place in a spur of moment and no deadly weapon was used by appellant-Harkishan. Hence, it would be appropriate to sentence him for three years' rigorous imprisonment with fine of Rs.5,000/-.

(23) On the basis of aforesaid discussion, the appeals filed by appellant-Bhagwanlal, Lal Singh, Laxman Singh and Ramcharan, Kamal Singh, Haricharan, Mangilal and Jai Singh are hereby allowed. Therefore, their conviction and sentence of offence under Sections 148 and 302/149 of IPC are hereby set aside. They are acquitted from all the charges. The appeal filed by appellant- Toran is hereby partly allowed. His conviction and sentence of offence under Sections 148 and 302/149 of IPC are hereby set aside. He is acquitted from the aforesaid charges. However, under the head of charge of Section 302 of IPC, appellant Toran is convicted of offence under Section 323 of IPC and sentenced with jail sentence of the period for which he already remained in custody. The appeal filed by appellant-Harkishan is partly allowed. His conviction and sentence of offence under Sections 148 and 302/149 of IPC are hereby set aside. He is acquitted from the aforesaid charges. However, under head of charge of Section 302 of IPC he is convicted of offence under Section 304 (Part-II) of IPC and sentenced to three years' rigorous imprisonment with a fine of Rs.5,000/-. His custody period shall be adjusted towards his main jail sentence. If fine is not deposited within two months, then he shall undergo for one year's rigorous imprisonment in default.

(24) The presence of remaining appellants except appellant- Harkishan is no more required. Therefore, it is directed that their bail bonds shall stand

discharged whereas appellant- Harkishan is directed to surrender immediately before the trial Court so that he may be sent to the jail for execution of remaining jail sentence.

(25) A copy of the judgment be also sent to the trial Court along with its record for information and to prepare the super-session warrant relating to appellant- Harkishan and to get the sentence executed.

Order accordingly.

I.L.R. [2017] M.P., 1211
CIVIL REVISION
Before Mr. Justice Anurag Shrivastava
C.R. No. 100/2009 (Jabalpur) decided on 1 December, 2016

ROOPADEVI @ AGARABAI (SMT.) & ors. ...Applicants
Vs.
SMT. GEETA DEVI & ors. ...Non-applicants

A. Succession Act, Indian (39 of 1925), Section 372 and Hindu Marriage Act (25 of 1955), Sections 5, 11 & 16 - Second Marriage - Presumption of Marriage - Entitlement of Wife and Children - **Deceased was earlier married to Respondent and had three children - During the subsistence of first marriage, deceased started living with applicant and also had three children from the relationship - Due to such relationship, the first wife was divorced in the year 1977 - After death of husband, both the wives alongwith their children claiming succession certificate in their favour - Held - As the first wife was divorced, she is not entitled for any succession certificate - So far as the second wife is concerned, she started living with the deceased as husband and wife, during the subsistence of first marriage of deceased and therefore the said marriage was void as per section 11 and in contravention as per Section 5 of the Act of 1955 and therefore she is also not entitled for the succession certificate - Further held - Children of both the marriages are legitimate children, so they are entitled for succession certificate - Impugned order modified accordingly - Revision partly allowed. (Paras 17, 19, 22 & 23)**

क. उत्तराधिकार अधिनियम, भारतीय (1925 का 39), धारा 372 एवं हिन्दू विवाह अधिनियम (1955 का 25), धाराएँ 5, 11 व 16 – द्वितीय विवाह –

विवाह की उपधारणा – पत्नी एवं बच्चों की हकदारी – मृतक का पूर्व में प्रत्यर्थी से विवाह हुआ था और तीन संताने थी – प्रथम विवाह के अस्तित्व में रहते मृतक ने आवेदिका के साथ रहना आरंभ किया और इस संबंध से भी उसे तीन संताने हुई – उक्त संबंध के कारण प्रथम पत्नी से वर्ष 1977 में विवाह विच्छेद हुआ – पति की मृत्यु के पश्चात् दोनों पत्नियां अपनी संतानों के साथ अपने अपने पक्ष में उत्तराधिकार प्रमाणपत्र का दावा कर रही है – अभिनिर्धारित – चूंकि प्रथम पत्नी से विवाह विच्छेद हुआ था, वह किसी उत्तराधिकार प्रमाणपत्र की हकदार नहीं है – जहां तक द्वितीय पत्नी का संबंध है, उसने मृतक के साथ पति–पत्नी के रूप में रहना, मृतक के प्रथम विवाह के अस्तित्व में रहते आरंभ किया था और इसलिए धारा 11 के अनुसार उक्त विवाह शून्य था तथा अधिनियम, 1955 की धारा 5 के अनुसार उसके उल्लंघन में था और इसलिए वह भी उत्तराधिकार प्रमाणपत्र की हकदार नहीं – आगे अभिनिर्धारित – दोनों विवाहों की संताने धर्मज संतान हैं अतः वे उत्तराधिकार प्रमाणपत्र की हकदार हैं – आक्षेपित आदेश को तद्नुसार परिवर्तित किया गया – पुनरीक्षण अंशतः मंजूर।

B. ***Evidence Act (1 of 1872), Section 114 - Presumption of Marriage*** **- Applicant was living with the deceased as husband and wife since more than last 20 years - Deceased always treated her as his wife and also constructed a house for her - They have 3 children from such relationship - A presumption of marriage can be raised in favour of the applicant. (Para 15)**

ख. साक्ष्य अधिनियम (1872 का 1), धारा 114 – विवाह की उपधारणा – आवेदिका, मृतक के साथ पिछले 20 वर्षों से अधिक समय से पति–पत्नी के रूप में रह रही थी – मृतक ने सदैव पत्नी के रूप उसके साथ व्यवहार किया और उसके लिए मकान का भी निर्माण किया – उक्त संबंध से उन्हें 3 संताने हैं – आवेदिका के पक्ष में विवाह की उपधारणा की जा सकती है।

Cases referred:

2000 (3) MPLJ 361, AIR 1978 SC 1557, ILR (2008) MP 981 (SC), AIR 1988 SC 644.

Gyanendra Singh Baghel, for the applicant.

Bhanu Pratap Yadav and *Pramod Kumar Thakre*, for the non-applicants.

ORDER

ANURAG SHRIVASTAVA, J. :- This Civil Revision has been preferred against the order dated 07.02.2009 passed by First Additional District Judge,

Narsingpur in Miscellaneous Civil Appeal No.02/2006, by which, the order dated 15.10.2005 passed by Civil Judge Class-I, Narsinhpur in Succession Case No.05/1998 is partly set-aside and application filed under Section 372 of Indian Succession Act, 1925 by the applicants for grant of succession certificate in respect of money deposited in various banks and Excise Department by Late Shri Kishori Lal, was dismissed and it was ordered that the succession certificate for the same amount be issued in favour of the present respondents No.2, 3 and 4.

2. The facts giving rise to this revision in short is that, the applicant Smt. Roopadevi alias Agara Bai stating herself to be wife of Late Shri Kishori Lal filed an application under Section 372 of Indian Succession Act, 1925 (hereinafter referred to as "Act' for brevity), which was registered as Succession Case No.05/1998 at Narsinghpur praying that she had married with Kishori Lal Rai and out of their wedlock, three sons Bharat Kumar, Bishwas Bharat and Rajesh Bharat (applicants No.2 to 4) were born. Late Kishori Lal had deposited money in various banks as described in paragraph No.2 of the application and also, there is Rs.3 Lakhs kept in Excise Department of Narsingpur which is payable to Kishori Lal thus, the total amount is Rs.10,68,469.69, which is after the death of Kishori Lal payable to the applicants Smt. Roopa Devi and her sons applicants No.2 to 4, who are the only legal heirs of the deceased. Therefore, it is prayed that the Succession Certificate may be issued in favour of the applicants.

3. After the publication of the notice the respondents filed the objection. Respondents No.1 to 4 Smt.Geeta Devi and her sons have submitted that Smt. Geeta Devi is the legally wedded wife of Late Shri Kishori Lal and respondents No.2 to 4 are their children. Therefore, being legal heirs of the deceased they are entitled to get the Succession Certificate on their name to receive the property of the deceased Kishori Lal. It is further pleaded that Smt. Roopa Devi is not legally wedded wife of the deceased Kishori Lal. She lived with Kishori Lal without any marriage and their relationship was like a concubine. The children of Roopa Devi i.e applicants No.2 to 4 are illegitimate children having no right on the property of Kishori Lal. Therefore, the respondents No.1 to 4 prayed for grant of Succession Certificate in their favour by filing a separate petition under Section 372 of the Act.

4. The other objectors namely Smt. Sarita Rai and Vipin Kumar Rai

(respondents No.6 and 7) denied the claim of the applicants and respondents No.1 to 4 on the ground that the applicants have no right on the properties of Late Kishori Lal as the applicant No.1 is not married wife of Late Kishori Lal and other applicants are their illegitimate sons. As far as, the respondents No.1 to 4 concerned, it is stated that respondent No.1 Smt. Roopa Devi was divorced by Late Kishori Lal and there was a decree of divorce passed by the Court under Section 13 of Hindu Marriage Act, in the year 1977. After divorce she has no right over the properties of Kishori Lal. Respondents No.2 to 4 had been given their share in the properties of Kishori Lal, therefore, they have no right on the disputed property. It is further avered that Smt. Sarita Rai is wife of younger brother of Late Kishori Lal and Vipin Rai is her son, therefore, they are entitled to get the property.

5. The objector namely Babul Lal Rai and Girja Bai (respondents No.5 and 8) also raised the similar objection as respondents No.6 and 7 against the applicants and respondents No.1 to 4 and thereafter respondent No.5 Babul Lal Rai claimed the property on the basis of the will deed dated 18.02.1990 said to be executed by Late Kishori Lal in favour of Babul Lal and Chhatar Sing. Respondent No.8 Girja Bai claimed the property as she is the sister and legal heir of Late Kishori Lal and prayed for grant of Succession Certificate on her name.

6. Learned trial Court partly allowed the application of the applicant and granted Succession Certificate in favour of the applicant and respondents No.2, 3 and 4 treating them as wife and children of the deceased Late Kishori Lal who are having equal 1/7, 1/7 share in the disputed property. The claim of the respondent No.1 and 5 to 8 and other objector was rejected on the ground that after divorce respondent No.1 has no right on the property of Late Kishori Lal. Trial Court also found that 'Will' dated 18.02.1990 not proved and Chhatar Singh, Babul Lal have no right on Kishori Lal's properties.

7. Being assailing the order of trial Court the respondents No.1 to 4 have preferred appeal before First Additional District Judge, Narsinghpur on the ground that the applicant No.1 is not a legally wedded wife of the deceased and the applicants No.2 to 4 are illegitimate sons, therefore, they have no right over the disputed property of Late Kishori Lal. The trial Court has wrongly found them as legal heirs of the deceased and granted Succession Certificate in their favour. It is further contended that, after divorce, respondent No.1

has reunited with Late Kishori Lal and started living as husband and wife with him. Therefore, being wife she is entitled for getting Succession Certificate. Learned Appellate Court partly allowed the appeal and the order of grant of Succession Certificate in favour of the applicants No.1 to 4 was set-aside on the ground that the applicant No.1 is not a legally wedded wife of the deceased and the applicants No.2 to 4 are illegitimate sons, therefore, they are not entitled to claim any right on the disputed property. The claim of respondent No.1 Smt. Geeta Devi was rejected on the ground that after divorce she has no right on the property of the deceased.

8. In this Civil Revision, it is contended by the learned counsel for the applicants that the applicant No.1 Smt. Roopa Devi was married with Late Kishori Lal and out of their wedlock, applicants No.2 to 4 have born. Late Kishori Lal was living with the applicants as husband and wife for long time. There is ample evidence to show that there is continuous co-habitation between the applicant No.1 and deceased Kishori Lal as husband and wife, therefore, it can be presumed that they are married couple. Learned Appellate Court has committed illegality by not drawing the presumption of marriage in favour of the applicant No.1 and on wrong appreciation of evidence rejected the claim of the applicants. Therefore, the revision may be allowed and the order of trial Court be upheld.

9. Learned counsel for the respondents submitted that the applicant No.1 could not prove the factum of marriage with Late Kishori Lal. Her status is as of concubine. The children of the applicant No.1 are not legitimate children, therefore, the learned appellate Court has rightly held that the applicants have no right on the property of deceased Kishori Lal. Learned counsel relied upon the decision rendered in the case of *Ram Kali and another Vs. Mahila Shyamwati and others,* reported in 2000 (3) MPLJ 361.

10. Having heard learned counsel for the parties, I am of the view that this revision deserves to be allowed in part.

11. On bare perusal of findings of the learned two Courts below, it is gathered that applicants No.2 to 4 and respondents No. 2, 3 and 4 are the children of Late Kishorilal Rai. The main question for adjudication in this revision arises as:-

Whether the applicant No.1 Smt. Roopa Devi @ Agra Bai is married wife of Late Kishorilal Rai?

12. The trial Court has given the findings that Smt. Roopa Devi is married wife of Late Kishorilal Rai, whereas learned appellate Court has recorded reversed finding and concluded that Smt. Roopa Devi is not married wife of Late Kishorilal Rai, but she is a "concubine". On the basis of this finding learned appellate Court declined to issue succession certificate in favour of applicants.

13. Regarding marriage of Smt. Roopa Devi with Late Kishorilal Rai,Smt. Roopa Devi (PW-1) has stated that deceased Kishorilal Rai solemnized second marriage with Smt. Roopa Devi and after this marriage, she was living with Late Kishorilal Rai as husband and wife in Village-Barmankala. In para 19 of the cross-examination, she has admitted the suggestions given by respondents that in Barmankala, Late Kishorilal Rai has constructed a house and gave it to Smt. Roopa Devi and in this house three sons applicants No.1, 2 and 3 are born. The other witnesses Himendra Shukla (PW-2) and Ramkishan Pandey (PW-4) have supported the applicants and in their evidence, they have categorically stated that since more than 25 years, they have seen Smt. Roopa Devi living with Late Kishorilal Rai as husband and wife. Late Kishorilal Rai always treated Smt. Roopa Devi as his wife and they have three children. These two witnesses are resident of Village- Barmankala and they had old acquaintance with Late Kishorilal Rai.Ramkishan was working in liquor shop of Late Kishorilal Rai for long time. Therefore, their evidence can be relied upon.

14. Non-applicants in rebuttal tried to say in their evidence that Smt. Roopa Devi was not a married with of Late Kishorilal Rai, but Babulal Rai (DW-2), in para 14 of the cross-examination, has admitted that for whole life Late Kishorilal Rai kept and treated Smt. Roopa Devi as his wife. In para 22 of the cross-examination, he deposed that Late Kishorilal Rai and Smt. Roopa Devi were living as husband and wife for life time. They had three children. Non-applicant Geeta Devi (DW-5) in her statement deposed that since 1970 Smt. Roopa Devi was living with Late Kishorilal Rai and due to these relations, Geeta Devi has divorced Late Kishorilal Rai in the year 1977. The decree of divorce (Ex.D1) shows that the divorce was granted on 20.12.1977 by the Court, only on the aforesaid ground.

15. Thus, considering the evidence laid by both the parties, it appears that applicant Smt. Roopa Devi was living with Late Kishorilal Rai as husband and

wife since more than 20 years in the Village- Barmankala. Late Kishorilal Rai always treated her as his wife and also constructed the house for her. They had three children out of wedlock. Hon'ble Supreme Court relying upon case law *Badri Prasad Vs. Deputy Director of Consolidation and others* AIR 1978 SC 1557, in case law *Tulsa Vs. Durghatiya and others*, reported in ILR (2008) MP 981 (SC) held in para 13 as:-

> *"Where the partners lived together for long spell as husband and wife there would be presumption in favour of wedlock.The presumption was rebuttable, but a heavy burden lies on the person who seeks to deprive the relationship of legal origin to prove that no marriage took place. Law leans in favour of legitimacy and frowns upon bastardy."*

Therefore, a presumption of marriage can be raised in favour of applicant Smt. Roopa Devi.

16. Learned First Appellate Court has given reversed finding treating Smt. Roopa Devi as concubine only on the ground that she could not state anything in her statement as to when and where her marriage took place, who were the witnesses of this marriage. This finding of learned Appellate Court is not well founded. Smt. Roopa Devi (PW-1) in her statement categorically stated that she is married wife of Late Kishorilal Rai. In her cross-examination, non-applicants had not asked any question regarding factum of marriage as when and where marriage solemnized. As there is no cross-examination on this point then it cannot be said that applicant Smt. Roopa Devi was not able to state about factum of her marriage. Therefore,her statement cannot be disbelieved on this account. Learned trial Court has rightly believed the statement of applicant and arrived at conclusion that she is a married wife of Late Kishorilal Rai. The finding of trial Court is right and to be accepted.

17. Therefore, in the light of above facts of the case, it is found that although Smt. Roopa Devi is married wife of Late Kishorilal Rai, but this marriage was solemnized during subsistence of first marriage of Late Kishorilal Rai with Smt. Geeta Devi, who was later on divorced in the year 1977. Thus, the marriage of Late Kishorilal Rai with Smt. Roopa Devi was in contravention to Section 5 of Hindu Marriage Act,1955, therefore, it is void marriage under Section 11 of Hindu Marriage Act, 1955. Hence, applicant Smt. Roopa Devi

is not entitled to any share in the property of Late Kishorilal Rai and succession certificate cannot be issued in her favour. Learned trial Court has erred in granting succession certificate in favour of applicant No.1 Smt. Roopa Devi.

18. As far as the applicants No.2,3 and 4 are concerned, they are the sons of deceased Late Kishorilal Rai. Their mother Smt. Roopa Devi is married wife of Late Kishorilal Rai. In this regard, Section 16 of Hindu Marriage Act, 1955 is quite clear, which reads as under:-

> *16.1- Notwithstanding that a marriage is null and void under Section 11, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate, whether such child is born before or after the commencement of the Marriage Laws (Amendment) Act, 1976, and whether or nota decree of nullity is granted in respect of that marriage under this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act.*

19. According to this section, even if the second marriage is null and void under Section 11 of Hindu Marriage Act, any child born out of such marriage would have been legitimate one and hence, entitled to obtain succession certificate. Hon'ble Supreme Court in *Smt. Yamunabai Anantrao Adhav Vs. Anantrao Shrivram Adhav* AIR 1988 SC 644 observed that "legislature has considered it advisable to uphold legitimacy of paternity of a child born out of a void marriage, it has not expanded a similar protection, in respect of mother of the child. She cannot be treated as validly married wife."

20. In the case law *Ramkali and another Vs. Mahila Shyamwati and others,* reported in 2000 (3) MPLJ 361, relied by learned counsel for respondents, this was the case of applicant Ramkali that she and her sister Shyamwati both were married with Chhote Singh on the same day. But no evidence was laid by the applicant in support of this pleading. She came with entirely new case that she had been married with Asharam and after his death she had been taken by Chhote Singh as his wife. On appreciation of evidence, the Court came to the conclusion that the marriage of applicant with Chhote Singh was not found proved and she was not a married wife.

21. In the present case, the facts are different. It is duly proved by applicant

No.1 that she is married wife of deceased Kishorilal Rai. A presumption of marriage can be drawn in her favour. Therefore, above case law is distinguishable on facts of this case.

22. Hence, I am of the view that the applicants No.2, 3 and 4 alongwith respondents No.2, 3 and 4 being legitimate sons of deceased Kishorilal Rai are entitled to claim succession certificate for the amount deposited by the deceased in the banks. They each have equal 1/6 and 1/6 shares in the money deposited.

23. For the reasons stated hereinabove, this revision succeeds in part and it is hereby held that applicants No.2, 3 and 4 namely Bharat Kumar, Vishwas Bharat Rai, Rajesh Bharat Rai and respondents No.2, 3 and 4 namely Rishi Kumar Rai, Ravi Bharat Rai and Anand Mohai sons of Late Kishorilal Rai are entitled for 1/6 shares each for the entire amount deposited by the deceased in the banks. The order of two Courts below is accordingly modified. The application filed by applicants No.1 to 4 and respondents No.1 to 4 under Section 372 of Indian Succession Act are partly *allowed and disposed* of to extend indicated hereinabove. The learned succession Court is directed to issue succession certificate accordingly.

24. Looking to the facts and circumstances of the case, the parties are hereby directed to bear their own costs.

Revisioin partly allowed.

I.L.R. [2017] M.P., 1219
CIVIL REVISION
Before Mr. Justice S.K. Awasthi
C.R. No. 100/2013 (Gwalior) decided on 4 January, 2017

PRATHVI RAJ SINGH & ors. ...Applicants
Vs.
KRISHAN GOPAL ...Non-applicant

Civil Procedure Code (5 of 1908), Order 17 Rule 2 & 3 and Order 9 Rule 9 - Applicability **- In a civil suit for permanent injunction, counsel for plaintiff sought adjournment - Trial Court rejected the prayer and dismissed the suit for want of evidence - Plaintiff filed an application under Order 9 Rule 9 CPC which was**

also rejected - Plaintiff filed an appeal whereby the same was allowed by the lower appellate Court - Challenge to - Held - When the suit was fixed for evidence/hearing, plaintiff was not present in person, his counsel appeared and sought adjournment because he was instructed by Plaintiff to ask for adjournment only and not to proceed with trial - In such circumstances, Rule 2 of Order 17 applies in case of dismissal of suit and against which application lies under Order 9 Rule 9 - No interference warranted - Revision dismissed. (Para 6)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 17 नियम 2 व 3 एवं आदेश 9 नियम 9 – प्रयोज्यता – स्थाई व्यादेश हेतु सिविल वाद में, वादी के अधिवक्ता ने स्थगन चाहा – विचारण न्यायालय ने प्रार्थना अस्वीकार की तथा साक्ष्य के अभाव के कारण वाद खारिज किया – वादी ने आदेश 9 नियम 9 सि.प्र.सं. के अंतर्गत आवेदन प्रस्तुत किया, उसे भी अस्वीकार किया गया – वादी ने अपील प्रस्तुत की जहाँ उक्त को निचले अपीली न्यायालय द्वारा मंजूर किया गया – को चुनौती – अभिनिर्धारित – जब वाद, साक्ष्य/सुनवाई हेतु नियत किया गया था, वादी व्यक्तिगत रूप से उपस्थित नहीं था, उसका अधिवक्ता उपस्थित हुआ और स्थगन चाहा क्योंकि उसे वादी द्वारा केवल स्थगन की मांग करने के लिए एवं विचारण में कार्यवाही नहीं करने के लिए अनुदेशित किया गया था – उक्त परिस्थितियों में, वाद खारिज होने की स्थिति में आदेश 17 का नियम 2 लागू होता है और इसके विरूद्ध आदेश 9 नियम 9 के अंतर्गत आवेदन प्रस्तुत होगा – हस्तक्षेप की आवश्यकता नहीं – पुनरीक्षण खारिज।

Case referred :

1999 (1) MPLJ 719.

J.P. Mishra, for the applicants.
Pawan Vijaywargiya, for the non-applicant.

ORDER

S.K. Awasthi, J. :- This civil revision under Section 115 of CPC has been filed by the applicants against the order dated 17.06.2013 passed by Second Additional District Judge, Sheopur in Miscellaneous Civil Appeal No. 17/2013, setting aside the order dated 19.12.2012 passed by Second Civil Judge Class I Sheopur in Miscellaneous Civil Case No. 15/2011 by which the trial Court initially rejected the application under Order 9 Rule 9 of CPC for restoration of original Civil Suit No. 76/2005

(New No. 109/2008).

2. The short facts of the case are that the respondent has filed a civil suit for permanent injunction in respect of agricultural land survey No. 843, 844, 848, 849 and 854 total area 7.034 hectare situated at village Baroda Tehsil and District Sheopur (M.P.), which was registered as Civil Suit No. 76-A/2005. This suit was listed on 20.04.2010 for recording evidence of the plaintiff and ealier also the opportunities were given to the plaintiff for pursuing his evidence but on that date plaintiff and his witnesses were not present and prayer was made by the counsel for the plaintiff/respondent for adjournment. The learned trial Court, however, rejected the prayer and vide order dated 20.04.2010 dismissed plaintiff's suit for want of evidence. Thereafter, plaintiff moved an application under Order 9 Rule 9 of CPC seeking restoration of original suit No. 76/2005 which was registered as Misc. Civil Case No . 15/2011. This application was dismissed by the learned trial court holding that original suit was dismissed in the light of the provision of Order 17 Rule 3 CPC, therefore, the appeal is maintainable and no application for restoration under Order 9 Rule 9 CPC lies. Being aggrieved by the order passed by the trial Court, respondent/plaintiff filed an appeal before the District Judge which was allowed by the impugned order dated 17.06.2013, which is subject matter of this revision petition.

3. Learned counsel for the applicants submitted that the Second Additional District Judge Sheopur passed the impugned order ignoring the mandatory provisions contemplated under Order 17 Rule 3 of CPC and restored the civil suit without jurisdiction and contrary to law. Since the suit was dismissed under the provisions of Order 17 Rule 3 of CPC, the application under Order 9 Rule 9 CPC is not maintainable. Hence, the impugned order dated 17.06.2013, deserves to be dismissed. .

4. Learned counsel for the respondent/plaintiff supported the impugned order and prayed of dismissal of this civil revision.

5. I have heard the contention of learned counsel for both the parties. The singular question which requires to be determined is whether the order dated 20.04.2010, dismissing the suit of the respondent/plaintiff was passed under Rule 3 or Rule 2 of Order 17 CPC.

Rule 2 of Order 17 CPC provides for the procedure where parties fail to appear on any day to which the hearing of the suit is adjourned. In the case of *State Bank of India, Ratlam Vs. Nandram (deceased) through Lr's and others,* reported in 1999 (1) MPLJ 719, this Court has held that the following conditions are necessary for application of Order 17 Rule 3 of CPC

> *"For application of Order 17, Rule 3 of the Civil Procedure Code three conditions are necessary; (1) time must have been granted to a party to take all or any of the steps mentioned therein for the progress of the suit; (2) there must have been a default in taking such steps, and (3) the party concerned should have appeared in court. Rule 3 would obviously apply only when the party concerned is present on the adjourned date and he fails to do the things for which adjournment was granted. Mere presence of counsel seeking adjournment would not amount to the presence of the party within the meaning of clauses (a) and (b) of Order 17. Rule 3. Rule 3 applies only where the hearing has commenced and an application for an adjournment is then made by one of the parties, but when before the hearing is commenced, Plaintiff fails to appear on an adjourned date and the counsel merely appears to seek adjournment; the court in case refuses the prayer for adjournment can proceed only under Rule 2 and not under Rule 3."*

6. In the instant case, the suit was called for hearing, the respondent/ plaintiff was not present in person and the counsel appeared and sought adjournment because he was instructed by the plaintiff to ask for adjournment only and not to proceed with the trial. In such circumstances, Rule 2 of Order 17 CPC applies in case of dismissal of suit and against that application lies under Order 9 Rule 9 CPC.

7. In view of above said position of law, no interference in the revision is warranted. The present revision has no substance and is hereby dismissed.

Revision dismissed.

I.L.R. [2017] M.P., 1223
CRIMINAL REVISION
Before Mr. Justice S.K. Palo
Cr.R. No. 2275/2013 (Jabalpur) decided on 26 August, 2016

IN REFERENCE ...Applicant
Vs.
JITENDRA ...Non-applicant

A. ***Commission for Protection of Child Rights Act, 2005 (4 of 2006), Section 25 - Children's Court - Jurisdiction*** **- Every offence in which a 'child' happens to be a complainant or a victim is not compulsorily triable under the Act of 2005, unless in respect of it, a proceeding has been initiated by concerned government or authority on the recommendation of the commission constituted under the Act of 2005 - If commission finds "violation of child rights of a serious nature" or "contravention of provisions of any law for the time being in force", then on the recommendation, case shall be deemed to be cognizable and triable by specified "Children's Court" constituted u/S 25 of the Act of 2005 otherwise in all other cases, ordinary procedure provided under the CrPC is to be followed - Reference answered with directions.** **(Para 7)**

क. बालक अधिकार संरक्षण आयोग अधिनियम, 2005 (2006 का 4), धारा 25 – बालक न्यायालय – अधिकारिता – प्रत्येक अपराध जिसमें 'बालक' परिवादी या पीड़ित है, 2005 के अधिनियम के अंतर्गत आवश्यक रूप से विचारणीय नहीं है जब तक कि उसके संबंध में संबंधित सरकार या प्राधिकारी द्वारा, 2005 के अधिनियम के अंतर्गत गठित आयोग की अनुशंसा पर कार्यवाही आरंभ न की गई हो – यदि आयोग "बालक अधिकारों का गंभीर स्वरूप का उल्लंघन" या "तत्समय प्रवर्तनशील किसी विधि के उपबंधों का अतिलंघन" पाता है तब प्रकरण को अनुशंसा पर, 2005 के अधिनियम की धारा 25 के अंतर्गत गठित विनिर्दिष्ट "बालक न्यायालय" द्वारा संज्ञेय एवं विचारणीय माना जाएगा, अन्यथा अन्य सभी प्रकरणों में, दं.प्र.सं. के अंतर्गत उपबंधित साधारण प्रक्रिया का पालन करना होता है – निदेशों के साथ निर्देश उत्तरित किया गया।

B. ***Practice and Procedure - Criminal Procedure Code, 1973 (2 of 1974), Section 193 & 194 - Jurisdiction - Irregularity/Procedural Lapse*** **- Offence u/S 342, 354 and 377 IPC was registered - Case, after committal was tried by Additional Sessions Judge - On the date of**

judgment, matter was returned back to Sessions Judge on the ground that Court of Additional Sessions Judge is not the designated Court under the Act of 2005 - Case was further remanded to the Magistrate for re-committal - Held - Once cognizance has been taken by Sessions Judge there is no need to send back the case to Magistrate for recalling his earlier order of committal and ask him to recommit - Since Additional Sessions Judge is competent to exercise jurisdiction of Sessions Court, therefore he is competent to try a case made over for consideration even though it is triable by some designated Court - In such a situation, trial by Additional Sessions Judge is not illegal but could be an irregularity or error which may attract Section 465 CrPC - Further held - Additional Sessions Judge retransmitted the case to Sessions Judge then, being the designated Court, the Sessions Judge could have tried the matter instead of remanding back the case for recommittal - Trial will not be vitiated by a mere irregularity or error unless it is shown that there is a failure of justice on account of said irregularity or error - No need for *de-novo* trial. (Paras 11, 13, 14 & 15)

ख. पद्धति व प्रक्रिया – दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 193 व 194 – अधिकारिता – अनियमितता/प्रक्रियात्मक गलती – भा.दं.सं. की धारा 342, 354 व 377 के अंतर्गत अपराध पंजीबद्ध किया गया था – उपार्पण पश्चात्, प्रकरण का विचारण अतिरिक्त सत्र न्यायाधीश द्वारा किया गया था – निर्णय की तिथि को मामला सत्र न्यायाधीश को इस आधार पर प्रतिप्रेषित किया गया कि अतिरिक्त सत्र न्यायाधीश का न्यायालय, 2005 के अधिनियम के अंतर्गत नामनिर्दिष्ट न्यायालय नहीं है – प्रकरण को पुनः उपार्पण हेतु मजिस्ट्रेट को प्रतिप्रेषित किया गया था – अभिनिर्धारित – एक बार सत्र न्यायाधीश द्वारा संज्ञान लिये जाने पर, मजिस्ट्रेट को अपना पूर्वतर उपार्पण आदेश वापस लेने हेतु प्रकरण प्रतिप्रेषित करने तथा उसे पुनः उपार्पित करने को कहने की कोई आवश्यकता नहीं – चूंकि सत्र न्यायालय की अधिकारिता का प्रयोग करने के लिए अतिरिक्त सत्र न्यायाधीश सक्षम है, अतः वह उसे विचार किये जाने हेतु अग्रेषित प्रकरण का विचारण करने के लिए सक्षम है यद्यपि वह किसी नामनिर्दिष्ट न्यायालय द्वारा विचारणीय है – उक्त स्थिति में, अतिरिक्त सत्र न्यायाधीश द्वारा विचारण अवैध नहीं अपितु वह अनियमितता या त्रुटि हो सकती है जो धारा 465 दं.प्र.सं. को आकर्षित कर सकती है – आगे अभिनिर्धारित – अतिरिक्त सत्र न्यायाधीश ने प्रकरण को सत्र न्यायाधीश को पुनः सौंपा तब नामनिर्दिष्ट न्यायालय होने के नाते सत्र न्यायाधीश पुनः उपार्पण हेतु मामला प्रतिप्रेषित करने के बजाय विचारण कर सकता था – विचारण मात्र अनियमितता या त्रुटि द्वारा दूषित नहीं होगा जब तक कि यह दर्शाया न जाए कि उक्त अनियमितता या त्रुटि के कारण न्याय

हानि हुई है – नये सिरे से विचारण की कोई आवश्यकता नहीं।

Cases referred :

AIR 2008 SC 1213, (1979) 1 SCC 345, (1995) 6 SCC 142, (2006) 7 SCC 296, (2007) 8 SCC 770, AIR 2005 SC 4161, AIR 2004 SC 3114, (2012) 4 SCC 516, (2001) 7 SCC 679.

ORDER

S.K. PALO, J. :- Learned Sessions Judge, Burhanpur has referred the matter with a view to be considered in *suo motu* revision and be directed accordingly.

2. The facts of the case are that a Criminal Case No.2145/2011 (State of Madhya Pradesh Vs. Jitendra) arising out of FIR 198/2012 Police Station Nepanagar, Distt. Burhanpur u/s 354, 342, 377 of I.P.C was registered in the Court of Judicial Magistrate First Class, Burhanpur. Learned Judicial Magistrate First Class vide order dated 16.07.2011 committed the case to the Court of Sessions which was registered as Sessions Trial No. 32/2011. The then learned Sessions Judge, Burhanpur made over the case to the First Additional Sessions Judge, Burhanpur. The trial commenced in that Court and the case was fixed for final arguments on 01.02.2012 and then for judgment on 06.02.2012. On the date of judgment i.e. 06.02.2012, learned Additional Sessions Judge was of the opinion that the case is triable by Special Court (Designated) established under "Commission for Protection of Child Rights Act, 2005" and returned back the case to the Sessions Judge for further proceeding observing that the learned Sessions Judge, being the designated court, had jurisdiction to try the offences pertaining to children as described in Commission for Protection of Child Rights Act, 2005".

3. The Sessions Judge remanded the case to the Judicial Magistrate First Class with a direction that the case be committed as per notification of the government dated 17.07.2001 (by which Sessions Court has been designated as "Children's Court" by the State Government with the consent of High Court. Thereafter, the Judicial Magistrate First Class vide order dated 21.02.2012 again committed the case to Sessions Court and the case was registered as Special Case No.14/2012. The detailed fact of the case was brought to the knowledge of Sessions Judge (Designated Court) on 25.02.2012 at the stage of arguments for framing of charge. The learned Sessions Judge (designated),

Burhanpur felt that trial was conducted by First Additional Sessions Judge who has the same jurisdiction as that of Sessions Judge and Addl. Sessions Judge could also be a designated court under "Commission for Protection of Child Rights Act, 2005 and since both Sessions Judge and Addl. Sessions Judge have coordinate jurisdiction, *de novo* trial will give rise to various complications, adversely affecting the merits of the case. At this stage, the matter has been referred by the learned Sessions Judge to treat this as a *suo motu* revision and guide.

4. The questions referred for consideration can be summed up as follows:

(i) Whether there was need to remand back the case to commit it again?

To find an answer the following points are also felt to be considered:

(ii) Whether the trial before the Additional Sessions Judge caused prejudice to the accused and, therefore, failure of justice.

(iii) Whether the trial by the Additional Sessions Judge in place of the designated Court is illegal?

(iv) Whether a *de novo* trial in such circumstances is mandatory?

5. If the Sessions Judge had taken cognizance and made over the case, the Additional Sessions Judge who has concluded the case and felt that the case ought to have been tried by Designated Court and the provisions mandate that the committal proceeding was wrong and the magistrate is required to pass a fresh order for committal then, definitely, in absence of first order of committal as recalled, there being a new committal order, there has to be a *de-novo* trial. However, at this point of time, it is necessary to answer whether there was need for recalling of order and re-commital by magistrate.

6. This question was set at rest in Criminal Reference No.1/2012 [decided on 07/08/2012 by High Court of M.P.] that a Special Court under Commission for Protection of Child Rights Act, 2005 is essentially a Court of Session and it can take cognizance of the offence, when the case is committed to it by the Magistrate.

7. It has also been held that each and every offence in which a "child" happens to be a complainant or a victim shall not necessarily be deemed to be an offence triable under the Act, unless in respect of it a proceeding has been initiated by concerned Government or Authority on the recommendation of Commission constituted under the Commission for Protection of Child Rights Act, 2005. Only those kind of cases in respect of which the Commission finds "violation of child rights of a serious nature" or "contravention of provision of any law for the time being in force" and recommends to the concerned Government or Authority for initiation of the proceedings for prosecution, shall be deemed to be cognizable and triable by the specified Children's Court constituted u/s 25 of the Act. In all other cases, ordinary procedure provided in the Code of Criminal Procedure shall be followed.

8. The present case was not initiated on the recommendation of Commission constituted under Commission for Protection of Child Rights Act, 2005 therefore technically the case was not necessarily to be tried by designated court. For offences not registered on the recommendations of Commission, a Sessions Court or a Court having coordinate jurisdiction (e.g. Additional Sessions Judge) would be competent Court to try the case.

9. Under the Code of Criminal Procedure, 1973 Court of Sessions for every Sessions Division is established by the State Government which has to be presided over by the Sessions Judge. Sub-section 3 of Section 9 of Cr.P.C. enables the High Court to appoint Additional Sessions Judge and Assistant Sessions Judge to exercise jurisdiction of Court of Sessions. This is a provision for appointment of judges, in addition to Sessions Judge in the Sessions Division, to man the work of Court of Sessions. The Sessions Judge has power to transfer the case to the Court of Additional Sessions Judges and Assistant Sessions Judge. Therefore, it is clear that the Sessions Judge presides over the Session Division and Additional Sessions Judges and Assistant Sessions Judges merely exercise jurisdiction in that Sessions Division.

10. Section 193 & 194 Cr.P.C. read together provide that no Court of Sessions shall take cognizance of offence as Court of original jurisdiction unless the case has been committed to it by the magistrate. It also provides that Additional Sessions judge or Assistant Sessions Judge shall try such cases as the Sessions Judge of the division, may by general or special order make over to him for trial. Therefore, Additional Sessions Judge or Assistant Sessions

Judge is empowered to try a case, only when the case has been made over by the Sessions Judge. This has been reiterated in AIR 2008 SC 1213 (*S.K. Sinha Chief Information Officer Vs. Videocon International*). It has been further made clear that only Sessions Judge has original jurisdiction to take cognizance u/s 193 Cr.P.C. which does not include Additional Sessions Judges and Assistant Sessions Judges. Additional Sessions Judges exercise concurrent jurisdiction to that of Sessions Judge only when the case is made over to them by the Sessions Judge u/s 194 of Code of Criminal Procedure.

11. The Apex Court on various occasions has emphasized that the cognizance taken by Sessions Court is a cognizance of offence and not of offender [See: (1979) 1 SCC 345 (*Joginder Singh Vs. State of Bengal*), (1995) 6 SCC 142 (*Anil Sharan Vs. State of Bihar*), (2006) 7 SCC 296 (*Popular Muthiah Vs. State*)]. Therefore, once cognizance has been taken by the Sessions Court, there is no need to send back the case to the magistrate for recalling his earlier order of committal and ask him to recommit. Hon'ble the Apex Court in *Dinesh Dalmia Vs. CBI* (2007) 8 SCC 770 has rejected the plea of recall of cognizance by magistrate even when the investigation was open, once order for taking cognizance exists.

12. In AIR 1996 SCC 905 *Abdul Mannan Vs. State of Bangalore*, Hon'ble the Supreme Court has held that Section 9 Sub-section 3 of Cr.P.C includes Additional Sessions Judges within the meaning of Sessions Judge. Once the case has been committed to Sessions Court and the Court has taken cognizance and the Sessions Court is of the opinion that the matter is exclusively triable by Court of Sessions which necessarily includes Additional Sessions Judge then the evidence recorded by the Additional Sessions judge will have the same effect as if it has been recorded by the Sessions Judge. In this factual position, the ratio of AIR 2005 SC 4161 (*Satyajit Banerjee & Ors. Vs. State of Bengal*) is important wherein the Hon'ble the Apex Court considering the *Best Bakery* Case (AIR 2004 SC 3114) being a case of extraordinary circumstances felt that, it cannot be applied to all cases against the established principles of criminal jurisprudence. Direction of retrial should not be made in all or every case. It is clear that even if a retrial is directed, the evidence already recorded at the initial trial cannot be erased or wiped out from the record of the case. The Trial Judge has to decide the case on the basis of evidence already on record and the additional evidence which could be recorded for retrial if there is a direction for retrial. The Trial Judge shall take

a decision on the basis of entire evidence on record.

13. Since the Additional Sessions Judge is competent to exercise jurisdiction of Sessions Court, therefore he is competent to try a case made over for consideration even though it is triable by some designated Court. A trial by Additional Sessions Judge in such a situation where otherwise it has the jurisdiction is not illegal but could be an irregularity or error which may attract section 465 Cr.P.C. This has been upheld by Hon'ble Supreme Court in *Ratiram & Ors. Vs. State of Madhya Pradesh* (2012) 4 SCC 516 where it has been enunciated that a trial would only be vitiated if there is failure of justice.

14. In the present case, the accused has faced the complete trial before the Additional Sessions Judge till the date of judgment neither the accused nor the prosecution has raised any objection as to the jurisdiction of the Court or failure of justice on the ground of incorrect forum. In *State of M.P. Vs. Bhoorajee & Ors.* reported as (2001) 7 SCC 679, Hon'ble the Supreme Court reversed order of the High Court order directing trial *de novo* by initiating committal proceedings. It was held that it must be shown that there is failure of justice on account of irregularity in trial proceedings. The competence of a Court will remain unaffected by procedural lapse.

15. In view of the fact that the Sessions Judge had already taken cognizance of the case, the matter of remanding back and recommital entails with it a *de-novo* trial and if the remanding back and recommital is considered to be correct, *de-novo* trial will have to take place which will be against the concept of taking cognizance u/s 193 and 194 of Cr.P.C. The Additional Sessions Judge has retransmitted the case to Sessions Judge then, being the designated Court the Sessions Judge could have tried the matter instead of remanding back the case for re-committal.

16. There is an error caused in remanding the case back to Magistrate and then asking for re-committal. The simple way could have been to take up the case as designated Court and accepting the evidence taken by the Additional Sessions Judge to be valid and proceed with the case. At the most, the designated Court/Sessions Court could have asked the accused for any other evidence. Had he wished for additional evidence that could have been taken for consideration, while deciding the case.

17. Thus, the matter is answered accordingly as under:-

(i) There was no need to remand back the case and ask for a re-committal order.

(ii) The trial before Additional Sessions Judge was a fair trial and has not caused prejudice to the accused and there was no failure of justice.

(iii) If at all, there was a procedural lapse, when the trial being conducted before Additional Sessions Judge in place of the designated Court, that is merely an irregularity and covered u/s 465 of Cr.P.C.

(iv) At the most that could have been done is, to give the accused an opportunity to redress grievance, if any. There is no need to go for a *de-novo* trial.

18. Before parting with the order, this Court appreciates the assistance provided by Shri Pankaj Gour, Registrar Judicial in tracing out the citations on this point.

19. The Registrar General is directed to place the matter before the Hon'ble Chief Justice for seeking his permission to circulate copy of this order to all Session Judges and Additional Session Judges, for future reference and guidance.

Order accordingly.

I.L.R. [2017] M.P., 1230
CRIMINAL REVISION
Before Mr. Justice Sushil Kumar Palo
Cr.R. No. 1709/2016 (Jabalpur) decided on 4 October, 2016

UMESH KUMAR ...Applicant
Vs.
STATE OF M.P. ...Non-applicant

***Protection of Children from Sexual Offences Act, (32 of 2012), Section 34 and Criminal Procedure Code, 1973 (2 of 1974), Section 311 - Determination of Age of Prosecutrix - Stage of Trial* - Petitioner charged with the offence u/S 363/34, 366-a/34, & 376 IPC - After**

completion of trial, at the stage of final arguments, DPO filed an application u/S 311 Cr.P.C. to adduce evidence with regard to the age of prosecutrix, which was allowed - Challenge to - Held - Section 34 mandates the determination of age of minor victim child which is very vital for trial - In view of Section 34 of the Act of 2012, Court was duty bound to determine the age of the child victim - Further held - Section 311 Cr.P.C. has been enacted in order to enable the Court to find out the truth and render a just decision - The words "at any Stage of the trial" indicates that once it is found that evidence is essential for just decision of the case, witness can be called at any time before pronouncement of judgment - Time factor would not come in the way - Impugned order cannot be said to be illegal or perverse - Revision dismissed. (Paras 8, 9, & 11)

लैंगिक अपराधों से बालकों का संरक्षण अधिनियम, (2012 का 32), धारा 34 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 311 – अभियोक्त्री की आयु का निर्धारण – विचारण का प्रक्रम – याची, धारा 363/34, 366–ए/34 व 376 भा.दं. सं. के अंतर्गत अपराध के लिए आरोपित – विचारण पूर्ण होने के पश्चात्, अंतिम तर्कों के प्रक्रम पर, जिला अभियोजन अधिकारी ने, अभियोक्त्री की आयु के संबंध में साक्ष्य प्रस्तुत करने हेतु दं.प्र.सं. की धारा 311 के अंतर्गत आवेदन प्रस्तुत किया जिसे मंजूर किया गया था – को चुनौती – अभिनिर्धारित – धारा 34, अप्राप्तवय पीड़ित बालिका की आयु का निर्धारण आदेशित करती है जो कि विचारण के लिए अति महत्वपूर्ण है – 2012 के अधिनियम की धारा 34 को दृष्टिगत रखते हुए न्यायालय, पीड़ित बालिका की आयु का निर्धारण करने के लिए कर्तव्यबद्ध था – आगे अभिनिर्धारित – धारा 311 दं.प्र.सं. की अधिनियमिती, न्यायालय को सत्य का पता लगाने एवं न्यायपूर्ण विनिश्चय देने के लिए समर्थ बनाने हेतु की गई है – शब्द "विचारण के किसी प्रक्रम पर" इंगित करता है कि जब एक बार यह पाया जाता है कि प्रकरण के न्यायपूर्ण विनिश्चय हेतु साक्ष्य आवश्यक है, निर्णय घोषित किये जाने पूर्व किसी भी प्रक्रम पर साक्षी को बुलाया जा सकता है – समय का कारक रास्ते में नहीं आयेगा – आक्षेपित आदेश को अवैध या विपर्यस्त नहीं कहा जा सकता – पुनरीक्षण खारिज।

Case referred :

AIR 1999 SC 3524.

S.K. Dwivedi, for the applicant.
A.R.S. Chauhan, P.L. for the non-applicant/State.

ORDER

S.K. PALO, J. :- This revision under Section 397 read with Section 401 has been filed assailing the orders dated 27.07.2016 and 30.6.2016 passed by the Special Judge (Prevention ofAtrocities), Panna in Special Case No. 21/201 3 whereby the learned trial Court had ordered to adduce evidence to determine the age of the prosecutrix.

2. The facts necessary for disposal of this petition are that, the petitioner (Umesh Kumar Choudhary) along with one accused Phool Singh have been charged for offence under Sections 363/34, 366-a/34, 376 of I.P.C and under Section 17 of the Protection of Children from Sexual Offences Act, 2012. Co-accused Phool Singh is a juvenile, therefore, charge sheet has been filed against him in the Juvenile Court, Panna.

3. The petitioner contended that co-accused Phool Singh has been acquitted after completion of trial. It is stated that after framing of charge, the learned Special Court ordered to adduce evidence of the prosecution witnesses at the stage of final arguments. The learned trial Court on 27.06.2016 has re-opened the case stating that at the time of final arguments, it is pleaded by the learned counsel for the accused/petitioner that the prosecutrix is not a "child." She is more than 18 years old. Without any such evidence on record, the petitioner prayed for acquittal.

4. The learned trial Court observing that the trial under the Special Act (i.e. Protection of Children from Sexual Offences, Act 2012) are different than the normal proceedings, after the completion of trial, this question has been raised that if the finding comes in favour of the accused then the whole proceeding would be vitiated. on the ground that the trial commenced in a forum which has no jurisdiction. The learned trial Court, therefore, held that question can be raised about the age of the minor victim at any stage of trial. Hence, without any evidence on this point, no adjudication can be done on merits. Therefore, ordered to adduce evidence, exercising the powers under Section 311 of Cr.P.C. to both the prosecution as well as the defence.

5. Subsequently, an application has been moved by D.P.O. on 28.06.2016 under Section 311 Cr.P.C. for calling the Principal of the Government Higher Secondary School, Krishnaganj, Panna and to prove the documents filed in this regard and to bring on record the Transfer Certificate of the prosecutrix and the admission at the time of entry into the school register. This application

was opposed by the petitioner stating that it amounts to investigation under Section 173 (8) of Cr.P.C. whereas the trial commenced for three years and this amounts to fill up of lacking.

6. Learned trial Court vide order dated 01.07.2016 allowed the application stating that Section 311 Cr.P.C is a mandatory provision and the earlier order passed for both prosecution and defence can be asked to adduce evidence in this regard. The defence has not filed any application in this regard. So far as the delay is concerned, the defence has sought time to argue the matter on 28.05.2016, 01.06.2016 and 18.06.2016. The defence did not ask any question to the prosecution witnesses during their examination about the age of the prosecutrix when the charges have been amended. Neither the defence asked any question regarding the age of the prosecutrix to the medical officer, nor any question was put to the prosecturix in this regard. When the defence evidence was closed, such question has been raised by the defence and the defence has itself delayed the proceeding. Now it cannot raise such objection that the trial is being delayed. Learned trial Court allowed the application under Section 311 Cr.P.C. and directed to adduce evidence.

7. Having heard the parties and perusing the record, it is found that the age of the minor victim is very vital for the trial. Section 34 of the Protection of Children from Sexual Offences, Act 2012 provides that:-

> **"34. Procedure in case of commission of offence by child and determination of age by Special Court-** (1) Where any offence under this Act is committed by a child, such child shall be dealt with under the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 (56 of 2000).
>
> (2) If any question arises in any proceeding before the Special Court whether a person is a child or not, such question shall be determined by the Special Court after satisfying itself about the age of such person and it shall record in writing its reasons for such determination.
>
> (3) No order made by the Special Court shall be deemed to be invalid merely by any subsequent proof that the age of a person as determined by it under sub-section (2) was not the correct age of that person."

8. In the light of the same, the Court was duty 'bound to determine the

age of the child which shall be dealt with the provisions as provided under the Juvenile Justice (Care and Protection of Children) Act.

9. As regarding the provisions of 311 of Cr. P.C, it would be appropriate to mention here that in order to enable the Court to find out the truth and render a just decision, the salutary provision of Section 311 are enacted. The words used "at any stage" shows that even after both the parties have closed their cases, it is open to the Court to summon any person as a witness, if his or her evidence appears to the court to be essential to the just decision of the case. The words "at any stage of the trial" indicates that once it is found that the evidence is essential for the just decision of the case, the witness can be recalled at any time before the pronouncement of the judgment. The time factor would not come in the way. In this regard reference can be profitably made to *Raj Deo Sharma Vs. State of Bihar,* AIR 1999, SC, 3524.

10. The object of the provision as a whole is to do justice, not only from the point of view of the accused and the prosecution but also from the point of view of an orderly society. The Court examines evidence under the Section 311 of Cr.P.C neither to help the prosecution nor to help the accused. It is done neither to fill up any gaps in the prosecution evidence nor to give it any unfair advantage against the accused.

11. The fundamental proceeding to be seen is whether the Court thinks necessary in the facts and circumstances of the case to call witnesses for the disposal of the case. Section 34 of the Act, 2012 mandates the determination of the age of the minor victim child. Therefore, the order impugned cannot be said to be illegal or irregular or perverse. Therefore, the present petition is dismissed as devoid of merit.

Revision dismissed.

I.L.R. [2017] M.P., 1234
CRIMINAL REVISION
Before Mr. Justice Alok Verma
Cr.R. No. 1225/2016 (Indore) decided on 21 October, 2016

SUNIL ...Applicant
Vs.
STATE OF M.P. ...Non-applicant

Practice and Procedure - Criminal Trial - Marking Exhibit on

Document - Effect **- Revision against refusal by trial Court in granting permission to mark exhibit on the document produced by the handwriting expert during his evidence - Held - Applicant facing trial u/S 307/149, 147, 148 & 506 IPC - Handwriting expert took into consideration certain documents for natural handwriting of the applicant - State as well as applicant has a right to examine and cross-examine the expert on these documents - Merely by putting exhibit marks on the documents would not mean that these documents would be read in evidence - Documents are to be proved as per the Evidence Act and till they are not proved they cannot be read in evidence - Burden is on applicant to prove the documents but at this stage putting exhibit marks on documents will not harm the opposite party - Additional Sessions Judge erred in disallowing the applicant to mark exhibit on documents - Impugned order set aside - Documents used by handwriting expert are allowed to be marked exhibit in the case - Revision allowed. (Para 4 & 5)**

पद्धति एवं प्रक्रिया – दाण्डिक विचारण – दस्तावेज पर प्रदर्श चिन्हित किया जाना – प्रभाव – हस्तलेख विशेषज्ञ द्वारा अपने साक्ष्य के दौरान प्रस्तुत किये गये दस्तावेज पर विचारण न्यायालय द्वारा प्रदर्श चिन्हित करने की अनुमति प्रदान करने से इंकार किये जाने के विरूद्ध पुनरीक्षण – अभिनिर्धारित – आवेदक, भा.दं.सं. की धारा 307/149, 147, 148 व 506 के अंतर्गत विचारण का सामना कर रहा है – हस्तलेख विशेषज्ञ ने आवेदक के नैसर्गिक हस्तलेख हेतु कतिपय दस्तावेज विचार में लिए – राज्य के साथ–साथ आवेदक को भी इन दस्तावेजों पर विशेषज्ञ के परीक्षण एवं प्रतिपरीक्षण का अधिकार है – दस्तावेजों पर मात्र प्रदर्श चिन्हित करने का यह अर्थ नहीं होगा कि इन दस्तावेजों को साक्ष्य में पढ़ा जाएगा – दस्तावेजों को साक्ष्य अधिनियम के अनुसार साबित किया जाना होता है और जब तक उन्हें साबित नहीं किया जाता, उन्हें साक्ष्य में पढ़ा नहीं जा सकता – दस्तावेजों को सिद्ध करने का भार आवेदक पर है परंतु इस प्रक्रम पर दस्तावेजों पर प्रदर्श चिन्हित करने से विरोधी पक्षकार को हानि नहीं होगी – अतिरिक्त सत्र न्यायाधीश ने आवेदक को दस्तावेजों पर प्रदर्श चिन्हित करने की अनुमति नहीं देने में त्रुटि की – आक्षेपित आदेश अपास्त – हस्तलेख विशेषज्ञ द्वारा प्रयुक्त दस्तावेजों को प्रकरण में प्रदर्श चिन्हित करने की अनुमति दी गई – पुनरीक्षण मंजूर।

Sanjay Kumar Sharma, for the applicant.
C.S. Ujjainia, for the non-applicant/State.

ORDER

ALOK VERMA, J. :- This criminal revision is directed against the order

passed by the learned 3rd Additional Sessions Judge in Session Trial No.56/2006 dated 12.09.2016 whereby the learned Additional Sessions Judge did not grant permission to exhibit certain documents on the ground that the handwriting expert through whom the documents were sought to be exhibited was not the writer or creator of the documents, and therefore, the handwriting expert could not prove the documents and on this premise, the learned Additional Sessions Judge refused permission to mark exhibit on the document.

2. The relevant facts for disposal of this case are that the applicant is facing trial under Sections 307/149, 147, 148 and 506 IPC. The applicant took a plea of alibi. According to him, he had been to Mantralaya Vallabh Bhawan, Bhopal on the relevant date and time when the incident allegedly took place. During the investigation, S.I. Jaswant Singh Parmar went to Bhopal and collected entry register Exhibit-10 of the Mantralaya, where the entries were made when the applicant entered Mantralaya Vallabh Bhawan, Bhopal. Also the entries in the register of Meghdoot hotel showing that the applicant stayed there on the relevant date and time. Some documents were examined by an handwriting expert. The handwriting expert Mahendrasingh Thakur was examined before the court who used these documents as sample documents for natural handwriting of the present applicant. Documents N5 to N7 were issued by the handwriting expert. During his statement, these documents were sought to be exhibited which was not allowed by the trial court. Against this, the present revision is filed.

3. Learned counsel for the State opposes the application for revision.

4. I have gone through the impugned order passed by the learned Additional Sessions Judge. It is apparent that the learned Additional Sessions Judge erred while disallowing the documents to be exhibited by the handwriting expert, as the handwriting expert took into consideration, these documents for natural handwriting of the applicant. The applicant and also the State have right to examine and cross-examine him on these documents. Merely by putting exhibit on these documents would not mean that these documents would be read in evidence for reading such documents and evidence. The documents are to be proved according to provision of Evidence Act. Till they are not proved they cannot be read in evidence, and therefore, the burden is on the applicant to prove these documents according to provision of Evidence Act. At this stage, merely putting exhibit on these documents will not harm the

opposite party and accordingly, in considered opinion of this Court, the learned Additional Sessions Judge erred in not allowing the applicant to mark exhibit on these documents.

5. Accordingly, the order passed by the learned Additional Sessions Judge is set aside. The documents used by the handwriting expert are allowed to be marked exhibit in this case, subject to their being proved in accordance with law. The revision stands disposed of.

Revision allowed.

I.L.R. [2017] M.P., 1237
CRIMINAL REVISION

Before Mr. Justice S.C. Sharma & Mr. Justice Ved Prakash Sharma
Cr.R. No. 418/2016 (Indore) decided on 8 November, 2016

SURAJ KERO ...Applicant
Vs.
STATE OF M.P. ...Non-applicant

A. Prevention of Corruption Act (49 of 1988), Sections 13(1)(d), 13(2) & 19 and Penal Code (45 of 1860), Sections 218, 466, 471, 474 & 120-B - Sanction for Prosecution **- Petition against dismissal of application u/S 19 of the Act of 1988 filed by the petitioner/accused seeking his discharge on the ground that at the time of filing of charge sheet, he was a Corporator of Indore Municipal Corporation and being a public servant, sanction as required for his prosecution was not taken by the respondents - Held - U/S 19 of the Act of 1988, question of obtaining sanction is relatable to the time of holding of office when offence was alleged to have been committed and in case when the person is not holding the said office as he might have retired, superannuated, discharged or dismissed then the question of sanction would not arise - In the instant case, petitioner was an elected Corporator from 2000 to 2005 and this term came to end by efflux of time - Simply because he was again elected as Corporator in February 2015, will not go to relate back his position as Corporator in the year 2000 to the same post - Subsequent election in 2015 was not by virtue of his holding the office of Corporator due to his election in the year 2000 rather it was on account of his fresh mandate, therefore two offices were different for the purpose of prosecution - No sanction required -**

Petition dismissed. **(Para 6)**

क. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धाराएँ 13(1)(डी), 13(2) व 19 एवं दण्ड संहिता (1860 का 45), धाराएँ 218, 466, 471, 474 व 120–बी – अभियोजन हेतु मंजूरी – याची/अभियुक्त द्वारा 1988 के अधिनियम की धारा 19 के अंतर्गत, अपनी आरोपमुक्ति चाहते हुए आवेदन की खारिजी के विरूद्ध याचिका इस आधार पर कि आरोप पत्र प्रस्तुत करने के समय वह इंदौर नगरपालिका निगम का पार्षद था और एक लोक सेवक होने के नाते उसके अभियोजन हेतु प्रत्यर्थीगण द्वारा यथा अपेक्षित मंजूरी नहीं ली गई थी – अभिनिर्धारित – 1988 के अधिनियम की धारा 19 के अंतर्गत, मंजूरी अभिप्राप्त करने का प्रश्न उस समय पद धारित होने के संबंध में है जब अभिकथित रूप से अपराध कारित किया गया था और जब व्यक्ति उक्त पद धारक नहीं था जैसा कि वह सेवानिवृत्त, अधिवर्षिता, कार्यभारमुक्त या पदच्युत हो गया हो तब मंजूरी का प्रश्न उत्पन्न नहीं होगा – वर्तमान प्रकरण में, याची वर्ष 2000 से 2005 तक एक निर्वाचित पार्षद था और समय बीत जाने पर यह पदावधि समाप्त हो गई थी – केवल इसलिए कि वह पार्षद के रूप में फरवरी 2015 में पुनः निर्वाचित हुआ था, इससे उसी पद पर वर्ष 2000 में पार्षद के रूप में उसकी स्थिति का संबंध नहीं जोड़ा जाएगा – 2015 में पश्चात्वर्ती निर्वाचन, वर्ष 2000 में उसके निर्वाचन के कारण उसके पार्षद का पद धारण करने के नाते नहीं था बल्कि वह उसे मिले नये जनादेश के कारण था, इसलिए, अभियोजन के प्रयोजन हेतु दो पद भिन्न थे – मंजूरी अपेक्षित नहीं – याचिका खारिज।

B. Criminal Procedure Code, 1973 (2 of 1974), Section 197 - Public Servant - Sanction for Prosecution **- Acts of cheating, fabrication of records or misappropriation of public money cannot be said to be a part of official duty of a public servant and therefore no sanction required u/S 197 of the Cr.P.C.** **(Para 9)**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 197 – लोक सेवक – अभियोजन हेतु मंजूरी – छल, अभिलेखों को गढ़ना या लोक धन के दुर्विनियोजन के कृत्यों को लोक सेवक के पदीय कर्तव्य का भाग नहीं कहा जा सकता और इसलिए दं.प्र.सं. की धारा 197 के अंतर्गत मंजूरी अपेक्षित नहीं।

Cases referred:

AIR 2015 SC 2022, 2011 AIR SCW 3955, AIR 1984 SCC 684, AIR 2012 SC 1185, (2007) 1 SCC 45, 2015 Cri.L.J. 2942 (SC), (1997) 5 SCC 326, (2015) 1 SCC 513.

S.K. Vyas with *L.S. Chandiramani*, for the applicant.

Anand Soni, for the non-applicant.

ORDER

The Order of the Court was delivered by : VED PRAKASH SHARMA, J. :- This petition under Section 397 of the Code of Criminal Procedure, 1973 (for short 'the Code) has been preferred against the order dated 21/03/2016 passed by Special Judge (under the Prevention of Corruption Act, 1988 – for short 'the Act of 1988') Indore, in Special Case No.08/2015, whereby the learned trial Court has rejected the application preferred by the petitioner Suraj Kero under Section 19 of 'the Act of 1988' read with Section 197 of 'the Code' praying for discharge on the ground that requisite sanction to prosecute him for offences under Section 13(1) (d) read with Section 13(2) of 'the Act of 1988' and Section 218, 466, 471, 474 & 120-B of Indian Penal Code, 1861 (for short 'IPC') has not been obtained by the prosecution.

02. The petitioner has been charge-sheeted by the respondent for offences under Section 13(1)(d) r/w Section 13(2) of 'the Act of 1988' and Section 218, 466, 471, 474 & 120-B 'IPC' on the basis of allegations that during 2000 to 2003 in the capacity of Corporator of Indore Municipal Corporation (for short 'IMC') and Member of the Mayor in Council (for short 'MIC') he, misusing his official position caused wrongful total loss of Rs.5,66,771/- + Rs.27,93,551/- = Rs.33,60,322/- to Municipal Corporation Indore by conferring undue advantage to Meghdoot Corporation in whose favour contract for maintenance and development of Meghdoot Upvan was granted by resolution No. 263 dated 29/03/2001. Allegedly, an amount of Rs.5,66,771/- was not recovered from this firm and an amount of Rs.27,93,551/- was wrongfully paid to it and that a forged working plan was prepared in order to justify the acts and omissions by showing that a meeting was held on 21/11/2002, though the working plant (sic:plan) was scribed on a paper printed in 2003.

03. The petitioner, vide his application under Section 19 of 'the Act of 1988' and Section 197 of 'the Code' prayed for discharge on the ground that during 2000 to 2003 he in the capacity of Corporator of 'IMC', was a public servant. At the time of filing of the charge-sheet on 16.06.2015 he was also Corporator having been elected for 5 years w.e.f. 04/02/2015, therefore, his prosecution without obtaining sanction under Section 19 of 'the Act of 1988' and Section 197 of 'the Code' is bad-in-law, hence he was entitled to be

discharged. The learned counsel for the petitioner referring to pronouncement of this Court in *Chhotelal Yadav @ Ramprakash Yadav vs. State of M.P. through S.P.E. Lokayukt in Cr.R. No.1296/2015 Bench Indore* and Criminal Revision No.1417/14 (*Chhotelal Yadav vs. State of M.P.*) and the pronouncement of apex Court in *D.T. Virupakshappa vs. C. Subhash,* AIR 2015 SC 2022, has vehemently contended before us that the learned trial Court without properly appreciating the relevant legal position has declined the prayer for discharge made by the petitioner, therefore, the impugned order, being contrary to law, is liable to be set aside. It is further contended that on 16.06.2015, the date of filing of the charge-sheet, the petitioner was holding the office of Corporator of 'IMC', therefore, the learned trial Court had no jurisdiction to take cognizance against him in absence of sanction under Section 19 of 'the Act of 1988' and Section 197 of 'the Code'.

04. Per contra, learned counsel for the respondent/State supporting the impugned order has submitted that the alleged acts of misconduct were committed by the petitioner while holding the office of Corporator of 'IMC' pursuant to his election as Corporator for a term of 5 years w.e.f.07.01.2000, 06.01.2005. On completion this term, the petitioner in 2015 again contested election for Corporator of 'IMC' and was elected for a new term of 5 years w.e.f. 04/02/2015. It is contended that the first term of the petitioner as Corporator commencing from 2000 and his second term commencing from 2015 are altogether 2 different aspects and that the second term was not in continuation of the first term. It is further submitted that the alleged acts of misconduct were committed by him during the first term between 2002 – 2003 which has nothing to do with his second term for which he was elected in February, 2015, therefore, no sanction was required either under Section 19 of 'the Act of 1988' or Section 197 of 'the Code'.

05. We have heard the learned counsel for the parties and have carefully gone through the record. As regards factual aspects, it is not a matter of dispute that the petitioner was elected as Corporator of 'IMC' on 07.01.2000 for a term of 5 years which came to an end on 06.01.2005 meaning thereby by virtue of his election as Corporator, he enjoyed a fixed tenure of 5 years as Corporator. His reelection in February, 2015 again as Corporator for a term of 5 years was not in continuation of his earlier election in the year 2000. The first election as Corporator conferred on the petitioner right to hold office of Corporator only till 06.01.2005. His liability for acts or omissions or for that

matter, the acts of alleged misconduct during his term of Corporator between 07.01.2000 to 06.01.2005 had no nexus or relationship with his subsequent election as Corporator in February 2015 for a term of 5 years. A sheer co-incidence that on the date of filing of the charge-sheet on 16.06.2015 he was a Corporator will not make any difference because in 2015, he came to occupy the office of Corporator on the basis of fresh election and further the alleged acts of misconduct were for the earlier period and not for the subsequent period.

06. The learned trial Court in the impugned order has dealt with this issue in an elaborate manner and referring to the pronouncements of the apex Court in *Abhay Singh Chotale vs. CBI,* 2011 AIR SCW 3955, *R.S. Naik vs. A.R.Antule,* AIR 1984 SCC 684, *Subramaniam Swamy vs. Manmohan Singh,* AIR 2012 SC 1185 and *Balkrishan Ravi Menon vs. Union of India,* (2007) 1 SCC 45, has rightly come to the conclusion that the question of obtaining sanction under Section 19 of 'the Act of 1988' is relatable to the time of holding of the office when the offence was alleged to have been committed and in the case when the person is not holding the said office as he might have retired, superannuated, discharged or dismissed then the question of sanction would not arise. In the instant case, the term of the office of Corporator held by the petitioner from 07.01.2000 to 06.01.2005 came to an end by efflux of time. Simply because he was again elected as Corporator in February, 2015 will not go to relate back his position as Corporator to his earlier election in 2000 to the same post. Subsequent election in 2005 was not by virtue of his holding the office of Corporator due to his election in 2000, rather it was on account of his fresh electoral mandate, therefore, the two offices were different for the purpose of prosecution under 'the Act of 1988'.

07. The pronouncement of apex Court in *Abhay Singh Chotala* (supra) to the effect that if public servant continues to be a public servant but in a different capacity or holding a different office which he is alleged to have abused, there will be no question of sanction. In the instant case though the petitioner was holding the office of the Corporator in 2015, however, it was on the basis of fresh election and not because he was earlier a Corporator. In *Bal Krishnan's* case (supra) the apex Court has made it very clear that if on the date when the cognizance is taken, a public servant is not continuing to hold that very office, no sanction will be required.

08. In the light of the aforesaid legal position as propounded by the apex Court, reliance by the petitioner on the decision of a Division Bench of this Court in *Chotelal Yadav* (supra) and other cases cannot be much help to the petitioner. The legal dictum as laid down by the apex Court in a series of decision, being specific and clear, has to be respected and followed.

09. As regards plea relating to absence of sanction under Section 197 of 'the Code' the learned trial Court referring to decisions of the apex Court in *Inspector of Police and another vs. Battenapatla Venkata Ratnam and another,* 2015 Cri.L.J. 2942 (SC) has rightly held that acts of cheating, fabrication of records or misappropriation of public money cannot be said to be a part of official duty of a public servant, therefore, in such matters sanction for prosecution is not required under Section 197 of 'the Code'.

10. In *Shambhoo Nath Misra v. State of U.P. and others,* (1997) 5 SCC 326, (para5) Honble the apex Court has held that:

> "5. The question is when the public servant is alleged to have committed the offence of fabrication of record or misappropriation of public fund etc. can he be said to have acted in discharge of his official duties. It is not the official duty of the public servant to fabricate the false records and misappropriate the public funds etc. in furtherance of or in the discharge of his official duties. The official capacity only enables him to fabricate the record or misappropriate the public fund etc. It does not mean that it is integrally connected or inseparably interlinked with the crime committed in the course of the same transaction, as was believed by the learned Judge. Under these circumstances, we are of the opinion that the view expressed by the High Court as well as by the trial court on the question of sanction is clearly illegal and cannot be sustained."

11. In *Rajib Ranjan and others v. R. Vijaykumar,* (2015) 1 SCC 513(para18) it has been held as under :

> "even while discharging his official duties, if a public servant enters into a criminal conspiracy or indulges in criminal misconduct, such misdemeanour on his part is not to be treated

as an act in discharge of his official duties and, there fore, provisions of Section 197 of the Code will not be attracted".

12. In view of the aforesaid, we do not find any infirmity, illegality or impropriety in the impugned order, therefore, this petition having no merits, deserves to be and is accordingly, hereby dismissed.

Revision dismissed.

I.L.R. [2017] M.P., 1243
CRIMINAL REFERENCE

Before Mr. Justice S.K. Gangele & Mr. Justice Subodh Abhyankar
Cr.Ref. No. 03/2016 (Jabalpur) decided on 12 January, 2017

IN REFERENCE ...Applicant
Vs.
MAHENDRA TIWARI ...Non-applicant

(Alongwith Cr.A. No. 2342/2016 & Cr.A. No. 2346/2016)

Penal Code (45 of 1860), Section 302/34 & 201 - Death due to Burn Injuries - Conviction and Sentence - Oral Dying Declaration - Death Penalty **- Husband, brother-in-law and mother-in-law were charged with the offence - Husband was awarded death sentence whereas other two accused were sentenced for life imprisonment - Held - It is alleged that husband sprinkled petrol on deceased and set her ablaze - No circumstantial evidence against brother-in-law and mother-in-law - Oral dying declaration of deceased against them is not reliable - Both are living separately from the deceased and except the oral dying declaration, there is no other evidence to connect them with the incident, benefit of doubt should be given to them - Evidence of cruelty by husband towards deceased, he did not even reached the spot nor accompanied the deceased to hospital - In forensic report, smell of petrol was found on under garments of deceased - Mother of deceased specifically stated that deceased told her that appellant husband sprinkled petrol on the deceased and set her ablaze, her testimony is reliable - Prosecution has proved the guilt of husband beyond reasonable doubt - Husband's conviction upheld whereas the conviction of brother-in-law and mother-in-law is set aside - Further held - Death penalty can be inflicted only on the gravest of the grave cases - Act of**

the appellant husband could not be termed as gravest of grave cases - Trial Court Committed error in awarding death sentence - Reference answered in negative - Husband's sentence modified to life imprisonment - Appeal filed by brother-in-law and mother-in-law allowed. (Paras 37, 38, 39 & 41)

दण्ड संहिता (1860 का 45), धारा 302/34 व 201 – जलने की क्षतियों के कारण मृत्यु – दोषसिद्धि एवं दण्डादेश – मौखिक मृत्युकालिक कथन – मृत्युदण्ड – पति, देवर व सास अपराध से आरोपित किये गये थे – पति को मृत्युदण्ड जबकि अन्य दो अभियुक्तों को आजीवन कारावास से दण्डादिष्ट किया गया – अभिनिर्धारित – यह अभिकथित किया गया है कि पति ने मृतिका पर पेट्रोल छिड़का और उसे आग लगा दी – देवर और सास के विरूद्ध कोई परिस्थितिजन्य साक्ष्य नहीं – उनके विरूद्ध मृतिका का मौखिक मृत्युकालिक कथन विश्वसनीय नहीं – दोनों मृतिका से पृथक रह रहे थे और मौखिक मृत्युकालिक कथन के अलावा उन्हें घटना के साथ जोड़ने के लिए कोई अन्य साक्ष्य नहीं, उन्हें संदेह का लाभ दिया जाना चाहिए – मृतिका के साथ पति द्वारा क्रूरता के व्यवहार का साक्ष्य, यहाँ तक कि वह मौके पर पहुंचा भी नहीं और न ही मृतिका के साथ चिकित्सालय गया – फॉरेंसिक प्रतिवेदन में मृतिका के अंतर्वस्त्रों पर पेट्रोल की गंध पायी गई थी – मृतिका की माँ ने विनिर्दिष्ट रूप से कथन किया है कि मृतिका ने उसे बताया था कि अपीलार्थी पति ने मृतिका पर पेट्रोल छिड़का और उसे आग लगा दी, उसका परिसाक्ष्य विश्वसनीय है – अभियोजन ने पति की दोषिता युक्तियुक्त संदेह से परे साबित की है – पति की दोषसिद्धि कायम रखी गई जबकि देवर एवं सास की दोषसिद्धि अपास्त की गई – आगे अभिनिर्धारित – मृत्युदण्ड केवल गंभीर से गंभीरतम प्रकरणों में दिया जा सकता है – पति का कृत्य गंभीर से गंभीरतम नहीं कहा जा सकता – विचारण न्यायालय ने मृत्युदण्ड प्रदान करने में त्रुटि कारित की – निर्देश को नकारात्मकता में उत्तरित किया गया – पति के दण्डादेश को आजीवन कारावास में परिवर्तित किया गया – देवर एवं सास द्वारा प्रस्तुत की गई अपील मंजूर की गई।

Cases referred :

AIR 1976 SC 1924, AIR 1981 SC 765 (1), AIR 1982 SC 839, AIR 1994 SC 464, AIR 1980 SC 436, 1971 (3) SCC 443, (2010) 10 SCC 611, (2008) 11 SCC 232, (2013) 12 SCC 255, (2014) 12 SCC 312, (2008) 13 SCC 268, (1999) 8 SCC 458, AIR 1980 SC 898.

Ajay Shukla, G.A. for the State in all the three cases.

Sankalp Kochar, for the non-applicant in Cr.Ref.C. No. 03/2016 and for the appellants in Cr.A. No. 2342/2016 & Cr.A. No. 2346/2016.

JUDGMENT

The Judgment of the Court was delivered by : **S.K. GANGELE, J. :-** The death reference has been referred by the trial Court because the Court has awarded a sentence of death to accused/appellant Mahendra Tiwari. The appellants Pawan Tiwari, Saroj Tiwari and Mahendra Tiwari have also filed criminal appeals. All the three cases are heard together.

2. Deceased Priya Tiwari died after receiving burn injuries. She was taken to the nearby hospital Amanganj by her mother-in-law and other persons, from where she was referred to Katni, thereafter, to Jabalpur. Before reaching Jabalpur, she died. The mother-in-law of the deceased informed the Police Station Amanganj on 10.12.2014 that she received information from her sister-in-law (devrani) Parvati Bai that smoke was coming out from the house of her daughter-in-law; then she had reached at the house of her daughter-in-law, then she came to know that her daughter-in-law received burn injuries. Thereafter, she had taken her daughter-in-law alongwith other family members to Government Hospital, Amanganj, thereafter, to Katni and Jabalpur. Ten kilometers before Jabalpur, her daughter-in-law died. Hence, information is submitted.

2. The police registered merg on 10.12.2014 Ex.P/20. Report of the incident was lodged on 13.12.2014. The police conducted investigation, recorded statements of witnesses and filed charge-sheet against the accused persons/appellants for commission of offences punishable under Sections 302/34 and 201 of the Indian Penal Code.

3. The trial Court framed charges against the accused persons/appellants for commission of offences punishable under Sections 302/34 and 201 of the Indian Penal Code. The accused persons/appellants abjured their guilt and pleaded not guilty. The trial Court, after trial, has held the appellants guilty and awarded a sentence of death to the husband of the deceased/Mahendra Tiwari and life sentence to the mother-in- law of the deceased/Smt. Saroj Tiwari and the brother-in-law of the deceased i.e. younger brother of the husband of the deceased/Pavan Tiwari.

4. The trial Court relied on the statements of the family members of the deceased and some other prosecution witnesses who deposed that the deceased had told them that accused persons/appellants had sprinkled petrol

and set her ablaze.

5. The counsel for the appellants has submitted that oral dying declaration of the deceased, which is said to be given by her to her family members and other persons, is not reliable. The evidence of the witnesses is also not reliable. It is contradictory to the evidence of other prosecution witnesses. The conviction is based on circumstantial evidence, however, the chain is not complete and the witnesses were not present at the place as deposed by them. He has further submitted that the deceased herself set her on fire and the family members had taken her to the hospital. Hence, the judgment passed by the trial Court is contrary to the evidence on record and the prosecution has failed to prove the guilt of the accused persons/appellants beyond reasonable doubt. Learned counsel has further submitted that the trial Court has further committed an error of law in awarding death sentence to the husband of the deceased. The case is not rarest of rare case in which sentence of death be awarded. In support of his contentions, learned counsel has relied on the following judgments:

(a) *Subhash and another vs State of U.P.,* AIR 1976 SC 1924

(b) *Shankarala Gyarasilal Dixit vs State of Maharashtra,* AIR 1981 SC 765(1);

(c) *Mohanlal Gangaram Gehani vs State of Maharashtra,* AIR 1982 SC 839;

(d) *Ramsai and others vs State of M.P.,* AIR 1994 SC 464;

(e) *Baldev Raj vs State of H.P.;* AIR 1980 SC 436;

(f) *Sadaram, son of Gurbux Kalar vs The State of Madhya Pradesh,* 1971(3) SCC 443;

(g) *Sunder Singh vs State of Uttaranchal,* (2010) 10 SCC 611;

(h) *Arun Bhandudas Pawar vs State of Maharashtra,* (2008) 11 SCC 232;

(i) *State of Rajasthan vs Shravan Ram and another,* (2013)

12 SCC 255;

(j) *Sudarshan and another vs State of Maharashtra,* (2014) 12 SCC 312;

(k) *State of Haryana vs Ved Prakash,* (2008) 13 SCC 268 and;

(l) *Heikrujam Chaoba Singh vs State of Manipur,* (1999) 8 SCC 458.

6. Learned Government Advocate for the State has submitted that the prosecution has led cogent evidence to prove the guilt of the accused persons/ appellants beyond reasonable doubt. The deceased had told the witnesses that accused persons/appellants after sprinkling petrol on her set her ablaze. This fact has been proved from circumstantial evidence also. The deceased received burn injuries. The trial Court appreciated the evidence properly and awarded a proper sentence.

7. PW-1 Halke Adiwasi is the witness of seizure and the memorandum. He denied the fact that any seizure (Ex.P1) was made before him or any memorandum was given by the accused. He is the witness of seizure of plastic cane in which it is said that the petrol was stored. He was declared hostile.

8. PW-2 Dr. M.K. Gupta was the doctor, who had first examined the deceased when she was brought at Community Health Center, Amanganj and thereafter, he had conducted the postmortem. His evidence shall be considered in detail subsequently.

9. PW-3 Girdhari Lal is the Constable who had taken the dead body of the deceased to Community Health Center, Amanganj for postmortem and after postmortem the dead body was handed over to the husband of the deceased/Mahendra Tiwari. Under garments of the deceased were seized before this witness and seizure memo Ex.P/6 was prepared.

10. PW-4 Smt. Prabha Devi is the mother of the deceased. She deposed that marriage of the deceased was solemnized with accused Mahendra Tiwari 12 years before. She received information in Amanganj from Ashish that her daughter had received burn injuries. She came alongwith her younger son and met with the deceased near petrol pump at Amanganj. At that time, in-laws of

the deceased were taking the deceased for treatment. They had taken her to Katni, then to Jabalpur. She deposed that she accompanied them and her daughter told her on the way that her husband had beaten her by a plas and her husband Mahendra Tiwari, younger brother of the husband Pavan Tiwari and mother-in-law Saroj Tiwari had sprinkled petrol on her and set her ablaze and thereafter, locked her in the kitchen. The deceased was examined by the doctor at Jabalpur at 9 O'Clock. The, doctor advised to take the deceased back because the deceased was died. Thereafter, body of the deceased was taken to Amanganj. The deceased was given cruel treatment in her in-laws' house by her husband, brother-in-law and mother-in-law. The husband of the deceased and his younger brother both used to drink. In her cross-examination, she admitted the fact that deceased had two children, one daughter Kajal Tiwari, aged about 10 years and one son Diwakar Tiwari, aged about 9 years, daughter Kajal Tiwari was living with her grandmother/accused Smt. Saroj Tiwari and son was living with her. She admitted the fact that Prem Shankar Tiwari had given her Rs.50,000/- to deposit in the name of son of the deceased namely Diwakar Tiwari. She further deposed that the deceased used to come to her house once in a month and she always used to tell about the cruel treatment meted out to her. In para 11 of her cross-examination, she admitted the fact that in her statement Ex.D/1, recorded by the police, it is mentioned that the husband had sprinkled petrol on her and set her ablaze. She further admitted the fact that she did not lodge any report at the police station. She denied the suggestion that deceased caught fire when she was cooking on a gas in the kitchen and that the deceased died due to accident.

11. PW-5 Ashish Payasi is the brother of the deceased. He also deposed that the marriage of the deceased was solemnized with the accused/appellant Mahendra Tiwari 11 years before. He further deposed that on the date of incident, he had gone to Amanganj Market where he got information that his sister received burn injuries. He immediately rushed to the hospital at Amanganj and noticed that his sister was taken out from the hospital on a stretcher and the doctor administered one injection and advised to take the deceased to Katni. Alongwith the deceased, in a jeep, mother-in-law of the deceased, Sudama, who was the bhanja of Smt. Saroj and Prem Shankar, who was the brother-in-law of Smt. Saroj, were there. Thereafter, he informed his father and then his mother reached at Amanganj Petrol Pump alongwith younger brother of the deceased and she had also gone alongwith the deceased. He

specifically deposed that he had inquired from the deceased, "how this has happened." Then, she told me that her husband, brother of the husband and the mother of the husband had beaten her and, thereafter, they sprinkled petrol on her and set her ablaze and locked her inside the kitchen and ran away. He admitted the fact that an iron rod and a burnt petrol cane were seized by the police before him. The map is Ex.P7 and the seizure memo is Ex.P8. He denied the fact in his cross-examination that nurse administered the injection to the deceased. He further deposed that he had talked with the deceased at Amanganj and he stayed with the deceased for 15 to 20 minutes at Amanganj.

12. PW-6 Mahesh Prasad Adiwasi turned hostile. He denied the fact that any seizure Ex.P2 was made before him on the basis of memorandum Ex.P1.

13. PW-7 Anil Pathak deposed that he had seen Ashish, who is the brother of the deceased, running at Amanganj market and he inquired him that what has happened, then he told that his sister received burn injuries. He further deposed that he accompanied Ashish to Amanganj Hospital and there the deceased was on stretcher and she told me, "brother save me, Mahendra, Pavan and Saroj had set me ablaze." He admitted the fact that he and Ashish are the residents of the same village.

14. PW-8 Rajesh Payasi is the father of the deceased. He in his evidence deposed that his son had told him that deceased received burn injuries and he also told him that deceased was crying and telling that the accused persons/ appellants had set her ablaze. He denied the fact that any article was seized from the jeep. On this point, he was declared hostile. He admitted that he had signed Ex.P11. He further deposed that accused persons/appellants had treated the deceased with cruelty.

15. PW-9 Manoj Upadhyay, who is a photographer, deposed that he is resident of village Pagra which is the village of mother and father of the deceased. On the date of incident, he had come to Amanganj and he had also gone to the hospital and at that time he inquired from the deceased that what had happened then she told him that Mahendra, Pavan and Saroj had set her ablaze after sprinkling petrol. He further deposed that he had taken photographs of the deceased.

16. PW-10 Ram Shiromani Pandey is the Assistant Sub-Inspector, who had arrested the accused Pavan Tiwari on 13.12.2014 and prepared the arrest

memo Ex.P12.

17. PW-11 Brijendra Kumar Mahdele is the Patwari, who has prepared the map Ex.P13.

18. PW-13 Ram Autar Pateriya is the Assistant Sub-Inspector who recorded the merg and information of death of the deceased vide Merg No.59/2014 on the basis of information given by accused Saroj Tiwari, mother-in-law of the deceased.

19. PW-14 Vasudev Prasad Tiwari is the neighbour of the deceased. He deposed that his house is at the backside of the house of the deceased. At around 4-5 O'Clock in the evening, Shyam Sundar cried that smoke was coming out from the house of Mahendra Tiwari and, thereafter, "I rushed to the house of Mahendra Tiwari, the gate was closed, I pushed the gate and entered the room, at that time, deceased Priya came out and her hands were up, she was burnt badly, then I asked my son Arjun to bring a bora (sack) and then Shyam Bihari also came and, thereafter, other persons also came and then her in-laws had taken the deceased to the hospital."

20. PW-15 Shyam Sundar Tiwari deposed that he had seen smoke coming out from the house and, thereafter, he had called Arjun Tiwari and he had gone inside the house, at that time, deceased was lying. Then, uncle of Mahendra Tiwari namely Prem Shankar Tiwari took a vehicle jeep and they had taken the deceased to the hospital. Other family members were not in the house. He had admitted the fact that Pavan Tiwari and Saroj Tiwari had been living separately from the deceased. He further deposed that the deceased died when she was preparing tea.

21. PW-16 Vishnu Kumar Pidha is also a neighbour. He deposed that he had accompanied the deceased and family members upto Amanganj Hospital where an injection was administered and the deceased was referred to Katni.

22. PW-17 Ram Sushil Shukla was also declared hostile. PW-18 Shyam Bihari Tiwari is also a hostile witness. He deposed that he had seen the deceased at the time of incident when she received burn injuries.

23. The prosecution examined total 18 witnesses before the trial Court.

24. PW-12 Mr. S.S. Baghel conducted the investigation. He deposed that

he had conducted investigation about the death of the deceased and prepared panchnama of the dead body of the deceased Ex.P10. He further deposed that he had seized a bag of joot vide Ex.P11 and also prepared the map, which is Ex.P7. He had recorded the FIR Ex.P14 and also seized plain soil (sada mitti) and blood stained soil from the kitchen and thereafter, 'plas' and 'pikiya' were also seized vide seizure memo Ex.P2. Saroj Tiwari was arrested vide Ex.P15 and Mahendra Tiwari was arrested vide Ex.P16. He further deposed that he had recorded the statements of the witnesses and sent the seized articles to FSL Sagar vide Ex.P17 and received the FSL reports which are Ex.P18 and Ex.P19. He in his cross-examination admitted the fact that he cannot say that on which seized article he found smell of petrol. He admitted the fact that in the panchnama of dead body Ex.P10, he did not mention that there was any injury on the person of the body of the deceased. He admitted the fact that accused Pavan and Saroj were living separately from the deceased. He further admitted the fact that there was a partition in the house. He denied the fact that any report was lodged before the incident by the family members of the deceased against Mahendra Tiwari.

25. PW2-Dr. M.K. Gupta was posted as Medical Officer on 10.12.2014 at Community Health Center, Amanganj. He deposed that at around 4:15 in the evening, one person told him that one lady received burn injuries and, thereafter, when he came out, one vehicle came and he had seen a lady in the vehicle. The persons told him that the lady had received burn injuries. They further told him that they want to take the deceased for treatment outside and requested him to administer injection of pain killer. He further told that he advised them to take the deceased to District Hospital, Panna. The lady was in the jeep. In his cross-examination he further deposed that on his instructions, nurse administered the injection to the deceased but no prescription of treatment was issued by the hospital. He denied the fact that the brother of the deceased met him. He further deposed that he had conducted postmortem of the deceased. He noticed that deceased received 96% burn injuries. The larynx and trachea were congested and the smoke particles were present in the trachea. He further deposed that he had seized the underwear of the deceased and the hair of the head of the deceased and had handed over the same to the Constable. The deceased was died due to shock received by her from burn injuries. In his cross-examination, he admitted the fact that he did not mention the fact in postmortem report Ex.P3 that from the dead body of

the deceased smell of petrol was coming neither from the cloths of the deceased smell of petrol was coming. He further deposed that if he had noticed the smell of petrol on cloths then he must have mentioned the aforesaid facts. He further deposed that he did not notice any injury except burn injuries on the person of the body of the deceased, neither any injury was reported by him except burn injuries. The persons did not told him how deceased received burn injuries, there may be an accident.

26. The FSL reports are Ex.P18 and Ex.P19. As per the reports, there was light smell of petrol on Ex.B and Ex.F which were under garments of the deceased. In the plastic cane, which was Ex.G, there was smell of vegetable oil. On Ex.B and Ex.F, some residuary articles of petrol were found, however, on Ex.A, Ex.C, Ex.E, Ex.G and Ex.H no particles of inflammable petroleum hydrocarbon (diesel/kerosene/ petrol) were found.

27. The trial Court has placed reliance on the evidence of PW-4 Smt. Prabha Devi, who is the mother of the deceased, PW-5 Ashish Payasi, who is the brother of the deceased, PW- 7 Anil Pathak, PW-8 Rajesh Payasi, who is the father of the deceased and PW-9 Manoj Upadhyay. All the witnesses have deposed that the deceased had told them that all the three accused persons had sprinkled petrol on her and set her ablaze. The dying declaration of the deceased is oral dying declaration. There is no dying declaration of the deceased said to be recorded by the Executive Magistrate or by the doctor.

28. PW-4 Smt. Prabha Devi in her evidence deposed that she reached at a petrol pump at Amanganj where she met with the in-laws of the deceased and they were taking the deceased to the hospital in a jeep. She further deposed that on the way the deceased told her that three accused persons namely Mahendra Tiwari (husband), Pavan Tiwari (devar) and Saroj Tiwari (mother-in-law) had sprinkled petrol on her and set her ablaze and locked the kitchen from inside and ran away. In para 11 of her cross-examination, she admitted the fact that in her statement Ex.D1, recorded by the police, it is not mentioned that all the three accused persons had set the deceased ablaze and it is mentioned that the husband of the deceased Mahendra Tiwari had set the deceased ablaze. We have perused the statement Ex.D1 of PW-4 Smt. Prabha Devi recorded under Section 161 of the Cr.P.C. by the police. In the aforesaid statement, she stated that the accused Mahendra Tiwari had locked the deceased in the kitchen and sprinkled petrol on her and set her ablaze. PW-5

Ashish Payasi, who is the brother of the deceased, deposed that at Amanganj he had asked from the deceased that what had happened, then she told him that all the three accused persons had beaten her and sprinkled petrol on her and set her ablaze. Same facts have been deposed by PW-7 Anil Pathak. He deposed that deceased had told him at Amanganj Hospital when she was on a stretcher that three accused persons had set her ablaze. PW-9 Manoj Upadhayay also deposed the same fact, however, he had said that he had seen the deceased when she was laying outside of the Amanganj Hospital and at that time deceased told him that three accused persons/appellants had sprinkled petrol on her and set her ablaze.

29. The question is that whether these statements of the witnesses are reliable in regard to oral dying declaration of the deceased or not. This is an important piece of evidence and it has to be examined carefully.

30. The Apex Court in the matter of *Ramsai and others vs State of M.P.*, AIR 1994 SC 464 has held as under in regard to oral dying declaration:

> *".....The oral dying declaration is no doubt an important piece of evidence. But it should be free from all infirmities....."*

31. The Apex Court in the matter of *Heikrujam Chaoba Singh vs State of Manipur,* (1999) 8 SCC 458 has held as under in regard to oral dying declaration:

> *"An oral dying declaration no doubt can form the basis of conviction, though the courts seek for corroboration as a rule of prudence. But before the said declaration can be acted upon, the court must be satisfied about the truthfulness of the same and that the said declaration was made by the deceased while he was in a fit condition to make the statement. The dying declaration has to be taken as a whole and the witness who deposes about such oral declaration to him must pass the scrutiny of reliability."*

32. The principle of law which emerges from the above quoted judgments of the Apex Court in regard to oral dying declaration is that the witness who deposes about such oral dying declaration to him must pass the scrutiny of

reliability.

33. PW-4 Smt. Prabha Devi, who is the mother of the deceased did not mention the names of other two accused persons namely Pavan Tiwari and Saroj Tiwari in her statement recorded under Section 161 of the Cr.P.C. to the effect that they had also set the deceased ablaze. Apart from this, she deposed that she was in the jeep and, thereafter, when the deceased died the vehicle returned back, however, she had not taken any care to take care of dead body of the deceased. The dead body was given on supurdaginama to the husband of the deceased. PW-4 did not lodge any FIR at the police station. The mother-in-law of the deceased i.e. accused Saroj Tiwari informed the police about the death of the deceased. On that basis, the merg was registered. The FIR was registered on 13.12.2014, however, the merg Ex.P20 was registered on 10.12.2014. There is no explanation that why the mother of the deceased did not lodge the FIR. The brother of the deceased PW-5 Ashish Payasi and other two witnesses i.e. PW-7 Anil Pathak and PW-9 Manoj Upadhyay are the residents of the same village. PW-9 Manoj Upadhyay told them about the act of the accused persons/appellants when they met with her at Amanganj Hospital. However, this statement does not find corroboration with the statement of PW-2. From the evidence of PW-2 Dr. M.K. Gupta, who is an independent witness deposed that one vehicle came and he had seen there that a lady was laying in the vehicle who had received burn injuries. The lady was not taken into the hospital. The nurse administered an injection to the deceased and thereafter, the vehicle had left the hospital. He specifically denied that brother of the deceased Ashish came to him. The statement of the doctor is quite natural. The condition of the deceased was serious and nurse administered an injection to her and, thereafter, the vehicle had rushed to another hospital. The statements of aforesaid two witnesses in regard to dying declaration are contrary to the statements and deposition of the neighbours.

34. The witnesses also deposed that deceased had told them that the accused persons had beaten her and locked her inside the kitchen. However, the doctor who conducted postmortem and the Investigating Officer, in their evidence deposed that they did not notice any injury except burn injuries on the person of the body of the deceased. The neighbours, who are also prosecution witnesses, did not depose that they found the kitchen locked from inside.

35. PW-14 Vasudev Prasad Tiwari, who is the neighbour of the deceased, deposed that he had seen smoke coming out from the house and, thereafter, he went to the house of the deceased and opened the door and at that time, the deceased came out from the house and, thereafter, he tried to save the deceased and then other persons came. He specifically denied the fact that the room was locked from inside and it was opened. Same facts have been deposed by PW-15 Shyam Sundar Tiwari, who also deposed that he had seen that the deceased was laying in the house and she was taken to the hospital by her in-laws in a vehicle. Same facts have been deposed by PW-16 Vishnu Kumar Pidha, PW-17 Ram Sushil Shukla, and PW-18 Shyam Bihari Tiwari. These witnesses are the independent prosecution witnesses. Even though, after death of the deceased, PW-8 Rajesh Payasi did not depose that the kitchen was locked from inside. He was declared hostile in regard to seizure memo. The witness of seizure Ex.P2 and Ex.P1 did not support the case. They have been declared hostile. As per the FSL report, Ex.P18, no smell of petrol was found in the plastic cane which was seized by the police and in which it is said that the petrol was stored, however, smell of petrol was found on the under garments of the deceased which is Ex.B, but, it is mentioned that smell was '...क्षीण...'. The doctor, who conducted the postmortem, specifically deposed that he did not notice any smell of petrol from the body of the deceased or her cloths that's why he did not mention the said facts in Ex.P3.

36. In this view of the matter, in our opinion, the dying declaration which is said to be given by the deceased to PW-4, PW-5, PW-7 and PW-9 in regard to two accused persons Pavan Tiwari and Saroj Tiwari is not reliable. The conduct of the aforesaid two accused persons has also to be taken into consideration.

37. The investigation officer admitted the fact that Pavan Tiwari, who is the younger brother of the husband of the deceased and Smt. Saroj Tiwari who is the mother-in-law of the deceased were living separately from the deceased. This fact has also been corroborated by the evidence of independent witnesses, who are the neighbours. The conduct of the accused persons is that mother-in-law Smt. Saroj Tiwari and other family members of the husband of the deceased had taken the deceased to the hospital in a jeep. Last rites were also preformed by them.

38. Except the oral dying declaration, there is no other evidence to connect the accused persons with the incident.Hence, in our opinion, the conviction recorded by the trial Judge of Pavan Tiwari and Smt. Saroj Tiwari is contrary to law and the prosecution has failed to establish the guilt beyond reasonable doubt against appellants Pavan Tiwari and Smt. Saroj Tiwari. There is no circumstantial evidence against these two accused persons/appellants, hence, benefit of doubt is given to them.

39. In regard to the conduct of the husband of the deceased Mahendra Tiwari, his conduct is quite suspicious. He was not accompanying the persons who had taken the deceased to the hospital, even though his mother, who had taken the deceased to the hospital after she received burn injuries. There is no evidence why the appellant Mahendra Tiwari, who is the husband of the deceased, did not reach on the spot immediately and did not accompany the deceased alongwith his mother to the hospital. Not only that, in the accused statement recorded under Section 313 of Cr.P.C., the defence adopted by this appellant is that he had lent Rs.50,000/- to his in-laws and in order to grab said amount, as also the land in his name they have falsely implicated to him, and has tried to make the most of accidental death of his wife. It is pertinent to mention here that no such suggestion has been made by the appellant to any of the witnesses, hence, the defence so adopted by the appellant cannot be accepted. The amount of Rs.50,000/- as suggested by the appellant was actually given towards the maintenance of his minor son who was living with his in laws. The mother of the deceased PW-4 Prabha Devi deposed that deceased told her that her husband Mahendra Tiwari sprinkled petrol on her and set her ablaze. She also stated the same fact in her statement recorded under Section 161 of the Cr.P.C. Up to that extent, the testimony of PW-4 is reliable. If the testimony of single witness is reliable, inspires confidence of the court, the conviction of the accused can be based on the aforesaid testimony. Hence, in our opinion, the prosecution has proved the guilt of the appellant Mahendra Tiwari beyond reasonable doubt. There is also evidence that appellant Mahendra Tiwari, who is the husband of the deceased, treated the deceased with cruelty. The son and the daughter of the deceased were living separately from their father and mother. Son was living with the mother of the deceased and the daughter was living with the mother-in-law of the deceased. It established the fact that the appellant Mahendra Tiwari was not treating the deceased properly. In our opinion, there is evidence to establish the fact that

the appellant Mahendra Tiwari had sprinkled petrol on the deceased and set her ablaze. In the forensic report, smell of petrol was found on the under garments of the deceased, seized by PW-2 who performed the postmortem. Hence, the conviction of the appellant Mahendra Tiwari for commission of offences punishable under Section 302 of the Indian Penal Code is hereby upheld.

40. Now, the next question is that whether punishment of death sentence is proper or not.

41. The Apex Court in the matter of *Sunder Singh vs State of Uttaranchal*, (2010) 10 SCC 611 has held as under in regard to award of death sentence and rarest of the rare case:

> *"51. The law is now well settled in the decision in Bachan Singh Vs. State of Punjab [AIR 1980 SC 898], where it was held that the death penalty can be inflicted only in the gravest of the grave cases. It was also held that such death penalty can be imposed only when the life imprisonment appears to be inadequate punishment. Again it was cautioned that while imposing the death sentence, there must be balance between circumstances regarding the accused and the mitigating circumstances and that there has to be overall consideration of the circumstances regarding the accused as also the offence. Some aggravating circumstances were also culled out, they being:*
>
> > *(a) where the murder has been committed after previous planning and involves extreme brutality; or*
> >
> > *(b) where the murder involves exceptional depravity.*
>
> *52. The mitigating circumstances which were mentioned in that judgment were:-*
>
> > *(a) That the offence was committed under the influence of extreme mental or emotional*

disturbance;

(b) The age of the accused. If the accused is young or old, he shall not be sentenced to death;

(c) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society;

(d) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions (c) and (d) above;

(e) That in the facts and circumstances of the case, the accused believed that he was morally justified in committing the offence;

(f) That the accused acted under the duress or domination of another person; and

(g) That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct.

53. The law was further settled in the decision in Machhi Singh & Ors. Vs. State of Punjab [AIR 1983 SC 957], where this Court insisted upon the mitigating circumstances being balanced against the aggravating circumstances. The aggravating circumstances were described as under:

(a) When the murder is in extremely brutal manner so as to arouse intense and extreme indignation of the community.

(b) When the murder of a large number of persons of a particular caste, community, or locality is committed.

(c) When the murder of an innocent child, a helpless woman is committed.

54. The matter was further considered in Devender Pal Singh Vs. State of NCT of Delhi [AIR 2002 SC 1661], wherein, after examining both the aforementioned cases, it was held that when a murder is committed in an extremely brutal manner, or for a motive which suggests total depravity and meanness or where the murder is by hired assassin for money or reward, or a cold blooded murder for gains, the death sentence is justified. Similar such observation was made even in the decision in Atbir Vs. Govt. of NCT of Delhi [JT 2010 (8) SC 372].

55. Relying on all these cases, this Court, in Criminal Appeal Nos. 127-130 of 2008 (C. Muniappan & Ors. Vs. State of Tamil Nadu) decided on 30.8.2010, confirmed the death sentence. That was a case where the accused persons, while demonstrating against the arrest of their leader, started damaging public transport vehicles. Some girl students of a University were travelling in a bus. The three accused persons attacked the bus and sprinkled petrol in the bus full of girl and boy students and set it on fire with the students still inside the bus. As a result, the inmates started escaping; however, three of the girls could not escape and were roasted alive. The unprovoked attack on the bus and the burning of the bus by sprinkling petrol on the bus, and the death of three students as a result of such burning was viewed by this Court as a barbaric and inhuman act of the highest degree. The offence was viewed as brutal, diabolical, grotesque and cruel, shocking the collective conscience of society. It was on that account that the death sentence was confirmed. Several comments have also been made by this Court on the inaction shown by the general public and the police who remained passive and did not try to help the unfortunate victims.

56. In Ravji Alias Ram Chandra Vs. State of Rajasthan

[1996 (2) SCC 175], relying on the decision in Dhananjoy Chatterjee Vs. State of West Bengal [1994 (2) SCC 220], this Court confirmed the death sentence, where the murder by the accused of his wife in the advanced stage of pregnancy and of his three minor children was viewed as rarest of the rare cases. The Court observed that the accused has not even spared his mother, who very rightly tried to prevent him, and the accused assaulted her with the same axe with which he killed his wife and minor children. The accused was described as blood-thirsty demon. In Dhananjoy Chatterjee Vs. State of West Bengal (cited supra), the murder was of a helpless girl who was raped and then murdered. That was viewed as the rarest of the rare cases.

57. In State of U.P. Vs. Dharmendra Singh & Anr. [1999 (8) SCC 325], it was held that the High Court was not right in avoiding the death sentence on the ground that the convict was languishing in death cell for more than 3 years. In that case, the accused had committed murder of 5 persons including an old man of 75 years, a woman aged 32 years, two boys aged 12 years and a girl aged 15 years when they were asleep only to wreak vengeance on the part of the accused. The High Court considered the act on the part of the accused in denuding the lower part of the body of the girl. This Court observed that the High Court had misdirected itself in refusing to confirm the death sentence on account of the so-called 3 years of languishing in death cell. For this proposition, the Court relied on the decision in Triveniben Vs. State of Gujarat [1988 (4) SCC 574], where it was held that the delay in executing the sentence was of no consequence.

58. In Atbir Vs. Govt. of NCT of Delhi (cited supra), which was a case dependant upon a dying declaration, the allegation was that the accused had stabbed all the three persons of a family so that he and his brother could enjoy the entire property and money. The repeated stabbing of the deceased was viewed as the act for which the accused

could be legitimately awarded death sentence. The incident therein had occurred on 22.1.1996 while the Sessions Judge had awarded the death sentence on 27.9.2004. The High Court had confirmed the death sentence on 13.1.2006 while this Court affirmed this sentence by its judgment dated 9.8.2010. This Court, after taking the stock of the aggravating circumstances and mitigating circumstances, as pointed out in Bachan Singh Vs. State of Punjab (cited supra) and Machhi Singh & Ors. Vs. State of Punjab (cited supra), came to the conclusion that though Atbir was a young person of 25 years of age and had already spent 10 years in jail, that was not a mitigating circumstance in his favour. The three murders were held to be extremely brutal and diabolical, committed with deliberate design in order to inherit the entire property of Jaswant Singh without waiting for his death.

59. In Sushil Murmu Vs. State of Jharkhand [AIR 2004 SC 394], which was a case of human sacrifice of a 9 years old child, this Court found the accused guilty on the basis of circumstantial evidence. While culling out the aggravating circumstances, this Court named five circumstances on the basis of the earlier case law in Machhi Singh & Ors. Vs. State of Punjab (cited supra), Bachan Singh Vs. State of Punjab (cited supra) and Ediga Anamma Vs. State of A.P. [AIR 1974 SC 799]. Two of the said circumstances are as follows:

> *1. When the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community.*
>
> *2. When the crime is enormous in proportion. For instance when multiple murders, say of all or almost all the members of a family or a large number of persons of a particular caste, community or locality, are committed.*

In this case, the Court recorded that the murder was a dastardly murder by sacrificing a hapless and helpless child of another for personal gain and to promote his fortunes by pretending to appease the deity or was a brutal act which is amplified by the grotesque and revolting manner in which it was committed. This case was even relied upon by the High Court while confirming the death sentence.

60. In another decision in Gurdev Singh & Anr. Vs. State of Punjab with Piara Singh & Anr. Vs. State of Punjab [AIR 2003 SC 4187], this Court specifically held in Para 19 that there could be no fixed or rigid formula or standard for invoking extreme penalty of death sentence. This was a case where this Court took notice of the decision in Rajendra Prasad Vs. State of Uttar Pradesh [1979 (3) SCC 646], where this Court had held that the focus had shifted from crime to criminal and the special reasons necessary for imposing death penalty must relate not to the crime as such but to the criminal. The Court, however, noted that this was overruled in Bachan Singh Vs. State of Punjab (cited supra) later on.

61. The Court also referred to various cases like

(i) A. Devendran Vs. State of Tamil Nadu [1997 (11) SCC 720], which was a case of triple murder, where the Court had refused to pass the death sentence,

(ii) Kumudi Lal Vs. State of U.P. [1999 (4) SCC 108], which was a case of rape and murder of a young girl aged 14 years and where this Court had refused to confirm the death sentence on the ground that the death of the girl must not had been intended by the accused, and

(iii) Om Prakash Vs. State of Haryana [1999 (3) SCC 19], which was a case where a BSF Jawan had murdered as many as 7 persons. This was also a case where the Court refused to confirm the death sentence on the

ground that the bitterness in the mind of the accused had increased to a boiling point and the agony suffered by the accused and his family members at the hands of the other party, and for not getting protection from the police officers concerned and the total inaction on their part inspite of repeated written prayers, had goaded or compelled the accused to take law in his own hands.

62. Two other cases where the death sentence was not confirmed were also referred to in Gurdev Singh & Anr. Vs. State of Punjab with Piara Singh & Anr. Vs. State of Punjab (cited supra). They were Mohd. Chaman Vs.State (NCT of Delhi) [2001 (2) SCC 28] and Lehna Vs. State of Haryana [2002 (3) SCC 76]. However, this Court then took notice of the facts and noted that the accused in that case had fired at the marriage party as he knew that there was going to be a marriage on the next day in the house of the complainant. The accused had fired at the time when the feast was going on and 13 persons were killed on the spot and 8 persons were seriously injured. Out of all those 13 persons, one was 7 years' child. This Court, under the circumstances, refused to convert the death sentence into the sentence for life.

63. There are three other cases which we must mention. In Haru Ghosh Vs. State of West Bengal [2009 (15) SCC 551], where one of us was a party (V.S. Sirpurkar, J.), there was a murder of a helpless lady and a child by a person who was already suffering death sentence. However, that act was not found to be a pre-meditated act. It was found that the accused had acted on account of the previous enmity and since he thought that his livelihood was being attacked by the husband of the deceased, though in an incorrect manner. It was found that he had not come armed to the scene of offence. It was also found that though he was not justified in eking out his livelihood by selling liquor, but the fact of the matter was that he and his family was surviving only on that, and the effort on

the part of the husband of the deceased to stop the activity of the accused was sufficient to nurture deep hatred in his mind on account of which the accused acted. Such is not the case here.

64. In Dilip Premnarayan Tiwari & Anr. Vs. State of Maharashtra etc. [2010 (1) SCC 775], again where one of us (V.S. Sirpurkar, J.) was a party, this Court refused to confirm the death sentence, where the accused was guilty of committing multiple murders (4 in number). However, considering the fact that the sister of the accused was married to the deceased out of a love affair, which marriage was not approved at all by the family of the accused being an inter-caste marriage and further they being neighbours and the accused having to suffer the ignominy because of the so-called marriage on day to day basis, this Court took the view that this was not a case where the death sentence was to be awarded. The Court considered the psychology of the accused, the taunts that he had suffered on account of his sister's marriage with a person of different community and further the fact that the situation had gone out of his hand as his sister was on the family way. The Court, therefore, viewed that this could not be the rarest of the rare cases.

65. Lastly, in Swamy Shraddananda @ Murali Manohar Mishra Vs. State of Karnataka [AIR 2008 SC 3040], though there was one of the most cold- blooded murder for gains, the Court recorded that considering the absolute irrevocability of the death penalty, sentencing accused to death would not be proper. We do not find anything in this decision, which will be helpful to the accused in the present matter."

It is not necessary to quote other judgments on this point because the Apex Court has considered number of judgments in this case. A Constitution Bench of this Court in *Bachan Singh vs State of Punjab,* AIR 1980 SC 898 has specifically held that death penalty can be inflicted only on the gravest of

the grave cases. In the present case, the allegation against the appellant-husband Mahendra Tiwari is that he had sprinkled petrol on the deceased who was his wife and set her ablaze. In our opinion, the act of the accused/ appellant Mahendra Tiwari could not be termed as the gravest of the grave cases. Hence, the trial Court has committed an error of law in awarding death sentence to the accused-appellant Mahendra Tiwari. In our opinion, the proper sentence which may be awarded to the accused-appellant Mahendra Tiwari is sentence of life.

42. Consequently, the reference is answered in negative and it is held that the trial Court has committed an error in awarding death sentence to the appellant Mahendra Tiwari.

43. Criminal Appeal No.2342 of 2016 filed by the appellants Pavan Tiwari and Smt. Saroj Tiwari is hereby allowed. They are acquitted from the offence. If they are not required in any other case, they be released immediately.

44. Criminal Appeal No.2346 of 2016 filed by appellant Mahendra Tiwari is partly allowed. His conviction for commission of offence punishable under Section 302 of the Indian Penal Code is hereby upheld, however, his sentence is modified and he is sentenced to life imprisonment. Impugned judgment of the trial Court in regard to Mahendra Tiwari is modified accordingly.

Order accordingly.

I.L.R. [2017] M.P., 1265

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice C.V. Sirpurkar

M.Cr.C. No. 21604/2015 (Jabalpur) decided on 20 June, 2016

TULSIDAS & anr. ...Applicants

Vs.

STATE OF M.P. ...Non-applicant

Probation of Offenders Act, (20 of 1958), Section 4 & 12 and Criminal Procedure Code, 1973 (2 of 1974), Section 482 - Practice and Procedure - Maintainability of Petition **- Petitioner No.1 and Petitioner No.2 were convicted u/S 325 and u/S 325/34 IPC respectively - In appeal, conviction of petitioner no.1 was maintained and conviction of petitioner no.2 was converted to one u/S 323 IPC - Sentence of**

petitioner no.1 was reduced to imprisonment till rising of the Court because he was a government servant, but fine amount was enhanced from Rs 500 to Rs. 3000 - They filed a revision before High Court whereby the court declined to interfere - They again filed the present petition u/S 482 CrPC alongwith an interlocutory application u/S 4 r/w Section 12 of the Act of 1958 submitting that even after making a prayer for relief under the provisions of the Act of 1958, all the courts have not considered the said provisions - Held - This court in revision filed by the petitioners have declined to interfere on merits of the case thus the relief of acquittal or the relief under the Act of 1958 shall be deemed to have been declined - Petitioners have exhausted all their remedies up to the stage of High Court and this is a second attempt before High Court by which petitioners are invoking inherent jurisdiction of Court to overturn the order passed earlier in revision by a coordinate bench of this Court, which tantamount to virtual review of a final order, which obviously is not permissible - Petition dismissed. (Paras 5, 6 & 8)

अपराधी परिवीक्षा अधिनियम, (1958 का 20), धारा 4 व 12 एवं दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – पद्धति एवं प्रक्रिया – याचिका की पोषणीयता – याची क्र. 1 व याची क्र. 2 को क्रमशः धारा 325 एवं धारा 325/34 भा. दं.सं. के अंतर्गत दोषसिद्ध किया गया था – अपील में याची क्र. 1 की दोषसिद्धि कायम रखी गई और याची क्र. 2 की दोषसिद्धि को अंतर्गत धारा 323 भा.दं.सं. में परिवर्तित किया गया था – याची क्र. 1 के दण्डादेश को न्यायालय उठने तक के कारावास तक घटाया गया क्योंकि वह एक शासकीय सेवक था, किंतु अर्थदण्ड की रकम रू. 500 से बढ़ाकर रू. 3000 की गई थी – उन्होनें उच्च न्यायालय के समक्ष एक पुनरीक्षण प्रस्तुत किया जिसमें न्यायालय ने हस्तक्षेप करने से इंकार कर दिया – उन्होनें पुनः दं.प्र.सं. की धारा 482 के अंतर्गत वर्तमान याचिका, 1958 के अधिनियम की धारा 4 सहपठित धारा 12 के अंतर्गत अंतर्वर्ती आवेदन इस निवेदन के साथ प्रस्तुत किया, कि 1958 के अधिनियम के उपबंधों के अंतर्गत अनुतोष हेतु प्रार्थना किये जाने के पश्चात् भी, सभी न्यायालयों ने उक्त उपबंधों को विचार में नहीं लिया है – अभिनिर्धारित – याचीगण द्वारा प्रस्तुत पुनरीक्षण में इस न्यायालय ने प्रकरण के गुणदोषों पर हस्तक्षेप करने से इंकार किया, अतः दोषमुक्ति का अनुतोष अथवा 1958 के अधिनियम के अंतर्गत अनुतोष से इंकार माना जाएगा – याचीगण ने उच्च न्यायालय के प्रक्रम तक अपने सभी उपचारों को निःशेषित किया है और यह उच्च न्यायालय के समक्ष द्वितीय प्रयास है जिसके द्वारा याचीगण इस न्यायालय की समकक्ष न्यायपीठ द्वारा पूर्व में पुनरीक्षण में पारित आदेश को पलटाये जाने के लिए न्यायालय की अंतर्निहित अधिकारिता का अवलंब ले रहे है जो कि एक अंतिम आदेश के परोक्ष पुनर्विलोकन के बराबर है, जो स्पष्टतः अननुज्ञेय है –

याचिका खारिज।

Cases referred:

1980 (1) SCC 43, AIR 2009 SC (Suppl) 282, AIR 2011 SC 1232.

B.K. Bajpai, for the applicants.
A.R.S. Chouhan, P.L. for the non-applicant/State.

ORDER

C.V. SIRPURKAR, J. :- This miscellaneous criminal case has been instituted on an application under section 482 of the Code of Criminal Procedure invoking inherent powers of the High Court challenging the judgment dated 11-01-2007 passed by the Court of Additional Sessions Judge, Rewa in Criminal Appeal No.71/2006.

2. It is the matter of record that petitioner Tulsidas was convicted under section 325 and petitioner Bholenath was convicted under section 325 read with section 34 of the Indian Penal Code by judgment dated 24-02-2006 passed by Judicial Magistrate First Class, Rewa, in Criminal Case No.112/2005. Sentence of imprisonment for a period one year and fine in the sum of Rs.500/- was imposed on each of them. They were directed to undergo simple imprisonment for a further period of one month in default of payment of fine. The judgment dated 24-02-2006 was challenged on behalf of the petitioners Tulsidas and Bholenath in Criminal Appeal No.71/2006 before Additional Sessions Judge, Rewa. By judgment dated 11-01-2007, conviction of petitioner Tulsidas under section 325 of the Indian Penal Code was maintained but that of petitioner Bholenath was converted into one under section 323 of the Indian Penal Code. The sentence of rigorous imprisonment of one year imposed upon petitioner Tulsidas was reduced to imprisonment till rising of the Court because he was a Government servant but the fine amount was increased from Rs.500/- to Rs.3000/-. He was directed to undergo a further period of six months' imprisonment in default of payment of fine. On realization of the fine amount, it was directed to be paid to the aggrieved person by way of compensation.

3. Aforesaid judgment dated 11-01-2007 passed by Additional Sessions Judge, Rewa, in Criminal Appeal No.71/2006, was challenged before the High Court in Criminal Revision No.439/2007. A coordinate bench of this

Court by order dated 09-04-2015, on merits, declined to interfere with the findings recorded by the Appellate Court.

4. Undeterred by aforesaid dismissal, the petitioners ventured to file this miscellaneous criminal case under section 482 of the Code of Criminal Procedure on the ground that the petitioners had prayed for benefit of the provisions of Probation of Offenders Act, 1958 before all three Courts; however, none of the Courts considered their prayer. In this miscellaneous criminal case also, the petitioners have filed an interlocutory application under section 4 read with section 12 of the Probation of Offenders Act, 1958 (I.A.No.23979/2015).

5. A perusal of order dated 09-04-2015 passed by a coordinate bench of this Court in Criminal Revision No.439/2015 reveals that petitioners were represented by a counsel of their own choice. The Court had declined to interfere either with the conviction or with the sentence imposed by the Appellate Court, on merits of the case. Thus, the relief of acquittal or the relief under the provisions of Probation of Offenders Act, shall be deemed to have been declined to the petitioners. In this view of the matter, it is clear that the petitioners have exhausted all their remedies up to the stage of High Court.

6. The instant application under section 482 of the Code of Criminal Procedure, in effect, is a second attempt to challenge the judgment of the Appellate Court dated 11-01-2007, which obviously is not permissible.

7. Learned counsel for the petitioners has invited attention of the Court to the judgment passed by Supreme Court in the case of *Raj Kapoor and others vs. State and others,* 1980 (1) SCC 43, whereby it has been held that inherent jurisdiction of the High Court can be invoked even where such exercise would overlap with exercise of power under section 397 of the Code of Criminal Procedure.

8. It may be noted here that aforesaid proposition of law has no application to the case at hand. Here, the petitioners are invoking inherent powers to overturn the order passed under section 397 of the Code of Criminal Procedure by a coordinate bench of this Court, on merits, which tantamount to virtual review of a final order passed by the coordinate bench.

9. In this regard, reliance may be placed upon judgment rendered by Supreme Court in the case of *Asit Kumar Vs.State of West Bengal and*

others, AIR 2009 SC (Suppl) 282 wherein it was observed that:

> *"There is a distinction between ..... a review petition and a recall petition. While in a review petition, the Court considers on merits whether there is an error apparent on the face of the record, in a recall petition the Court does not go into the merits but simply recalls an order which was passed without giving an opportunity of hearing to an affected party. We are treating this petition under Article 32 as a recall petition because the order passed in the decision in All Bengal Licensees Association v. Raghabendra Singh and Ors. [2007 (11) SCC 374] : (AIR 2007 SC 1386) cancelling certain licences was passed without giving opportunity of hearing to the persons who had been granted licences."*

In the case of *Vishnu Agrawal vs. State of Uttar Pradesh,* AIR 2011 SC 1232, Supreme Court held that though an order may be recalled but not reviewed.

10. In aforesaid view of the matter, this Court is of the view that the petitioners herein have made second attempt to challenge an order passed in appeal, which effectively would amount to a review of the order passed earlier by a co-ordinate bench in revision and that cannot be countenanced.

11. Consequently, this miscellaneous criminal case is dismissed, as being not maintainable.

Application dismissed.

I.L.R. [2017] M.P., 1269
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice Anand Pathak
M.Cr.C. No. 12633/2015 (Gwalior) decided on 28 September, 2016

SANTRA BAI LODHA (SMT.) ...Applicant
Vs.
STATE OF M.P. & anr. ...Non-applicants

Forest Act (16 of 1927), Sections 52(3), 52(5) & 55 and Constitution - Article 19(1)(g) - Confiscation of Vehicle - Stage of Trial

- *Fundamental Rights* - In respect of transportation of contraband teak wood, tractor of petitioner/accused was seized by Forest authorities - Competent authority SDO started the confiscation proceedings and ordered confiscation of vehicle - Challenge to - Held - Confiscation can be made upon conviction of the offender in such forest offence committed by him for which his vehicle has been seized - Legislative intent is clear that confiscation proceeding can only be held and culminated after criminal trial for commission of forest offence is over otherwise, confiscation before conviction would be a serious encroachment on the fundamental right of a citizen under Article 19(1)(g) of the Constitution to carry on his trade, occupation or business - Vehicle was directed to be returned to petitioner on furnishing a bank guarantee alongwith certain conditions - Petition disposed.

(Paras 7, 9 & 15)

वन अधिनियम (1927 का 16), धाराएँ 52(3), 52(5) व 55 एवं संविधान – अनुच्छेद 19(1)(जी) – वाहन का अधिहरण – विचारण का प्रक्रम – मूलभूत अधिकार – विनिषिद्ध सागौन लकड़ी के परिवहन के संबंध में वन प्राधिकारियों द्वारा याची/अभियुक्त के ट्रैक्टर को जब्त किया गया था – सक्षम प्राधिकारी उपखंड अधिकारी ने अधिहरण कार्यवाहियां शुरू की और वाहन का अधिहरण आदेशित किया – को चुनौती – अभिनिर्धारित – अपराधी द्वारा कारित ऐसे वन अपराध में जिसके लिए उसका वाहन जब्त किया गया है, अधिहरण किया जा सकता है – विधायिका का आशय स्पष्ट है कि, अधिहरण कार्यवाही केवल वन अपराध कारित किये जाने हेतु, दाण्डिक विचारण पूर्ण होने के पश्चात् चलायी एवं समाप्त की जा सकती है अन्यथा, दोषसिद्धि से पहले अधिहरण, एक नागरिक का संविधान के अनुच्छेद 19(1)(जी) के अंतर्गत अपना व्यापार, व्यवसाय या कारोबार चलाने के मूलभूत अधिकार का अधिक्रमण होगा – याची को कतिपय शर्तों के साथ बैंक गारंटी पेश करने पर, वाहन वापस करने के लिए निदेशित किया गया – याचिका निराकृत।

Cases referred:

(2008) 1 JLJ 427, 2000 (1) MPLJ (FB) 289, 2013 (2) MPLJ 218, AIR 1995 MP 1, AIR 2012 SC 61.

S.K. Shrivastava, for the applicant.

G.S. Chauhan, P.P. for the non-applicant/State.

ORDER

ANAND PATHAK, J. :- Petitioner has preferred this petition under Section

482 of the Code of Criminal Procedure, 1973 against the order dated 18-08-2015 (Annexure P/1) passed by the Special and Additional Sessions Judge, Shivpuri in Criminal Revision No.74/2011 whereby the order dated 12-05-2011 (Annexure P/2) passed by the appellate authority Forest Circle, Shivpuri in Appeal No.01/2011 has been affirmed which in turn has confirmed the order dated 27-12-2000 (Annexure P/3) passed by the competent authority cum Sub Divisional Officer, Forest Beenaganj.

2- The matter pertains to confiscation of the vehicle under the Indian Forest Act, 1927 (for brevity 'the Act') and its provisions. As per submission of the petitioner, she is vehicle owner of tractor Mahindra having registration No.RJ17 RA2037. On the input received by the forest office regarding transportation of some contraband teak wood at Chachoda Rajgarh Road on 18-04-2010, the forest authority stopped the vehicle in question and caught hold of the vehicle and the goods whereas the persons driving the vehicle fled away. Thereafter, teak wood was seized and confiscation proceedings have started in respect of vehicle in question. The confiscation proceedings were undertaken by the competent authority, Sub Divisional Officer, Forest Circle Beenaganj and passed the order dated 27- 12-2010 for confiscation of the vehicle. Petitioner preferred appeal under Section 52 (d) of the Act before the Chief Conservator of Forest cum Appellate Authority. Petitioner suffered in appeal, therefore, had an occasion to file revision before the Special and Additional Sessions Judge, Shivpuri but met the same result because of passing of the order dated 18-08-2015 in criminal revision preferred by her.

3- Being crestfallen by the orders passed by the Additional Sessions Judge as well, appellate authority and the competent authority respectively, petitioner preferred the present petition challenging the confiscation proceedings as well as subsequent appellate and revisional orders on the ground that the said confiscation proceeding could not have been invoked by the authority till the criminal case is pending against the present petitioner under the provisions of the Act and the M.P. Vanopaj Vyapar Viniyaman Adhiniyam, 1969. He relied upon the judgment rendered by the Apex Court in the case of *State of M.P. and others Vs. Madhukar Rao*, (2008) 1 JLJ 427, Full Bench of this Court in the case of *Madhukar Rao Vs. State of M. P. and others*, 2000 (1) MPLJ (Full Bench) 289 and the judgment of Coordinate Bench in the case of *Premdas*

Vs. State of M.P. and others, 2013 (2)MPLJ 218.

4- Counsel for the respondent/State opposed the prayer of the petitioner and submitted that the authorities and Court below have rightly passed the order. He prayed for dismissal of the petition.

5- Heard learned counsel for the parties and perused the record.

6- Chapter IX of the Act deals in respect of penalty and procedure. Section 52(3) and (5) of the Act deals in respect of confiscation which reads as under:

> **"52. Seizure of property liable to confiscation and procedure therefor.**
>
> 52(3) Subject to sub-section (5), where the authorized officer upon production before him of property seized or upon receipt of report about seizure, as the case may be, is satisfied that a forest offence has been committed in respect thereof, he may by order in writing and for reasons to be recorded, confiscate forest produce so seized together with all tools, vehicles, boats, ropes, chains or any other article used in committing such offence. A copy of order of confiscation shall be forwarded without any undue delay to the Conservator of Forests of the forest circle in which the timber or forest -produce, as the case may be, has been seized.
>
> 52(5) No order of confiscation under sub-section (3) of any tools, vehicles, boats, ropes, chains or any other article (other than timber or forest -produce seized) shall be made if any person referred to in clause (b) of sub-section (4) proves to the satisfaction of authorized officer that any such tools, vehicles, boats, ropes, chains or other articles were used without his knowledge or connivance or, as the case may be, without the knowledge or connivance of his servant or agent and that all reasonable and necessary precautions had been taken against use of objects aforesaid for commission of forest-offence."

Similarly, Section 55 of the Act deals in respect of exigencies for confiscation which reads as under:

> ***"55. Forest-produce, tools, etc., when liable to confiscation.--(1) All timber or forest produce which in either case is not the property of the Government and in respect of which a forest-offence has been committed, and all tools, boats, vehicles, ropes, chains or any other article, in each case used in committing any forest offence, shall be liable to provisions of sections 52, 52-A, 52-B and 52-C, be liable to confiscation upon conviction of the offender for such forest -offence.***
>
> *(2) Such confiscation may be in addition to any other punishment prescribed for such offence."*

7- Perusal of Section 52 (3) and (5) as well as Section 55 makes the case clear in favour of petitioner because the confiscation can be made upon conviction of offender in such forest offence committed by him for which his vehicle has been seized. The law in this regard is well settled.

8- The Division Bench of this Court in the matter of *Kailash Chand and another Vs. State of Madhya Pradesh and others,* AIR 1995 MP 1 has held that the scheme of the Act providing for a separate confiscation procedure has a substantial public purpose to serve and is in tune with Articles 48-A and 51-A(g) of the Constitution of India. According to the Division Bench no repugnancy exists between Section 52(3) and 53-C of the Act as amended. Therefore, from perusal of Section 52 (3) and 52(5) as well as Section 55 of the Act makes the case clear in favour of the petitioner because confiscation can be made upon the conviction of the offender in such forest offence committed by him for which his vehicle has been seized.

9- The said harmonious construction of the provisions of the Act appears logical also. The legislative intent must have been to confiscate the vehicle after trial in respect of offence committed under the Act is over. Before that confiscation may prejudicially affect the property and its owner. If as contended in the impugned order, seizure of property merely on accusation would make the property confiscated, it would have the result of depriving an accused of his property without proof of his guilt. This interpretation would mean that a specified officer under the Act merely by seizure of property of an accused would deprive him of his property which he might be using for his trade, profession or occupation. This would be a serious encroachment on the

fundamental right of a citizen under Article 19(1)(g) of the Constitution to carry on his trade, occupation or business.

10- Even otherwise, if the confiscation proceedings are treated to be final before the criminal proceeding then the confiscated vehicle is if auctioned in the interregnum period (between confiscation and completion of trial) then how the property of the acquitted person in the criminal trial would be returned back or compensated would be the question. Same is the case with the vehicle being decayed and got rusted after confiscation if subsequently the accused is acquitted from the allegations of forest offence in the criminal trial. Therefore, the legislative intent is clear that the confiscation proceeding can only be held and culminated after criminal trial for commission of forest offence is over.

11- Initially a Full Bench of this Court in the case of *Madhukar Rao* (supra) has laid the principles that once the criminal case was pending, confiscation proceedings should not be held and finalized. The judgment rendered by the Full Bench has been affirmed by the Supreme Court in the case of *State of M.P. Vs. Madhukar Rao* (supra) and it has been held by the Supreme Court in the aforesaid case that the provisions of section 50 of the Wild Life (Protection) Act, and the amendment made to the said Act {Section 39(1)(d)} do not in any way affect the powers of the Magistrate to pass interim order with regard to release of the vehicle and it is further held that when the criminal case is pending final order with regard to confiscation of the vehicle should not be passed. This principle laid down in the case of *Madhukar Rao* (supra) is again reiterated and affirmed by the Supreme Court in the case of *Principal Chief Conservator of Forests Vs. J.K. Johnson,* AIR 2012 SC 61 and it has been held that the provisions of Act do not permit Specified Officer to deal with the property seized for commission of the offence until and unless final decision in the criminal proceedings are not taken.

12- Thus, meandering through the interpretational realm, the legal position is settled.

13- In view of the above settled legal position coupled with the provisions contained in the Act, the impugned orders directing confiscation and forfeiture of the vehicle is unsustainable and it cannot be done until and unless criminal proceedings are finalized and in the present case as the criminal proceedings are still pending, the action impugned cannot be sustained.

14- Accordingly, this petition is allowed. Impugned order dated 18-08-2015 (Annexure P/1) passed by the revisional Court, the order dated 12-05-2011 (Annexure P/2) passed by the appellate authority and the order of confiscation dated 27-12-2010 (Annexure P/3) passed by respondent No.2 are hereby quashed and the vehicle in question is directed to be returned back to the petitioner and liberty is granted to the State Government to proceed with the matter in accordance with law after criminal case is finalized. As the vehicle in question is in custody of the State Government and as the possibility of the vehicle being destroyed cannot be ruled out, interest of justice requires that the custody of the vehicle should be given to the petitioner on certain conditions.

15- In view of the above, it is directed that the vehicle in question (tractor Mahindra having registration No. RJ17 RA2037) shall be returned to the petitioner on the petitioner's furnishing a bank guarantee to the tune of Rs.2.00 lakh to be kept alive during the pendency of the criminal case and petitioner shall further give an undertaking that she shall not alienate the vehicle till decision of the criminal case and shall produce it before the Court as and when required.

With the aforesaid, the petition stands disposed of.

Application allowed.

I.L.R. [2017] M.P., 1275

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice S.C. Sharma

M.Cr.C. No. 10037/2016 (Indore) decided on 5 October, 2016

STATION COMMANDER, MHOW CANTT.
MAJOR GENERAL R.S. SHEKHAWAT, SM, VSM ...Applicant
Vs.
STATE OF M.P. & ors. ...Non-applicants

(Alongwith M.Cr.C. No. 10039/2016)

Criminal Procedure Code, 1973 (2 of 1974), Section 475, Army Act, (45 of 1950), Section 125, Army Rules, 1954 and Criminal Court and Court Martial (Adjustment of Jurisdiction) Rules, 1978 - Transfer of Proceedings **- Altercation between Police Officers and Army Personnel - FIR was lodged by police officers against 60-70 Army**

Personnel - Matter was also reported to Military Police whereby they started investigation and Army also initiated Court of Enquiry - Station Commander filed an application u/S 475 Cr.P.C. seeking transfer of entire proceedings to Army Station Commander enabling them to proceed under the provisions of Army Act but the same was dismissed on the ground that charge sheet was not filed - Challenge to - Held - 60-70 Army Personnel are involved in the matter and they shall be forced to attend criminal Court every month, which the nation cannot afford, especially keeping in view the present situation - Matter is pending before two different forums in respect of same incident - Statutory provisions of law permits transfer of criminal proceedings to Competent Army Authority in such a situation - Impugned order quashed - State directed to transfer the complete record to petitioner authority - Petition allowed. (Paras 14, 17 & 22)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 475, सेना अधिनियम (1950 का 45), धारा 125, सेना नियम, 1954 एवं दाण्डिक न्यायालय और सेना न्यायालय (अधिकारिता का समायोजन) नियम, 1978 – कार्यवाहियों का अंतरण – पुलिस अधिकारियों और सेना कर्मियों के बीच कहासुनी – पुलिस अधिकारियों द्वारा 60–70 सेना कर्मियों के विरूद्ध प्रथम सूचना प्रतिवेदन दर्ज किया गया – सैन्य पुलिस को भी मामले की रिपोर्ट की गई जिससे, उन्होनें अन्वेषण आरंभ किया और सेना ने जाँच न्यायालय भी आरंभ किया – स्टेशन कमांडर ने, उन्हें सेना अधिनियम के उपबंधों के अधीन कार्यवाही करने हेतु समर्थ बनाने के लिए आर्मी स्टेशन कमांडर को संपूर्ण कार्यवाहियों का अंतरण चाहते हुए, दं.प्र.सं. की धारा 475 के अंतर्गत आवेदन प्रस्तुत किया परंतु उक्त को इस आधार पर खारिज किया गया कि आरोप पत्र प्रस्तुत नहीं किया गया था – को चुनौती – अभिनिर्धारित – मामले में 60–70 सेना कर्मी शामिल हैं और उन्हें प्रत्येक माह दाण्डिक न्यायालय में उपस्थित होना अनिवार्य होगा, जिसको राष्ट्र वहन नहीं कर सकता, विशिष्ट रूप से वर्तमान स्थिति को दृष्टिगत रखते हुए – उसी घटना के संबंध में दो भिन्न फोरम के समक्ष मामला लंबित है – ऐसी किसी स्थिति में, विधि के कानूनी उपबंध, सक्षम सेना प्राधिकारी को दाण्डिक कार्यवाहियों के अंतरण की अनुमति देते हैं – आक्षेपित आदेश अभिखंडित – याची प्राधिकारी को संपूर्ण अभिलेख अंतरित करने के लिए राज्य को निदेशित किया गया – याचिका मंजूर।

Cases referred:

2007 Cri.L.J. 4516, 1996 Cri.L.J. 1549, 1984 Cri.L.J. 718, 1983 Cri.L.J. 1899, 2003 Cri.L.J. 4028.

Deepak Rawal, Asstt. Solicitor General for the applicant.
Himanshu Joshi, for the non-applicants/State.

ORDER

S.C. SHARMA, J. :- Regard being had to the similitude in the controversy involved in the present cases, these two petitions were analogously heard and by a common order, they are being heard and disposed of by this Court.

2. The present petition has been filed under Section 482 of Cr.P.C. by Station Commander, Major General R.S. Shekhawat, The Infantry School, Mhow, Indore against the State of Madhya Pradesh and its functionaries being aggrieved by the order dated 06/08/2016 passed by JMFC, Indore in respect of crime No.973/2015 and No.972/2015 for the offence punishable under Section 147, 148, 149, 395, 397, 353, 332, 307, 427 of IPC.

3. The facts of the case reveals that some altercation took place between the Police Officers and the Army Personnel at Vijay Nagar, Indore and thereafter Police Officers lodged a FIR at crime No.973/2015 and No.972/2015. It was stated that about 60-70 Army Personnel from the Infantry School, Mhow have reached to the Police Station-Vijay Nagar with the allegations that Police Officers have abused and beaten their fellow officers.

4. It is note-worthy to mention that the incident was also reported to Station Commander, Mhow as well as to the Commanding Officer, Infantry School, Mhow and the matter was reported to Army Police also and they have initiated the Court of Inquiry under the provisions of Army Act, 1950, meaning thereby, there is FIR involving 60-70 Army Officers registered at Police Station, Vijay Nagar, Indore and Military Police is also investigating the matter and the Army has initiated the Court of Inquiry in respect of the same incident. Matter was pending before two different Forums in respect of the same incident and, therefore, an application was preferred before the CJM, Indore under Section 475 of Cr.P.C. and Section 125 of Army Act readwith Criminal Court and Court Martial (Adjustment of Jurisdiction), Rules 1978 and a prayer was made that the entire matter be forwarded to the Commanding Officer/Station Commander enabling them to proceed further in the matter under the provisions of the Army Act, 1950 read with The Army Rules, 1954.

5. Learned JMFC after hearing the parties has dismissed the application on the ground that as the charge-sheet has not been filed, therefore, the question of transferring the proceedings does not arise.

6. Shri Deepak Rawal, learned Assistant Solicitor General for the petitioner has urged before this Court that Section 125 of Army Act, 1950 permits the authorities for such a transfer of proceedings and his contention is that Criminal Court and Court Martial have jurisdiction in respect of the offences and it is the discretion of Army or Commandant to decide whether the matter will be taken before the Army Court or before the Criminal Court. He has further urged before this Court that the impugned order passed by learned JMFC is bad in law. Learned counsel placed reliance on a judgment delivered in the matter of *Chandra Mohan Shukla vs. State of Assam* 2007 Cri.L.J. 4516 and his contention is that in the similar circumstances, the High Court of Guwahati has transferred the proceedings to the Court of Martial.

7. Shri Rawal has drawn the attention of this Court towards the incident and stated that senior Officers were forcibly taken to Vijay Nagar Police Station and they were beaten-up by the Police Officers, as a result, they sustained fractures with multiple contusions and injuries were caused by blunt objects. They were admitted in Military Hospital, Mhow and some of them were admitted in the 'Intensive Care Unit' (ICU). Medical papers are also on record. In order to protest the cause of their Officers, the other Officers reached at Police Station-Vijay Nagar and the Army Officers informed about the incident to S.P., Collector, DIG and inspite of this, FIR was registered by the Police only against the Army Personnels and inspite of best attempts made by Army Officers, no fruitful result has come out and no offence has been registered against the erring Police Officers.

8. He has further argued that the Police Officials have acted in a biased manner in the matter and matter has to be dealt with the provisions of Army Act, 1950 and Army Rules, 1954.

9. On other hand, learned counsel for the respondents/State has urged before this Court that Army Officers cannot be allowed to decide the dispute, which is against it's own Officers, therefore, learned JMFC was justified in dismissing the application preferred by the petitioner.

10. Heard learned counsel for the parties and perused the record. The

matter is being disposed of with the consent of the parties, at the motion hearing stage itself.

11. In the present case, the question before this Court whether the Criminal Court or the Court Martial is having jurisdiction in the matter and whether the matter can be transferred to Court Martial or not, at the discretion of Commanding Officer ?

12. It is true that a dispute has taken place out-side the defence area and in the area of Indore City and learned counsel for Union of India has argued that dispute arose only because of Army Personnel were assaulted by Police Officers.

13. In the instant case most of the Officers at present have been transferred to guard the border of the Country, keeping in view the present scenario and their services are more important for the nation. The leave of other Officers has also been cancelled, taking into consideration the situation prevailing in the Country.

14. Not only this, the other important aspect of the case is that on the basis of complaint, 60-70 Army Officers are involved in the matter and the 60-70 Army Officers shall be forced to attend the criminal court every month which the nation cannot afford, especially keeping in view the present situation.

15. This Court is also aware of the fact that there are about 1.3 million or 1325450 people serving the Indian Armed Forces, who defend and protect us, selflessly on a daily basis. In fact, we cannot forget those who have lost their lives and those who have left their families to guard our borders. A soldier scarifies everything for his country.

16. The relevant statutory provisions necessary for deciding the matter, reads as under :

Section 475 of the Code of Criminal Procedure, 1973

"475. Delivery to commanding officers of persons liable to be tried by Court- martial.

(1) The Central Government may make rules consistent with this Code and the Army Act, 1950 (46 of 1950), the Navy Act, 1957 (62 of 1957), and the Air Force Act, 1950 (45 of

1950), and any other law, relating to the Armed Forces of the Union, for the time being in force, as to cases in which persons subject to military, naval or air force law, or such other law, shall be tried by a Court to which this Code applies or by a Court- martial; and when any person is brought before a Magistrate and charged with an offence for which he is liable to be tried either by a Court to which this Code applies or by a Court- martial, such Magistrate shall have regard to such rules, and shall in proper cases deliver him, together with a statement of the offence of which he is accused, to the commanding officer of the unit to which he belongs, or to the commanding officer of the nearest military, naval or air force station, as the case may be, for the purpose of being tried by a Court- martial. Explanation.- In this section-

(a) "Unit" includes a regiment, corps, ship, detachment, group, battalion or company,

(b) "Court- martial" includes any tribunal with the powers similar to those of a Court- martial constituted under the relevant law applicable to the Armed Forces of the Union.

(2) Every Magistrate shall, on receiving a written application for that purpose by the commanding officer of any unit or body of soldiers, sailors or airmen stationed or employed at any such place, use his utmost endeavours to apprehend and secure any person accused of such offence.

(3) A High Court may, if it thinks fit, direct that a prisoner detained in any jail situate within the State be brought before a Court- martial for trial or to be examined touching any matter pending before the Court- martial."

Section 125 of Army Act, 1950 reads as under :-

"125. Choice between criminal court and court- martial. When a criminal court and a court- martial have each jurisdiction in respect of an offence, it shall be in the discretion of the officer commanding the army, army corps, division or independent

brigade in which the accused person is serving or such other officer as may be prescribed to decide before which court the proceedings shall be instituted, and, if that officer decides that they should be instituted before a court- martial, to direct that the accused person shall be detained in military custody."

17. The aforesaid statutory provisions of law does permit for transfer of a criminal case registered at Crime No.973/2015 and No.972/2015 at Police Station-Vijay Nagar to the Competent Army Authority to initiate proceedings under the Army Act, 1950 and 1954.

18. The Kerala High Court, in a Reference case Kerala High Court 1996 Cri.L.J. 1549 has held that a matter can be transferred to Commanding Officer concerned.

19. The constitution validity of Section 125 of Army Act, 1950 has been upheld in the case of *Gurman Singh vs. Union of India* 1984 CRI.L.J. 718 and the Calcutta High Court has held that in view of Article 33 of the Constitution of India, Section 125 of the Army Act, 1950 is not *ultra vires* of Part-III of Constitution. Section 125 does permit for such transfer of proceedings.

20. In the matter of Ex. *Havildar Gh. Mohd. Dar vs. Union of India* 1983 CRI.L.J. 1899 the Jammu and Kashmir High Court has held that GOC/ Army Officer is competent to decide whether the accused can be tried by Court Martial or by Criminal Court, meaning thereby, there is not even an iota of doubt that a case can be transferred from civil authorities to army authorities under the provisions of Army Act, 1950 readwith Army Rules, 1954.

21. In the matter of *G.M. Rao vs. Union of India* 2003 CRI.L.J. 4028, it has been held that it is the discretion of Army Authorities under Sections 125 and 126 to decide whether particular accused should be tried by Court Martial or by Criminal Court.

22. This Court is of the considered opinion that the impugned order passed by learned JMFC, Indore dated 06/08/2016 deserves to be quashed and is accordingly hereby quashed. The application preferred by Station Commander/ Commanding Officer in respect of Crime No.973/2015 and No.972/2015 is

allowed. The Respondents/State are directed to transfer the complete record and proceedings in respect of crime No.973/2015 and No.972/2015 registered at Police Station-Vijay Nagar, Indore to petitioner under the relevant provisions of Army Act, 1950 readwith Army Rules, 1954.

23. The exercise of transferring the entire proceedings be concluded within a period of 10 days from today.

24. With the aforesaid, petition stands allowed.

C.C. as per rules.

Application allowed.