

HIGH COURT OF MADHYA PRADESH, BENCH AT INDORE

**Division Bench : HON'BLE MR. JUSTICE S. C. SHARMA AND
HON'BLE MR. JUSTICE VIVEK RUSIA**

M. Cr. C. No.7333/2019

Suresh Kumar S/o Kishanlal Jain

Versus

State of Madhya Pradesh

Counsel for the Parties : Shri Aviral Vikas Khare, learned counsel for the applicant.

Shri Raghvendra Singh Raghuvanshi, learned counsel for the respondent – Special Police Establishment (Lokayukta).

Whether approved for reporting : Yes

Law laid down : The provisions of Prevention of Corruption Act, 1988 are having overriding effect over the other statutory provisions keeping in view Section 28 of the Prevention of Corruption Act, 1988.

Proviso to Rule 9 of the Madhya Pradesh Civil Services (Pension) Rules, 1976 do not provide for quashment of criminal case and the Rule 9 of Madhya Pradesh Civil Services (Pension) Rules, 1976 deals only with the power of the Governor to withhold or withdraw the pension. The judgments delivered in the case of **Parmanand Champalal Lad Vs. State of M. P.** reported in **2004(4) MPLJ 199** and **Basant Khampariya Vs. State of Madhya Pradesh** (Writ Petition No.11173/2010, decided on 29/10/2015) are *per incuriam*.

Significant paragraph numbers : 08 to 12

O R D E R

(Delivered on this 26th day of April, 2019)

Per : S. C. Sharma, J:

The applicant before this Court has filed present petition under Section 482 of Code of Criminal Procedure, 1973 for quashment

of charge sheet and the subsequent proceedings arising out of Crime No.24/2008 registered by Special Police Establishment, Bhopal for offences under Section 13(1)d and 13(2) of the Prevention of Corruption Act, 1988 read with Section 218, 466, 471 read with 120(B) of the Indian Penal Code, 1860.

02- The facts as stated in the petition reveals that the applicant is a retired Government servant and he has attained the age of superannuation on 31/08/2011. The First Information Report was lodged on 05/06/2008 and a crime was registered. The applicant was also named as one of the co-accused in the criminal case.

03- The applicant's contention is that he has attained the age of superannuation on 31/08/2011 and no charge sheet could have been filed against the applicant in the criminal case as has been done in the matter i.e. on 22/06/2015. Shri Aviral Vikas Khare, learned counsel for the applicant has vehemently argued before this Court in light of Rule 9 of the Madhya Pradesh Civil Services (Pension) Rules, 1976 (hereinafter referred as "Pension Rules, 1976"), no judicial proceedings could have been instituted against the applicant as has been done in the present case.

04- He has placed reliance upon a judgment delivered in the case of **Parmanand Champalal Lad Vs. State of M. P.** reported in **2004(4) MPLJ 199** and his contention is that in similar circumstances, the learned Single Judge has quashed the proceedings initiated under the Prevention of Corruption Act, 1988 as judicial proceedings were initiated after four years of retirement. He has also placed reliance

upon a judgment again delivered by coordinate Bench of this Court in the case of **Basant Khampariya Vs. State of Madhya Pradesh** (Writ Petition No.11173/2010, decided on 29/10/2015).

05- On the other hand, Shri Raghuvanshi, learned counsel for the Lokayukta has opposed the prayer of the applicant and his contention is that First Information Report in the present case was lodged on 05/06/2008 and at the relevant point of time, the applicant was very much in service. The applicant has attained the age of superannuation on 31/08/2011 and therefore, as the FIR was lodged while the applicant was in service, the question of quashment of FIR and charge sheet does not arise.

06- This Court has carefully gone through the statutory provision governing field as contained under the Pension Rules, 1976. Rule 9 of the Pension Rules, 1976 deals with right of Governor to withhold or withdraw the pension. The limitation of four years is only in context with the payment of pension.

07- Rule 9 of Pension Rules, 1976 reads as under:-

“9. Right of Governor to withhold or withdraw pension. - (1) The Governor reserves to himself the right of withholding or withdrawing a pension or part thereof, whether permanently or for a specified period, and of ordering recovery from pension of the whole or part of any pecuniary loss caused to the Government if, in any departmental or judicial proceeding, the pensioner is found guilty of grave misconduct or negligence during the period of his service, including service rendered upon re-employment after retirement:

Provided that the State Public Service Commission shall be consulted before any final orders are passed :

Provided further that where a part of pension is withheld or withdrawn, the amount of such pension shall not be reduced below [the minimum pension as determined by the Government from time to time];

(2) (a) The departmental proceedings [xxx], if instituted while the Government servant was in service whether before his retirement or during his re-employment, shall, after the final retirement of the Government servant, be deemed to be proceedings under this rule and shall be continued and concluded by the authority by which they were commenced, in the same manner as if the Government servant had continued in service :

Provided that where the departmental proceedings are instituted by an authority subordinate to the Governor, that authority shall submit a report regarding its findings to the Governor.

(b) The departmental proceedings, if not instituted while the Government servant was in service whether before his retirement or during his re-employment :-

(i) shall not be instituted save with the sanction of the Governor;

(ii) shall not be in respect of any event which took place more than four years before such institution; and

[(iii) shall be conducted by such authority and in such place as the Government may direct and in accordance with the procedure applicable to departmental proceedings :

(a) in which an order of dismissal from service could be made in relation to the Government servant during his service in case it is proposed to withhold or withdraw a pension or part thereof whether permanently or for a specified period; or

(b) in which an order of recovery from his pay of the whole or part of any pecuniary loss caused by him to the Government by negligence or breach of orders could be made in relation to the Government servant during his service if it is proposed to order recovery from his pension of the whole or part of any pecuniary loss caused to the Government].

(3) No judicial proceeding, if not instituted while the Government servant was in service, whether before his retirement or during his re-employment, shall be instituted in respect of a cause of action which arose or in respect of an event which took place, more than four years before such institution.

(4) In the case of a Government servant who has retired on attaining the age of superannuation or otherwise and against whom any departmental or judicial proceedings are instituted or where departmental proceedings are continued under sub-rule (2), a provisional pension and death-cum-retirement gratuity as provided in [Rule 64], as the case may be, shall be sanctioned :

[Provided that where pension has already been finally sanctioned to a Government servant prior to institution of departmental proceedings, the Governor may, by order in writing, withhold, with effect from the date of institution of such departmental proceedings fifty per cent of the pension so sanctioned subject however that the pension payable after such withholding is not reduced to less than [the minimum pension as determined by the Government from time to time] :

Provided further that where departmental proceedings have been instituted prior to the 25th October, 1978, the first proviso shall have effect as it for the words "with effect from the date of institution of such proceedings" the words "with effect from a date not later than thirty days from the date aforementioned," had been substituted :

Provided also that-

- (a) If the departmental proceedings are not completed within a period of one year from the date of institution thereof, fifty per cent of the pension withheld shall stand restored on the expiration of the aforesaid period of one year;
- (b) If the departmental proceedings are not completed within a period of two years from the date of institution the entire amount of pension so withheld shall stand restored on the expiration of the aforesaid period of two years; and
- (c) If in the departmental proceedings final order is passed to withhold or withdraw the pension or any recovery is ordered, the order shall be deemed to take effect from the date of the institution of departmental proceedings and the amount, of pension since withheld shall be adjusted in terms of the final order subject to the limit specified in sub-rule (5) of Rule 43].

(5) Where the Government decides not to withhold or withdraw pension but orders recovery of pecuniary loss from pension, the recovery shall not be made at a rate exceeding one-third of the pension admissible on the date of retirement of a Government servant.

(6) For the purpose of this rule-

- (a) departmental proceedings shall be deemed to be instituted on the date on which the statement of charges is issued to the Government servant or pensioner, or if the Government servant has been placed under suspension from an earlier date, on such date; and
- (b) judicial proceedings shall be deemed to be instituted-
 - (i) in the case of criminal proceedings, on the date on which the complaint or report of a

- 6 -

police officer, of which the Magistrate takes cognizance, is made, and

- (ii) in the case of civil proceedings, on the date the plaint is presented in the Court.”

The relevant statutory provision of law providing limitation under the Code of Criminal Procedure, 1973 as contained under Section 468 reads as under:-

“468. Bar to taking cognizance after lapse of the period of limitation.- (1) Except as otherwise provided elsewhere in this Code, no Court shall take cognizance of an offence of the category specified in sub-section (2), after the expiry of the period of limitation.

(2) The period of limitation shall be-

- (a) six months, if the offence is punishable with fine only.
(b) one year, if the offence is punishable with imprisonment for a term not exceeding one year;
(c) three years, if the offence is punishable with imprisonment for term exceeding one year but not exceeding three years.

(3) For the purposes of this section, the period of limitation in relation to offences which may be tried together, shall be determined with reference to the offence which is punishable with the more severe punishment or, as the case may be, the most severe punishment.”

The aforesaid statutory provisions of law makes it very clear that Sub Section 3 of Section 468 does not provides for any limitation in respect of offences like offences which are the subject matter of the present petition.

08- Section 28 of the Prevention of Corruption Act, 1988 reads as under:-

“28. Act to be in addition to any other law.—The provisions of this Act shall be in addition to, and not in derogation of, any other law for the time being in force, and nothing contained herein shall exempt any public servant from any proceeding which might, apart from this Act, be instituted against him.”

Meaning thereby, the provisions of Prevention of Corruption Act, 1988 are having overriding effect over the other statutory provisions.

09- It is true that the learned Single Judge in the case of **Parmanand** (Supra) has quashed the proceedings under the Prevention of Corruption Act, 1988 solely relying upon the Pension Rules, 1976. In the considered opinion of this Court, the judgment delivered by the learned Single Judge is *per incuriam* as it has not taken care of the statutory provisions as contained under the Prevention of Corruption Act, 1988 as well as the provisions of Code of Criminal Procedure, 1973.

10- The pensions rules are governing payment of pension and the circumstances in which Governor can withhold or withdraw pension. It is got nothing to do with cases under the Prevention of Corruption Act, 1988 or the cases under the Indian Penal Code, 1860 as argued by learned counsel. Resultantly, the judgment delivered in the case of **Parmanand** (Supra) is of no help to the applicant. In the other case i.e. **Basant Khampariya** (Supra) a similar view has been taken by the coordinate Bench of this Court.

11- We have given due consideration to the judgment delivered in the case of **Basant Khampariya** and the judgment is again *per incuriam* as the pensions rules are for specific purposes i.e. for payment of pension, for withholding of pension and for payment of pension keeping in view the various contingencies as detailed in Rule 9 of Pension Rules, 1976.

12- The Division Bench of this Court in the case of **State of M.P. Vs. Vicco Products (Bombay)** (Writ Appeal No.102/2006, decided on 26/04/2017) while holding a judgment as *per incuriam* in paragraphs No.13 to 18 has held as under:-

“13. The question as to when a judgment can be said to be *per incuriam* has been interpreted by the Supreme Court time and again. The Constitution Bench in a judgment reported as **A.R. Antulay v. R.S. Nayak, (1988) 2 SCC 602** held as under:

42. It appears that when this Court gave the aforesaid directions on 16-2-1984, for the disposal of the case against the appellant by the High Court, the directions were given oblivious of the relevant provisions or law and the decision in *Anwar Ali Sarkar case* [AIR 1952 SC 75 : 1952 SCR 284 : 1952 Cri LJ 510] . See *Halsbury's Laws of England*, 4th Edn., Vol. 26, page 297, para 578 and page 300, the relevant notes 8, 11 and 15; *Dias on Jurisprudence*, 5th Edn., pages 128 and 130; *Young v. Bristol Aeroplane Co. Ltd.* [(1944) 2 All ER 293, 300] Also see the observations of Lord Goddard in *Moore v. Hewitt* [(1947) 2 All ER 270, 272-A] and *Penny v. Nicholas* [(1950) 2 All ER 89, 92-A] . “*Per incuriam*” are those decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned, so that in such cases some part of the decision or some step in the reasoning on which it is based, is found, on that account to be demonstrably wrong. See *Morelle v. Wakeling* [(1955) 1 All ER 708, 718-F] . Also see *State of Orissa v. Titaghur Paper Mills Co. Ltd.* [1985 Supp SCC 280 : (1985) 3 SCR 26] We are of the opinion that in view of the clear provisions of Section 7(2) of the Criminal Law Amendment Act, 1952 and Articles 14 and 21 of the Constitution, these directions were legally wrong.

“47.....We are of the opinion that Shri Jethmalani is not right when he said that the decision was not made *per incuriam* as submitted by the appellant. It is a settled rule that if a decision has been given *per incuriam* the court can ignore it. It is also true that the decision of this Court in the case of *Bengal Immunity Co. Ltd. v. State of Bihar* [AIR 1955 SC 661 : (1955) 2 SCR 603, 623] was not regarding an order which had become conclusive inter parties. The court was examining in that case only the doctrine of precedents and determining the extent to which it could take a different view from one previously taken in a different case between different

parties.”

14. Another Constitution Bench in a judgment reported as ***Punjab Land Development and Reclamation Corpn. Ltd. v. Presiding Officer, Labour Court***, (1990) 3 SCC 682, the Supreme Court held that the Latin expression *per incuriam* means through inadvertence.

15. In ***State of U.P. v. Synthetics and Chemicals Ltd.***, (1991) 4 SCC 139, the Court held that the Court is not bound by earlier decision if it was rendered without any argument, without reference to the crucial words of the rule and without any citation of the authority. The Court held as under:-

“40. ‘Incuria’ literally means ‘carelessness’. In practice *per incuriam* appears to mean *per ignoratium*. English courts have developed this principle in relaxation of the rule of stare decisis. The ‘quotable in law’ is avoided and ignored if it is rendered, ‘*in ignoratium* of a statute or other binding authority’. (*Young v. Bristol Aeroplane Co. Ltd.* [(1944) 1 KB 718 : (1944) 2 All ER 293]). Same has been accepted, approved and adopted by this Court while interpreting Article 141 of the Constitution which embodies the doctrine of precedents as a matter of law. In *Jaisri Sahu v. Rajdewan Dubey* [(1962) 2 SCR 558 : AIR 1962 SC 83] this Court while pointing out the procedure to be followed when conflicting decisions are placed before a bench extracted a passage from *Halsbury's Laws of England* incorporating one of the exceptions when the decision of an appellate court is not binding.

41. Does this principle extend and apply to a conclusion of law, which was neither raised nor preceded by any consideration. In other words can such conclusions be considered as declaration of law? Here again the English courts and jurists have carved out an exception to the rule of precedents. It has been explained as rule of sub-silentio. “A decision passes sub-silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the court or present to its mind.” (*Salmond on Jurisprudence* 12th Edn., p. 153). In *Lancaster Motor Company (London) Ltd. v. Bremith Ltd.* [(1941) 1 KB 675, 677 : (1941) 2 All ER 11] the Court did not feel bound by earlier decision as it was rendered ‘without any argument, without reference to the crucial words of the rule and without any citation of the authority’. It was approved by this Court in *Municipal Corporation of Delhi v. Gurnam Kaur.* [(1989) 1 SCC 101].....”

16. In a judgment reported as ***Govt. of A.P. v. B. Satyanarayana Rao***, (2000) 4 SCC 262 the Court held that the rule of *per incuriam* can be applied where a court omits to consider a binding precedent of the same Court or the superior

Court rendered on the same issue or where a Court omits to consider any statute while deciding that issue.

17. In another judgment reported as ***State of Bihar v. Kalika Kuer*, (2003) 5 SCC 448**, the Supreme Court quoted from *Halsbury's Laws of England* (4th Edn.) Vol. 26 to hold that a decision is *per incuriam* which is given in ignorance of some inconsistent statute or binding authority. The Court held as under:-

“5. At this juncture we may examine as to in what circumstances a decision can be considered to have been rendered *per incuriam*. In *Halsbury's Laws of England* (4th Edn.) Vol. 26: *Judgment and Orders: Judicial Decisions as Authorities* (pp. 297-98, para 578) we find it observed about *per incuriam* as follows:

“A decision is given *per incuriam* when the court has acted in ignorance of a previous decision of its own or of a court of coordinate jurisdiction which covered the case before it, in which case it must decide which case to follow [*Young v. Bristol Aeroplane Co. Ltd.*, 1944 KB 718 at 729 : (1944) 2 All ER 293 at 300. In *Huddersfield Police Authority v. Watson*, 1947 KB 842 : (1947) 2 All ER 193.]; or when it has acted in ignorance of a House of Lords decision, in which case it must follow that decision; or when the decision is given in ignorance of the terms of a statute or rule having statutory force [*Young v. Bristol Aeroplane Co. Ltd.*, 1944 KB 718 at 729: (1944) 2 All ER 293 at 300. see also *Lancaster Motor Co. (London) Ltd. v. Bremith Ltd.*, (1941) 1 KB 675 : (1941) 2 All ER 11. For a Divisional Court decision disregarded by that court as being *per incuriam*, see *Nicholas v. Penny*, (1950) 2 KB 466 : (1950) 2 All ER 89.]. A decision should not be treated as given *per incuriam*, however, simply because of a deficiency of parties [*Morelle Ltd. v. Wakeling*, (1955) 2 QB 379 : (1955) 1 All ER 708 (CA)], or because the court had not the benefit of the best argument [*Bryers v. Canadian Pacific Steamships Ltd.*, (1957) 1 QB 134 : (1956) 3 All ER 560 (CA) Per Singleton, L.J., affirmed in *Canadian Pacific Steamships Ltd. v. Bryers* 1958 AC 485 : (1957) 3 All ER 572.] , and, as a general rule, the only cases in which

decisions should be held to be given per incuriam are those given in ignorance of some inconsistent statute or binding authority [*A. and J. Mucklow Ltd. v. IRC*, 1954 Ch 615 : (1954) 2 All ER 508 (CA), *Morelle Ltd. v. Wakeling*, (1955) 2 QB 379 : (1955) 1 All ER 708 (CA), see also *Bonsor v. Musicians' Union*, 1954 Ch 479 : (1954) 1 All ER 822 (CA), where the per incuriam contention was rejected and, on appeal to the House of Lords although the House overruled the case which bound the Court of Appeal, the House agreed that that court had been bound by it; see *Bonsor v. Musicians' Union*, 1956 AC 104 : (1955) 3 All ER 518 (HL).]. Even if a decision of the Court of Appeal has misinterpreted a previous decision of the House of Lords, the Court of Appeal must follow its previous decision and leave the House of Lords to rectify the mistake.” [*Williams v. Glasbrook Bros. Ltd.*, (1947) 2 All ER 884 (CA)]

Lord Godard, C.J. in *Huddersfield Police Authorities case* [*Young v. Bristol Aeroplane Co. Ltd.*, 1944 KB 718 at 729 : (1944) 2 All ER 293 at 300. In *Huddersfield Police Authority v. Watson*, 1947 KB 842 : (1947) 2 All ER 193.] observed that where a case or statute had not been brought to the court's attention and the court gave the decision in ignorance or forgetfulness of the existence of the case or statute, it would be a decision rendered in per incuriam. (emphasis supplied)

18. A Division Bench of this Court in a judgment reported as ***State of M.P. v. Shiv Shankar*, (2000) 1 MP LJ 156** held that the doctrine of *per incuriam* only applies where another Division Bench of this Court has reached a decision in the absence of knowledge of a decision binding on it or a statute, and that in either case it has to be shown that had the Court had this material, it must have reached a contrary decision. The Court held as under:-

“49. It must be emphasised that the doctrine of *per incuriam* only applies where another Division Bench of this Court has reached a decision in the absence of knowledge of a decision binding on it or a statute, and that in either case it has to be shown that had the Court had this material, it must have reached a contrary decision. This is *per incuriam*. This doctrine however cannot be extended to a case where if different arguments had been placed before it or if different material had been placed before it, it might

- 12 -

have reached a different conclusion.”

In light of the aforesaid, in the present the rule of *per incuriam* can be applied as the learned Single Judge while deciding the case of **Parmanand and Basant Khampariya** (Supra) has failed to consider the statutory provisions as contained under the Code of Criminal Procedure, 1973, Indian Penal Code, 1860 and Prevention of Corruption Act, 1988 and therefore, the judgment delivered by this Court in the case of **Parmanand and Basant Khampariya** are not binding precedents. The judgments are *per incuriam*.

13- In light of the aforesaid, no case for interference is made out in the matter, accordingly, the present petition stands dismissed.

Certified copy as per rules.

(S. C. SHARMA)
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(VIVEK RUSIA)
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