State Of Madhya Pradesh vs State Of Maharashtra & Ors on 5 January, 1977

Equivalent citations: 1977 AIR 1466, 1977 SCR (2) 555, AIR 1977 SUPREME COURT 1466, 1977 2 SCC 288, 1977 LAB. I. C. 697, 1977 2 LABLJ 369, 1977 2 SCR 555, 1977 U J (SC) 122, 1978 (1) LABLN 24, 1977 34 FACLR 371, 1977 (1) SERVLR 433

Author: A.N. Ray

Bench: A.N. Ray, M. Hameedullah Beg, Jaswant Singh

PETITIONER:
STATE OF MADHYA PRADESH

Vs.

RESPONDENT:
STATE OF MAHARASHTRA & ORS.

DATE OF JUDGMENT05/01/1977

BENCH:
RAY, A.N. (CJ)
BENCH:
RAY, A.N. (CJ)
BEG, M. HAMEEDULLAH
SINGH, JASWANT

CITATION:
1977 AIR 1466 1977 SCR (2) 555
1977 SCC (2) 288
CITATOR INFO :
R 1980 SC1773 (21)

ACT:
Code of Civil Procedure, Order 2 Rule 2, bar under, when-operates-- Whether applicable when omission to sue has occurred by lack of knowledge or absence of right to claim.
Limitation Act , s. 2(1), application to claim for sal-ary--Whether effected by suspension or dismissal order--Whether salary accrues while such orders remain operative.

HEADNOTE:
Dismissing the appeal, the Court,

HELD: (1) A litigant will be barred under Order 2 Rule 2 of the C.P.C. when he omits to sue for or relinquishes the claim in a suit with knowledge that he has a right to sue for that relief. A right which he does not know that he possesses or a right which is not in existence at the time of the first suit is not a "portion of his claim" within the meaning of Order 2 Rule 2 of the C.P.C. The crux of the matter is presence or lack of awareness of the right at the time of first suit. [561D-E, 562-B]

Amant Bibi v. Imdad Hussain 15 I.A. 106 at 112, applied.

Om Prakash Gupta v. State of Uttar Pradesh [1955] 2 S.C.R. 391, distinguished.

High Commissioner for India v. I. M. Lall 75 I.A. 225; Province of Punjab v. Pandit Tara Chand [1947] F.C.R. 89; State of Bihar v. Abdul Majid [1955] 1 S.C.R. 286, referred to.

The bar under Order 2 Rule 2 of the C P.C. cannot operate when the litigant's cause of action in an earlier suit is totally different from the cause. of action in a later suit. [562-C]

Pawana Reena Saminathan v. Palaniappa 41 I.A.142, applied.

(2) During the period of suspension the plaintiff was not entitled to salary under Fundamental Rule 53. The cause of action for his salary for such period did not accrue until he was reinstated as a result of the decree setting aside the orders of suspension and of dismissal. [563C-D]

Jai Chand Sawhney v. Union of India, [1970] 3 S.C.R. 222 and Sakal Dean Sahai Srivastava v. Union of India, [1974] 2 S.C.R. 485, distinguished.

(3) Under Fundamental Rule 52 the pay and allowance of a Government servant who is dismissed or removed from service, cease from the date of his dismissal or removal. Therefore, there would be no question of salary accruing or accruing due so long as orders of suspension and dismissal stand. [564 B-C]

Khem Chand v. Union of India, [1963] Supp 1 S.C.R. 229, followed.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No.. 1870 of 1968.

(From the Judgment and Decree dated 6-3-1967 of the Bombay High Court (Nagpur Bench) in Appeal No. 101/59.) I. N. Shroff and H.S. Parihar, for the appellant. S.B. Wad and M.N. Shroff, for respondent No. 1.

A. S. Bobde, G.L. Sanghi, V.K. Sanghi, Miss Rama Gupta and M.S. Gupta, for respondent No. 2.

The Judgment of the Court was delivered by C.J.--This appeal is by certificate from the judgment dated 6 March, 1967 of the High Court of Bombay. The appellant is the State of Madhya Pradesh. The first respondent is the State of Maharashtra. The second respondent is the plaintiff-decree holder. They will be referred to, for short, as Madhya Pradesh, Maharashtra and the plaintiff., The trial court passed a decree in favour of the plain- tiff. It was declared that the order dated 9 January, 1954 of the suspension of the plaintiff as well as the. order of removal of the plaintiff from service passed on 2 February 1956 is illegal, void and inoperative. The further declara- tion was that the: plaintiff shall be deemed to be continu- ing in service from 16 September, 1943. A sum of Rs. 64, 588-2-0 was decreed in favour of the plaintiff and Bombay the predecessor of Maharashtra was ordered to. pay the same with interest. Both Madhya Pradesh and Maharashtra were ordered to pay costs to the plaintiff.

Maharashtra preferred an appeal against the decree. Madhya Pradesh preferred objections against the order of costs.

The High Court confirmed the decree and the declara- tions. The High Court however modified the decree and held Madhya Pradesh liable. The claim of the plaintiff against Maharashtra was dismissed.

The plaintiff was appointed Assistant Medical Officer in 1938. In 1939 he was appointed officiating Assistant Surgeon. He was posted at Elichpur (now Achalpur). In 1942 he was transferred to Hoshangabad. In 1943 he ap- plied for medical leave for four months. The Civil Surgeon recommended leave for six weeks. The plaintiff again ap- plied for leave in the month of August, 1943. The leave was sanctioned by the Civil Surgeon. The plaintiff then requested the Civil Surgeon in anticipation of sanction of leave by the Government for relief because he was not keep- ing good health. The Civil Surgeon then reported to the Government that the plaintiff absented himself from duty from 10 August, 1943 without leave. The Government sanc- tioned leave for six weeks. On 28 September, 1943 the plaintiff was suspended by an order with effect from 16 September, 1943.

The plaintiff was served with a notice dated 30 September, 1943 to show cause why he: should not be dismissed from service. Four charges Were levelled against the plaintiff. First, that he refused to come to duty at the time of epi- demic in August, 1943; Second, that he left his station without permission. Third, that he refused to attend the Departmental enquiry when ordered to do so. Fourth, that he wilfully and deliberately acted in total disregard of orders and absented himself from duty though he was declared to be fit to. resume duty.

The Enquiry Officer by report dated 22 February, 1945 gave his findings that the first charge was not proved; that the second charge was proved but mitigated and the third and the fourth charges were technically proved. On 21 June, 1945 the plaintiff was asked to show cause why he. should not be dismissed or reduced in rank. On 18 August, 1945 the Government of Central Provinces and Berar intimated to the plaintiff that the Government accepted the report of the Enquiry Officer and proposed to remove the plaintiff from service with effect from the date of the passing of the final order. By order dated 7 November, 1945 the Provincial Government passed an order removing the plaintiff from service with effect from that date. On 10 May, 1945 the plaintiff filed an appeal to the

Governor but it was dismissed.

On 6 January, 1949 the plaintiff filed a suit in the court of the Second Additional District Judge, Nagpur. By judgment dated 31 August, 1953 the District Judge held that the suspension order and the order of dismissal were illegal and declared the plaintiff to. be deemed to. continue in service. The plaintiff was thereafter reinstated in service aS Assistant Surgeon on 12 December, 1953. He was posted at Rays Hospital, Nagpur on 15 September, 1953. On 13 January, 1954 the plaintiff was again suspended from service under order dated 9 January, 1954. The plain- tiff handed over charge on 13 January, 1954. On 1 February 1954 the plaintiff was served with a notice dated 29 Janu- ary, 1954 to show cause why he should not be removed from service. The former report of the Enquiry Officer dated 22 February, 1945 was also given to the plaintiff. On 2 February, 1956 the plaintiff was removed from service. He appealed to the Governor. The appeal was dismissed. On 6 October, 1956 the plaintiff filed this suit in the court of the Joint Civil Judge, Nagpur against Madhya Pra- desh and Maharashtra. The plaintiff asked for a declaration that the order dated 9 January, 1954 suspending the plain- tiff as well as the order dated 2 February, 1956 is illegal. The plaintiff asked for a declaration that he is deemed to continue in service. He claimed recovery of Rs. 64,588-2-0 as arrears of salary.

The plaintiff in his suit alleged that both Maharashtra and Madhya Pradesh are "liable to make good the plaintiff's claim the liability for which is not exclusive but joint and several". The alternative case. of the plaintiff in the suit was that "if it will be held that the State of Maha- rashtra and not the State of Madhya Pradesh is liable or viceversa the plaintiff will claim the decree' against such State as would be liable".

The Civil Judge passed the. decree on 25 April 1959' declaring: the order dated 9 January, 1954 suspending the plaintiff as well as the order dated 2 February, 1956 remov- ing the plaintiff from service as illegal, void and inopera- tive. The decree further stated that the plaintiff was deemed to continue in service from 16 Septem- ber, 1943. The Civil Judge passed a decree against the State of Bombay with the direction to pay Rs. 64,588-2-0 with 'interest at 6 per cent.

Both Maharashtra and Madhya Pradesh went up in appeal. The Division Bench of the Bombay High Court placed the matter before a larger Bench and referred these two ques- tions for the decision of the Larger Bench. (1) Whether in the events that have happened which of these two States of Maharashtra and Madhya Pradesh can be compelled to take the plaintiff in service. (2) Whether both or only one of the two States can be made liable for the payment of ar- rears of salary of the plaintiff, if so, which State is liable.

The larger Bench of the Bombay High Court said that the State of Madhya Pradesh is constituted after the States Reorganisation Act referred to as the Act came into. force on 1 November, 1956 is the principal successor State of the former State of Madhya Pradesh. The High Court further said that the State of Maharashtra is the successor State of the former Madhya Pradesh inasmuch as certain territo- ries, namely, Vidharbha which formed part of the former St. ate of Madhya Pradesh became: a part of the new State of Maharashtra. The High Court then referred to. clause (B) of section 88 of the Act and said that Maharashtra would be liable for the claim of the plaintiff only if the cause of

action has arisen in its entirety within the territories which formed part of Maharashtra, otherwise initial liabil- ity for the plaintiff's claim will be on the principal successor State Madhya Pradesh under section 88(c) of the Act. The larger Bench therefore referred the matter to the Division Bench to consider the question whether the cause of action for the plaintiff's claim arose in its entirety within the territories which formed part of the Maharashtra. The High Court held that under section 88(c) of the Act Madhya Pradesh is responsible for the claim of the plain- tiff. The High Court further held that the plaintiff was appointed under conditions of service Prescribed for him and accepted by him, and, therefore, the plaintiffs claim for arrears of salary would be governed by section 87 of the Act and not by section 88 of the Act. The High Court said that the plaintiffs claim for arrears of salary and allowance was based on contract, either express or implied, on the basis of the terms. of appointment and the conditions of service prescribed by the Government and accepted by the plaintiff. The High Court also said that at the time of the plaintiff's appointment in 1939 the plaintiff's services were available for the then entire Province of Central Provinces and Berar and not only for those districts which formed part of Madhya Pradesh. Therefore, the High Court said that section 87(b) of the Act would not apply. Under the residuary clause of section 87(c) of the Act Madhya Pradesh would be liable as the principal successor State because the purpose of the contract were as from the appointed day not exclusively purposes of any of the two successor States. Madhya Pradesh raised three contentions. First, the plaintiff did not claim salary and allowances for the period subsequent to 15 September, 1943 in the. suit filed by the. plaintiff in 1949 and was therefore by reason of the provisions contained in Order 2 Rule 2 of the Code of Civil Procedure precluded from claim- ing the salary and allowances for the period of 16 Septem- ber, 1943 to 31 August, 1953 in the second suit which was filed on 6 October, 1956. Second, the plaintiff's claim in the second suit for salary and allowances prior to 6 October 1953 would be barred by the reason of Article 102 of the Limitation Act 1908. Third, the liability, if any, would be under section 88(b) of the Act of Maharashtra which succeeded the State of Madhya Pradesh on 1 November, 1956 in so far as Nagpur District of the then existing State of Madhya Pradesh was concerned. Reference was made to section 8(1) (c) of the Act for the purpose. Further it is said by the appellant that on or after 1 November, 1956 the plain- tiff could continue the suit only against the State of Bombay later known as State of Maharashtra and not against the State of Madhya Pradesh as constituted on or after 1 November, 1956.

Maharashtra contended that the liability was of Madhya Pradesh because of the provisions contained in section 88(c) of the Act. It was said on behalf of Maharashtra that the plaintiff had been appointed to service in Central Prov- inces and Berar which became the principal successor State of Madhya Pradesh. The order of removal was also by the existing State which became the principal successor State of Madhya Pradesh.

In order to appreciate the rival contentions reference is necessary to two sections of the Act. Section 87 speaks of liability in the case of contracts. 'Broadly stated, the provisions of section 87 of the Act are that where before the appointed day "1 November 1956" an existing State has made any contract in the exercise of 'its executive power for any purposes of the State, that contract shah be deemed to have been made in the exercise of the executive power--(a) if there be only one successor States of the State; and (b) if there be two or more successor States and the purposes of the contract are,as from the appointed day, exclusively purposes of any one of them--of that State; and (c) if there be

two or more successor States and the purposes of the contract are,contract are, as from that day, not exclusively purposes of any one of them.---of the principal successor State: and all rights and liabilities which have accrued or may accrue, under any such contract shall, to the extent to which they would have been rights or liabilities of the existing State be rights or liabilities of the successor State or the principal succes- sor State. The proviso to section 87 of the Act is that where the liability attaches under clause (c) the initial allocation of rights and liabilities made by this sub- section shall be subject to such financial adjustment as may be agreed upon between all the successor States concerned, or in default of such agreement, as the central Government may by order direct.

Section 88 of the Act provides that where before the appointed day, an existing State is subject to any liability in respect of an actionable wrong other than breach of contract, that liability shall (a) if there be only one successor State, be a liability of that State; (b) if there be two or more successor' States and the cause of action arose wholly within the territories which as from that day are the territories of one of them, be a liability of that successor State, and (c) in any other case, be initially a liability of the principal successor State, but subject to such financial adjustment as may be agreed upon between 'all the successor States concerned, of in default of such agreement, as the Central Government may by order direct.

The claim for declaration that the order of suspension as welt as the order of dismissal was void is in respect of an actionable wrong other than breach of contract. In order to. determine as to which of the two States would be liable e under section 88 of the'. 1956 Act it has to be found out whether the cause of action arose wholly within the territories of one of the States or arose partly in the territories of one State and partly in the territo- ries of the1 other. The departmental enquiry which was alleged to be illegal was held at Hoshangabad which has all along been a part of the State of Madhya Pradesh only. The. final orders which were challenged in the suit were passed at Nagpur which became part of the State of Bombay and later on known as Maharashtra. The plaintiff's cause of action comprises of every fact which is necessary to be proved. The plaintiff based his claim with regard to de- partmental enquiry which was held at Hoshangabad and also with regard to impugned order passed at Nagpur. The appel- lant State is the principal successor State of the former State of Madhya Pradesh. Maharashtra was one of the succes- sor States, like Madhya Pradesh. Section 88(a) of the 1956 Act in the present case has no .application because it speaks of only one successor State. Section 88(b) of the 1956 Act refers to the State. where the cause of action wholly arose within the territories of either of the. two. successor States. In the present case, it cannot be said that the cause of action arose wholly within the successor State of Maharashtra. Therefore, the residuary 'provision contained in section 88(c) of the 1956 Act applies and the liability is of the principal successor State, namely, Madhya Pradesh. The High Court was right in arriving at the conclusion that Madhya Pradesh is liable.

The plaintiff's suit in 1949 was only for setting aside the impugned orders. The plaintiff did not ask for relief for arrears of salary for the obvious reason that the plain- tiff in the 1949 suit asked fox' setting aside of the im- pugned orders and an order that the plaintiff was deemed to be continuing in service. The plaintiff proceeded on the existing law as it stood by reason of the decision in High Commissioner for India v. 1. M. Lall(1). The Judicial Committee in that case held that a civil servant was not entitled to. sue the State for recovering arrears of salary and pay. Counsel for Madhya

Pradesh relied on the decision in Province of Punjab v. Pandit Tara Chand (2) which held that a public servant had a right to bring a suit for ar- rears .of pay. The decision of the Judicial Committee in Lall's case (supra) takes a contrary view to the decision of the Federal Court in Pandit (1) 75 I.A. 225.

(2) [1947] F.C.R. 89.

Tara Chand's case (supra). It it true that the decision of the Federal Court in Pandit Tara Chand's case (supra) was not brought to the notice of the Privy Council. Under section 208 of the Government of India Act 1935 the law declared by the Judgment of the Privy Council had to be followed by all the Courts including the Federal Court. Therefore, the earlier decision of the Federal Court though not expressly overruled by the Judicial Committee must be deemed to have overruled by implication by the decision of the Judicial Committee in Lall's case (supra). This Court in State of Bihar v. Abdul Majid(1) stated that a Government servant could ask for arrears of salary. Counsel for Madhya Pradesh said that the decision of this Court in Abdul Majid's case (supra) declared what the exist- ing law has been, and, therefore, the plaintiff could not contend that it was not open to him to ask for arrears of salary in the 1949 suit. It is in that background that Madhya Pradesh contends that the plaintiff not having asked for relief under Order 2 Rule 2 of the Code of Civil Proce- dure would not be entitled to claim salary in the 1956 suit. The contention of Madhya Pradesh cannot be accepted. The plaintiff will be barred under Order 2 Rule 2 of the Code of Civil Procedure only when he omits to sue for or relinquishes the claim in a suit with knowledge that he has a right to. sue for that relief. It will not be correct to say that while the decision of the Judicial Committee in Lall's case (supra) was holding the field the plaintiff could be said to know that he was yet entitled to make a claim for arrears of salary. On the contrary, it will be correct to say that he knew that he was not entitled to make such a claim. If at the date of the former suit the plain- tiff is not aware of the right on which he insists in the latter suit the plaintiff cannot be said to be disentitled to the relief in the latter suit. The reason is that at the date of the former suit the plaintiff is not aware of the right on which he insists in the subsequent suit. A right which a litigant does not know that he possesses or a right which is not in existence at the time of the first suit can hardly be regarded as a "portion of his claim"

> within the meaning of Order 2 Rule 2 of the Code of Civil Procedure. See Amant Bibi v. Imdad Husain(2). The crux of the matter is presence or lack of awareness of the right at the time of first suit.
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> This Court in Om Prakash Gupta v. State of Uttar Pradesh(2) considered the prayer for refund of court fees on a claim which was abandoned. The plaintiff in that case asked for a declaration that the order of dismissal was void and also asked for arrears of salary or in the alternative damages for wrongful dismissal.In view of the decision in Lall's case (supra) the plaint in that casewas amended by deleting the claim for arrears of salary and also for damages.The plaintiff thereupon praved for refund of the court fees which had been paid on arrears of salary for damages.Both the trial
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> Court (1) [1955] 1 S.C.R. 286.

(2) 15 I.A. 106, 112.

(3) [1955] 2 S.C.R. 391.

and the High Court rejected the claim for refund of court fees. This Court also upheld the same view. The reason given by this Court was that at the time the suit was insti- tuted the law as it then stood permitted such a claim to be made. The decision of the Privy Council made it clear that no such claim could be made. The decision of the Privy Council clarifying the position was held by this Court not to be a ground for refund of court fee which was paid in accordance with law as it then stood.

The appellant Madhya Pradesh is, therefore, not right in contending that the plaintiff is barred by provisions con- tained in Order 2 Rule 2 of the Code of Civil Procedure from asking for arrears of salary in the 1956 suit. The plain- tiff could not have asked for " arrears of salary on the law as it then stood. The plaintiff did not know of or possess any such right. The plaintiff, therefore, cannot be said to have omitted to sue for any right.

Another reason why the bar under Order 2 Rule 2 of the Code of Civil Procedure cannot operate is that the plain- tiff's cause of action in the 1956 suit is totally different from the cause of action in the 1949 suit. See Pavana Reena Saminathan v. Palaniappa(1).

This Court in Jai Chand Sawhney v. Union of India (2) held that in a suit for setting aside the order of dismissal and for arrears of salary a claim for salary for the period prior to three years of the suit would be barred. The reason given is that when the order of dismissal is set aside the Government servant is deemed to be in service throughout the period during which the order of dismissal remains operative. Once an order of dismissal is declared bad it is held to be bad from the date of dismissal and salary would be due from the date when the dismissal order was bad.

The same view has been taken by this Court in Sakal Dean Sahai Srivastava v. Union of India(3). In that case the plaintiff filed a suit on 27 November, 1962 for a declara- tion that from 1 July, 1949 the date of illegal reversion up to 30 September, 1959 the date of his retirement he was a railway employee.

Relying on the decision of this Court in Jai Chand Sawhney's case and Sakal Deep's case (supra) counsel for Madhya Pradesh contended that the plaintiff would not be entitled to more than three years' salary. The present case is not one of setting aside an order of dismissal simpliciter. When the plaintiff filed a suit in 1949 he could not ask for arrears of salary. Pursuant to the decree dated 30 August, 1953 in his favour he was reinstated on 12 December, 1953. Three features are to be borne in mind in appreciating the plaintiff's case from the point of view of limitation. First the plaintiff became entitled to salary for the period 16 September, 1943 up to the date of rein- statement on 12 December, 1953, only when pursuant to the decree dated 30 August, 1953 there was actual reinstatement of the plaintiff on 12 December, 1953. Second, the plain- tiff was (1) I.A. 142. (2) [1970] S.C.R. 222.

(3) [1974] 2 S.C.R 485.

again suspended on 19 January, 1954 and was dismissed on 23 February 1956. The Madhya Pradesh Government on 5 March, 1954 decided that during the period of first suspension till his reinstatement on 12 December, 1953 he was not entitled to salary. Again on 29 January, 1956 the Madhya Pradesh Government decided under Fundamental Rule 54(iii) that during the period of suspension from 16 September 1943 to 12 December 1953 and again from 19 January 1954 to 23 February 1956 he would not be entitled to any payment of allowances. On these facts two consequences arise in the present appeal. First, since the plaintiff was under suspension from 16 September, 1943 till 12 December, 1953 when he was rein- stated and again suspended from 19 January, 1954 till 23 February, 1956 when he was dismissed, his suit on 6 October, 1956 is within a period of three years from the date of his reinstatement on 12 December, 1953. Second, during the period of suspension he was not entitled to salary under Fundamental Rule 53. Further decision to that effect was taken by the Madhya Pradesh Government on 28 January, 1956 under Fundamental Rule 54. Therefore, the plaintiff's cause of action for salary for the period of suspension did not accrue until he was reinstated on 12 December, 1953. The plaintiff's salary accrued only when he was reinstated as a result of the decree setting aside the orders of sus- pension and of dismissal.

The rulings of this Court in Jai Chand Sawhney's case (supra) and Sakal Deep's case (supra) do. not apply to the present appeal because there was no aspect of any suspen- sion order remaining operative until the fact of rein- statement pursuant to the decree.

The plaintiff's cause of action for arrears of salary is this. When the plaintiff was reinstated on 12 December, 1953 pursuant to the decree dated 30 August, 1953 the plain- tiff became entitled to salary which was suspended during the period of suspension._ The plaintiff was again suspend- ed from 19 January, 1954 and he was dismissed from service on 23 February, 1956. Therefore, when the plaintiff filed the suit on 6 October, 1956 his entire claim for salary is founded first on his reinstatement on 12 December, 1953 pursuant to the decree and second on the order of suspen- sion dated 19 January, 1954 and the order of dismissal on 23 February 1956 which the plaintiff challenged as illegal. The original order of suspension on 16 September, 1943 as welt as the original dismissal dated 7 November, 1945 was declared to be illegal by the decree dated 30 August, 1953. Therefore, when the plaintiff was reinstated on 12 December, 1953 it is then that the plaintiff's claim for salary accrued due. This salary was again suspended from 19 January, 1954. Dismissal on 23 February, 1956 was at a time when the plaintiff was still under suspension. The order of suspension does not put an end to his service. Suspension merely suspends the claim to salary. During suspension there is suspension allowance. See Khem Chand v. Union of 2-112 SCI/77 India(1) where this Court said that the real effect of the order of suspension is that though he continues to be a member of the service he is not permitted to work and is paid only subsistence allowance which is less than his salary. Under Fundamental Rule 52 'the pay and allowance of a Government servant who is dismissed or removed from service, cease from the date. of his dismissal or remov- al.Therefore, there would be no question of salary accruing or accruing due so long as orders of suspension and dismiss- al stand. The High Court was correct in the conclusion that the plaintiff's claim for salary accrued due only on the order of dismissal dated 23 February, 1956 being set aside. For the foregoing reasons the appeal is dismissed. There will be costs only to the plaintiff respondent to be paid by the State of Madhya Pradesh.

M .R. Appeal dismissed.