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न्यायिक अधिकारी प्रशिक्षण एवं अनुसंधान संस्थान

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JUDICIAL OFFICERS' TRAINING & RESEARCH INSTITUTE

HIGH COURT OF MADHYA PRADESH, JABALPUR - 482 007

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FROM THE PEN OF THE EDITOR

J.P. Gupta
Director, JOTRI

Esteemed Readers

This is the second issue of JOTI Journal which is in your hands, though a bit late. During the last four months, the Institute was totally engrossed in imparting second phase training to the newly recruited Civil Judges Class II. This training, aimed at imparting practical training like writing judgments/orders to these newly appointed Civil Judges for improving their practical skills. The Institute, with its limited resources has tried to prepare the freshly appointed Judicial Officers for the challenging responsibilities, which they are going to shoulder.

They were also acquainted with the finer nuances of law which they were required to know in their day to day working. The focus of this training was to imbibe in them a strong sense of responsibility and also to make them understand as to how much the society reposes its faith in the judiciary. They were quite enthusiastic in their approach and interacted freely with faculty members so that no iota of doubt in their mind regarding law persists.

Hon'ble the Chief Justice, Hon'ble the Chairman, High Court Training Committee and most of the Hon'ble Sitting Judges of High Court were kind enough to spare their valuable time to grace this Institute and to enlighten our trainee Judicial Officers on various topics. For the trainee Judicial Officers, the opportunity of being guided by such high dignitaries was a blessing in disguise. The Institute will remain extremely obliged to them for their valuable and unstinting support. The Officers from the Registry, District Court and other Guest Faculty also did their lot to train these Judicial Officers. I extend my sincere thanks to them for their valuable support.

The field of law is very vast and learning is an unending process. Therefore one has to put in a lot of effort and dedication in learning new things to become a Judicial Officer in the true sense. With this endeavour, the Institute is always striving hard to equip the Judicial Officers with latest developments of law through this Journal.

An article on *New Challenges facing Indian Judiciary* by Hon'ble Shri Justice D.M. Dharmadhikari finds place in Part I alongwith other articles of bi-monthly training programme.

Part II of the Journal is abound with various important legal pronouncements of our own High Court as well as of the Apex Court which will help the Judicial Officers in a long way.

In Part III we have included various circulars/notifications including an order of the High Court of Madhya Pradesh relating to *Norms for Promotion and criteria for grant of Higher Scales.*

Due to the breakdown of joint family system, parents and senior citizens are exposed to emotional neglect and also lack physical and financial support. Therefore to give them more care and protection, Legislation came out with an Act relating to the *Maintenance and Welfare of Parents and Senior Citizens Act, 2007* which is included in Part IV of the issue. An amendment in *Madhya Pradesh Court Fees Act, 1870* also finds place in this part.

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Anything I do, I learn about first. I am not in favour of improvisation; I believe in work and in learning.

- Ferreira Gullar

PART - I

NEW CHALLENGES FACING INDIAN JUDICIARY

Justice D. M. Dharmadhikari
Chairperson
MP Human Rights Commission
Bhopal

Modern Judge in India is faced with greater challenges than Judge of previous generation. The reason is ever increasing pressure of work and the continuous strain on the judiciary in maintaining constitutional governance.

CONSTITUTIONAL DUTY OF THE JUDICIARY

The Constitution has entrusted important role to the judiciary. The duty of judiciary is to maintain **rule of law** by ensuring that the laws enacted by the Legislature are enforced by the Executive not merely in letter but in spirit. The Constitution nowhere makes a mention of separation of powers between the three organs of the State i.e. Legislature, Executive and Judiciary. There is no clear indication that each organ of the State has to work within a clearly demarcated sphere with no power to encroach into the field of another. The Constitution provides democratic governance to be distributed between three organs with total independence given to the judiciary. The judiciary is expected to maintain the **balance of power** between the three organs and to ensure that democratically formed government functions in accordance with the constitutional principles and constantly strives to achieve the constitutional goals. The judiciary has to be always conscious of its primary role assigned to it by the Constitution of ensuring constitutional governance and 'rule of law'. The expected role requires grant of full independence to judiciary and demands of judges absolute integrity. This paramount duty of the judiciary can be best discharged if there are ideal working conditions for the members of the judiciary and by their work and conduct they command respect of other two organs of the State.

The success of democracy, to a large extent depends on proper functioning of the judiciary. How-so-ever ideal a law is made by Legislature unless it is enforced in its full spirit by the Executive, justice in accordance with the law to the citizens cannot be guaranteed.

The on-going controversy and criticism of the so-called growing tendency of the judiciary to make undue encroachment into the field of Executive and sometimes Legislature is a misunderstanding. In this controversy some sections of the other two organs of the State forget that the 'separation of power' between three organs of the State in the Constitution, which is seen as implicit in its structure, is with the purpose of maintaining a 'balance of power' with the prime

object of establishing and maintaining constitutional governance. On important human rights issues, particularly those which are part of fundamental rights, if the Legislature is inattentive, the higher judiciary, by mode of interpretation of the provisions of the Constitution, can mould the law and, where urgently needed, fill the vacuum in law. This encroachment on legislative field of higher judiciary by interpretation of the Constitution is a well recognized permissible mode of ensuring constitutional governance.

Where the Executive fails to implement the law and thereby the Constitutional governance is impaired, the Judiciary has to step-in to protect the interest of the citizens for the limited purpose of protecting their basic human or fundamental rights. The legitimate attempt of higher Judiciary has always been to compel the Executive to implement the law and protect constitutional rights of citizens. Some critics, with a narrow view, describe it as an undue encroachment by Judiciary into the field of Executive. This exercise of the Judiciary undertaken, as and when necessitated, is not an unwanted adhoc adventurism, because the Constitution itself envisages that constitutional governance and protection of fundamental rights of citizens has to be achieved by the mutual cooperation of the three organs of the State. If one organ seems inefficient or inactive, the other organs must come forward to support the constitutional governance.

From the above point of view, the modern judge, with experience of 60 years of working of the Constitution in India, has to keep in view the above new challenges and serve the cause of justice in the best interest of the people of the country, unmindful of unjustified criticism of a section of holders of powers in the two other organs of the State.

In the Constitutional scheme, the independence given to the judiciary demands that its members shall not succumb to the pressure of the other two organs and discharge their dual duty of maintaining **rule of law** and **protecting the fundamental rights of citizens**. The role of modern judiciary is not limited to **maintaining law and order** as was the traditional role assigned to the judiciary during British period.

NEW ROLE OF TRIAL JUDGE

The trial Judge of the present time is facing tremendous pressure of work despite various experiments currently on for decentralizing the judicial system. In the past all kinds of litigations were concentrated in the traditional civil and criminal courts. To decentralize the judicial system specific categories of cases, subject-wise have been entrusted to special courts and tribunals like Service Tribunal, Consumer Courts, Debt Recovery Courts, Railway Rates and Claims Tribunal, Tax and Central Excise Tribunals and the like. Some other categories of cases are found better suited for resolution through Alternative Dispute

Resolution systems like Arbitration, Mediation, Conciliation and Lok Adalats. Huge arrears of cases and their long pendency necessitated development of **Case** and **Court management techniques**. This need to solve problems of Laws' Delays led to introduction of computerization of Courts under the **E-Court Project**, which has recently been inaugurated by the President of India. Courts all over India, right from Apex down to Subordinate Courts at Tehsil level have been linked by computers, to make easy flow of information of decided cases of different Courts.

The on-going, experiments to make judicial system efficient are most welcome but in this process the Judges should not be unmindful that they have to handle delicate human issues for decision which requires human approach to the problems in their hands. Every Judge has to work within the powers conferred on him by Law. Howsoever clearly defined and demarcated a law be, while dealing with a given case, there is an area which is unoccupied and unchartered requiring use of **discretion**, which is the most precious asset of a Judge, not to be snatched away from him. It is in this elbow room given to a Judge of using discretion while applying a law, he has to mould the law in a manner to do justice to the parties in contest before him.

Problem of long pendency of cases in the Courts, required entrusting some special types of cases to tribunals, and transferring few others to Alternate Dispute Resolution Fora, but we have to guard against the possibility of dilution of quality of justice under less formal adjucatory methods. The quality of justice dispensation has to be maintained at all cost and in all methods-formal, less formal or informal. The traditional courts trained in formal methods, had to sacrifice some of their work and power only because they failed to function efficiently in the manner expected of them. The result of inefficiency of traditional courts is before us. Now instead of legally trained Judge dispensing justice in open court under a formal procedure, justice is being dispensed in informal way by persons not fully trained in art of judging.

The modern judge of the traditional court, therefore, has to be more efficient and sensitive to the cause of litigating parties before him. Use of computerization should not make him too mechanical, that he merely makes a search of precedents on the computer and selects one nearest in facts to the case before him and makes his decision A Judge has never to forget that each case is peculiar involving different people and different facts. A precedent, how so ever binding and nearer to the facts of the case in his hands, requires the judge to decide the case before him on the facts of that case and law to be applied to those facts not merely on the basis of a binding precedent. Use of computers by the modern Judge is no doubt beneficial. On computer screen he can know all the law on the subject of India and abroad, but his real work begins thereafter of appreciating the facts of the case before him and applying the law to it for the

purpose of coming to a just conclusion of his own. This faculty of judging has to be developed by the modern Judge, with the aided advantage of all relevant information made available to him on the computer.

HUMAN RIGHTS NORMS

Law made by Centre and State legislatures is **Domestic Law** or National Law. It is binding on all institutions and citizens of the Country. Law which regulates relations between the countries is **International Law**. Universal Declaration of Human Rights with the Covenants and Agreements signed and ratified by member-countries of United Nations, constitutes human rights law which can be called **Global law** or **Universal law.** The Global or Universal law accepted by member countries to protect fundamental human rights and freedoms is not limited to the geographical boundaries of any country. India being a member of United Nations and a party to various Intemational Human Rights Conventions and Agreements has incorporated substantially human rights norms in its Domestic or National Laws. In the Domestic or National Laws, if there are gaps and vacuum, the judges in dispensation of justice should keep the principles of human rights law into consideration.

The famous **Bangalore Principles** which were released as a summary of issues discussed at a Judicial Colloquium on ***"The Domestic Application of International Human Rights Norms" (in accordance with para 6 of the Understanding between the Party Nations)*** state that where there are gaps in domestic law the human rights norms can be taken aid of for purpose of dispensation of justice.

Bangalore Principles No.7 to 10 need special attention:-

Principle No.7: It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to intemational obligations which a country undertakes - whether or not they have been incorporated into domestic law - for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law.

Principle No.8: However, where national law is clear and inconsistent with the international obligation of the state concerned, in common law countries the national court is obliged to give effect to national law. In such cases the court should draw such inconsistency to the attention of the appropriate authorities since the supremacy of national law in no way mitigates a breach of an international legal obligation which is undertaken by a country.

Principle No.9: It is essential to redress a situation where, by reasons of traditional legal training which has tended to ignore the international dimension, judges and practicing lawyers are often unaware of the remarkable and comprehensive developments of statements of international human rights norms. For the practical implementation of these views it is desirable to make provision

for appropriate courses in universities and colleges and for lawyers and law enforcement officials, and meetings for exchanges of relevant information and experience.

Principle No. 10: These views are expressed in recognition of the fact that judges and lawyers have a special contribution to make in the administration of justice in fostering universal respect for fundamental human rights and freedoms.

Article 14 of the **Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms - 1998 reads**:-

Article 14 : 1. The State has the responsibility to take legislative, judicial, administrative or other appropriate measures to promote the understanding by all persons under its jurisdiction of their civil, political, economic, social and cultural rights.

2. Such measures shall include, *inter alia*:

a. The publication and widespread availability of national laws and regulations and of applicable basic international human rights instruments;

b. Full and equal access to international documents in the field of human rights, including the periodic reports by the State to the bodies established by the international human rights treaties to which it is a party, as well as the summary records of discussions and the official reports of these bodies.

3. The State shall ensure and support, where appropriate, the creation and development of further independent national institutions for the promotion and protection of human rights and fundamental freedoms in all territory under its jurisdiction, whether they be ombudsmen, human rights commissions or any other form of national institution.

Article 18 expects judiciary to play an active role in safeguarding democracy and promoting human rights and fundamental freedom.

ARTICLE 18:

1. Everyone has duties towards and within the community, in which alone the free and full development of his or her personality is possible.

2. Individuals, groups, institutions and non-governmental organizations have an important role to play and a responsibility in safeguarding democracy, promoting human rights and fundamental freedoms and contributing to the promotion and advancement of democratic societies, institutions and processes.

3. Individuals, groups, institutions and non-governmental organizations also have an important role and a responsibility in contributing, as appropriate, to the promotion of the right of everyone to a social and international order in which the rights and freedoms set forth in the Universal Declaration of Human Rights and other human rights instruments can be fully realized.

The modern judge, therefore, has not only to apply the domestic law in letter but also in spirit, and as and when he finds domestic law to be silent on a particular aspect of human rights, he should take aid of human rights norms as part of Universal or global law.

RECENTLY PROPOSED AND INTRODUCED AMENDMENTS TO CRIMINAL PROCEDURE CODE

In India, it is being painfully realized that the British system of dispensation of justice by the Criminal Court unduly leans in favour of the accused with a desirable object of zealously guarding his right of defence, but there is almost no or very little consideration given to the human rights of victims and witnesses, on whose testimony the success of Criminal Justice Delivery System depends. In the course of police investigation and trial in court, the attention of law enforcing agencies and Judges always remains focused on the accused resulting in complete neglect of victims and witnesses. United Nations Human Rights **Document No. 52** contains the **Declaration of Basic Principles of Justice of Victims for Crime and Abuse of Powers**. The Declaration contains guidelines for extending protection to victims and witnesses.

Document No. 63 contains the **Basic Principles on the Role of Lawyers** and **Document No. 64** contains the **Guidelines on the role of Prosecutors.**

In conducting criminal trials, judges should keep in mind Document No. 52 on human rights of victims and insist on Prosecutors and Lawyers to follow the principles mentioned in Documents No. 63 and 64.

Criminal Procedure Code is being amended to provide effective and better rights to victims, although there is as yet no legislative move to extend support to witnesses. Code of Criminal Procedure Amendment Bill 2006 proposes various amendments to CrPC with intend to give effective participation to victims at all important stages of trial like at the time of consideration of prayer for bail by the accused and recording of evidence of witnesses. Grant of independent right of appeal to the victims in the event of undeserved acquittal is also under contemplation.

The judges in the course of trial have to take special care that the victims and witnesses are given effective participation, along with prosecutors and the defence. The trial judges have also to ensure that as and when there is a complaint by the witnesses that they are being terrorized, pressurized or attempted to be

bribed, remedial measures shall be taken through the law enforcing agencies. No longer a modern Judge, while trying a criminal case, can remain merely a referee or umpire. He has to actively participate and to remain constantly watchful to ensure that not only accused gets full right of defence but victims and witnesses are well protected so that they are able to freely and fearlessly participate in the trial. The proposed reforms in Criminal Law Justice delivery system may take considerable time but in the course of conducting trial, by applying human rights norms, the trial judge can achieve substantially the desired results and best serve the ends of justice.

AMENDMENTS TO CIVIL PROCEDURE CODE

As a result of setting up of Special Courts and Tribunals, a big chunk of litigation, earlier handled by the regular Civil Courts, have been transferred. The traditional Civil litigation concerning house and land properties and other disputes of civil nature, on reduction of overload on courts, can now be effectively and expeditiously handled by Judge trying Civil cases. The modern trial Judge working on civil side, as a result of amendments introduced to CPC, has been armed with powers to refuse adjournments, cut short amendments to pleadings and impose heavy costs for deliberate procrastination-tactics adopted by any party. Trial Judge, as and when occasion demands, can direct action against defaulting parties for 'Perjury' and fabrication of records.

The most important provision to be used frequently is Section 89 of the Code of Civil Procedure which requires a Judge to formulate agreed issues on pleadings of parties and refer the matter for arbitration or conciliation or mediation or settlement in Lok Adalats. The Judge has now a dual role, of determining the disputed issues on the pleadings of the parties and to formulate questions on which the parties can agree for settlement of the disputes. This provision in Section 89 CPC demands of a Judge a different role, hitherto not available to him and for which he needs a different kind of training.

TO DEVELOP AND CONSTANTLY MAINTAIN THE LINKS WITH LEGAL SERVICES AUTHORITY AND LEGAL AID MOVEMENT

On the introduction of Article 39 A to the Constitution, with the aim of giving access to Justice to poor, deprived and needy, Legal Services Authority Act, 1987 has been passed. The provisions of the Act expects the Judge, wherever possible, to play a role of mediator and conciliator. The Legal Services Authorities comprise Judges, Lawyers and Social Activists. The Legal Services Authorities with Judges as their heads are not merely to grant legal aid to poor and needy for approaching the Courts but they are also required to take part in Lok Adalats to make attempts of arriving compromises and thus settling the disputes between the parties. This new role of Indian Judge is comparable to the role of an American Judge. An American Judge spends greater time with the parties in his chamber,

to persuade them to come to settlement terms. Only if his attempt to bring parties to terms in his chamber fails, he hears them formally in the Court Room and delivers a Judgment.

PUBLIC INTEREST LITIGATIONS

Public Interest Litigations presently handled by higher judiciary can be better and efficiently handled by Legal Services Authorities particularly concerning subjects of violation of human rights by public authorities and Environment. The Courts have to develop links with Legal Services Authorities and Human Rights Commission. The Human Rights Commissions are set up under the Protection of Human Rights Act to create awareness of human rights in all branches of Government and Public Authorities. It has also to entertain complaints of human rights violations committed by public authorities and recommend redressal and relief.

The Human Rights Commission is merely a recommendatory body. It has no power to make a binding decision and enforce compliance of its recommendations. This distinction between the Commission and the Court needs to be maintained. The provisions of the Protection of Human Rights Act allows the Commission to approach the Court, as and when found necessary, for obtaining mandatory directions for grant of relief to the victims of human rights violations. The complaints received generally are from deprived sections of society, who have no means to approach the Court. The Commission is ill-equipped to take a cause to the Court as a litigating party. On the recommendations of the Human Rights Commission, if the relief is not granted to the victim by the State or the Violator, the victim should be provided legal aid for easy and free access to the Court to seek redress and relief.

The modern Judge, therefore, has not merely to discharge the traditional duty of applying the law applicable to the case and render a judgment. He has a new role of making an attempt for mediation, conciliation and settlement of disputes brought before him. In discharging his judicial duties, a Judge has to keep human rights norms in view. Wherever necessary and permissible, he has to mould the law to do full justice. The modern judge, in the course of discharge of his duties is not confined to the four walls of his Court. He is required to participate in the activities of Legal Services Authorities and develop links through it, with Human Rights Commission.

Let us hope that the modern Judge will measure up to the new task and fulfill the expectations of the society.

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BI-MONTHLY TRAINING PROGRAMME

Following five topics were sent by this Institute for discussion in the bi-monthly district level meeting of October, 2007. The Institute has received articles from various districts. Articles regarding topic no. 2 and 4 received from Shivpuri and Damoh respectively, are being included in this issue. As we have not received worth publishing articles regarding remaining topics, i.e. topic no. 1,3 and 5, they have been sent to other group of districts for discussion :

1. What are the main legal aspects relating to procedure and proof in trial of cases of cyber offences involving fraud or obscenity?

   कपट अथवा अश्लीलता से जुड़े सायबर अपराधों के मामलों के विचारण में प्रक्रिया तथा प्रमाण विषयक प्रमुख विधिक पहलू क्या है?

2. Describe the procedure to be adopted after arrest or recovery of woman under the Immoral Traffic (Prevention) Act, 1956.

   अनैतिक व्यापार (प्रतिषेध) अधिनियम, 1956 के अन्तर्गत किसी महिला को हिरासत में लिये जाने के बाद या महिला की बरामदगी होने के बाद अपनायी जाने वाली अग्रिम कार्यवाही संबंधी विधि समझाईये।

3. State the scope and limitations of the Role of Magistrate and other agencies under the Protection of Women from Domestic Violence Act, 2005.

   घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम, 2005 के अन्तर्गत मजिस्ट्रेट सहित अन्य संस्थाओं की भूमिका की सीमाए एवं क्षेत्र समझाइये।

4. Whether a Judicial Magistrate has jurisdiction to grant bail in respect of any offence under the Scheduled Castes/Scheduled Tribes (Prevention of Atrocities) Act, 1989?

   क्या अनुसूचित जाति एवं अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम,1989 के अन्तर्गत किसी अपराध के संबंध में न्यायिक मजिस्ट्रेट को जमानत देने की अधिकारिता हैं?

5. Examine the law relating to execution of various orders passed under the Protection of Women from Domestic Violence Act, 2005.

   घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम, 2005 के अन्तर्गत पारित विभिन्न आदेशों के निष्पादन संबंधी विधि का परीक्षण कीजिए।

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अनैतिक व्यापार (प्रतिषेध) अधिनियम, 1956 [Immoral Trafficking (Prevention) Act, 1956] के अन्तर्गत किसी महिला को हिरासत में लिये जाने के बाद या महिला की बरामदगी होने के बाद अपनायी जाने वाली अग्रिम कार्यवाही संबंधी विधि

न्यायिक अधिकारीगण
जिला शिवपुरी

अनैतिक व्यापार (प्रतिषेध) अधिनियम, 1956 [Immoral Trafficking (Prevention) Act, 1956], के अन्तर्गत जिन महिलाओं को बरामद किया जाता है उसके संबंध में अधिनियम में जो वैधानिक प्रावधान है उन प्रावधानों के अनुसार जो विधि बतायी गयी है प्रथमतः उस पर प्रकाश डाला जाना आवश्यक है, जो वैधानिक प्रावधान निम्नानुसार है :–

अनैतिक व्यापार (प्रतिषेध) अधिनियम, 1956 की धारा 15 के प्रावधान अनुसार जहां विशेष पुलिस अधिकारी या दुर्व्यापार पुलिस अधिकारी वारंट के बिना किसी परिसर की तलाशी लेकर महिलाओं को बरामद करता है तो धारा 15 (5) अनैतिक व्यापार (प्रतिषेध) अधिनियम, 1956 के प्रावधान अनुसार इस प्रकार की महिलाओं को तत्काल उपरोक्त पुलिस अधिकारी को समुचित मजिस्ट्रेट के समक्ष पेश करना होगा, तथा समुचित मजिस्ट्रेट का यह कर्त्तव्य है कि, वह वारंटशुदा महिला की आयु अवधारण के लिये या उसके साथ किये गये लैंगिक दुरूपयोग के परिणाम स्वरूप हुई किसी क्षति का पता लगाने के लिये या किसी लैंगिक पारेषित रोग की जानकारी के लिये उपरोक्त महिला का रजिस्ट्रीकृत चिकित्सा व्यवसायी द्वारा परीक्षण करायेगा।

अनैतिक व्यापार (प्रतिषेध) अधिनियम, 1956 की धारा 16 के प्रावधान अनुसार जहाँ मजिस्ट्रेट के आदेश पर या राज्य शासन द्वारा प्राधिकृत व्यक्ति के आदेश पर पुलिस अधिकारी यदि किसी महिला को बरामद करता है तो उस पुलिस अधिकारी को धारा 16 (2) के प्रावधान अनुसार उसे ऐसी बरामद महिलाओं को तत्काल आदेश जारी करने वाले मजिस्ट्रेट के समक्ष पेश करना होगा।

इसी अधिनियम की धारा 17 (1) में यह प्रावधान किया गया है कि, यदि धारा 15 व 16 के अनुसार बरामद की गयी महिलाओं को समुचित मजिस्ट्रेट या आदेश जारी करने वाले मजिस्ट्रेट के समक्ष पेश करने में संबंधित पुलिस अधिकारी की असमर्थता है तो वह तत्काल निकटतम किसी भी वर्ग के मजिस्ट्रेट के समक्ष उपरोक्त महिलाओं को पेश कर सकता है और वह मजिस्ट्रेट उपरोक्त महिलाओं को समुचित मजिस्ट्रेट या आदेश जारी करने वाले मजिस्ट्रेट के समक्ष पेश किये जाने तक की समयावधि के लिये प्रकरण की परिस्थितियों के अनुसार वह उचित आदेश पारित कर सकता है, परन्तु ऐसा आदेश करने वाला मजिस्ट्रेट उपरोक्त महिलाओं की अभिरक्षा के लिये 10 दिन से अधिक कालावधि की अवधि का आदेश नहीं दे सकता व यदि उपरोक्त महिलाओं को अभिरक्षा में रखे जाने पर उस पर हानि का असर पड़ेगा तो उसे भी अभिरक्षा में रखने का आदेश नहीं दे सकता है।

जब उपरोक्त अधिनियम की धारा 15 व 16 के प्रावधान अनुसार महिलाओं को बरामद किया जाता है व समुचित मजिस्ट्रेट या आदेश जारी करने वाले मजिस्ट्रेट के समक्ष पेश किया जाता है तो उपरोक्त अधिनियम की धारा 17(2) में यह प्रावधान किया गया है कि, उपरोक्त मजिस्ट्रेट उपरोक्त महिलाओं के संबंध में जो पुलिस अधिकारी को सूचना दी गयी थी, उसकी सत्यता की तथा उस महिला की आयु, चरित्र एवं उसका प्रभार उसके माता–पिता, संरक्षक या पति को देने के संबंध में महिला पर क्या असर होगा तथा उक्त महिलाओं को उनके प्रभार में देना उपयुक्त होगा या नहीं इसकी वह जाँच करेगा तथा इसी अधिनियम की धारा 17 (3) में यह प्रावधान किया गया है कि, ऐसी जाँच के दौरान उक्त मजिस्ट्रेट को उपरोक्त महिला की सुरक्षित अभिरक्षा के लिये आदेश पारित करने का अधिकार होगा, जो वह प्रकरण की परिस्थितियों के अनुसार उचित आदेश पारित कर सकेगा, परन्तु इसी उपधारा में यह भी प्रावधान किया गया है कि, यदि धारा 16 के अधीन कोई महिला बरामद की गयी है और वह अवयस्क या बालक महिला है (अर्थात इसी अधिनियम के प्रावधान अनुसार 16 वर्ष अथवा 16 से 18 वर्ष तक की है) तो मजिस्ट्रेट ऐसे अवयस्क, बालक महिलाओं को सुरक्षित अभिरक्षा में बाल अधिनियम के अन्तर्गत स्थापित किसी मान्यता प्राप्त संस्था में भी उसे रखे जाने का आदेश करने हेतु सक्षम है, परन्तु ऐसा मजिस्ट्रेट उपरोक्त अवयस्क, बालक महिला को आदेश की तारीख से 3 सप्ताह तक ही अभिरक्षा में रखने का आदेश दे सकता है उससे अधिक अवधि के लिये अभिरक्षा में रखने का आदेश नहीं दे सकता, परन्तु ऐसे अवयस्क, बालक महिला को अभिरक्षा में रखे जाने का आदेश नहीं दे सकता, जिस बालक और अवयस्क को उपरोक्त संस्था में रखने पर उस पर हानिकारक असर पड़ने की संभाव्यता हो।

उक्त अधिनियम की धारा 15 व 16 के प्रावधान अनुसार महिला बरामद होती है व उक्त अधिनियम की धारा 17 (2) के अनुसार जांच पूर्ण की जाती है तब इसी अधिनियम की धारा 17 (4) के प्रावधान अनुसार जांच पूरी होने पर यदि संबंधित मजिस्ट्रेट इस बात से संतुष्ट हो जाता है कि, पुलिस अधिकारी को प्राप्त सूचना सही है और उपरोक्त बरामदशुदा महिला के संरक्षण और देख–रेख की आवश्यकता है तो वह इसी धारा की उपधारा 5 के प्रावधानों के उपबंधों के अधीन रहते हुये एक वर्ष से 3 वर्ष तक की कालावधि के लिये वह उपरोक्त धारा में वर्णित अनुसार उपरोक्त महिलाओं की अभिरक्षा के संबंध में आदेश पारित करेगा।

उक्त अधिनियम की धारा 17 (क) में यह प्रावधान है कि, यदि धारा 17 के अनुसार जांच करने वाला मजिस्ट्रेट धारा 16 के अन्तर्गत बरामद की गयी महिलाओं को उनके माता–पिता, संरक्षक या पति को सौंपने का आदेश देता है तो उक्त मजिस्ट्रेट के लिये यह आवश्यक है कि, वह मजिस्ट्रेट उपरोक्त महिला को सौंपने के पूर्व इस बात की जाँच करेगा कि, वह व्यक्ति उपरोक्त महिला को रखने के लिये सक्षम है या नहीं और उसकी असलियत के बारे में भी मान्यता प्राप्त कल्याण संस्था या संगठन द्वारा अन्वेषण कराकर अपना समाधान करेगा तभी उचित पाये जाने पर उपरोक्त महिला को इन व्यक्तियों के सुपुर्द करेगा।

सामान्यतः यह देखने में आया है कि, न्यायिक मजिस्ट्रेट या अन्य मजिस्ट्रेट द्वारा अनैतिक व्यापार प्रतिषेध अधिनियम, 1956 के अन्तर्गत की जा रही कार्यवाही में बरामदशुदा महिलाओं को भी नारी निकेतन

या इसी प्रकार की अन्य किसी संस्था में या उक्त अधिनियम के प्रावधानों में बतायी गयी प्रक्रिया का पालन किये बिना, अभिरक्षा में भेज देते हैं जो उचित नहीं है। इस अधिनियम में जो प्रक्रिया बतायी गयी है उसका पालन किया जाना आवश्यक है। इस प्रक्रिया का पालन किये बिना यदि अभिरक्षा में भेजा जाता है तो वह अवैधानिक है। इस संबंध में माननीय मुम्बई उच्च न्यायालय द्वारा न्याय दृष्टांत ***मिस खुशी हरकिशन मल्होत्रा बनाम स्टेट ऑफ महाराष्ट्र 2006 क्रिमिनल लॉ जनरल पेज 612*** में यही प्रतिपादित किया है कि, इस अधिनियम के प्रावधान के अनुसार जिन महिलाओं को बरामद किया जाता है उनको अभिरक्षा में रखने के लिये इस अधिनियम में उक्त वर्णित प्रावधानों का पालन किया जाना आवश्यक है तथा इसी न्यायदृष्टांत में माननीय उच्च न्यायालय द्वारा यह भी बताया गया है कि, बरामदशुदा महिलाओं के संबंध में धारा 17 (2) के प्रावधान के अनुसार जो जाँच की जाती है उस जांच के दौरान जांच करने वाला मजिस्ट्रेट धारा 17 (3) के प्रावधान अनुसार उपरोक्त महिलाओं की सुरक्षित अभिरक्षा के लिये समुचित आदेश पारित करने हेतु भी सक्षम है।

परन्तु जहाँ इस प्रकार की बरामदशुदा महिलाओं की Transfering Custody का प्रश्न है इस संबंध में माननीय मध्य प्रदेश उच्च न्यायालय की खण्डपीठ द्वारा न्यायदृष्टांत ***प्रिया (कु.) बनाम स्टेट ऑफ एम.पी. व अन्य दो, 2002 (1) जे.एल.जे. पेज 354*** में मान्नीय उच्च न्यायालय के एक अन्य न्यायदृष्टांत के आधार पर यह मत व्यक्त किया गया है कि, Transfering Custody पर उपरोक्त बरामदशुदा महिलाओं को सोंपने का अधिकार केवल सत्र न्यायाधीश को ही है। यहाँ उक्त न्याय दृष्टांत के पैराग्राफ 12 का उल्लेख सुसंगत होगा जो इस प्रकार है।

> 12. Here it will not be out of place to mention that in the year 1988, two public interest writs bearing No. M.P. 16/1989 and 427/1989 *Ramasanehi v. State of M.P. and others* were filed in this Court complaining of and bringing to the notice of this Court the racket in women trafficking, pointing out two most unsatisfactory implementations of the suppression of Immoral Traffic in Women and Girls Act, 1959 in the State of M.P. The Division Bench of this Court, by the interim order dated 12.3.1989, directed that as and when any application to any court is made claiming custody of any such girl, it shall be duty of that Court to stay hands and not to pass any instant order thereon but to bear the girl and make enquiry as to whether the girl could be victim of sexual exploitation and the application was made bona fide in her interest. In any case, in so far as orders of transfering custody are to be made, that power shall be exercised only by the learned Sessions Judges of the Districts and the orders shall be passed after hearing the girl and after holding proper enquiy. This direction was made in exercise of supervisory powers of this Court

under Article 227 of the Constitution of India. The then Dy. Advocate General, Gwalior was asked to take necessary steps administratively to ensure that the directions are issued relating thereto by the State and the concerned officers of the State duly comply with the same at all levels and the Bench Registry was also directed to circulate with due despatch copies of the said order to all the Sessions Judges of the State for compliance at their level and at the levels of subordinate Courts.

इस प्रकार से बरामदशुदा महिलाओं के संबंध में अपनाये जाने वाली प्रक्रिया ऊपर वर्णित अनुसार है।

जहाँ तक अनैतिक व्यापार (प्रतिषेध) अधिनियम, 1956 के अन्तर्गत परिभाषित अपराध धारा 3 से 9 के अन्तर्गत अपराध करने वाली महिलाओं को हिरासत में लिये जाने पर अपनायी जाने वाली प्रक्रिया का प्रश्न है इस संबंध में जब तक अपराध का विचारण होगा तब तक उन्हें अभिरक्षा में रखे जाने का कोई विशिष्ठ प्रावधान इस अधिनियम में नहीं है ऐसी दशा में ऐसी अपराधी महिलाओं के लिये दंड प्रक्रिया संहिता के प्रावधान ही लागू होंगे और दण्ड प्रक्रिया संहिता के प्रावधान अनुसार ही उपरोक्त महिलाओं को विचारण के दौरान अभिरक्षा में रखा जावेगा अथवा जमानत पर छोड़ा जावेगा एवं विचारण पूर्ण होने के पश्चात् दंडित किये जाने पर दं.प्र.सं. के प्रावधान अनुसार ही उन्हें निरोध में रखा जावेगा, परन्तु इस अधिनियम की धारा 10 (क) के अनुसार जहाँ धारा 7 और 8 के अधीन वर्णित अपराध में कोई महिला दोषी पायी जाती है तो उसे उसके चरित्र, स्वरूप एवं उसकी मानसिक स्थिति को व अन्य प्रकरण की परिस्थितियों को ध्यान में रखते हुए उसे कारावास का दंड न देकर 2 वर्ष से 5 वर्ष तक की अवधि के लिये सुधार संस्था में भी भेजा जा सकता है परन्तु ऐसा करने के पूर्व धारा 10 (क) में जो प्रक्रिया वर्णित है उसका पालन करना भी आवश्यक है।

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Thinking should become your capital asset, no matter whatever ups and downs you come across in your life.

-Dr. A.P.J. ABDUL KALAM

JURISDICTION OF A JUDICIAL MAGISTRATE TO GRANT BAIL IN RESPECT OF ANY OFFENCE UNDER THE SCHEDULED CASTES AND THE SCHEDULED TRIBES (PREVENTION OF ATROCITIES) ACT, 1989

Judicial Officers
District Damoh

A question of law, important and interesting which is sought to be raised in this bi-monthly training programme relates to the powers of the Judicial Magistrate in respect of the grant or refusal of the bail to accused persons in cases which are exclusively triable either by the Special Courts established under a special statute the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, hereinafter referred to as "the Act".

Section 437 of the Code of Criminal Procedure, 1973 hereinafter called as "the Code" deals with the subject of availability of bail in cases of non-bailable offences. It specifically provides that when any person accused of, or suspected of the commission of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a Court other than the High Court or Court of Sessions, then such person may be released on bail, unless there appears reasonable ground for believing that such person is guilty of an offence punishable with death or imprisonment for life and/or such person had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more, or he had been previously convicted on two or more occasions for a non-bailable and cognizable offence.

At the same time the first proviso to the said Section provides that if the accused person happens to be of the age of less than 16 years or a woman or is sick or infirm, then such a person can be released on bail. Even in some cases where person is accused of the commission of the offence punishable with death or imprisonment for life can also be released on bail if the Court is satisfied that it is just and proper to grant such bail for any special reason. The third proviso to sub section 1 of Section 437 of the Code provides that the mere fact that an accused person may be required for being identified by the witnesses during the investigation shall not be sufficient ground for refusal of bail if he is otherwise entitled to be released on bail and gives an undertaking that he shall comply with such conditions as may be imposed by the Court. Obviously, apart from the cases wherein the person is accused of commission of the offence punishable with death or imprisonment for life, the Court of Magistrate has wide power in the matter of grant or refusal of the bail to the accused person, of course, such power is to be exercised judiciously and the same should be

apparent from the order passed by the Magistrate. Nevertheless the fact remains that there is no total prohibition against grant of bail merely because a person is accused of commission of offence of serious nature. Besides, if we peruse Section 209 of the Code which deals with the committal proceedings, it is apparent that even in the course of the committal proceedings there is no bar imposed upon the powers of Magistrate in the matter of grant or refusal of bail. Clause (b) of Section 209 of the Code clearly provides that while dealing with the accused persons appearing and brought before the Magistrate having committed the matter as the same is triable exclusively by the Court of Session, while the Magistrate is enjoined to commit the proceedings to the Court of Session or the Special Court constituted under any special statute, the accused may be remanded to the custody until such committal proceedings are complete, subject to the provisions of the Code relating to the bail. In other words while the Magistrate is empowered to remand the accused of the custody until the conclusion of the committal proceedings, that is to say till the proceedings are placed before the Court of Session or the Special Court as the case may be, the powers of the Magistrate either to grant the bail if asked for or to refuse the same are not restricted in any manner. On the contrary, provision of Section 209 of the Code makes it very clear that the Magistrate while dealing with the committal proceedings is fully empowered either to grant or refuse the bail depending upon the facts of the case, albeit he has to exercise the discretion judiciously.

The provisions of the Act under which the charge sheet has been filed, specifically provides under Section 18 thereof that the provision of Section 438 of the Code is not applicable to the cases arising under the Act, yet there is no bar under Section 209 of the Code or under any other provision of law including under the Act for grant of bail to the person accused of offences punishable under Section 3 of the Act while the matter is being committed to the Special Court.

Referring to the decision of the Apex Court in *Gangula Ashok v. State of A.P., (2000) 2 SCC 504: 2000 CriLJ 819* wherein it has been ruled that a Special Court under the Act is not empowered to take cognizance directly of the offence committed under the Act but it has to be only after committal of the case by the Magistrate in exercise of powers under Section 209 of the Code, it is necessary for the Magistrate to commit the proceedings to Special Court in order to enable the Special Court to take cognizance of the said proceedings arising from the chargesheet filed by the police in relation to the offence in question. In the interregnum period there is absolutely no justification for detention of the petitioner, nor it has been the case of the investigating agency that such detention is necessary. Besides, there is no statutory provision to debar the Magistrate to

refuse bail in the course of committal proceedings. However, considering the normal practice followed by the Magistrate in committal proceedings, it is necessary for this Court to give direction to the Court of Magistrate to exercise their powers in relation to the grant of bail even in such cases including the one of the petitioner.

In *Sanjay Narhar Malshe v. State of Maharashtra, 2005 Cri.L.J. 2984* (D. B.) Bombay High Court laid down that:

> "The offence under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 is exclusively triable by the Special Court in terms of the provision of Section 14 of the said Act, it cannot be said that the Magistrate will have no power to grant the bail. The provisions of the said Act as well as the provisions of the Code of Criminal Procedure, it is apparent that the Magistrate has power to grant the bail even at the time of committal proceedings, if the facts of the case do not justify remanding of such person to the custody. **The exclusive jurisdiction of the Special Court to try the offence that by itself could not be the criteria to decide about the absence of the powers to the Magistrate to grant bail in case of offences under the said Act. Unless the special statute which gives exclusive jurisdiction to the Special Court for the trial of the offences thereunder makes a specific provision like in the nature of Section 36-A of the NDPS Act or on similar lines, specifically excluding the powers of the Magistrate to grant the bail to the persons accused of commission of such offence, there cannot be any restriction on the powers of the Magistrate to grant the bail, merely because the person is accused of the offence punishable under the said Act, unless, of course, the offence is punishable with death or life imprisonment."**

The Kerala High Court in *Shanu v. State of Kerala, (2001) 1 Crimes 292* held that "it is clear that the J.M.F.C's Court has got jurisdiction to grant bail to the persons accused of the offence punishable under any of the sub-clauses (i) to (xv) of sub-section (1) of Section 3 of the Act". The Hon'ble High Court further stated that "the Magistrate is competent to release an accused, either appeared or brought before him, if the offence alleged is not punishable with death or imprisonment of life."

Similarly in *Ram Bharoshi's case, 2004 (3) Crimes 651* the Allahabad High Court held that "it is abundantly clear that there is no prohibition on a Magistrate to grant bail in a Sessions triable case, unless it is punishable with death or imprisonment for life".

Undoubtedly, Section 18 of the Act provides that nothing in Section 438 of the Code shall apply in relation to any case involving the arrest of any person on an accusation of having committed an offence under the Act. Undoubtedly, therefore, the question of grant of anticipatory bail in case of persons accused of commission of offence under the Act does not arise at all. The Act nowhere debars the Magistrate from exercising the powers under Section 437 of the Code whenever facts of the case demand such an exercise of powers of the Magistrate under the said provision of the Code.

In *A.M. Ali & Ors. v. State of Kerala, 2000 Cri.L.J. 2721* it was held that 'An anticipatory bail order is prohibited by the provisions in Section 18 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. Though the case is triable by Sessions Court, there is no prohibition in granting regular bail. The Supreme Court has made it clear that committal proceeding must be followed in cases under the Act. Section 3 of the Act take in a number of offences. Some are grave offences. Some offences are comparatively not that grave and carry only a lesser punishment. In many cases pre-trial detention in judicial custody will not be necessary or even be unjust. There is no bar for the Magistrate for granting bail in such cases on the basis of the general principles enunciated in Section 437 Cr.P.C. If the petitioners surrender before the Court or are arrested and produced, the Magistrate will consider any bail application on merits.'

The High Court of M.P. in *Mirchi alias Rakesh Jain v. State of M.P., 2003 (I) MPJR 140* held that:

> *"from a reading of Section 437 of the Code, it is clear that in case, where the offences are not punishable either with death or life imprisonment, a suitably empowered Magistrate has power to grant bail to a person after his arrest or detention. The word other than the High Court or a Court of Session, employed in Section 437 (1) of the Code refers to Court of Judicial Magistrate competent to take cognizance of the offence or before whom the accused is produced."*

But in *Prahlad Singh Bhati v. N.C.T. Delhi & others, AIR 2001 SC 1444,* Hon'ble the Apex Court held that –

"Even though there is no legal bar for a Magistrate to consider an application for grant of bail to a person who is arrested for an offence exclusively triable by a Court of Session yet it would be proper and appropriate that in such a case the Magistrate directs the accused person to approach the Court of Sessions for the purposes of getting the relief of bail. Even in a case where any Magistrate opts to make an adventure of exercising the powers under Section 437 of the Code in respect of a person who is suspected of the commission of such an offence, arrested and detained in that connection, such Magistrate has to specifically negativate the existence of reasonable ground for believing that such accused is guilty of an offence punishable with the sentence of death or imprisonment for life. In a case, where the Magistrate has no occasion and in fact does not find that there were no reasonable grounds to believe that the accused had not committed the offence punishable with death or imprisonment for life, he shall be deemed to be having no jurisdiction to enlarge the accused on bail.

Power of the Magistrate, while dealing with the applications for grant of bail, are regulated by the punishment prescribed for the offence in which the bail is sought. Generally speaking, if punishment prescribed is for imprisonment for life and death penalty and the offence is exclusively triable by the Court of Sessions, Magistrate has no jurisdiction to grant bail unless the matter is covered by the provisos attached to S. 437 of the Code. The limitations circumscribing the jurisdiction of the Magistrate are evident and apparent. Assumption of jurisdiction to entertain the application is distinguishable from the exercise of the jurisdiction."

In conclusion, we can say that, a Judicial Magistrate has jurisdiction to grant bail in respect of any offence under the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, but the jurisdiction to grant bail has to be exercised on the basis of well settled principles having regard to the circumstance of each case and not in an arbitrary manner.

We would reiterate that in cases where the offence is punishable with death or imprisonment for life which is triable exclusively by a Court of Sessions, the Magistrate may, in his wisdom, refrain to exercise the powers of granting bail and refer the accused to approach the higher Courts unless he is fully satisfied that there is no reasonable ground for believing that the accused has been guilty of an offence punishable with death or imprisonment for life.

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विधिक समस्याऐं एवं समाधान

(न्यायिक दायित्वों के निर्वहन के क्रम में अनेक प्रकार की विधिक समस्यायें समय–समय पर न्यायाधीशों के समक्ष उपस्थित होती हैं। ऐसी समस्याओं के विधि सम्मत समाधान के सुस्पष्ट सोच के अभाव में न केवल न्यायादान में विलम्ब की सम्भावना बढ़ जाती है अपितु न्याय के हनन का खतरा भी आसन्न रहता है। फरवरी 2006 अंक के साथ प्रारंभ इस स्तम्भ के माध्यम से हम ऐसी कुछ महत्वपूर्ण समस्याओं के विषय में नियमित रूप से विचार विमर्श करते रहेंगे। प्रयास यह होगा कि समस्या के सम्यक समाधान के विषय में विश्लेषणात्मक दृष्टिकोण अपनाया जावे)

क्या सत्र न्यायालय के समक्ष बचाव साक्षी को बुलाए जाने पर उसका खर्चा अभियुक्त द्वारा या शासन द्वारा अदा किए जाने के संबंध में आदेश दिये जाने बाबत् न्यायालय को कोई विवेकाधिकार हैं?

उक्त विधिक प्रश्न का विश्लेषणात्मक उत्तर हाल ही में मध्यप्रदेश उच्च न्यायालय जबलपुर की एकल पीठ द्वारा ***क्रिमीनल रिवीजन न. 767/07 नंदलाल देवानी एवं अन्य बनाम स्टेट ऑफ महाराष्ट्र में दिनांक 10.03.08*** को पारित निर्णय में मिलता हैं।

माननीय उच्च न्यायालय द्वारा इस न्याय दृष्टान्त में यह प्रकट किया गया है कि उक्त विधिक प्रश्न के उत्तर के लिए सर्वप्रथम दण्ड प्रक्रिया संहिता 1973 की धारा 233 (3) एवं धारा 312 तथा नियम एवं आदेश (आपराधिक) के नियम 558 का अवलोकन आवश्यक हैं जो निम्नानुसार हैं :–

233– प्रतिरक्षा आरम्भ करना – (1) .....

(2) .....

(3) यदि अभियुक्त किसी साक्षी को हाजिर होने या कोई दस्तावेज या चीज पेश करने को विवश करने के लिए कोई आदेशिका जारी करने के लिए आवेदन करता है तो न्यायाधीश ऐसी आदेशिका जारी करेगा जब तक उसका ऐसे कारणों से, जो लेखबद्ध किए जाएंगे, यह विचार न हो कि आवेदन इस आधार पर नामंजूर कर दिया जाना चाहिए कि वह तंग करने या विलम्ब करने या न्याय के उद्देश्यों को विफल करने के प्रयोजन से किया गया हैं।

दण्ड प्रक्रिया संहिता की धारा 312 परिवादियों और साक्षियों के व्यय के संबंध में निम्न प्रावधान करती हैं :–

> ''राज्य सरकार द्वारा बनाए गये किन्हीं नियमों के अधीन रहते हुए, यदि कोई दण्ड न्यायालय ठीक समझता है तो वह ऐसे न्यायालय के समक्ष इस संहिता के अधीन किसी जांच, विचारण या अन्य कार्यवाही के प्रयोजन से हाजिर होने वाले किसी परिवादी या साक्षी के उचित व्ययों के राज्य सरकार द्वारा दिए जाने के लिए आदेश दे सकता है।''

नियम 558– इसमें इसके पश्चात् अन्तर्विष्ट उपबंधों के अधीन रहते हुए, दण्ड न्यायालय :–

(क) परिवादियों तथा साक्षियों, चाहे वे अभियोजन साक्षी हों या प्रतिरक्षा साक्षी, के व्ययों का संदाय निम्नलिखित मामलों में करने के लिए प्राधिकृत हैं –

(1) ऐसे मामले, जो राज्य सरकार के या किसी न्यायाधीश, मजिस्ट्रेट या उस हैसियत में कार्य करने वाले अन्य लोक अधिकारी के द्वारा/ या उसके आदेशों के अधीन या मंजूरी से अभियोजित किए गए हों, संस्थित किए गए हों या चलाए गए हों,

(2) ऐसे मामले, जिनमें पीठासीन अधिकारी ऐसे संदायों के संबंध में यह समझता है कि वे लोकहित को प्रत्यक्षतः अग्रसर करने वाले स्वरूप के हैं, और

(3) समस्त अजमानतीय मामले

(ख) उन साक्षियों के व्ययों का संदाय करने के लिए प्राधिकृत हैं जो दंड प्रक्रिया संहिता, 1898 की धारा 540 (समानांतर प्रावधान वर्तमान द.प्र.सं. 1973 की धारा 311 में हैं) के अधीन पीठासीन अधिकारी द्वारा स्वप्रेरणा से, समन किए गए हों या पुनः बुलाए गए हों :

परन्तु किसी भी साक्षी को सरकार की ओर से कोई भी संदाय उस दशा में नहीं किया जाएगा जब कि ऐसे साक्षियों की हाजिरी के लिए संहिता की धारा 216, 244, 257 (समानांतर प्रावधान वर्तमान दण्ड प्रक्रिया संहिता की धारा 243 या 254 में हैं) के अधीन न्यायालय में व्ययों का निक्षेप कर दिया गया हैं।

दण्ड प्रक्रिया संहिता 1973 की धारा 312 एवं उक्त नियम एवं आदेश (आपराधिक) के नियम 558 के प्रावधान आपराधिक मामलों में साक्षियों को तलब करने के दाण्डिक न्यायालयों को विवेकाधिकार प्रदान करते हैं। मद्रास उच्च न्यायालय द्वारा ***रे वेन्दांत ए.आई.आर. 1950 मद्रास 283*** में यह कहा गया है कि दण्ड प्रक्रिया संहिता की धारा 312 में शब्द साक्षी के अंतर्गत अभियोजन और बचाव दोनों के ही साक्षी समाहित हैं। माननीय मध्यप्रदेश उच्च न्यायालय की खंडपीठ ने ***कोडू बनाम बनमाली, 1968 जे.एल.जे. 530*** में उक्त विवेकाधिकार युक्त शक्तियों के प्रयोग के संबंध में निम्न मार्गदर्शन दिए हैं :–

1. विवेकाधिकार का प्रयोग राज्य शासन के द्वारा बनाए गए नियमों के अनुसार किया जाना चाहिए।
2. विवेकाधिकार का न्यायिक रूप से इस्तेमाल किया जाना चाहिए।
3. ऐसा आदेश प्रत्यक्षतः लोकहित को अग्रसर करने वाला होना चाहिए।

माननीय मध्यप्रदेश उच्च न्यायालय ने इस संबंध में इलाहाबाद उच्च न्यायालय के न्याय दृष्टान्त ***महे आलम बनाम उत्तरप्रदेश राज्य 2005 क्रिमिनल ला जर्नल 4554*** के इस मत को कि मजिस्ट्रेट को साक्षियों के व्यय के संबंध में दण्ड प्रक्रिया संहिता की धारा 243 (3) के अंतर्गत विवेकाधिकार प्राप्त है परन्तु सत्र न्यायालय को दण्ड प्रक्रिया संहिता की धारा 233 (3) के अंतर्गत ऐसा कोई विवेकाधिकार प्राप्त नहीं हैं, त्रुटिपूर्ण मानते हुए एवं धारा 312 दण्ड प्रक्रिया संहिता के प्रावधानों को अनदेखा किये जाने के आधार पर विभेदित किया हैं।

माननीय मध्यप्रदेश उच्च न्यायालय ने इस संबंध में केरल उच्च न्यायालय के न्यायदृष्टान्त ***के. वी. बेबी बनाम फुड इन्सपेक्टर, वधककनचेरी सर्कल, 1994 क्रिमनल लॉ जर्नल 3421*** को भी मध्यप्रदेश के संदर्भ में असंगत होना प्रकट किया है क्योंकि केरल राज्य द्वारा धारा 312 दण्ड प्रक्रिया संहिता के अंतर्गत वर्णित नियम नहीं बनाए गए है जबकि मध्यप्रदेश में उक्त पूर्व वर्णित नियम 558 के प्रावधान हैं।

अंत में माननीय उच्च न्यायालय ने यह निर्धारित किया है कि सत्र न्यायालय के समक्ष विचारण के मामले में प्रत्येक बचाव साक्षी को शासकीय व्यय पर ही बुलाना आवश्यक नहीं हैं एवं अभियुक्त की आर्थिक स्थिति इस संबंध में निर्धारक तत्व नहीं होगी वह केवल पूर्व वर्णित मार्गदर्शक सिद्धान्तों के अनुसार विवेकाधिकार के उपयोग के लिए एक सुसंगत विचारणीय परिस्थिति हो सकती है।

दूसरे शब्दों में माननीय उच्च न्यायालय ने यह निर्धारित किया है कि सत्र न्यायालय को यह विवेकाधिकार है कि यदि वह लोकहित में उचित समझता है तो बचाव साक्षी को शासकीय व्यय पर बुला सकता हैं अथवा अभियुक्त को ही बचाव साक्षी का व्यय वहन करने का आदेश दे सकता है।

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क्या अधिकरण अथवा अधीनस्थ न्यायालय को यह अधिकार हैं कि वह माननीय उच्च न्यायालय के निर्णय एवं आदेशों को इस आधार पर गलत कह सकें कि माननीय उच्च न्यायालय ने संबधित विधिक प्रावधान अथवा संशोधित प्रावधान पर विचार न करते हुए निर्णय एवं आदेश पारित किए हैं ?

उक्त विधिक प्रश्न का विश्लेषणात्मक उत्तर हाल ही में मध्यप्रदेश उच्च न्यायालय की इंदौर पीठ की खंडपीठ द्वारा ***नेशनल टेक्सटाइल्स कारर्पोरेशन लिमिटेड (म.प्र.) बनाम इन्कमटेक्स कमिश्नर भोपाल, I.T.R. No. 4 of 2005*** में दिनांक ***04.02.08*** को पारित निर्णय में मिलता हैं।

उपरोक्त निर्णय में यह प्रकट किया गया हैं कि भारतीय संविधान के अनुच्छेद 141 के प्रावधानों के अनुसार उच्चतम न्यायालय द्वारा निर्मित विधि उच्च न्यायालय एवं सभी अधीनस्थ न्यायालयों पर बंधनकारी प्रभाव रखती हैं । यद्यपि यह सही हैं कि ऐसा कोई प्रावधान भारतीय संविधान में नहीं हैं कि उच्च न्यायालय द्वारा निर्मित विधि अधीनस्थ न्यायलय पर बंधनकारी होगी परन्तु माननीय उच्चतम न्यायालय ने ***ईस्ट इंडिया कामिर्शयल कम्पनी लिमिटेड बनाम कलेक्टर आफ कस्टम, ए.आई.आर. 1962 सु.को. 1893*** में यह प्रतिपादित किया हैं कि उच्च न्यायालय को भारतीय संविधान के अनुच्छेद 227 के अनुसार उसके क्षेत्राधिकार के अंतर्गत कार्यरत सभी अधीनस्थ न्यायालयों एवं अधिकरणों पर निरीक्षण की शक्ति प्राप्त हैं और उन पर उच्च न्यायालय द्वारा निर्मित विधि बंधनकारी है। इसी मामले में माननीय उच्चतम न्यायालय ने यह भी निर्धारित किया है कि ऐसा पालन उनके कार्य की सुगमता के लिए भी आवश्यक है अन्यथा इससे विधि के प्रशासन में भ्रम उत्पन्न होगा और विधि की प्रतिष्ठा को अपूर्णनीय क्षति होगी।

माननीय उच्चतम न्यायालय द्वारा ***सुगंधी सुरेश कुमार बनाम जगदीशन, ए.आई.आर. 2002 सु.को. 681*** में यह निर्धारित किया है कि उच्चतम न्यायालय द्वारा निर्धारित विधि सभी उच्च न्यायालयों एवं अधीनस्थ न्यायालयों एवं अधिकरणों पर बंधनकारी हैं। उच्च न्यायालय के लिए ऐसा अनुज्ञेय नहीं कि वह

उच्चतम न्यायालय द्वारा निर्धारित विधि को यह कहकर अमान्य करें कि उच्चतम न्यायालय ने विधि के प्रावधानों पर उचित रूप से विचार नहीं किया है। उच्चतम न्यायालय द्वारा घोषित विधि की औचित्यतता एवं वैधानिकता का परीक्षण करने का अधिकार उच्च न्यायालय या अधीनस्थ न्यायालयों को नहीं हैं। इसी मामले में माननीय उच्चतम न्यायालय ने यह स्पष्ट मत दिया है कि उच्च न्यायालय या अन्य अधीनस्थ न्यायालय इस आधार पर निर्णय को विभेदित नहीं कर सकते कि माननीय उच्चतम न्यायालय ने किसी विधिक प्रावधान को या संशोधित प्रावधानों को विधि का विशलेषण करते समय विचार में नहीं लिया। उच्चतम न्यायालय या उच्च न्यायालय द्वारा निर्धारित विधि चाहे वह किसी विधि के प्रावधानों को ध्यान में न रखते हुए घोषित की गई है, अधीनस्थ न्यायालय को उस पर कोई टिप्पणी करने का अधिकार नहीं हैं। उच्चतम न्यायालय अथवा उच्च न्यायालय ही ऐसी निर्णय विधि को प्रभावहीन घोषित कर सकेंगे और जब तक वह प्रभावहीन घोषित नहीं हो जाती तब तक वह अधीनस्थ न्यायालयों पर बंधनकारी हैं।

माननीय उच्चतम न्यायालय के उपरोक्त न्याय दृष्टान्तों में प्रतिपादित सिद्धान्त का विस्तृत विश्लेषण व विवेचन कर माननीय उच्च न्यायालय मध्यप्रदेश की खण्डपीठ द्वारा राज्य में कार्यरत सभी अधीनस्थ न्यायालयों/अधिकरणों को यह स्पष्ट किया हैं कि उच्चतम न्यायालय एवं राज्य के उच्च न्यायालय के ऐसे न्याय दृष्टांत प्रस्तुत होने पर क्या करना चाहिए ? माननीय मध्यप्रदेश उच्च न्यायालय के अनुसार ऐसी परिस्थति में भी प्रस्तुत विनिश्चय उन पर पूर्णतः बाध्यकारी है और अधीनस्थ न्यायालयों/अधिकरणों को उच्च न्यायालय या उच्चतम न्यायालय के किसी विनिश्चय पर अपनी ओर से कोई अभिमत देने या ऐसे विनिश्चय को किस तरह से दिया गया, को प्रश्नगत बनाने का अधिकार नहीं है और न ही उसे किसी ऐसे विधिक सिद्धान्त को केवल इस आधार पर अमान्य या अनदेखा करने का अधिकार है कि उनमें विधि के किसी विशिष्ट प्रावधान पर विचार नहीं किया गया।

माननीय उच्च न्यायालय की खंडपीठ द्वारा उपरोक्त मान्य विधिक सिद्धान्त का एक सुस्थापित अपवाद भी प्रकट किया है, जिसके अनुसार अधीनस्थ न्यायालयों/अधिकरणों को किसी प्रकरण विशेष की विशिष्ट परिस्थितियों में उच्च न्यायालय/उच्चतम न्यायालय के किसी विनिश्चय में घोषित विधि को उसके तथ्यों एवं परिस्थितियों के आधार पर विभेदित कर सकने का अधिकार है लेकिन इस संबंध में न्यायालयों/अधिकरणों को इसके कारण देना आवश्यक है। इस प्रकार उपरोक्तानुसार ही उच्च न्यायालय/उच्चतम न्यायालय के विनिश्चय (न्याय दृष्टांत) को विभेदित किया जा सकता है अन्यथा नहीं, जब तक कि प्रश्नगत विनिश्चय को माननीय उच्चतम न्यायालय द्वारा या संबंधित उच्च न्यायालय की वृहद् पीठ द्वारा अमान्य नहीं किया जाता।

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PART - II

NOTES ON IMPORTANT JUDGMENTS

***93. ABSCONDING:**

Absconding by itself is not conclusive either of guilt or of a guilty conscience.

Sanjay Gour v. State of M.P.

Reported in I.L.R (2008) M.P. 390

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***94. ACCOMMODATION CONTROL ACT, 1961 – Sections 5 & 6**

If standard rent is fixed then only Section 5 of the Act will apply with full force but if neither standard rent exists nor is determined, the tenant is bound to pay contractual rent.

Peoples Chemist through partner Irfan Hussain v. Suresh Narayan Vijayvargiya

Reported in 2008 (1) MPLJ 142

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95. ACCOMMODATION CONTROL ACT, 1961 – Section 12 (1) (a)

(i) Demand notice u/s 12 (1) (a) of the Act, requirement of – Period for which the tenant is in default is not required to be mentioned in the notice – S. 12 (1) (a) of the Act merely requires issuance of demand notice by the landlord and its service on the tenant.

(ii) Denial of derivative title, effect of – In case of derivative title, the tenant may bonafide require landlord to prove his ownership – It does not amount to denial of title within the meaning of S.12 (1) (c) of the Act.

Kandhi Lal v. Abhilash Kumar

Reported in 2008 (1) MPLJ 146

Held:

> Section 12 (1) (a) reads as under :–
>
> that the tenant has neither paid nor tendered the whole of the arrears of the rent legally recoverable from him within two months of the date on which a notice of demand for the arrears of rent has been served on him by the landlord in the prescribed manner.

A bare look at the said provision makes it clear that the said provision merely requires issuance of notice demanding thereby the arrears of rent and its service on the tenant. It is not necessary at all that the period for which the tenant is in default is required to be specified in the demand notice. The provision postulates merely issuance of demand notice by the landlord and its service on

the tenant. Thereafter, the tenant is obliged to pay/tender/offer the whole of arrears of rent to the landlord within a period of two months. Since the tenant is well aware of his liability to pay the rent including the arrears, it is not at all necessary to specify either the arrears of rent or the period for which the tenant is in arrears. If the defendant is in arrears of rent and if he is served with the demand notice in a valid manner in accordance with law, it is for him to prove that the whole of the arrears have been paid /tendered by him to the landlord within a period of two months.

It may be seen that defendant has not been inducted into the suit premises by the plaintiff. It is not proved that the defendant did acknowledge the plaintiff as his landlord or did pay the rent at any point of time to the plaintiff. The suit property was purchased by the plaintiff from Kunwarji Sonkar. There is no material on record to show that Kunwarji Sonkar ever informed the defendant about the sale of the suit premises to the plaintiff. This being so, the defendant was under no obligation to acknowledge the plaintiff as his landlord and to pay the rent to the latter. Claim of the plaintiff is based on derivative title and it is an admitted position in the present case that the vendor did not issue a notice to the defendant informing him about the sale of the suit premises to the plaintiff. In this view of the matter the defendant was well within his rights to dispute the derivative title of the plaintiff. Reliance may be placed on the case of *Suggabai v. Smt. Hiralal 1969 JLJ 227.* The Apex Court also in the case of *Sheela and Ors. v. Firm Prahlad Rai Prem Prakash 2002(2) M.P.H.T. 232 (SC) : 2002(2) JLJ 312,* has held that in case of derivative title the tenant may bonafide require the landlord to prove his ownership and the same does not amount to denial of title within the meaning of Section 12 (1) (c) of the Act.

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***96. ACCOMMODATION CONTROL ACT, 1961 – Sections 12 (1) (a), 12 (1) (c) & 12 (1) (e)**

Arrears of rent – Respondent/Plaintiff claimed rent at the rate of Rs. 1,200/- per month – Appellant/tenant claimed the rent to be of Rs. 200/- per month – In view of dispute provision of S. 13 (1) of the Act could not be invoked as same was arrested till deciding such dispute by Court – Trial Court fixed provisional rate of rent @ Rs. 200/- per month – Entire arrears of rent deposited by defendant/ tenant within one month of order – No further default in paying rent committed by tenant – Tenant cannot be held the defaulter – Decree u/s 12 (1) (a) set aside.

Nuisance – Appellant/tenant taking new electricity connection – Held, landlord bound to provide all necessary amenities for proper use to keep accommodation in tenanted condition – If landlord fails to provide the same then tenant has right to obtain such amenities in accordance with law – Electricity connection was given by MPSEB after considering application – Appellant/tenant had acted in

accordance with procedure – Such act would not be termed as part of nuisance for passing decree u/s 12 (1) (c) of the Act.

Bonafide requirement – Respondent/plaintiff pleaded that his family comprises of 13 members – Any account of available accommodation not disclosed – Held, in matter of bonafide requirement, landlord is duty bound to put forth the account of available accommodation in his possession – In the lack of such pleadings, alleged need could not be considered as bonafide and genuine – Plaintiff is having 6 vacant rooms in tenanted premises and is residing in another house – If his need was genuine and bonafide, he could have started use of vacant rooms – His need could not be termed as bonafide or genuine – Decree u/s 12 (1) (e) set aside.

Gulkhan v. Om Prakash Khatri

Reported in I.L.R. (2008) M.P. 98

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97. **ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Sections12 (1) (a), 12 (3) & 13 (1)**

Willful default in payment of rent, effect of – Tenant failed to pay rent within 2 months from service of demand notice – He again failed to pay rent within 1 month of service of summons – He also intentionally failed to pay rent in time as directed by Trial Court – Held, the tenant was guilty of willful default.

Harishankar Sharma v. Shrikrishan Dubey

Reported in 2008 (1) MPHT 223

Held:

In the present case, clause (a) of sub-section (1) of Section 12 of the Act makes it clear that non-payment of arrears of rent recoverable from a tenant within two months of the date on which the notice of demand for the arrears of rent has been served on him by the landlord in the prescribed manner, as one of the ground for filing a suit a Civil Court against a tenant for his eviction from the rented accommodation. But, the legislative mandate contained in sub-section (3) of Section 12 is that no order of eviction of a tenant shall be made if he makes payment or deposit as required by Section 13 of the Act. The proviso appended to Section 12 (3) restricts entitlement to the benefit available under that sub-section. It cannot be availed of by tenant who having obtained such benefit once in respect of any accommodation again make a default in payment of rent of that accommodation for three consecutive months. A perusal of sub-section (1) of Section 13 discloses that it imposes twin obligation on the tenant against whom a suit or proceedings is instituted on any of the grounds mentioned in sub-section (1) of Section 12.The first is that within one month of the service of the writ of summons on him or within such further time as the Court may, on an application made to it, allow in this behalf, the tenant shall deposit in the Court or pay to the landlord an amount.

In the case of *Jamnalal and others Vs. Radheshyam, 2000(4) MPHT 218 = (2000) 4 SCC 380,* it has been held that two obligations are independent of each other.

Here in the present case, the appellant in spite of receipt of notice (Exh. P-2), dated 8-6-1999 failed to pay the arrears of rent within two months from the date on which a notice of demand for arrears of rent has been served on him. Thereafter, after filing of the suit the appellant failed to pay the rent within one month of service of writ of summons, arrears due on him and also failed to pay the rent regularly month by month and raised a dispute under Section 13 (2) cf the Act which was decided on 26-8-2000. The Trial Court vide order 26-8-2000 directed him to pay all the arrears of rent at the rate of Rs. 2300/- per month within a period of one month and further pay rent regularly month by month by the 15th of each succeeding month at the rate of Rs. 2300/- per month. It is not in dispute that appellant failed to comply the order dated 26-8-2000 and arrears were not paid by 26-9-2000. He prayed for extension on 28-9-2000 for depositing the arrears in six months' installment by 31st March, 2001 but he failed to pay the arrears as per application for extension of time and did not deposit all the arrears of rent by 31-3-2001. The Trial Court also vide order dated 13-10-2003 found that for the month of June, 2001, June, 2002, September 2002, October, 2002, October, 2003 and June, 2003 the appellant failed to deposit the rent by 15th of each succeeding month as per Section 13 (1) of the Act. Thereafter again he filed an application for extension of time and delay in depositing the rent. The Trial Court considered his application and exercised its discretion and after exercising the discretion has held that the reason assigned by the appellant is not sufficient to condone the delay. The Trial Court exercised the discretion while rejecting the application for condonation of delay and was of the view that in the facts of the case reason assigned by the appellant was not sufficient to condone the delay and passed the decree under Section 12(1)(a) of the Act.

From the above facts and circumstances of the case it cannot be said that the Trial Court has mechanically exercised its discretion without any application of mind to the facts of the case. The appellant intentionally failed to pay rent in time as directed by the Trial Court and committed default after default and failed to pay the rent without just and lawful cause and therefore, it cannot be said that he was not guilty of wilful default. The decision cited by the appellant in the case of *Chordia Automobiles v. S. Moosa and others, (2000) 3 SCC 282* and *Manoharlal Gopilal Pande v. Dr. Abdul Mazid Khan, 1997 (1) MPLJ 232,* will not be applicable in the present facts and circumstances of the case.

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***98. ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Section 12 (1) (c)**

(i) Denial of tenancy by the tenant, effect of – Is an act inconsistent with the purpose for which he was admitted to the tenancy of the premises – Such an act creates a ground for eviction u/s 12 (1) (c) of the Act.

(ii) Non-framing of an issue, effect of – Issue regarding landlord-tenant relationship between the parties was framed by the trial court – However no issue was framed in respect of denial of tenancy – Held, it is well settled that when parties are aware of the case then non-framing of a particular issue pales into insignificance –Therefore, non-framing of an issue with regard to S.12 (1) (c) would have no impact especially when issue regarding relationship of landlord and tenant between the parties was framed.

Indira Kumar v. Vishnukumar

Reported in 2008 (1) MPLJ 349

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*99. ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Sections 12 (1) (e) & 12 (1) (i)

S. 12 (1) (e), bonafide requirement – Respondent/landlord wants to shift to city for getting better medical treatment for his aged grandmother and providing better educational facilities to children – Held, once bonafide need is established, neither tenant nor Court can dictate terms to landlord or act as rationing authority – Appellate Court rightly granted decree on the ground of bonafide requirement.

Acquisition of accommodation suitable for residence of tenant – Alternative accommodation in the name of wife of tenant – No evidence to show that tenant cannot live in the said accommodation – Landlord/ respondent entitled for decree of eviction u/s 12 (1) (i) also.

Raj Singh v. Anil Kumar

Reported in I.L.R. (2008) M.P. 292

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*100. ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Section 12 (1) (f)

Application for amendment – Crucial test for deciding an application for amendment is that whether the proposed amendment is necessary or not for deciding the controversy – Amendment to delete pleading relating to impermissible grounds for eviction and substitution of pleadings with regard to permissible ground may be allowed.

Sudhir Jha v. Smt. Krishna Dangiwala and another

Reported in 2008 (1) MPLJ 396

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*101. ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Section 12 (1) (f)

Plaintiff filed a suit for eviction u/s 12 (1) (f) of the Act – Amendment application by filed by plaintiff seeking addition of two more grounds of ejectment u/ss 12 (1) (d) and (i) of the Act allowed by the Court – Defendant challenged the order contending that ground for ejectment if not available at the time of filing of the suit, then such a ground cannot be introduced by way of amendment later on – Held, Trial Court

always possess a jurisdiction to permit the amendment regarding induction of additional ground for eviction after the institution of a suit – However, the Trial Court is bound to examine and adjudicate the objection, if any, raised by defendant as to availability of ground inducted by way of amendment.

Jogendra Singh v. Virendra

Reported in 2008 (1) MPLJ 584

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*102. BANKERS BOOKS EVIDENCE ACT, 1891 – Sections 2 (8) & 4
BANKING REGULATION ACT, 1949 [As inserted by Banking Law (Amendment) Act, 1984] – Section 21-A
CIVIL PROCEDURE CODE, 1908 – Order 30 Rule 4 (1), (2) & Order 1 Rule 10

(i) Mode of proof of entries in Banker's Book – Manager of plaintiff Bank proved statement of account – Nothing could be extracted in cross examination of the witness to create doubt in respect of maintenance of account as provided under the Act – Nothing irregular shown by appellant that loan accounts were not maintained properly – No discrepancy in respect of maintenance of account.

(ii) Rate of interest – Agreement provides that bank shall be entitled to change rates of interest from time to time – S.21-A of the Act provides that rates of interest charged by banking companies not to be subjected to scrutiny by Courts – Therefore contention that interest being excessive and *de hors* the term of agreement is without substance.

(iii) Suit by or against firm – Legal representatives of deceased partner, impleadment of – Suit filed against defendant who is only surviving partner – Rule 4 (1) of O. 30 carves out exception to provision of S. 45 of Contract Act – Not necessary to join legal representative of deceased partner as a party to the suit.

Kalinidi Mohan v. Bank of Maharashtra & Ors.

Reported in I.L.R. (2008) M.P. 316

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103. CIVIL PROCEDURE CODE, 1908 – Section 20

Jurisdiction of Civil Court – Contract between company based at Hong Kong and its employee, executed in Hong Kong – Clause 18 of the contract provides that terms and conditions of the contract should be interpreted in accordance with Hong Kong law – Held, such terms do not bar the territorial jurisdiction of the Civil Court – Cause of action and applicability of law is different concept – Cause of action, meaning of – Law restated.

Laxman Prasad v. Prodigy Electronics Ltd. and another
Judgment dated 10.12.2007 passed by the Supreme Court in Civil Appeal No. 5751 of 2007 reported in (2008) 1 SCC 618

Held:

We find considerable force in the submission of the learned Counsel for the respondent Company. In our view, 'cause of action' and 'applicability of law' are two distinct, different and independent things and one cannot be confused with the other. The expression 'cause of action' has not been defined in the Code. It is however settled law that every suit presupposes the existence of a cause of action. If there is no cause of action, the plaint has to be rejected [Rule 11(a) of Order VII). Stated simply, 'cause of action' means a right to sue. It consists of material facts which are imperative for the plaintiff to allege and prove to succeed in the suit. The classic definition of the expression ('cause of action') is found in the observations of Lord Brett in *Cooke v. Gill (1873) LR 8 CP 107* His Lordship stated;

> "Cause of action means every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court."

In *A.B.C. Laminart (P) Ltd. v. A.P. Agencies, (1989) 2 SCC 163* this Court said: (SCC p. 170, para 12)

> "12. *A cause of action means every fact, which if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the court.* In other words, it is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief against the defendant. It must include some act done by the defendant since in the absence of such an act no cause of action can possibly accrue. It is not limited to the actual infringement of the right sued on but includes all the material facts on which it is founded. It does not comprise evidence necessary to prove such facts, but every fact necessary for the plaintiff to prove to enable him to obtain a decree. Everything which if not proved would give the defendant a right to immediate judgment must be part of the cause of action. But it has no relation whatever to the defence which may be set up by the defendant nor does it depend upon the character of the reilef prayed for by the plaintiff."

Now, Sections 16 to 20 of the Code deal with territorial jurisdiction of a court (place of suing). Whereas Sections 16 to 18 relate to immovable property, suits for compensation for wrongs to persons or movables have been dealt with under Section 19. Section 20 of the Code is a residuary provision and covers all cases not falling under Sections 16 to 19.

In the case on hand, we have referred to the relevant clauses of the agreement. Clause 18 provides for applicability of law and it specifically declares that the terms and conditions of the agreement shall be interpreted in accordance with 'the laws of Hong Kong Special Administrative Region'. That, in our judgment, does not mean that a suit can be instituted only in Hong Kong and not in any other country.

Territorial jurisdiction of a Court, when the plaintiff intends to invoke jurisdiction of any Court in India, has to be ascertained on the basis of the principles laid down in the Code of Civil Procedure. Since a part of 'cause of action' has arisen within the local limits of Delhi as averred in the plaint by the plaintiff Company, the question has to be considered on the basis of such averment. Since it is alleged that the appellant- defendant had committed breach of agreement by using trade mark/trade name in Trade Fair, 2005 in Delhi, a part of cause of action has arisen in Delhi. The plaintiff-Company, in the circumstances, could have filed a suit in Delhi. So far as applicability of law is concerned, obviously as and when the suit will come up for hearing, the Court will interpret the clause and take an appropriate decision in accordance with law. It has, however, nothing to do with the local limits of the jurisdiction of the Court.

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104. CIVIL PROCEDURE CODE, 1908 – Section 54 and Order 20 Rule 18 (1) Passing of preliminary and final decree in suits for declaration of share and possession about agricultural lands and house property – For partition of agricultural land, mere declaration of share is sufficient – For other property i.e. house property, passing of preliminary and final decree both are required – Law explained.

Tripti Pathak and others v. B.C. Vaidya and another

Reported in 2008 (1) MPLJ 200

Held:

Order 20 Rule 18 of the CPC also clarifies the position. Sub rule (1) deals with properties assessed to the payment of Revenue to the Govt. and provides that after declaration of the rights of the parties, the Revenue Officers to give effect to the declaration as per Section 54 of the C.P.C. Sub-rule (2) of Rule 18 provided that other immovable properties or movable properties would be partitioned as per the preliminary decree declaring the rights of several parties interested in the property and the Court while passing decree can issue further directions as may be required. So as per provision enumerated under Order 20 rule 18 Sub-rule (2) a final decree is to be passed after receiving a scheme from the Commissioner in this regard. The legal position may be summarized as under:

(i) in respect of an estate assessed to the payment of revenue to the Government only a declaration is required from the Civil Court. The declaration has to be given effect to by the Revenue Authorities as enumerated in Section

54 and Order 20 Rule 18 (1) of C.P.C.,(ii) in respect of other properties, a preliminary decree has to be passed and as per directions issued by the Civil Court as enumerated under Sub rule (2) of Rule 18 of Order 20, the directions have to be complied with and thereafter a final decree is to be passed. So the proceedings for final decree are envisaged only in respect of the directions as may be issued in preliminary decree. Final decree has been defined by the Apex Court in *Shankar Balwant Lokhande v. Chandrakant Shankar Lokhande, AIR 1995 SC 1211 = (1995) 3 SCC 413* wherein the Apex Court held thus:

> 3. Order 20 Rule 7 of CPC envisages that the decree "shall bear the day on which the judgment was pronounced, and, when the judge has satisfied himself that the decree has been drawn up in accordance with the judgment, he shall sign the decree". Section 2(2) of CPC defines "decree" to mean "the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final". A preliminary decree is one which declares the rights and liabilities of the parties leaving the actual result to be worked out in further proceedings. Then, as a result of the further inquiries conducted pursuant to the preliminary decree, the rights of the parties are fully determined and a decree is passed in accordance with such determination which is final. Both the decrees are in the same suit. Final decree may be said to become final in two ways: (i) when the time for appeal has expired without any appeal being filed against the preliminary decree or the matter has been decided by the highest Court; (ii) when, as regards the Court passing the decree, the same stands completely disposed of. It is in the latter sense the word "decree" is used in Section 2(2) of CPC. The appealability of the decree will, therefore, not affect its character as a final decree. The final decree merely carries into fulfilment the preliminary decree.
>
> 4. Order 20 Rule 18 envisages passing of a decree for partition of property or for separate possession of a share therein. Sub-rule (2) is material which provides that "if and in so far as such decree relates to any other immovable property or to movable property, the Court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties interested in the property and giving such further directions as may be required."

Thus, it could be seen that where the decree relates to any immovable property and the partition or separation cannot be conveniently made without further inquiry, then the Court is required to pass a preliminary decree declaring the rights of several parties interested in the property. The Court is also empowered to give such further directions as may be required in this behalf. A preliminary decree in a partition action, is a step in the suit which continues until the final decree is passed. In a suit for partition by a coparcener or co-sharer, the Court should not give a decree only for the plaintiff's share, it should consider shares of all the heirs after making them parties and then to pass a preliminary decree. The words "declaring the rights of the several parties interested in the property" in Sub-rule (2) would indicate that shares of the parties, other than the plaintiff(s), have to be taken into account while passing a preliminary decree. Therefore, preliminary decree for partition is only a declaration of the rights of the parties and the shares they have in the joint family or coparcenery property, which is the subject-matter of the suit. The final decree should specify the division by metes and bounds and it needs to be engrossed on stamped paper.

8. It has been seen that after passing of preliminary decree for partition, the decree cannot be made effective without a final decree. The final decree made in favour of the first respondent is only partial to the extent of his 1/6th right without any demarcation or division of the properties. Until the rights in the final decree proceedings are worked out qua all and till a final decree in that behalf is made, there is no formal expression of the adjudication conclusively determining the rights of the parties with regard to the properties for partition in terms of the declaration of 1/6th and 5/6th shares of the first respondent and the appellants so as to entitle the party to make an application for execution of the final decree.

In the case of *Hasham Abbas Sayyad v. Usman Abbas Sayyad, AIR 2007 SC 1077* the apex Court held thus:

19. "It is true that the house property was found to be an impartible one; but a preliminary decree having been passed, the valuation thereof and final allotment of the property could have been done only in a final decree proceeding. Only when final allotments were made or a determination is made that the property should be put on

auction sale, a final decree in respect thereof should have been passed. It is appealable. Only a final decree could be put to execution."

In view of the aforesaid settled law, it is apparent that a decree in a given case may be both preliminary and final. In the present case, as stated hereinabove, the properties in respect of which land revenue was payable to the State Govt, the Civil Court was not required to pass any preliminary or final decree and only right or share in respect of those properties were to be declared by the Civil Court. The Civil Court in para 1 of the decree found that the plaintiffs are entitled for 1/8th share in the agricultural lands and after declaring their share issued directions as enumerated in Section 54 of the C.P.C. Meaning thereby that the Civil Court was not to do anything further in respect of agricultural lands and the entire follow up action was to be taken by the Revenue Courts in that regard, though on filing of an application.

Only in respect to house properties in respect of which directions were issued in para 2 of the decree, the Civil Court was required to pass a final decree as at the time of passing of the decree, the Civil Court was not in a position to finally determine the rights of the parties and after declaring the rights of the parties, necessary directions were issued. So the final decree was required only in respect of direction No. 2 and not in respect of direction No. 1 of the decree.

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***105. CIVIL PROCEDURE CODE, 1908 – Section 152**

A decree for specific performance does not contain a direction for delivery of possession – Such direction can be issued even by the Executing Court.

Amendment of judgments, decrees or orders – A decree for specific performance of contract to execute sale deed passed in favour of plaintiffs – No decree for possession was passed inspite of specific relief claimed by the plaintiffs – If it is an accidental slip or omission in decree – Can be amended in exercise of power u/s 152 of the Code.

Abdul Hameed v. Shahjahan Begum

Reported in I.L.R. (2008) M.P. 1

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***106. CIVIL PROCEDURE CODE, 1908 – Sections 152 & 151**

Correction in judgment, decree and order may be made by the Court in exercise of its power u/s 152 CPC as also u/s 151 CPC – Such power of the Court is well recognized – The principle behind is to ensure that nobody shall be prejudiced by an act of Court.

Niyamat Ali Molla v. Sonargon Housing Co-operative Society Ltd. & Ors.

Reported in AIR 2008 SC 225

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107. CIVIL PROCEDURE CODE, 1908 – Order 1 Rule 10

Whether a co-owner can file a suit for eviction without joining other co-owners? Held, Yes.

Ashok Kumar and another v. Late S.R. Verma through L.Rs. and others

Reported in 2008 (1) MPHT 114

Held:

One of co-owners can institute and maintain a suit for eviction without joining other co-owners as a party to the suit because they are not necessary party to such eviction suit. If any co-owner has objection to ejectment of a tenant from the property jointly owned, then said objection must be taken prior to institution of suit in explicit terms and not after filing of the suit because, on the institution of suit, rights and obligations of parties to the suit crystallise for adjudication in accordance with substantive and procedural laws. See *India Umbrella Manufacturing Co. and another v. Bhagabandei Agarwalla (dead) by L.Rs., (2004) 3 SCC 178 (183).* That was a case where during the pendency of eviction proceedings initiated jointly, one of the co-owners of the accommodation had sold her share in favour of tenant and then applied for the dismissal of the suit. Supreme Court in *India Umbrella* (supra) held that such a course, is not open to prejudice the co-owners and mutual rights of the co-owners could be settled in a partition suit.

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108. CIVIL PROCEDURE CODE, 1908 – Order 1 Rule 10 (2)

(i) Determination of necessary party, test of – Law explained.

(ii) Plaintiff being *dominus litis* cannot be forced to add party against whom he does not want to fight unless it is a compulsion of the rule of law.

Smt. Meera Rani and others v. Ghanshyam and others

Reported in 2008 (1) MPHT 75

Held:

The question whether a person is a necessary or proper party should be ascertained and decided on the basis of averments made in the plaint.

The Full Bench of this Court in the case of *Panna and another v. Jeewanlal and another, 1976 JLJ 84,* has laid down the test for determining whether a party is a necessary party are :-

(i) There must be a right to some relief against such party in respect of the matter involved in the proceeding in question.

(ii) It should not be possible to pass an effective decree in the absence of such a party.

The plaintiff is the dominus litus and cannot be forced to add parties against whom he does not want to fight unless it is a compulsion of the rule of law. The plaintiff cannot be required to change the nature

of his suit on the ground that the addition of a party is necessary to avoid multiplicity of suits.

On the basis of elucidated position of the law, it is luminous clear that the petitioner is *dominus litis* and he cannot be forced to add parties against whom does not want to fight unless it is a compulsion of the rule of law. The plaintiff cannot be required to change the nature of his suit on the ground that the addition of a party is necessary to avoid multiplicity of suits.

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***109. CIVIL PROCEDURE CODE, 1908 – Order 3 Rule 4**

Advocate witness – Whether a Counsel can subsequently appear as a witness? Held, Advocate accepting brief and conducting matter knowing fully well that he is likely to be cited as witness on material point – He cannot subsequently withdraw from suit and appear as witness.

Jhanak v. Santosh @ Monu

Reported in I.L.R. (2008) M.P. 310

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***110. CIVIL PROCEDURE CODE, 1908 – Order 5 Rule 17 Proviso (as applicable in State of M.P.)**

In case of ordinary service, refusal on the part of defendant (s) to accept summons and/or to sign the acknowledgement would not amount *ipso facto* to due service unless a copy of summons is affixed on the conspicuous part of the house in which the defendant ordinarily resides or carries on business – Only in case of special service M.P. Amendment would be applicable.

Rooprani and another v. Prem Singh and another

Reported in 2008 (1) MPLJ 150

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***111. CIVIL PROCEDURE CODE, 1908 – Order 6 Rule 2**

Variance in pleading and proof – A case cannot be based on grounds outside plea of parties – The case that is pleaded has to be founded – Appellate Court cannot make out a new case which is not pleaded – The case of deriving title in suit property on account of partition is totally lacking from pleadings – Decision cannot be passed outside the pleadings – Pleadings in plaint, plaintiff has acquired Bhumiswami right by adverse possession – To prove this pleading, no evidence has been laid down by plaintiff – Judgment and decree passed by First Appellate Court set aside and that of Trial Court restored.

Ramrani v. Durga Bai

Reported in I.L.R. (2008) M.P. 25

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112. CIVIL PROCEDURE CODE, 1908 – Order 7 Rule 11
COURT FEES ACT, 1870 – Section 7 (iv) (c)

(i) Proper court fees, determination of – Suit for declaration that sale deed is null and void, plaintiff also claimed relief of injunction against defendant not to obstruct his right of access – Plaintiff was not party to sale deed – Held, only averments made in the plaint are to be seen – Relief of injunction claimed is quite distinct and separate from relief of declaration claimed – Since relief of injunction claimed is not consequential to main relief of declaration, plaintiff is not required to pay *ad valorem* court fees.

(ii) Consequential relief, meaning of – Law explained.

Ashok Kumar Gehani and another v. Ramhet Agrawal and another
Reported in 2008 (1) MPLJ 116

Held:

It is well settled in law that at the time of consideration of an application under Order 7, Rule 11, Civil Procedure Code only the averments made in the plaint is required to be seen. On going through the plaint averments made in para 7(e) it is gathered that plaintiff is seeking relief of injunction not to raise construction so that his right to access may not be obstructed. Thus he has valued the suit for Rs. 500/- for the purpose of injunction. I am of the view that proper valuation has been made by the plaintiff for the purpose of obtaining decree of injunction and proper Court fee has been paid on this relief.

The true test in determining whether a relief is consequential or not is that if such relief can be claimed independently, then it cannot be said to be a consequential relief (see *Shamsher Singh vs. Rajinder Prasad. AIR 1973 SC 2384*). I may further add that the expression 'consequential relief' in section 7(iv)(c) of the Court Fees Act means some relief which would follow strictly from the declaration given, the valuation of which is not capable of being definitely ascertained and which is not specifically provided for anywhere in the Act and cannot be claimed independently of declaration as a substantial relief. A consequential relief would be a relief which in absence of a declaration in favour' of the party seeking it, cannot be granted. If the plaintiff who is a party to the deed or earlier decree or any other proceeding wants to avoid it, then without seeking a declaration that such proceedings or documents were void, he cannot seek an injunction against the other party that the other party be restrained from taking benefit from the sale deed or executing the decree. In such a case unless the declaration is granted, no injunction would be issued. An injunction in such cases would be a consequential relief of the declaration.

In present case the relief of injunction claimed by plaintiff is that defendant should not obstruct his right of access which is quite distinct and separate from his relief of declaration and therefore the valuation of Rs. 500/- for the purpose of injunction cannot be said to be arbitrary and since this relief of injunction is

not consequential to main relief of declaration that sale deed is void therefore plaintiff is not bound to pay ad valorem Court fees on Rs. One crore. See *Sabina @ Farida v. Mohd, Abdul Wasit, 1997 (1) MPLJ 554* and *Nainsukh Kishandas and others v. Smt. Manish Choudhari and others, 1998(2)MPLJ 79.* The decision of *Raj Kaur w/o Garumukh Singh Randhawa v. M/s Kinetic Gallery and another, 2000 (2) MPLJ 72* is not applicable in the present case because in this case relief of permanent injunction was flowing from the relief of declaration and hence it was held by this Court that for declaration and injunction section 7 (iv) (c) of Court Fees Act would be applicable.

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***113. CIVIL PROCEDURE CODE, 1908 – Order 7 Rule 11 (b)**

Under Clause (b) of Rule 11 of O. 7 CPC, plaint can be rejected for under valuation and not for over valuation as this Clause seems to be inserted to protect the revenue of the State and does not seem to have been inserted for giving a tool in the hand of defendant to oppose the suit on the ground of over valuation.

Vinod Kumar Tamrakar v. Mukesh Kumar Agrawal

Reported in 2008 (1) MPLJ 213

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***114. CIVIL PROCEDURE CODE, 1908 – Order 9 Rule 9**
MOTOR VEHICLES RULES, 1994 – Rule 240
MOTOR VEHICLES ACT, 1988 – Section 166

Dismissal of claim petition for default of appellant's counsel – Party should not suffer due to the mistake of counsel.

Application for restoration of claim petition – Case fixed for awaiting service report of notices issued to respondents – Claim petition could not be dismissed for want of prosecution.

Restoration of claim petition – Provisions of Motor Vehicles Act regarding compensation have been enacted to do social justice to victims of road accidents – Tribunal should adopt liberal attitude.

Tikaram Sen v. T. Sandhya Rani

Reported in I.L.R. (2008) M.P. 12

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115. CIVIL PROCEDURE CODE, 1908 – Order 20 Rule 18

Family settlement is not synonymous to partition, effect of – Unless family settlement is effected with intention of bringing an end to joint status of family, it cannot be equated to a family partition.

Jagram Shakya and others v. Gokul Prasad

Reported in 2008 (1) MPLJ 517

Held:

"Family settlement" is not synonymous to partition. A partition causes

severance of status of the family as well the joint family property whereas a family settlement is effected for better and convenient user of joint family property. A family settlement, in strict sense, does not cause severance of status whereas a family partition does result into severance of status. A member of H.U.F. in occupation of a particular portion of H.D.F. property under a family settlement may compel another member to approach a Court of law for seeking partition. To this extent, Courts often recognise family settlement which is obviously to allow joint family to maintain the balance amongst its members. By virtue of a valid partition, title of other sharers would come to an end with respect to a specific portion allotted to a particular member. A family settlement is normally effected for peaceful, better and convenient user and enjoyment of the family property. Rights of other members are not extinguished in a specific portion allotted to a particular member in family settlement. Thus, unless a family settlement is effected with an intention of bringing an end to the joint status of the family, it cannot be equated to a family partition.

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116. CIVIL PROCEDURE CODE, 1908 – Order 20 Rule 18
LIMITATION ACT, 1963 – Article 136
The decree for partition does not become enforceable until the final decree is passed and therefore, under Article 136 of the Limitation Act, the period of 12 years begins to run from the date on which final decree becomes enforceable and not when decree becomes executable.

Suresh Vyas v. Ramchandra Vyas through L.Rs. and others
Reported in 2008 (1) MPHT 78

Held:

The period of 12 years begins to run from the date on which decree becomes enforceable and not when decree becomes executable. The requirement of the Limitation Act in the matter of enforcement of a decree is the date on which decree becomes enforceable or capable or being enforced. In the case of *Hameed Joharan (D) and others v. Abdul Salam (D) by L.Rs.* and *others, AIR 2001 SC 3404* the final decree was passed on 20.11.1970, notice to furnish stamp paper issued on 28.02.1972 and no stamp paper, however, filed until 26.03.1984. The Apex Court has held that when no stamp paper was filed until 26.03.1984, it does not mean and imply that the period of limitation as prescribed under Article 136 stands extended for a period of 12 years from 26.03.1984 else it, would lead to an utter absurdity and a mockery of the provisions of the statute. Thus it cannot but be said that the decree was capable of being enforced on and from 20.11.1970 and the 12 years period ought to be counted therefrom. Needless to record that engrossment of stamped paper would undoubtedly render the decree executable but that does not mean and imply however, that the enforceability of the decree would remain suspended until furnishing of the stamped paper this is opposed to the fundamental principle of which the statutes of limitation as founded.

From the above observation made by the Apex Court, it is clear that in execution of decree period of limitation of 12 years begins to run from the date on which decree becomes enforceable and not when decree becomes executable.

Here, in the present case, no final decree is drawn up and, therefore, the decree for partition does not become enforceable.

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117. CONSTITUTION OF INDIA – Article 20 (3)
IDENTIFICATION OF PRISONERS ACT, 1920 – Sections 5 & 6
Taking specimen fingerprints and handwritings from the accused permissible u/ss 5 and 6 of the Identification of Prisoners Act and not unconstitutional as not hit by Article 20 (3) of Constitution of India – It does not amount to witness against himself.
State through SPE and CBI, A.P. v. M. Krishna Mohan & Anr.
Reported in AIR 2008 SC 368

Held:

The High Court also committed a manifest error in purporting to hold that the specimen fingerprints and handwritings could not have been taken from Respondent No. 1.

Sections 5 and 6 of the Identification of Prisoners Act, 1920 clearly provides for such a contingency and read as under:

> **5. Power of Magistrate to order a person to be measured or photographed.–** If a Magistrate is satisfied that, for the purposes of any investigation of proceeding under the Code of Criminal Procedure, 1898 (5 of 1898) it is expedient to direct any person to allow his measurements or photograph to be taken, he may make an order to that effect, and in that case the person to whom the order relates shall be produced or shall attend at the time and place specified in the order and shall allow his measurements or photograph to be taken, as the case may be, by a police officer:
>
> Provided that no order shall be made directing any person to be photographed except by a magistrate of the first class:
>
> Provided further, that no order shall be made under this section unless the person has at some time been arrested in connection with such investigation or proceeding.
>
> **6. Resistance to the taking measurements, etc . –** (1) If any person who under this Act is required to allow his measurements or photograph to be taken resists or refuses to allow the taking of the same, it shall be lawful to use all means necessary to secure the taking thereof.

(2) Resistance to or refusal to allow taking of measurements or photograph under this Act shall be deemed to be an offence under Section 186 of the Indian Penal Code, 1860.

A Constitution Bench of this Court in *State of Bombay v. Kathi Kalu Oghad, AIR 1961 SC 1808,* examined the question in regard to the application of the aforementioned provisions, *vis-a-vis* the constitutional mandate that nobody shall be compelled to be a witness against himself as contemplated in Article 20 of the Constitution of India in great details. It was clearly held:

> 10. "To be a witness" may be equivalent to "furnishing evidence" in the sense of making oral or written statements, but not in the larger sense of the expression so as to include giving of thumb impression or impression of palm or foot or fingers or specimen writing or exposing a part of the body by an accused person for purpose of identification. "Furnishing evidence" in the latter sense could not have been within the contemplation of the Constitution makers for the simple reason that - though they may have intended to protect an accused person from the hazards of self-incrimination, in the light of the English law on the subject - they could not have intended to put obstacles in the way of efficient and effective investigation into crime and of bringing criminals to justice. The taking of impressions of parts of the body of an accused person very often becomes necessary to help the investigation of a crime. It is as much necessary to protect an accused person against being compelled to incriminate himself, as to arm the agents of law and the law courts with legitimate powers to bring offenders to justice. Furthermore it must be assumed that the Constitution-makers were aware of the existing law, for example, Section 73 of the Evidence Act or Sections 5 and 6 of the Identification of Prisoners Act (33 of 1920). Section 5 authorises a Magistrate to direct any person to allow his measurements or photographs to be taken, if he is satisfied that it is expedient for the purposes of any investigation or proceeding under the Code of Criminal Procedure to do so: "Measurements" include finger impressions and foot-print impressions. If any such person who is directed by a Magistrate, under Section 5 of the Act, to allow his measurements or photographs to be taken resists or refuses to allow the taking of the measurements or photographs, it has been declared lawful by Section 6 to use all necessary means to secure the taking of the required measurements or photographs. Similarly, Section 73 of the Evidence Act authorises the court to permit the taking of

finger impression or a specimen handwriting or signature of a person present in court, if necessary for the purpose of comparison.

11. When an accused person is called upon by the court or any other authority holding an investigation to give his finger impression or signature or a specimen of his handwriting, he is not giving any testimony of the nature of a "personal testimony". The giving of a "personal testimony" must depend upon his volition. He can make any kind of statement or may refuse to make any statement. But his finger impressions or his handwriting, in spite of efforts at concealing the true nature of it by dissimulation cannot change their intrinsic character. Thus, the giving of finger impressions or of specimen writing or of signatures by an accused person, though it may amount to furnishing evidence in the larger sense, is not included within the expression "to be a witness".

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***118. CONSTITUTION OF INDIA – Article 226**

Delay in filing Writ Petition – In case of pension, cause of action arises from month to month – In such case, claim for disability pension should not be rejected only on the ground of delay.

Mohd. Dildar v. Union of India

Reported in I.L.R. (2008) M.P. 22

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119. COPYRIGHT ACT, 1957 – Sections 13, 14, 17 & 52

What is copyright? When a person produces something with his skill and labour, it belongs to him – Copyright stops others from exploiting the work without the consent of the creature – Copyright is purely creation of statute under the Copyright Act, 1957 – Copyright in Law Reports or Journals publishing judgments of Courts – The judicial pronouncements of the Apex Court or any Court or Tribunal would not infringe the copyright unless it is headnotes, editorial notes and footnotes – Paragraphs made for internal reference are original text which would require knowledge, sound judgment and legal skill – These are copyrights of Publisher.

Eastern Book Company and others v. D.B. Modak and another

Judgment dated 12.12.2007 passed by the Supreme Court in Civil Appeal No. 6472 of 2004 reported in (2008) 1 SCC 1

Held:

The copyright, protection finds its justification in fair play. When a person produces something with his skill and labour, it normally belongs to him and the

other person would not be permitted to make a profit out of the skill and labour of the original author and it is for this reason the Copyright Act, 1957 gives to the authors certain exclusive rights in relation to the certain work referred in the Act. The object of the Act is to protect the author of the copyright work from an unlawful reproduction or exploitation of his work by others.

Copyright is a right to stop others from exploiting the work without the consent or assent of the owner of the copyright. A copyright law presents a balance between the interests and rights of the author and that of the public in protecting the public domain, or to claim the copyright and protect it under the copyright statute. One of the key requirements is that of originality which contributes, and has a direct nexus, in maintaining the interests of the author as well as that of public in protecting the matters in' public domain. It is a well-accepted principle of copyright law that there is no copyright in the facts per se, as the facts are not created nor have they originated with the author of any work which embodies these facts. The issue of copyright is closely connected to that of commercial viability, and commercial consequences and implications.

Copyright is purely a creation of the statute under the 1957 Act. What rights the author has in his work by virtue of his creation, are defined in Sections 14 and 17 of the Act. These are exclusive rights, but subject to the other provisions of the Act. In the first place, the work should qualify under the provisions of Section 13, for the subsistence of copyright. Although the rights have been referred to as exclusive rights, there are various exceptions to them which are listed in Section 52.

By virtue of Section 52(1) of the Act, it is expressly provided that certain acts enumerated therein shall not constitute an infringement of copyright. Sub-clause (iv) of Clause (q) of Section 52 (1) excludes the reproduction or publication of any judgment or order of a court, tribunal or other judicial authority, unless the reproduction or publication of such judgment or order is prohibited by the court, the tribunal or other judicial authority from copyright. The judicial pronouncements of the Apex Court would be in the public domain and its reproduction or publication would not infringe the copyright.

However, the inputs put in the original text by the appellants in (i) segregating the existing paragraphs in the original text by breaking them into separate paragraphs; (ii) adding internal paragraph numbering within a judgment after providing uniform paragraph numbering to the multiple judgments; and (iii) indicating in the judgment the Judges who have dissented or concurred by introducing the phrases like 'concurring', 'partly concurring', 'partly dissenting', 'dissenting' 'supplementing', 'majority expressing no opinion', etc., have to be viewed in a different light. The task of paragraph numbering and internal referencing requires skill and judgment in great measure. The editor who inserts para numbering must know how legal argumentation and legal discourse is conducted and how a judgment of a court of law must read. Often legal arguments or conclusions are either clubbed into one paragraph in the original judgment or

parts of the same argument are given in separate paragraphs. It requires judgment and the capacity for discernment for determining whether to carve out a separate paragraph from an existing paragraph in the original judgment or to club together separate paragraphs in the original judgment of the court. Setting of paragraphs by the appellants of their own in the judgment entailed the exercise of the brain work, reading and understanding of subject of disputes, different issues involved, statutory provisions applicable and interpretation of the same and then dividing them in different paragraphs so that chain of thoughts and process of statement of facts and the application of law relevant to the topic discussed is not disturbed, would require full understanding of the entire subject of the judgment. Making paragraphs in a judgment could not be called a mechanical process. It requires careful consideration, discernment and choice and thus it can be called as a work of an author. Creation of paragraphs would obviously require extensive reading, careful study of subject and the exercise of judgment to make paragraph which has dealt with particular aspect of the case, and separating intermixing of a different subject. Creation of paragraphs by separating them from the passage would require knowledge, sound judgment and legal skill. In our opinion, this exercise and creation thereof has a flavour of minimum amount of creativity.

The High Court has already granted interim relief to the appellant-plaintiffs by directing that though the respondent-defendants shall be entitled to sell their CD-ROMS with the text of the judgments of the Supreme Court along with their own headnotes, editional notes, if any, they should not in any way copy the headnotes of the appellant-plaintiffs; and that the respondent-defendants shall also not copy the footnotes and editorial notes appearing in the journal of the appellant-plaintiffs. It is further directed by us that the defendant-respondents shall not use the paragraphs made by the appellants in their copy-edited version for internal references and their editor's judgment regarding the opinions expressed by the Judges by using phrases like 'concurring', 'partly dissenting', etc. on the basis of reported judgments in SCC. The judgment of the High Court is modified to the extent that in addition to the interim relief already granted by the High Court, we have granted the above-mentioned additional relief to the appellants.

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120. CRIMINAL PROCEDURE CODE, 1973 – Section 30
N.D.P.S. ACT, 1985 – Section 18
There is no express provision for sentence in default – Whether the court can impose such sentence? S.25 of General Clauses Act provides that Sections 63 to 70 IPC and the provision of CrPC relating to award of imprisonment in default would apply to all cases unless prohibited by the Act.
Shanti Lal v. State of M.P.
Reported in 2008 CrLJ 386 (SC)

Held:

We may as well refer to Section 25 of the General Clauses Act, 1897 which states;

> **25. Recovery of fines.-** Sections 63 to 70 of the Indian Penal Code (45 of 1860) and the provisions of the Code of Criminal Procedure (5 of 1898) for the time being in force in relation to the issue and the execution of warrants for the levy of fines shall apply to all fines imposed under any Act, Regulation, rule or bye-law unless the Act, Regulation, rule, or bye-law contains an express provision to the contrary.

From the above provisions, in our opinion, it is clear that if a person commits any offence under IPC, he can be punished and when such offence is punishable with substantive sentence and fine, or substantive sentence or fine, or fine only, in default of payment of fine, he can be ordered to undergo imprisonment. Section 30, CrPC prescribes maximum period for which a Court may award imprisonment in default of payment of fine.

In the provisions of Narcotic Drugs and Psychotropic Substances Act, 1985, which is a special law, there is no express power in a Court to order imprisonment in default of payment of fine. But, the law is well settled and it has been held since more than a century that such an order can be passed by a competent Court of law having power to impose fine as one of the punishments. Sections 63 to 70 IPC and the provisions of Cr.P.C. relating to award of imprisonment in default of payment of fine would appy to all cases wherein fines have been imposed on an offender unless 'the Act, Regulation, Rule or bye-law contains an express provision to the contrary.' It cannot be said that in absence of specific provision to order imprisonment in default of payment of fine in a statute, a Court of law has no power to order imprisonment of an offender who fails to pay fine and such action would be illegal or without authority of law. In absence of a provision to the contrary, viz., that no order of imprisonment can be passed in default of payment of fine, such power is explicit and can always be exercised by a Court subject to the relevant provisions of I.P.C. and Cr.P.C.

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***121. CRIMINAL PROCEDURE CODE, 1973 – Section 125**

Illegitimate child has right to claim maintenance u/s 125 during minority – Claim for maintenance by illegitimate child supported by the evidence of mother and villagers and Birth Register – Claim liable to be allowed.

Dimple Gupta (Minor) v. Rajiv Gupta

Reported in AIR 2008 SC 239

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122. CRIMINAL PROCEDURE CODE, 1973 – Section 125

Claim for maintenance by the deserted wife – If she earns somehow to survive, does not disentitle her – The phrase "unable to maintain herself" means unable to maintain as she was living with her husband.

Chaturbhuj v. Sita Bai

Reported in AIR 2008 SC 530

Held:

The object of the maintenance proceedings is not to punish a person for his past neglect, but to prevent vagrancy by compelling those who can provide support to those who are unable to support themselves and who have a moral claim to support. The phrase "unable to maintain herself" in the instant case would mean that means available to the deserted wife while she was living with her husband and would not take within itself the efforts made by the wife after desertion to survive somehow. Section 125 Cr.P.C. is a measure of social justice and is specially enacted to protect women and children and as noted by this Court in *Captain Ramesh Chander Kaushal v. Mrs. Veena Kaushal and Ors., AIR 1978 SC 1807* falls within constitutional sweep of Article 15(3) reinforced by Article 39 of the Constitution of India, 1950 (in short the 'Constitution'). It is meant to achieve a social purpose. The object is to prevent vagrancy and destitution. It provides a speedy remedy for the supply of food, clothing and shelter to the deserted wife. It gives effect to fundamental rights and natural duties of a man to maintain his wife, children and parents when they are unable to maintain themselves. The aforesaid position was highlighted in *Savitaben Somabhai Bhatiya v. State of Gujarat and Ors., 2005 AIR SCW 1601.*

Under the law the burden is placed in the first place upon the wife to show that the means of her husband are sufficient. In the instant case there is no dispute that the appellant has the requisite means.

But there is an inseparable condition which has also to be satisfied that the wife was unable to maintain herself. These two conditions are in addition to the requirement that the husband must have neglected or refused to maintain his wife. It is has to be established that the wife was unable to maintain herself. The appellant has placed material to show that the respondent-wife was earning some income. That is not sufficient to rule out application of Section 125 Cr.P.C. It has to be established that with the amount she earned the respondent-wife was able to maintain herself.

In an illustrative case where wife was surviving by begging, would not amount to her ability to maintain herself. It can also be not said that the wife has been capable of earning but she was not making an effort to earn. Whether the deserted wife was unable to maintain herself, has to be decided on the basis of the material placed on record. Where the personal income of the wife is insufficient she can claim maintenance under Section 125 Cr.P.C. The test is whether the wife is in a position to maintain herself in the way she was used to

in the place of her husband. In *Bhagwan v. Kamla Devi, AIR 1975 SC 83* it was observed that the wife should be in a position to maintain standard of living which is neither luxurious nor penurious but what is consistent with status of a family. The expression "unable to maintain herself" does not mean that the wife must be absolutely destitute before she can apply for maintenance under Section 125 Cr.P.C.

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***123. CRIMINAL PROCEDURE CODE, 1973 – Section 146 (1)**

Attachment of property and appointment of receiver – If after passing order u/s 145 (1) CrPC the Magistrate considers the case to be one of emergency, has to record reasons of satisfaction to the effect that it is a case of emergency – Only apprehension of breach of piece simplicitor cannot be said to be a valid ground for attachment of a property – Reasons lacking – Order is not sustainable in law.

Yashwant v. Sachin

Reported in I.L.R. (2008) M.P. 14

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124. CRIMINAL PROCEDURE CODE, 1973 – Section 154

Although in cognizable case police is duty bound to register the case – However in the given case police may conduct preliminary enquiry to satisfy themselves about the correctness of the allegation.

Rajinder Singh Katoch v. Chandigarh Administration & Ors.

Reported in 2008 CrLJ 356 (SC)

Held:

Although the officer in charge of a police station is legally bound to register a first information report in terms of Section 154 of the Code of Criminal Procedure, if the allegations made by them gives rise to an offence which can be investigated without obtaining any permission from the Magistrate concerned; the same by itself, however, does not take away the right of the competent officer to make a preliminary enquiry, in a given case, in order to find out as to whether the first information sought to be lodged had any substance or not. In this case, the authorities had made investigations into the matter. In fact, the Superintendent of Police himself has, pursuant to the directions issued by the High Court, investigated into the matter and visited the spot in order to find out the truth in the complaint of the petitioner from the neighbours. It was found that the complaint made by the appellant was false and the same had been filed with an ulterior motive to take illegal possession of the first floor of the house.

Ms. Madan contended that the right of the appellant to live in the joint family cannot be taken away. Right of a co-sharer to enjoy the joint family property is a civil right. Such a right, if denied by the other co-sharers for one reason or the other, must be enforced by taking recourse to the remedies available under the civil laws.

Criminal proceedings, in our opinion, cannot be taken recourse to for enforcing such a civil right. In any event, in a case of this nature where the authorities bound by law have already investigated into the matter and found that the allegations made by the appellant against respondent No.4 were not correct, it would not be proper for us to issue any direction to the respondent Nos. 1 to 3 to lodge a first information report.

We are not oblivious to the decision of this Court in *Ramesh Kumari v. State (NCT of Delhi) and Ors. (2006) 2 SCC 677* wherein such a statutory duty has been found in the Police Officer. But, as indicated hereinbefore, in an appropriate case, the Police Officers also have a duty to make a preliminary enquiry so as to find out as to whether allegations made had any substance or not.

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125. CRIMINAL PROCEDURE CODE, 1973 – Sections 154 & 173 (2) & (8) Whether two FIRs against the same accused in respect of same case is permissible? Held, No – But if two rival versions in respect of the same case is presented, they can be treated as different FIRs – Investigation can be carried out under both of them – Apart that investigating agency has power of further investigation and forward a report u/s 173 (2) & (8) Cr.P.C.

Bank of Rajasthan v. Keshav Bangur & Anr.
Reported in 2008 CrLJ 397 (SC)

Held:

Lastly, in the case of *Kari Choudhary v. Most. Sita Devi and Ors. AIR 2002 SC 441* at page 443, this Court has explained the legal position in case of FIRs being filed against the same accused in respect of the same case. This Court has held that when there are rival versions in respect of the same incident, they would normally take the shape of two different FIRs and investigation can be carried on under both by the same investigating agency. That, to set aside the proceedings merely on the ground that the final report has been laid in the first FIR is, to say the least, too technical as the ultimate object of every investigation is to find out whether the offences alleged have been committed and if so who has committed them. Even otherwise, the investigating agency is not precluded from further investigation in respect of an offence in spite of forwarding a report under Section 173(2) on a previous occasion. We quote hereinbelow paragraphs 11 and 12 of the said judgment which read as follow:

> 11. Learned Counsel adopted an alternative contention that once the proceeding initiated under FIR No. 135 ended in a final report the police had no authority to register a second FIR and number it as FIR 208. Of course the legal position is that there cannot be two FIRs against the same accused in respect of the same case. *But when there are rival versions in respect of the same episode, they would normally*

take the shape of two different FIRs and investigation can be carried on under both of them by the same investigating agency. Even that apart, the report submitted by the court styling it as FIR No. 208 of 1998 need be considered as an information submitted to the court reading the new discovery made by the police during investigation the persons not named in FIR No. 135 are the real culprits. To quash the said proceeding merely on the ground that final report had been laid in FIR No. 135 is, to say the least, too technical. The ultimate object of every investigation is to find out whether the offences alleged have been committed and, if so, who have committed it.

12. Even otherwise the investigating agency is not precluded from further investigation in respect of an offence in spite of forwarding a report under Sub-section (2) of Section 173 on a previous occasion. This is clear from Section 173(8) of the Code.

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126. CRIMINAL PROCEDURE CODE, 1973 – Sections 157 & 194
EVIDENCE ACT, 1872 – Section 45
INDIAN PENAL CODE, 1860 – Section 149

(i) Special report to Magistrate – No universal rule about the time – The same must be dispatched as each case turns on its own facts.

(ii) Ballistic Expert can say that particular injury can be caused by bullet alone – Doctor is not a proper person, as expert, to give answers to such questions.

(iii) Once membership of unlawful assembly is established, prosecution need not establish any specific overt act to any of the accused for holding him guilty of the offence.

Mahmood & Anr. v. State of U.P.
Reported in AIR 2008 SC 515

Held:

It is not possible to lay down any universal rule as to within what time the special report is required to be despatched by the Station House officer after recording the FIR. Each case turns on its own facts.

The learned senior counsel invited our attention to the judgments of this Court in *Balaka Singh and Ors. v. State of Punjab, AIR 1975 SC 1962* and *Datar Singh v. The State of Punjab, (1975) 4 SCC 272* in which this Court highlighted the importance of despatch of special report to the Illaqua Magistrate. There is no dispute with the proposition that it is the duty of the Station House Officer to despatch Special Report to the Illaqua Magistrate as is required under Section 157(2) of the Code of Criminal Procedure. But there may be variety of factors

and circumstances for the delay in despatch of the FIR and its receipt by the local Magistrate. The existence of FIR and its time may become doubtful in cases where there is no satisfactory and proper explanation from the investigating agencies.

The learned Counsel for the appellant contended that the oral account as given by PW-1, 2 and 3 is at variance with medical evidence available on record. It is contended that while according to the eye-witnesses all the four shots were fired from the gun, from right side of the victim, wound No.1 (wound of entry) was on the left side of the face and caused by bullet and this evidence belies the claim of eye witnesses that they saw the assault on Ram Singh. It is true that to a pointed query in cross-examination as regards the nature of injury No. 1, the Medical Officer stated that the said injury was caused by bullet only. The learned Counsel contended that weapons in the hands of the accused even according to PW-1 were of 12 bore guns and not any pistols or revolvers. No bullet injury could have been caused with the fire-arms that were alleged to be in the hands of the assailants. We find no substance in this submission. The Medical Officer is not ballistic expert. He was not expected to answer as to whether injury no. 1 could have been caused by bullet alone. His opinion to that extent is of no consequence. It is well settled that medical evidence is only an evidence of opinion and it is not conclusive and when oral evidence is found to be inconsistent with the medical opinion, the question of relying upon one or the other would depend upon the facts and circumstances of each case. No hard and fast rule can be laid down therefor. The ocular evidence, if otherwise, is acceptable, has to be given importance over medical opinion. However, where the medical evidence totally improbabilises the ocular version the same can be taken to be a factor to affect credibility of the prosecution version. We are not inclined to place any reliance upon the opinion of the Medical Officer that the injury no. 1 could have been caused only with bullet since he is not a ballistic expert. This part of the evidence of the Medical Officer cannot be considered to be the opinion of an expert and the same has no evidentiary value. It is not possible to disbelieve the evidence of PW-1, 2 and 3 and their presence at the scene of occurrence based on the medical evidence. The High Court rightly observed that the controversy as regards injury No. 1 and whether the same could have been caused by bullet or pellet to be without any basis.

The learned Counsel for the State rightly contended that in case of attack by members of unlawful assembly on the victim in furtherance of common object, it is not necessary for the prosecution to establish overt-act done by each accused. It is required to be noticed that Ram Samujh (A-1) who had fired two shots, convicted by the Sessions Court, did not even challenge his conviction in the High Court. The appellants have been rightly convicted under Section 302 read with aid of Section 149 of IPC. PW-5 in his evidence stated that all the injuries sustained by the deceased were from gun. It is further stated that "from the body of deceased one bullet, one cover "tikli', two dat and 40 'chare' shots were taken out, put in packet and sealed...." It is also stated in his evidence that injuries caused on the body of the deceased were sufficient in the normal course

to cause death. This part of the medical evidence if juxtaposed with the oral evidence of PW-1, 2 and 3 it becomes unnecessary to go into the question as to which accused caused what injury and which was a fatal one. Once a membership of an unlawful assembly is established, it is not incumbent on the prosecution to establish any specific overt-act to any of the accused for fastening of liability with the aid of Section 149 of the IPC. Commission of overt-act by each member of the unlawful assembly is not necessary. The common object of the unlawful assembly of the accused in the present case is evident from the fact that some of them were armed with deadly weapons. None of them were curious onlookers or spectators to the macabre drama that was enacted on 19.2.1977 at 3.30 p.m. at galiyara, village Badipur.

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***127. CRIMINAL PROCEDURE CODE, 1908 – Section 161**
INDIAN PENAL CODE, 1860 – Sections 376, 302 & 201

(i) Delayed examination of witness, effect of – Incident took place on 14.04.1995 – Statement of witnesses recorded by police on 26th and 28th April – Held, No question put to Investigating Officer about delayed examination of witnesses – Factual explanation ought to have been obtained from I.O. – Defence cannot gain any advantage therefrom.

(ii) Rape and murder – Circumstantial evidence – Witnesses stated that appellant was putting lungi of brown colour – Fabric threads seized from place of incident – Lungi seized from the house of appellant on his memorandum – As per FSL report, fabric threads were found to be of lungi – Held, this is a material clinching circumstance to fasten the guilt upon accused.

(iii) Rape and murder – Deceased, a 13 year old girl and her brother were in agricultural fields – Younger brother met the appellant while he was returning home – Appellant told brother that he will take his sister towards river and he should not disclose to anybody – Younger brother came back and informed deceased – Deceased told him to call grandfather and hid herself in standing crop of wheat – Hue and cry heard by some witnesses who saw that appellant was lying on a girl – Grandfather also came to spot and called deceased number of times – On next day dead body of deceased was found in the river – *Ante mortem* injuries were found on the body of deceased – Injuries were also found on the body of accused – Fabric threads also seized from spot which were later on found to be that of lungi belonging to appellant – Deceased was subjected to rape – Conviction of appellant affirmed.

Mithilesh v. State of M.P.
Reported in I.L.R. (2008) M.P. 333

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***128. CRIMINAL PROCEDURE CODE, 1973 – Sections 167 (2) & 439**
N.D.P.S. ACT, 1985 – Section 20 (b) (ii) (B)
Accused illegally possessing 15.300 kg (medium quantity) ganja – Offence punishable u/s 20 (b) (ii) (B) of the Act with rigorous imprisonment which may extend to ten years and with fine which may extend to rupees one lakh – Chargesheet not filed within 60 days – Magistrate refused to enlarge the accused on bail stating that chargesheet could be filed within 180 days – Held, it has been held in *Rajeev Chaturvedi v. State (NCT) of Delhi, (2005) 5 SCC 34* and the order passed by the High Court of M.P. in *M.Cr.C. No. 4721/06 (Smt. Rama Devi v. State of M.P. on 19.7.2006)* that the expression "not less than" would mean the imprisonment should be ten years or more and would cover only those offences for which punishment could be for a clear period of ten years or more and in these circumstances, the chargesheet should have been filed within 60 days and not within 180 days – Held, accused entitled for bail u/s 167 (2) of Cr.P.C.
Annu @ Anil v. State of M.P.
Reported in 2008 (1) MPHT 286

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129. CRIMINAL PROCEDURE CODE, 1973 – Sections 169, 170 & 173
What course of action Magistrate may adopt when police file charge sheet or final report ? Magistrate may either :
(a) accept the report and take cognizance;
(b) may disagree with report and drop the proceeding;
(c) may direct further investigation u/s 156(3) and require the police to make further report;
(d) may follow the procedure laid down in Ss. 200 and 202 CrPC.
However, if Magistrate decides not to take cognizance as regards all of the accused or some of them, Magistrate is duty bound to give notice to informant – No other person than informant is entitled to notice – However, Magistrate cannot direct police officer to file charge sheet against any person.
Sanjay Bansal & Anr. v. Jawajarla Vats & Ors.
Reported in 2008 Cr.L.J 428 (SC)

Held:

When a report forwarded by the police to the Magistrate under Section 173 (2) (i) is placed before him several situations arise. The report may conclude that an offence appears to have been committed by a particular person or persons and in such a case, the Magistrate may either (1) accept the report and take cognizance of the offence and issue process, or (2) may disagree with the report and drop the proceeding, or (3) may direct further investigation under Section 156 (3) and require the police to make a further report. The report may on the other hand state that according to the police, no offence appears to have

been committed. When such a report is placed before the Magistrate he has again option of adopting one of the three courses open i.e., (1) he may accept the report and drop the proceeding; or (2) he may disagree with the report and take the view that there is sufficient ground for further proceeding, take cognizance of the offence and issue process; or (3) he may direct further investigation to be made by the police under Section 156 (3). The prosition is, therefore, now well-settled that upon receipt of a police report under Section 173 (2) a Magistrate is entitled to take cognizance of a offence under Section 190 (1) (b) of the Code even if the police report is to the effect that no case is made out against the accused. The Magistrate can take into account the statements of the witnesses examined by the police during the investigation and take cognizance of the offence complained of and order the issue of process to the accused. Section 190 (1) (b) does not lay down that a Magistrate can take cognizance of an offence only if the Investigating Officer gives an opinion that the investigation has made out a case against the accused. The Magistrate can ignore the conclusion arrived at by the Investigating Officer and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit, exercise of his powers under Section 190 (1) (b) and direct the issue of process to the accused. The Magistrate is not bound to such a situation to follow the procedure laid down in Sections 200 and 202 of the Code for taking cognizance of a case under Section 190 (1) (a) though it is open to him to act under Section 200 or Section 202 also. [See *M/s. India Carat Pvt. Ltd. v. State of Karnataka and another (AIR 1989 SC 885)*]. The informant is not prejudicially affected when the Magistrate decides to take cognizances and to proceed with the case. But where the Magistrate decides that sufficient ground does not subsist for proceeding further and drops the proceeding or rakes he view ha there is material for proceeding against some and other are insufficient grounds in respect of others, the informant would certainly be prejudiced as the First Information Report lodged becomes wholly or partially ineffective. Therefore, this Court indicated in *Bhagwant Singh v. Commissioner of Police and Another, AIR 1985 SC 1285* that where the Magistrate decides not to take cognizance and to drop the proceeding or takes a view that there is no sufficient ground for proceeding against some of the persons mentioned in the First Information Report, notice to the informant and grant of opportunity of being heard in the matter becomes mandatory. As indicated above, there is no provision in the Code for issue of a notice in that regard.

We may add here that the expressions "charge-sheet" or "final report" are not used in the Code, but it is understood in Police Manuals of several States containing the Rules and the Regulations to be a report by the police filed under Section 170 of the Code, described as a "charge-sheet". In case of reports sent under Section 169, i.e., where there is no sufficiency of evidence to justify forwarding of a case to a Magistrate, it is termed variously i.e., referred charge, final report or summary. Section 173 in terms does not refer to any notice to be given to raise any protest to the report submitted by the police. Though the

notice issued under some of the Police Manuals states it to be a notice under Section 173 of the Code, though there is nothing in Section 173 specifically providing for such a notice.

As decided by this Court in *Bhagwant Singh's case* (supra), the Magistrate has to give the notice to the informant and provide an opportunity to be heard at the time of consideration of the report. It was noted as follows :–

> "... the Magistrate must give notice to the informant and provide him an opportunity to be heard at the time of consideration of the report..."

Therefore, the stress is on the issue of notice by the Magistrate at the time of consideration of the report. If the informant is not aware as to when the matter is to be considered, obviously, he cannot be faulted, even if protest petition in reply to the notice issued by the police has been filed belatedly. But as indicated in *Bhagwant Singh's case* (supra), the right is conferred on the informant and none else.

The aforesaid position was highlighted by this Court in *Gangadhar Janardhan Mhatre v. State of Maharashtra and Ors., (2004) 7 SCC 768.*

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***130. CRIMINAL PROCEDURE CODE, 1973 – Sections 178 (c), 451 & 457**
INDIAN PENAL CODE, 1860 – Section 498-A
Offence punishable u/s 498-A IPC is not a continuing offence – Admittedly, as many as five out of the eight applicants did not commit any act of cruelty at Bhopal, no part of cause of action against them had arisen at Bhopal and against rest three applicants, cause of action accrued at Unnao where most of alleged acts of cruelty committed – Offence u/s 498-A IPC must be tried at a Court at Unnao and not at Bhopal – Petition u/s 482 allowed by the High Court with the direction to Trial Magistrate to return the charge sheet to SHO for presentation before a Court of competent jurisdiction at Unnao.
Taskeen Ahmed v. State of M.P.
Reported in I.L.R. (2008) M.P. 29

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***131. CRIMINAL PROCEDURE CODE, 1973 – Sections 200 & 202**
RULES & ORDERS (CRIMINAL) (M.P.) – Rule 558
At the stage of enquiry u/s 200 or 202 CrPC if complainant seeks order of the Court to call or produce his witnesses, the provision of Rule 558 of the M.P. Rules and Orders (Criminal) will not be applicable and therefore, complainant has to deposit the expenses of witnesses at the stage.
Satish Tyagi v. Radha Kishan Tyai and others
Reported in 2008 (1) MPHT 87

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***132. CRIMINAL PROCEDURE CODE, 1973 – Section 293**
EVIDENCE ACT, 1872 – Section 45
INDIAN PENAL CODE, 1860 – Section 498-A

(i) Mere exhibiting hand writing expert's report is no evidence unless proved by examining hand writing expert – Such expert does not come withing the category of Government scientific expert shown in S.293 (4) Cr.P.C.

(ii) Conviction based on letters purported to be written by deceased (wife of appellant) and oral evidence of parents of deceased – No evidence produced that letters were written by deceased – Hand writing expert report filed but not duly proved – No explanation sought in accused statement regarding contents of letters – Such letters can't be used as evidence – Material omission and contradiction in oral evidence – Cruelty by husband (appellant) not proved – Conviction and sentence set aside.

Ayyub v. State of M.P.
Reported in I.L.R. (2008) M.P. 343

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133. CRIMINAL PROCEDURE CODE, 1973 – Section 306
Before examining the approver, order about granting pardon is must – Thereafter his examination and cross-examination has to be done in the presence of accused.

Sitaram Sao @ Mungeri v. State of Jharkhand
Reported in AIR 2008 SC 391

Held:

So far as pardon portion of the order of CJM is concerned, that has not been set aside and the proceeding relating to other portion has been set aside by which Lalit Sanga was examined but he was not cross examined nor his statement was recorded in presence of the accused and so the trial court below, after remand of the case completed this part of the order and Lalit Sanga was examined in presence of the accused and he was also cross examined and thereafter case was committed to the Court of Sessions, and therefore, there was complete compliance of Section 306 Cr.P.C. The stage of examining the approver comes only after he has been granted pardon and after pardon he was examined as a witness in presence of the accused and also he was cross examined. So there is no illegality in the order and in the procedure adopted by the learned CJM after remand of the case.

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134. CRIMINAL P0ROCEDURE CODE. 1973 – Section 320

Compounding of offence – Only offence shown in first two columns of the table may be compounded by the persons mentioned in the third column of that table – However, if the parties compounded the matter in non-compoundable case though acquittal cannot be recorded on the basis of compromise, but factor of compromise may be taken into consideration for reducing the sentence.

Hasi Mohan Barman and another v. State of Assam and another

Judgment dated 13.11.2007 passed by the Supreme Court in Criminal Appeal No. 1534 of 2007 reported in (2008) 1 SCC 184

Held:

Section 320 of Code of Criminal Procedure says that the offences punishable under the sections of the Indian Penal Code (45 of 1860) specified in the first two columns of the table next following may be compounded by the persons mentioned in the third column of that table. A perusal of Section 320 will show that the offence under Section 313 IPC is not compoundable. Therefore, the consent given by the wife PW-1 or the affidavit filed by her cannot be utilized for the purpose of recording a finding of acquittal in favour of the appellants, accused.

There are some decisions of this Court wherein the factor of compromise between the accused and the complainant (or injured or person aggrieved) has been taken into consideration for reducing the sentence. The first decision on this point was rendered by this Court in *Ram Pujan and Ors. v. State of Uttar Pradesh (1973) 2 SCC 456,* wherein the trial court had convicted the accused under Section 326 IPC which is a non-compoundable offence and had sentenced the accused to four years R.I. The High Court took into consideration the compromise between the accused appellant and the injured and reduced the sentence to two years R.I. This Court, after observing that the fact of compromise can be taken into account in determining the quantum of sentence, reduced the sentence to the period already undergone which was little more than four months and further imposed a fine of Rs.1500/- on each of the appellants. *Surendra Nath Mohanty and Anr. v. State of Orissa, (1999) 5 SCC 238* is a decision of a Bench of three learned Judges. It was observed that in view of the legislative mandate contained in Section 320 Cr.P.C. an offence can be compounded only in accordance with the provisions of the said section. The Court followed the view taken in the case of Ram Pujan (supra) and having regard to the fact that the parties had compromised and a period of ten years had elapsed from the date of the incident reduced the sentence of five years R.I. imposed under Sections 307 and 326 IPC to the period of sentence already undergone which was three months and also imposed fine of Rs. 5000.

There are several other decisions of this Court wherein factor of compromise has been taken into consideration and the sentence has been reduced mostly to the period already undergone and they are *Bankat v. State of*

Maharashtra, (2005) 1 SCC 343, Badrilal v. State of M.P., (2005) 7 SCC 55 and Jetha Ram v. State of Rajasthan, (2006) 9 SCC 255.

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135. CRIMINAL PROCEDURE CODE, 1973 – Sections 437 & 439
Competency of Courts to consider regular bail application u/ss 437 & 439 of the Code – Competent Court would be the Court of Sessions where a person is granted anticipatory bail by a Court and the offence is punishable with death or imprisonment for life or where Magistrate applies his mind and takes cognizance of an offence punishable with death or imprisonment for life – Magistrate shall be competent to consider bail application if a person is arrested or detained by the police or if he appears or is brought before the Court in connection with an offence punishable with death or imprisonment for life.
Yogesh Ganore v. State of Madhya Pradesh
Reported in 2008 (1) MPHT 352

Held:

Having considered all the aspects, this Court is of the view that if a person is arrested or detained by the police or if he appears or is brought before the Court in connection with an offence punishable with death or imprisonment for life, the Magistrate shall be competent to consider the bail application under Section 437 of the Code and such person shall not. be entitled to file an application under Section 439 of the Code in the Court of Session, directly. But where a person is granted anticipatory bail by a Court in a case where the offence is punishable with death or imprisonment for life, after considering all the aspects of the case including the nature of offence and punishment provided for it, expressly or impliedly or the Magistrate, at the time of taking cognizance, applied his mind and found that a particular offence is made out prima facie for taking cognizance and if that offence is punishable with death or imprisonment for life, in such circumstances, the Court of Session would be the Competent Court to consider the regular bail application under Section 439 of the Code and the Court of the Magistrate would not be the Competent Court to consider the bail application because in such circumstances, the filing of an application under Section 437 of the Code, would be a futile exercise and it is not the intention of the legislature that a person must go into the jail before grant of regular bail though he was granted anticipatory bail. This principle shall also be applicable, to a woman or to those persons who are sick, infirm or under the age of sixteen years, irrespective of the fact that a special provision has been made under Section 437 of the Code for grant of bail.

In the present case, the position is much better for the applicant because when the 'Khatma' report was filed before the Court of Chief Judicial Magistrate, the notice was issued to the prosecutrix and after recording the statements of the prosecutrix and her witnesses, the cognizance was taken in respect of the offence punishable under Section 376 of the IPC. It shows that in the opinion of

the Magistrate, there appear reasonable grounds for believing that the applicant has been guilty of the offence punishable with imprisonment for life and because of that, the non-bailable warrant was issued after taking cognizance. In these circumstances, the filing of an application under Section 437 of the Code would be totally unnecessary because the bail application will not be allowed as the Magistrate had already applied his mind on this point that a prima facie case is made out against the applicant under Section 376 of IPC, which is punishable with imprisonment for life and, therefore, he has to reject the bail application and then the applicant will be sent to jail, whereas he had already been granted anticipatory bail by the Competent Court. In these circumstances, it was not necessary at all for the applicant to file an application under Section 437 of the Code before' the Court of Chief Judicial Magistrate and application under Section 439 of the Code was maintainable directly before the Court of Session.

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136. CRIMINAL PROCEDURE CODE, 1973 – Sections 437, 439 & 482

A case u/ss 324, 342 and 506 of IPC was registered against accused – Being bailable offences, accused were enlarged on bail by CJM – After four days, complainant succumbed to his injuries – Case was converted into 304 IPC – Accused moved to High Court u/s 482 Cr.P.C. – High Court given the direction that if accused furnish personal bonds and sureties to the satisfaction of court, same shall be accepted u/s 304 IPC – Supreme Court set aside the order of the High Court – Held, High Court cannot grant bail u/s 482 CrPC by-passing the provision of S. 439 CrPC.

Hamida v. Rashid alias Rasheed and others

Judgment dated 27.04.2007 passed by the Supreme Court in Criminal Appeal No. 632 of 2007 reported in (2008) 1 SCC 474

Held:

The appellant Hamida lodged an FIR at P.S. Kotwali, Muzaffarnagar at 00.10 hours on 13.6.2005 alleging that when her husband Balla was participating in a Panchayat of the Biradari (community) the four accused respondents lodged an attack upon him with licensed and illegal arms, exhorting that they would kill him. Naushad accused assaulted him with a 'chhuri' (long knife) due to which Balla received serious injuries. The other accused fired from their respective weapons and thereafter ran away from the scene of occurrence. On the basis of the FIR lodged by the appellant, a case was registered as Crime No. 792 of 2005 under Sections 324, 352 and 506 IPC at P.S. Kotwali, Muzaffarnagar. The injured Balla was rushed to the District Hospital, where he was medically examined at 11.10 p.m. on 12.6.2005. He had sustained serious stab wound in his abdomen from which loops of intestines were coming out.

Two accused respondents were arrested by the police and were produced before the learned Chief Judicial Magistrate on 13.6.2005 for the purpose of seeking remand. The accused also moved a bail application seeking bail in

Case Crime No. 792 of 2005 which had been registered against them. The complainant-appellant Hamida also put in appearance through a counsel and filed an affidavit stating that as a serious injury had been caused to the injured Balla and accused had resorted to firing the offence committed by them was one under Section 307 IPC, but the police in collusion with the accused had registered the case only under Sections 324, 352 and 506 IPC. It was also submitted that on account of the serious injuries received by the injured Balla, he had been referred to the Medical College, Meerut, and the bail application should be heard after summoning the medical examination report. The learned CJM, however, observed that remand of the accused had been sought only in the offences in which the case had been registered against them and as the offences were bailable, they were entitled to bail. He accordingly passed an order on the same day i.e. 13.6.2005 granting bail to the accused Rashid and Arshad. It was, however, made clear in the order that if the case was converted into a more serious offence, the accused would not get any benefit of the bail being granted to them. Subsequently, the remaining two accused were also released on bail. Balla succumbed to his injuries in the night intervening 16th and 17th of June, 2005. Thereafter, the offence was converted into one under Section 304 IPC. It was at this stage that the four accused respondents filed a petition under Section 482 Cr.P.C. before the High Court seeking a direction to the Chief Judicial Magistrate, Muzaffarnagar, to permit them to remain on same bail even after conversion of the offence into one under Section 304 IPC. The only submission made before the High Court was that on the same facts and circumstances, the accused had been granted bail by the learned Chief Judicial Magistrate and they had not misused the privilege of the bail and, therefore, they should be allowed to remain on bail even after conversion of offence. The High Court accepted the prayer made on behalf of the accused respondents and the relevant part of the order, which is under challenge, is being reproduced below:

> "In view of the facts and circumstances of the case and the submissions made by the learned Counsel for the applicants, it is directed that if the applicants appear before the court concerned and furnish their personal bonds and two sureties each in the like amount to the satisfaction of the court concerned the same shall be accepted under Section 304 I.P.C.
>
> With these observations, the application is disposed of finally."

In the case in hand, the accused respondents could apply for bail afresh after the offence had been converted into one under Section 304 IPC. They deliberately did not do so and filed a petition under Section 482 Cr.P.C. in order to circumvent the procedure whereunder they would have been required to surrender as the bail application could be entertained and heard only if the accused were in custody. It is important to note that no order adverse to the

accused respondents had been passed by any Court nor there was any miscarriage of justice or any illegality. In such circumstances, the High Court committed manifest error of law in entertaining a petition under Section 482 Cr.P.C. and issuing a direction to the subordinate court to accept the sureties and bail bonds for the offence under Section 304 IPC. The effect of the order passed by the High Court is that the accused after getting bail in an offence under Section 324, 352 and 506 IPC on the very day on which they were taken into custody, got an order of bail in their favour even after the injured had succumbed to his injuries and the case had been converted into one under Section 304 IPC without any Court examining the case on merits, as it stood after conversion of the offence. The procedure laid down for grant of bail under Section 439 Cr.P.C., though available to the accused respondents, having not been availed of, the exercise of power by the High Court under Section 482 Cr.P.C. is clearly illegal and the impugned order passed by it has to be set aside.

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137. CRIMINAL PROCEDURE CODE, 1973 – Section 438

Anticipatory bail – Consideration for dealing with application for grant of – Court must record reasons therefor – Post-bail conduct of accused and other supervening circumstances should be taken into account – Cases involving serious offences such as S. 376 IPC should be allowed to be fully investigated – Prosecutrix being girl of easy virtue not a relevant consideration.

State of Maharashtra and another v. Mohd. Sajid Husain Mohd. S. Husain and others

Judgment dated 10.10.2007 passed by the Supreme Court in Criminal Appeal No. 1402 of 2007 reported in (2008) 1 SCC 213

Held:

The four factors, which are relevant for considering the application for grant of anticipatory bail, are:

(i) the nature and gravity or seriousness of accusation as apprehended by the applicant;

(ii) the antecedents of the applicant including the fact as to whether he has, on conviction by a Court, previously undergone imprisonment for a term in respect of any cognizable offence;

(iii) the likely object of the accusation to humiliate or malign the reputation of the applicant by having him so arrested; and

(iv) the possibility of the appellant, if granted anticipatory bail, fleeing from justice.

It is now well-settled principle of law that while granting anticipatory bail, the court must record the reasons therefor.

A case of this nature (offence u/s 376 I.P.C.) should be allowed to be fully investigated. Once a criminal case is set in motion by lodging an information in regard to the commission of the offence in terms of Section 154 Cr. PC, it may not always be held to be imperative that all the accused persons must be named in the First Information Report. It has not been denied nor disputed that the prosecutrix does not bear any animosity against the respondents. There is no reason for her to falsely implicate them. It is also not a case that she did so at the behest of some other person, who may be inimically disposed of towards the respondents. The prosecution has disclosed the manner in which she was being taken from place to place which finds some corroboration from the testimonies of the other witnesses and, thus, we can safely arrive at a conclusion that at least at this stage her evidence should not be rejected outrightly.

Immoral conduct on the part of police officers should not be encouraged. We fail to understand as to how the police officers could go underground. They had been changing their residence very frequently. Although most of them were police officers, their whereabouts were not known. During the aforementioned period attempts had been made even by Mahananda to obtain the custody of the girl at whose instance, we do not know. On the one hand, Mahananda had been praying for the custody of the girl and Sunita, the mother of the girl, as noticed hereinbefore, had affirmed an affidavit in relation to her date of birth. These may not be acts of voluntariness on their part. It, therefore, in our opinion, is a case where no anticipatory bail should have been granted.

Reliance has been placed by Mr. Patwalia on *State of U.P. v. Amarmani Tripathi, (2005) 8 SCC 21.* This Court therein opined that in an application for cancellation of bail, conduct subsequent to release on bail and the supervening circumstances alone are relevant. But the court while considering an appeal against grant of anticipatory bail would keep in mind the parameters laid down therefor. The matter, however, may be different for deciding an appeal from an order granting bail, where the accused has been at large for a considerable time, in which event, the post-bail conduct and other supervening circumstances will also have to be taken note of.

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138. CRIMINAL PROCEDURE CODE, 1973 – Section 438

Anticipatory bail, scope of – Court can lay down a condition that accused shall make himself available for interrogations by police officer, if required – If the condition is breached by the accused, State may approach the Court for cancellation of bail.

State of Punjab v. Raninder Singh and another

Judgment dated 19.11.2007 passed by the Supreme Court in Criminal Appeal No. 1608 of 2007 reported in (2008) 1 SCC 564

Held:

It may be mentioned here that Section 438(2)(i) of the Code of Criminal Procedure is very clear that while granting anticipatory bail the Court can lay down a condition that the accused shall make himself available for interrogation by a police officer as and when required. The purpose of such a provision is that anticipatory bail cannot be permitted to be abused. It is therefore, implicit that whenever the Court imposes such a condition in its order, and the accused called for interrogation or for certain investigation does not appear before the investigating officer then it will be open for the State to move the High Court for cancellation of bail.

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***139. CRIMINAL PROCEDURE CODE, 1973 – Section 438**

Maintainability of anticipatory bail application – If an application for anticipatory bail is allowed and regular bail application is rejected then anticipatory bail application would not be maintainable in higher Courts – However, in peculiar circumstances of the matter, application u/s 438 is entertained and period of anticipatory bail may be extended by next 45 days.

Fazilat Mohammad v. State of M.P.

Reported in I.L.R. (2008) M.P. 7

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***140. CRIMINAL PROCEDURE CODE, 1973 – Sections 451 & 457**

Interim custody – Applicants prayed for interim custody of cattle on the ground that they are owners – Revisional Court granted interim custody to applicants but imposed the condition of depositing Rs. 3000/- per cattle – Held, applicants were prima facie found rightful owners of cattle – No one else claimed custody – Cattle should have been given after obtaining proper security – Condition imposed by Court extremely harsh.

Munshi v. State of M.P.

Reported in I.L.R. (2008) M.P. 187

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***141. CRIMINAL PROCEDURE CODE, 1973 – Section 452**

Disposal of property on conclusion of trial – Appellant tried for offences punishable u/ss. 395, 397 and 396 – Appellant acquitted – Trial Court directed for retention of gun, cartridges and wrist watch seized from the possession of appellant till conclusion of trial of absconding accused person – Held, Court has discretion to dispose of property in any of three modes specified in S. 452 – Discretion is inherently judicial function – Manner of disposal is not to be made arbitrarily but judiciously – When accused is acquitted Court should normally restore property to person from whose custody it was taken

– Even if gun was used for commission of any offence for which absconding accused are to be tried, no useful purpose would be served by retaining custody for indefinite period – Property restored to appellant on certain conditions.

Munnilal Yadav v. State of M.P.

Reported in I.L.R. (2008) M.P. 150

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142. CRIMINAL TRIAL:

Appreciation of evidence – Accused alleged to have called victim in his house on fake pretext and subjected her forcefully to sexual intercourse – No injury found on the body of the victim – No semen was found on the private part of the body – Neither her clothes were torn nor any hair was present on the private part of the body of the prosecutrix – She was habituated to sexual intercourse – Held, prosecution story is not reliable

Bibhishan v. State of Maharashtra

Reported in 2008 CrLJ 721 (SC)

Held:

We have gone through the judgment of both the Courts below and also perused the necessary record. As per the evidence of the doctor, there was no injury on the body of the prosecutrix. There was no sign of semen on the private part of the body. Neither her clothes were torn nor there was any presence of hair of the accused on the private part of the prosecutrix. The doctor after examining the prosecutrix deposed that the girl was habituated to sexual intercourse. In view of this evidence, we are of the opinion that the High Court as well as the Trial Court has not correctly appreciated the evidence and has wrongly convicted the accused-appellant. The accused who has been charged under Section 376 read with Section 511 IPC is entitled to benefit of doubt.

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***143. CRIMINAL TRIAL:**

Punchanamas and memorandum, proof and evidentiary value of – Contents not admissible in evidence unless proved by witness in Court – Can be used for refreshing the memory and to corroborate the version of its author as per provisions u/ss 157 and 159 of Evidence Act.

Dashrath v. State of M.P.

Reported in I.L.R. (2008) M.P. 360

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144. CRIMINOLOGY:

Punishment – Aims of punishment – Protection of society – Accused must realize that he has committed an offence which is harmful to the society and his own future too – Sentences, both lenient and too harsh, lose their efficaciousness and amounts to encouragement to potential criminals – Courts of law must adhere the doctrine of proportionality to determine appropriate quantum of sentence – Person convicted for an offence of rape should be treated with heavy hand.

State of M.P. v. Babulal

Judgment dated 03.12.2007 passed by the Supreme Court in Criminal Appeal No. 1658 of 2007 reported in (2008) 1 SCC 234

Held:

The object of punishment has been succinctly stated in Halsbury's Laws of England (4th Edn., Vol. 11, Para 482) thus:

> *"482. Object of punishment :–* The aims of punishment are now considered to be retribution, justice, deterrence, reformation and protection and modern sentencing policy reflects a combination of several or all of these aims. The retributive element is intended to show public revulsion to the offence and to punish the offender for his wrong conduct. The concept of justice as an aim of punishment means both that the punishment should fit the offence and also that like offences should receive similar punishments. An increasingly important aspect of punishment is deterrence and sentences are aimed at deterring not only the actual offender from further offences but also potential offenders from breaking the law. The importance of reformation of the offender is shown by the growing emphasis laid upon it by much modern legislation, but judicial opinion towards this particular aim is varied and rehabilitation will not usually be accorded precedence over deterrence. *The main aim of punishment in judicial thought, however, is still the protection of society and the other objects frequently receive only secondary consideration when sentences are being decided."*
>
> (emphasis supplied)

In justice-delivery system, sentencing is indeed a difficult and complex question. Every Court must be conscious and mindful of proportion between an offence committed and penalty imposed as also its impact on society in general and the victim of the crime in particular.

In *B.G. Goswami v. Delhi Admn., (1974) 3 SCC 85* this Court stated: (SCC p. 89, para 10)

"10. .....Now the question of sentence is always a difficult question, requiring as it does, proper adjustment and balancing of various considerations which weigh with a judicial mind in determining its appropriate quantum in a given case. The main purpose of the sentence broadly stated is that the accused must realise that he has committed an act which is not only harmful to the society of which he forms an integral part but is also harmful to his own future, both as an individual and as a member of the society. Punishment is designed to protect society by deterring potential offenders as also by preventing the guilty party from repeating the offence; it is also designed to reform the offender and re-claim him as a law abiding citizen for the good of the society as a whole. Reformatory, deterrent and punitive aspects of punishment thus play their due part in judicial thinking while determining this question. In modern civilized societies, however, reformatory aspect is being given somewhat greater importance. *Too lenient as well as too harsh sentences both lose their efficaciousness. One does not deter and the other may frustrate thereby making the offender a hardened criminal."*

Penal laws, by and large, adhere to the doctrine of proportionality in prescribing sentences according to culpability of criminal conduct. Judges in principle agree that sentence ought always to commensurate with the crime. In practice, however, sentences are determined on other relevant and germane considerations. Sometimes it is the correctional need that justifies lesser sentence. Sometimes the circumstances under which the offence is committed play an important role. Sometimes it is the degree of deliberation shown by the offender in committing a crime which is material. Sentencing is thus a delicate task which requires skill, talent and consideration of several factors, such as, the nature of offence, circumstances -extenuating or aggravating- in which it was committed, prior criminal record of the offender, if any, age and background of the criminal with reference to education, home life, social adjustment, emotional and mental condition, prospects of his reformation and rehabilitation, etc. All these and similar other considerations can, hopefully and legitimately, tilt the scale on the propriety of sentence.

Moreover, social impact of the crime, particularly where it relates to offences against women, cannot be lost sight of and per se require exemplary treatment. Any liberal attitude of imposition of meager sentence or too sympathetic view may be counter productive in the long run and against social interest which needs to be cared for, protected and strengthened by string of deterrence inbuilt in the sentencing system.

Sexual violence apart from being a dehumanizing act is also an unlawful intrusion of the right to privacy and sanctity of a female. It is a serious blow to her supreme honour and offends her self-esteem and dignity. It degrades and humiliates the victim and leaves behind a traumatic experience. It has been rightly said that whereas a murderer destroys the physical frame of a victim, a rapist degrades and defiles the soul of a helpless female. The courts are, therefore, expected to try and decide cases of sexual crime against women with utmost sensitivity. Such cases need to be dealt with sternly and severely. A socially sensitized Judge is a better armour in cases of crime against women than long clauses of penal provisions, containing complex exceptions and complicated provisos.

Once a person is convicted for an offence of rape, he should be treated with a heavy hand. An undeserved indulgence or liberal attitude in not awarding adequate sentence in such cases would amount to allowing or even to encouraging 'potential criminals'. The society can no longer endure under such serious threats. Courts must hear the loud cry for justice by society in cases of heinous crime of rape and impose adequate sentence. Public abhorrence of the crime needs reflection through imposition of appropriate sentence by the Court [*Dinesh v. State of Rajasthan, (2006) 3 SCC 771.*]

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145. EASEMENTS ACT, 1882 – Sections 4 & 15

Easementary right of passage over land, proof of – Law explained – It is not necessary that a person should live in the dominant heritage – It is enough if he had been using it – It is also not necessary that a person should be the owner of the dominant heritage – Person occupying it would have easementary right.

Ramcharan and others v. Ram Asrey

Reported in 2008 (1) MPHT 293

Held:

if said house was being used by the plaintiff and his father, irrespective of the fact whether they were living or not in it, since the disputed property was being used as a way to approach the said house, it would mean that plaintiff was having easementary right of way on the disputed land which is servient heritage. On conjoint reading of Sections 4 and 15 of the Act it would reveal that it is not necessary that a person should live in the dominant heritage. What Sections 4 and 15 say is that right of easement should be for the beneficial enjoyment of the dominant heritage and if the right of way is exercised peaceably as an easement without interruption and for 20 years, merely because the dominant heritage was being used other than residential purpose would not forfeit the right of easement or it cannot be said that plaintiff had not acquired right of prescription of easement of the way on the servient heritage. Under Section 15 of the Act nowhere it has been enacted that if the dominant heritage is used for the residential purpose, then only such right of way would accrue.

Under this section word "building" has been used and if that is the position, I am of the view that word "building" is having a broader spectrum. Similarly under Section 4 of the Act, for the beneficial enjoyment of the land an easementary right can be claimed. The expression "land" has been explained in the explanation to Section 4, according to which "land" would also include things permanently attached to the earth. Thus a house would also come under the purview of Section 4 of the said Act.

Under Section 4 and 15 of the Act, it is not necessary that a person should be the owner of the dominant heritage since under Section 4 the words not only "owner", but, "or occupier" have been used which would mean that any person who is occupying the dominant heritage would have easementary right.

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146. EVIDENCE ACT, 1872 – Sections 3 & 45

Multiple murder case – Inconsistency in ocular and medical evidence – Witnesses stating to use modern fire arms, rifle and pistol from a distance of one or two feet – Defence pray that the injuries on the deceased person can only be caused by short gun – Medical report shown that all entry wounds had a sign of charring and tattooing and had different dimensions – In such circumstances, no inconsistency about the use of different fire arms.

Sarvesh Narain Shukla v. Daroga Singh & Ors.

Reported in AIR 2008 SC 320

Held:

It has been emphasized that there appeared to be no injuries from a rifle or pistol. We however beg to differ. It bears reiteration that shots had been fired from a distance of a feet or two and this opinion is fortified as the entry wounds without exception show signs of charring and tattooing. The dimensions of the entry wounds also show that several different types of weapons have been used. It is clear from the post mortem examination of Devi Shankar Dubey's body (during which a cork had been recovered) that a shotgun had undoubtedly been used in his murder and that the shot had entered en masse as is apparent from the size of wound of entry (Injury No. 1).

We now come to the reports of the other two deceased. Injury No. 3 on the person of Vakil Shukla is clearly not an injury caused by a shotgun and has been caused by a medium calibre automatic or semi-automatic rifle or pistol. Learned Counsel has however submitted that this injury had possibly been caused by a shotgun using buckshot SG/LG cartridges as had a high velocity rifle been used from a close range as suggested, the bullet would have had a blasting effect on the body. We, however, find that this argument is not substantiated on the evidence, that is, available to us. Undoubtedly, this shot too had been fired from a little beyond point blank range and if it had been fired from a shotgun, the shoulder would have been shattered and in any event the

entire charge would have entered the body en masse making a rat hole wound of entry. We are fortified in our view by the observations on page 465 of the Fourth Edition of Dr. B.R. Sharma's Forensic Science in Criminal Investigation and Trials:

> "9.10.7.3 Shotgun injuries:
>
> The nature of the injuries caused by the shotgun is greatly altered by the range. Contact or near contact wounds look like explosions. Close range shots upto about three meters give rat holes varying in diameter from about 2 to 6 centimetres. From about 2 metres to 10 metres the projectiles may form a rat hole surrounded by individual pellet holes. Beyond 10 metres most of the shots form separate holes. The buckshots may separate earlier. For example, n L.G. cartridge may give individual injuries for each shot from a range of about 2 metres. The area covered by the pellets vary with the range and the choke characteristics of a gun.
>
> Ordinarily, the shotguns projectiles do not form exit holes except when buckshots are used from close ranges."

Modi's *Medical Jurisprudence and Toxicology,* Twenty- third Edition at page 722 is to the same effect. We reproduce the relevant passage hereunder:

> The effects produced by small shot fired from a shotgun vary according to the distance of the weapon from the body, and choking device. A charge of small shot, fired very close to, or within a few inches, of the body enters in one mass like a single bullet making a large irregular wound with scorched and contused edges, and is followed by the gases of the discharge which greatly lacerate and rupture the deeper tissues. Particles of unburnt powder expelled from the weapon behind the missile are driven to some distance through the wound, and some of them are found embedded in the wound and the surrounding skin, which is also singed and blackened by the flame and smoke of combustion. The exit wound of a close range shot may show greater damage of tissues than the entrance wound, the margins are everted, but there is no evidence of blackening of singeing. At a distance of one to three feet, small shots make a single aperture with irregular and lacerated edges corresponding in size to the bore of the muzzle of the gun, as the shot enter as one mass, but are scattered after entering the wound and cause great damage to the internal tissues. The skin surrounding the wounds is blackened, scorched and tattooed, with unburnt grains of powder. On the other hand,

> at a distance of six feet, the central aperture is surrounded by separate openings in an area of about two inches in diameter made by a few pellets of the shot, which spread out before reaching the mark. The skin surrounding the aperture may not be blackened or scorched, but is tattooed to some extent. At a distance of 12 feet, the charge of the shot spreads widely and enters the body as individual pellets producing separate openings in an area of five to eight inches in diameter depending on the choke, but without causing blackening, scorching or tattooing of the surrounding skin.

Learned Counsel argument with regard to the use of a high velocity rifle and its effect on the body when fired from a close range would undoubtedly merit serious consideration but in the light of the facts on the record, we are unable to concur. It is the case of the prosecution that carbines and 9mm pistols in addition to shotguns had been used during the attack. A carbine, a high velocity weapon firing automatically or semi automatically, and 9mm bore pistols are prohibited firearms permitted for use only by the police and armed forces which invariably use hard nosed bullets in contradistinction to soft nosed ones used in sporting rifles against soft skinned game and which cause immense internal damage on the victim and huge wounds of exit, if any. We find that all six wounds of entry are of 0.8x0.8 cm. and with the exception of one, all exit wounds are also of almost similar dimensions. We are, therefore, of the opinion that injury No. 3 appears to be a wound of entry from a weapon firing hard nosed bullets which had penetrated the body and exited on the other side. We find support for this view from *Modi* (supra) (at pgs.717-718):

> "Because of obvious difference in design and construction, the wounds produced by hunting ammunition are much more devastating than that of the military ammunition. In military ammunition, the bullets are full metal jacketed having a core of steel or lead inside and are thus prevented from deformation (or expansion) when they hit the target. In contrast, a hunting bullet is designed to deform (or expand) in its passage through the body, producing an increase in its presenting area. Thus a hunting bullet, which is partially metal jacketed, but with the lead core exposed at its tip, is referred to as soft-point bullet. Hollow Point hunting- bullets are also partially jacketed but have a cavity at the tip of lead core to facilitate expansion on striking the target. The silver tip hunting bullet in reality is a soft point bullet whose lead core at its tip is protected by a thin jacket of aluminium alloy sheath.

> Modern steel-jacketed bullets used in army weapons have the shape of an elongated cone and owing to their great velocity usually pass straight and direct through the body without any deflection or deviation, and without causing much damage. The wounds of entry and exit are almost circular and similar in appearance without any bruising or laceration of the surrounding parts."

The nature of injuries found on the dead body of Shesh Mani Rai are equally significant. It appears from injury Nos. 1 and 2 which are on the neck and head respectively that the shot had furrowed through the body with a huge exit wound. The very dimension of these injuries show the presence of a rat hole type of entry with a larger wound of exit on the other side. Injury No. 3 substantially corresponds with the injuries found on the dead body of Vakil Shukla and reveals that this injury had not been caused with the weapon which caused the other two injuries.

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147. EVIDENCE ACT, 1872 – Sections 45, 60 & 3

Medical evidence vis-a-vis ocular evidence, appreciation of – If eye-witnesse's account is found reliable and trustworthy, medical evidence only pointing to alternative possibilities, such medical evidence should not be accepted as conclusive – Criterion to appreciate evidence – Law reiterated.

D. Sailu v. State of Andhra Pradesh

Reported in 2008 CrLJ 686 (SC)

Held:

Coming to the plea that the medical evidence is at variance with ocular evidence, it has to be noted that it would be erroneous to accord undue primacy to the hypothetical answers of medical witnesses to exclude the eye-witnesse's account which had to be tested independently and not treated as the 'variable' keeping the medical evidence as the 'constant'.

It is trite that where the eyewitnesse's account is found credible and trustworthy, medical opinion pointing to alternative possibilities is not accepted as conclusive. Witnesses, as Bentham said, are the eyes and ears of justice. Hence the importance and primacy of the quality of the trial process. Eye-witnesse's account would require a careful independent assessment and evaluation for its credibility which should not be adversely prejudged making any other evidence, including medical evidence, as the sole touchstone for the test of such credibility. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be creditworthy; consistency with the undisputed facts, the "credit" of the witnesses; their performance in the witness box; their power of observation etc. Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation.

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***148. HINDU MARRIAGE ACT, 1955 – Section 9**

Restitution of conjugal rights – Plaintiff filed suit for restitution of conjugal rights on the ground of desertion – Defendant denied the factum of marriage – Plaintiff proved by oral and documentary evidence that marriage was solemnized in accordance with customary rites and usage including Saptapadi and also proved that defendant deserted the plaintiff without any sufficient cause – Defendant did not appear for cross examination after filing his examination in chief on affidavit – Defendant's evidence cannot be read in evidence – Fails to rebut evidence of plaintiff – Suit rightly decreed.

Devendra Kumar Patle v. Manjushri Patle

Reported in I.L.R. (2008) M.P. 6

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149. HINDU SUCCESSION ACT, 1956 – Sections 14 (1) & 14 (2)

Applicability of S.14 (1) or 14 (2) – Sub-section (2) is confined to a case where property is acquired by for the first time as grant without any pre-existing right by any instrument, the terms of which prescribe restricted estate in the property – If instrument merely declares or recognizes a pre-existing right which the female is entitled, sub-section 14 (1) will apply.

Santosh and others v. Saraswathibai and another

Judgment dated 20.11.2007 passed by the Supreme Court in Civil Appeal No. 5321 of 2007 reported in (2008) 1 SCC 465

Held:

Legal position in regard to the right of a female Hindu was laid down by this Court in *V. Tulasamma v. Sesha Reddy, (1977) 3 SCC 99* wherein the legal consequences were summarized as under (SCC pp. 135-36, para 62)

> "62. (1) The Hindu female's right to maintenance is not an empty formality or an illusory claim being conceded as a matter of grace and generosity, but is a tangible right against property which flows from the spiritual relationship between the husband and the wife and is recognised and enjoined by pure Shastric Hindu law and has been strongly stressed even by the earlier Hindu jurists starting from Yajnavalkya to Manu. Such a right may not be a right to property but it is a right against property and the husband has a personal obligation to maintain his wife and if he or the family has property, the female has the legal right to be maintained therefrom. If a charge is created for the maintenance of a female, the said right becomes a legally enforceable one. At any rate, even without a charge the claim for maintenance is doubtless a pre-existing right so that any transfer declaring or recognising such a right does

not confer any new title but merely endorses or confirms the pre-existing rights.

(2) Section 14(1) and the Explanation thereto have been couched in the widest possible terms and must be liberally construed in favour of the females so as to advance the object of the 1956 Act and promote the socio-economic ends sought to be achieved by this long needed legislation.

(3) Sub-section (2) of Section 14 is in the nature of a proviso and has a field of its own without interfering with the operation of Section 14(1) materially. The proviso should not be construed in a manner so as to destroy the effect of the main provision or the protection granted by Section 14(1) or in a way so as to become totally inconsistent with the main provision.

(4) Sub-section (2) of Section 14 applies to instruments, decrees, awards, gifts, etc. which create independent and new titles in favour of the females for the first time and has no application where the instrument concerned merely seeks to confirm, endorse, declare or recognise pre-existing rights. In such cases a restricted estate in favour of a female is legally permissible and Section 14(1) will not operate in this sphere. Where, however, an instrument merely declares or recognises a pre- existing right, such as a claim to maintenance or partition or share to which the female is entitled, the sub-section has absolutely no application and the female's limited interest would automatically be enlarged into an absolute one by force of Section 14(1) and the restrictions placed, if any, under the document would have to be ignored. Thus where a property is allotted or transferred to a female in lieu of maintenance or a share at partition, the instrument is taken out of the ambit of Sub-section (2) and would be governed by Section 14(1) despite any restrictions placed on the powers of the transferee.

(5) The use of express terms like 'property acquired by a female Hindu at a partition', 'or in lieu of maintenance', 'or arrears of maintenance', etc. in the Explanation to Section 14(1) clearly makes Sub-section (2) inapplicable to these categories which have been expressly excepted from the operation of Sub-section (2).

(6) The words 'possessed by' used by the Legislature in Section 14(1) are of the widest possible amplitude and include the state of owning a property even though the owner is not in actual or physical possession of the same.

Thus, where a widow gets a share in the property under a preliminary decree before or at the time when the 1956 Act had been passed but had not been given actual possession under a final decree, the property would be deemed to be possessed by her and by force of Section 14(1) she would get absolute interest in the property. It is equally well settled that the possession of the widow, however, must be under some vestige of a claim, right or title, because the section does not contemplate the possession of any rank trespasser without any right or title.

(7) That the words 'restricted estate' used in Section 14(2) are wider than limited interest as indicated in Section 14(1) and they include not only limited interest, but also any other kind of limitation that may be placed on the transferee."

In *Nazar Singh v. Jagjit Kaur, (1996) 1 SCC 35* this Court following *Tulasamma* (supra) held as under: (SCC pp. 38-39, para 9)

"9. ..... The principles enunciated in this decision have been reiterated in a number of decisions later but have never been departed from. According to this decision, Sub-section (2) is confined to cases where property is acquired by a female *Hindu for the first time as a grant without any pre-existing right under a gift, will, instrument, decree, order or award, the terms of which prescribe a restricted estate in the property:* (emphasis supplied) It has also been held that where the property is acquired by a Hindu female in lieu of right of maintenance inter alia, it is in virtue of a pre-existing right and such an acquisition would not be within the scope and ambit of Sub-section (2) even if the instrument, decree, order or award allotting the property to her prescribes a restricted estate in the property. Applying this principle, it must be held that the suit lands, which were given to Harmel Kaur by Gurdial Singh in lieu of her maintenance, were held by Harmel Kaur as full owner thereof and not as a limited owner notwithstanding the several restrictive covenants accompanying the grant. (Also see the recent decision of this Court in *Mangat Mal v. Punni Devi, (1995) 6 SCC 88* where a right to residence in a house property was held to attract Sub-section (1) of Section 14 notwithstanding the fact that the grant expressly conferred only a limited estate upon her.) According to Sub-section (1), where any property is given to a female Hindu in lieu of her maintenance before the commencement of the Hindu Succession Act, such property becomes the absolute property of such female

Hindu on the commencement of the Act provided the said property was "possessed" by her. *Where, however, the property is given to a female Hindu towards her maintenance after the commencement of the Act, she becomes the absolute owner thereof the moment she is placed in possession of the said property (unless, of course, she is already in possession) notwithstanding the limitations and restrictions contained in the instrument, grant or award whereunder the property is given to her.* (emphasis in original) This proposition follows from the words in Sub-section (1), which insofar as is relevant read : 'Any property possessed by a female Hindu...after the commencement of this Act shall be held by her as full owner and not as a limited owner'. In other words, though the instrument, grant, award or deed creates a limited estate or a restricted estate, as the case may be, it stands transformed into an absolute estate provided such property is given to a female Hindu in lieu of maintenance and is placed in her possession. So far as the expression 'possessed' is concerned, it too has been the subject-matter of interpretation by several decisions of this Court to which it is not necessary to refer for the purpose of this case."

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150. INDIAN PENAL CODE, 1860 – Section 34

Common intention, ingredients of – Meeting of minds of all the accused persons to commit the offence – It may be pre-planned or may occur in spur of a moment – But it must be before the commission of the offence – Proof of common intention – Direct evidence is seldom available – Can only be inferred from circumstances appearing from the proved facts – However, it must be proved – The act of the accused persons may be different in character, but must have been actuated by one in furtherance of the common intention.

Sewa Ram & Anr. v. State of U.P.

Reported in 2008 CrLJ 801 (SC)

Held:

Section 34 has been enacted on the principle of joint liability in the doing of a criminal act. The section is only a rule of evidence and does not create a substantive offence. The distinctive feature of the section is the element of participation in action. The liability of one person for an offence committed by another in the course of criminal act perpetrated by several persons arises under Section 34 if such criminal act is done in furtherance of a common intention of the persons who join in committing the crime. Direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved

circumstances. In order to bring home the charge of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was plan or meeting of minds of all the accused persons to commit the offence for which they are charged with the aid of Section 34, be it pre-arranged or on the spur of the moment; but it must necessarily be before the commission of the crime. The true concept of the section is that if two or more persons intentionally do an act jointly, the position in law is just the same as if each of them has done it individually by himself. As observed in *Ashok Kumar v. State of Punjab, (1977) 1 SCC 746* the existence of a common intention amongst the participants in a crime is the essential element for application of this section. It is not necessary that the acts of the several persons charged with commission of an offence jointly must be the same or identically similar. The acts may be different in character, but must have been actuated by one and the same common intention in order to attract the provision.

The section does not say "the common intentions of all", nor does it say "an intention common to all". Under the provisions of Section 34 the essence of the liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. As a result of the application of principles enunciated in Section 34, when an accused is convicted under Section 302 read with Section 34, in law it means that the accused is liable for the act which caused death of the deceased in the same manner as if it was done by him alone. The provision is intended to meet a case in which it may be difficult to distinguish between acts of individual members of a party who act in furtherance of the common intention of all or to prove exactly what part was taken by each of them. As was observed in *Chinta Pulla Reddy v. State of A.P. 1993 Supp.(3) SCC 134.* Section 34 is applicable even if no injury has been caused by the particular accused himself. For applying Section 34 it is not necessary to show some overt act on the part of the accused.

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***151. INDIAN PENAL CODE, 1860 – Section 100**

Right of self defence against property can be exercised in relation to a dispute over an open space.

Kishan Chand & Ors. v. State of U.P.

Reported in AIR 2008 SC 133

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***152. INDIAN PENAL CODE, 1860 – Sections 141 & 300 Exception 1**

Unlawful assembly – All accused persons pelted stones at the house of deceased and witnesses – When they did not come out, their houses were set on fire – As deceased and his family members came out, he and his sons were assaulted by accused persons – Since the appellants were members of unlawful assembly they constructively became liable for the act of other members of that assembly – Individual act was not required to be proved – Conviction upheld.

Sudden and grave provocation – Number of persons killed the deceased, caused injuries to the witnesses and set their houses on fire – Benefit of Exception 1 of S. 300 cannot be given to offenders who sought provocation as excuse for killing or doing harm to any person – The act must be done under immediate impulse of provocation – Provocation must be such as will upset person of ordinary sense and calmness – It cannot be held that all of them lost their power of control and committed offence – Defence of sudden and grave provocation not available.

Bhaddu v. State of M.P.

Reported in I.L.R. (2008) M.P. 363

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153. **INDIAN PENAL CODE, 1860 – Section 300**

Murder – Circumstantial evidence – Last seen together with deceased – Proximity of place and time between the event of last seen and death is necessary ingredient – Mere circumstance of last seen not sufficient to base conviction and in such case non-explanation as to what happened to deceased has no effect.

Malleshappa v. State of Karnataka

Reported in AIR 2008 SC 69

Held:

In the present case also, there is no proximity of time and place. We have already noted that the dead body, even if it is to be accepted, was that of the deceased-Yankanna, had been recovered after 10 days after the date of which the deceased was last seen in the company of the appellant. This singular piece of circumstantial evidence available against the appellant, even if the version of PW-10 is to be accepted, is not enough. It is fairly well settled that the circumstantial evidence in order to sustain the conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused.

The appellant's failure to offer any explanation in his statement under Section 313 Cr.P.C. is not a circumstance to hold appellant guilty of the charge. The prosecution has failed to establish as to when the death of Yankanna took place, it could be at any time between 12th July, 2001 to 21st July, 2001. There is nothing on record to show as to what transpired between 12th July, 2001 to 21st July, 2001. Mere non-explanation on the part of the appellant, in our considered opinion, by itself cannot lead to proof of guilt against the appellant. Learned Counsel for the State relied upon the decision in *Mohibur Rahman and Anr. v. State of Assam, (2002) 6 SCC 715* which in fact is in support of the defence and nor the prosecution.In this case it has been observed that :

> "The circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime. There must be something more

establishing connectivity between the accused and the crime. There may be cases where on account of close proximity of place and time between the event of the accused having been last seen with the deceased and the factum of death a rational mind may be persuaded to reach an irresistible conclusion that either the accused should explain how and in what circumstances the victim suffered the death or should own the liability for the homicide. In the present case there is no such proximity of time and place. As already noted the dead body has been recovered about 14 days after the date on which the deceased was last seen in the company of the accused. The distance between the two places is about 30-40 kms. The event of the two accused persons having departed with the deceased and thus last seen together (by Lilima Rajbongshi, PW6) does not bear such close proximity with the death of victim by reference to time or place. According to Dr. Ratan Ch. Das the death occurred 5 to 10 days before 9.2.1991. The medical evidence does not establish, and there is no other evidence available to hold, that the deceased had died on 24.1.1991 or soon thereafter. So far as the accused Mohibur Rahman is concerned this is the singular piece of circumstantial evidence available against him. We have already discussed the evidence as to recovery and held that he cannot be connected with any recovery. Merely because he was last seen with the deceased a few unascertainable number of days before his death, he cannot be held liable for the offence of having caused the death of the deceased. So far as the offence under Section 201 IPC is concerned there is no evidence worth the name available against him. He is entitled to an acquittal."

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154 INDIAN PENAL CODE, 1860 – Section 300, Exceptions 1 & 4 and Section 304

Grave and sudden provocation – Throwing waste and rubbish inside the house or shop is within purview of grave and sudden provocation – Accused was not carrying knife from beginning but picked up during the scuffle – In such circumstances it cannot be said that he had motive to cause the death of the deceased – Position may be different if the accused carried it from the beginning – Accused committed offence u/s 304 (II) IPC.

Muthu v. State

Reported in 2008 CrLJ 442 (SC)

Held:

In our opinion, throwing waste and rubbish inside the house or shop of somebody is certainly a grave and sudden provocation. Everyone wishes to keep his premises neat and clean, and is likely to lose his self-control in such a situation.

It is evident that the accused had no motive or intention to cause the death of the deceased since the accused was not carrying the knife from before, and only picked it up during the scuffle with the deceased.

The position may have been different if right from the beginning the appellant accused had been carrying a knife with the intention to attack the deceased. But that is not the case here.

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155. INDIAN PENAL CODE, 1860 – Sections 302 & 304-B

Material circumstances coupled with medical evidence shows that death was on account of strangulation – The accused alone was inside the house along with his wife at the time of incident – Accused alone was responsible for commission of offence.

Prosecution evidence also established that accused harassed the deceased, threatened her on many occasions for not fulfilling his demand of dowry – Accused also doubted her character – Trial Court altered charges from Section 302 IPC to Sections 304-B and 201 – In such circumstances, conviction u/s 304-B in place of Section 302 of the Code is proper.

Vanga Sriniwas v. Public Prosecutor, High Court of A.P.
Reported in AIR 2008 SC 88

Held:

The scene of observation report (Ex.P-9) prepared by the investigating officer show that the house of the accused is located in the middle of other houses. In view of the medical evidence and in conjunction with the other circumstances, particularly the undisputed fact that at or about the time of Vanga Vimala's death, no third person excepting the accused and the deceased, was present in the house, it will inescapably lead to the conclusion that within all human probability, it was the accused-appellant and none else, who had murdered the deceased by strangulating her to death. We have already noted that the accused alone was inside the house along with his wife, namely, the deceased. As rightly pointed out by the prosecution, it is not the case of the accused that any other person was residing with them in the same house particularly on the fateful day. Further, as rightly pointed out, there was no explanation from the accused as to when he left the house and came to know about the hanging of the dead body and it would be right in arriving at a conclusion that he alone was responsible for the commission of the offence. If we consider all the above mentioned material circumstances coupled with the medical evidence, it is safe to conclude that the death of the deceased was on account of strangulation. As rightly pointed out, there was no possibility of any other

person committing the offence and the accused alone was responsible for the commission of the offence. In such circumstances, we agree with the contention of the State counsel that the prosecution placed sufficient evidence to establish the guilt of the accused beyond reasonable doubt. As observed by the High Court, the trial Court acquitted the accused only on the simple ground that the doctor, who conducted post-mortem examination, did not offer cause of death in his preliminary report, forgetting that in the final report particularly after receipt of FSL report, the very same doctor has opined that the death was due to "Asphyxia due to throttling". In the light of the materials available, the conclusion of the trial Judge cannot be accepted and the High Court taking into consideration the totality of the circumstances and the entire materials was right in accepting the case of the prosecution and found the accused guilty.

Annexures A1 and A2 which clearly show that based on the materials collected the investigating agency altered the offence from Sections 302 IPC to 304B and 201 IPC. The altered charge has not been taken note of by the High Court while arriving at a conclusion against the accused. In the earlier part of our judgment, we have referred to the relevant materials with regard to demand of dowry, suspicion, harassment and torture by the accused and the medical evidence as to the cause of death. In view of the same and in the light of the altered charge memo as one of Section 304B instead of 302 IPC, it is but proper to convict the accused only under Section 304B IPC and not under Section 302 IPC as ordered by the High Court.

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156. INDIAN PENAL CODE, 1860 – Section 304
CRIMINAL PROCEDURE CODE, 1973 – Section 162
EVIDENCE ACT, 1872 – Sections 45 & 145

(i) Conflict between oral testimony and medical evidence, appreciation of – Law explained.

(ii) Statement recorded u/s 161 CrPC – Can only be used to contradict witness – Cannot be used for corroboration of testimony of a witness.

Jamsingh v. State of M.P.
Reported in 2008 (1) MPHT 329

Held:

Having heard the learned counsel for parties and after perusing the entire record, this Court is of the view that solitary testimony of wife of the deceased Heerabai (PW-3) is not fully reliable because according to her FIR, appellant struck farsi blow twice and her version in Court is not fully corroborated by her FIR (Ex.P-7). The learned trial Court, in para 30 of the impugned judgment, held that statement of Heerabai is reliable and proved for causing two injuries on the head of deceased and not four injuries. The learned trial Court sought corroboration to the Court statement of Heerabai from FIR (Ex.P-7) and her case diary statement (Ex.D-1) vis-a-vis evidence of Dr. A.K. Shrivastava (PW.2).

This finding of learned trial Court does not appear to be correct because in Court Heerabai has specifically stated that appellant dealt four farsi blows from its sharp side and caused four injuries to deceased. Out of these four injuries, which two were caused by appellant is not clear from the finding of the learned trial Court. The learned trial Court has also erred in seeking corroboration to the statement of Heerabai given in Court by her case diary statement (Ex.D-1) recorded u/s.161 of the Cr.P.C. *This statement can only be used to contradict the witness and not for corroboration, as per provision u/s.162 of the Cr.P.C read with section. 145 of the Evidence Act.* This is the undisputed established legal position by the plethora of Apex Court judgments as well as judgments of High Courts of the country. See *Satpal Vs. Delhi Administration [AIR 1976 SC 294], Jagdish Narain Vs. State of U.P [1996(8)SCC 199] and Onkar Namdeo Vs. Second Additional Sessions Judge, Buldana [1996 (7)SCC 498].*

This is true that eye witness/eye witnesses account can be relied upon if the same is found fully reliable and truthful even there is conflict with the medical evidence, but in the instant case, statement of Heerabai is not fully reliable and same is contradicted by her FIR. It is not clear that out of four injuries caused by hard and blunt object which two were caused by the appellant by the blunt side of the farsi. The learned trial Court having held that witness Heerabai has specifically stated that all the four injures were caused by sharp edge of the farsi without any solid and proper reasons, jumped into the conclusion in para 35 of the impugned judgment that appellant caused two injuries on the head by blunt side of the farsi. In the case of *Thaman Kumar v. State of Union Territory of Chandigarh, (2003) 6 SCC 380,* the Supreme Court has considered conflict between the medical evidence and eye witness/witnesses statements and observed as under:-

> "The conflict between oral testimony and medical evidence can be of varied dimensions and shapes. There may be a case where there is total absence of injuries which are normally caused by a particular weapon. There is another category where though the injuries found on the victim are of the type which are possible by the weapon of assault, but the size and dimension of the injuries do not exactly tally with the size and dimension of the weapon. The third category can be where the injuries found on the victim are such which are normally caused by the weapon of assault but they are not found on that portion of the body where they are deposed to have been caused by the eye witnesses. The same kind of inference cannot be drawn in the three categories of apparent conflict in oral and medical evidence enumerated above. In the first category it may legitimately be inferred that the oral evidence regarding assault having been made from a particular weapon is not truthful. However, in the second and third categories no

such inference can straight away by drawn. The manner and method of assault, the position of the victim, the resistance offered by him, the opportunity available to the witnesses to see the occurrence like their distance, presence of light and many other similar factors will have to be taken into consideration in judging the reliability of ocular testimony".

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157. INDIAN PENAL CODE, 1860 – Section 304-A

WORDS & PHRASES:

(i) Bus was hit by train at railway crossing resulting in death and injuries to passengers – Charges were framed u/s 302 IPC alternatively u/ss 304, 325 and 323 IPC – Revision filed by the accused questioning the charge dismissed by High Court – Supreme Court set aside the order – Held, S. 302 IPC has no application and at the most it may be S. 304-A of IPC

(ii) 'Negligence', meaning of.

Naresh Giri v. State of M.P.

Judgment dated 12.11.2007 passed by the Supreme Court in Criminal Appeal No. 1530 of 2007 reported in (2008) 1 SCC 791

Held:

(i) Section 304-A carves out a specific offence where death is caused by doing a rash or negligent act and that act does not amount to culpable homicide under Section 299 or murder under Section 300. If a person willfully drives a motor vehicle into the midst of a crowd and thereby causes death to some person, it will not be a case of mere rash and negligent driving and the act will amount to culpable homicide. Doing an act with the intent to kill a person or knowledge that doing an act was likely to cause a person's death is culpable homicide. When the intent or knowledge is the direct motivating force of the act, Section 304A has to make room for the graver and more serious charge of culpable homicide. The provision of this section is not limited to rash or negligent driving. Any rash or negligent act whereby death of any person is caused becomes punishable. Two elements either of which or both of which may be proved to establish the guilt of an accused are rashness/negligence, a person may cause death by a rash or negligent act which may have nothing to do with driving at all. Negligence and rashness to be punishable in terms of Section 304-A must be attributable to a state of mind wherein the criminality arises because of no error in judgment but of a deliberation in the mind risking the crime as well as the life of the person who may lose his life as a result of the crime. Section 304-A discloses that criminality may be that apart from any mens rea, there may be no motive or intention still a person may venture or practice such rashness or negligence which may cause the death of other. The death so caused is not the determining factor.

(ii) What constitutes negligence has been analysed in Halsbury's Laws of England (4th Edition), Volume 34, paragraph 1 (para 3) as follows:

> *"1. General principles of the law of negligence.*– Negligence is a specific tort and in any given circumstances is the failure to exercise that care which the circumstances demand. What amounts to negligence depends on the facts of each particular case. It may consist in omitting to do something which ought to be done or in doing something which ought to be done either in a different manner or not at all. Where there is no duty to exercise care, negligence in the popular sense has no legal consequence. Where there is a duty to exercise care, reasonable care must be taken to avoid acts or omissions which can be reasonably foreseen to be likely to cause physical injury to persons or property. The degree of care required in the particular case depends on the surrounding circumstances, and may vary according to the amount of the risk to be encountered and to the magnitude of the prospective injury. The duty of care is owed only to those persons who are in the area of foreseeable danger, the fact that the act of the defendant violated his duty of care to a third person does not enable the plaintiff who is also injured by the same act to claim unless he is also within the area of foreseeable danger. The same act or omission may in accordingly some circumstances involve liability as being negligent, although in other circumstances it will not do so. The material considerations are the absence of care which is on the part of the defendant owed to the plaintiff in the circumstances of the case and damage suffered by the plaintiff, together with a demonstrable relation of cause and effect between the two."

In this context the following passage from *Kenny's Outlines of Criminal Law,* 19th Edition (1966) at page 38 may be usefully noted:

> "Yet a man may bring about an event without having adverted to it at all, he may not have foreseen that his actions would have this consequence and it will come to him as a surprise. The event may be harmless or harmful, if harmful, the question rises whether there is legal liability for it. In tort, (at common law) this is decided by considering whether or not a reasonable man in the same circumstances would have realised the prospect of harm and would have stopped or changed his course so as to avoid it. If a reasonable man would not, then there is no liability and the harm must lie where it falls. But if the reasonable man would

have avoided the harm then there is liability and the perpetrator of the harm is said to be guilty of negligence. The word 'negligence' denotes, and should be used only to denote, such blameworthy inadvertence, and the man who through his negligence has brought harm upon another is under a legal obligation to make reparation for it to the victim of the injury who may sue him in tort for damages. But it should now be recognized that at common law there is no criminal liability for harm thus caused by inadvertence. This has been laid down authoritatively for manslaughter again and again. There are only two states of mind which constitute mens rea and they are *intention* and *recklessness*. The difference between recklessness and negligence is the difference between advertence and inadvertence: they are opposed and it is a logical fallacy to suggest that recklessness is a degree of negligence. The common habit of lawyers to qualify the word "negligence" with some moral epithet such as 'wicked' ,'gross' or 'culpable' has been most unfortunate since it has inevitably led to great confusion of thought and of principle. It is equally misleading to speak of criminal negligence since this is merely to use an expression in order to explain itself."

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158. INDIAN PENAL CODE, 1860 – Section 304-B
EVIDENCE ACT, 1872 – Section 113-B
Basic ingredients of S. 304-B IPC explained.
Biswajit Halder alias Babu Halder and others v. State of W.B.
Judgment dated 19.03.2007 passed by the Supreme Court in Criminal Appeal No. 371 of 2007 reported in (2008) 1 SCC 202

Held:

The basic ingredients to attract the provisions of Section 304B are as follows:

(1) The death of a woman should be caused by burns or fatal injury or otherwise than under normal circumstances;

(2) Such death should have occurred within seven years of her marriage;

(3) She must have been subjected to cruelty or harassment by her husband or any relative of her husband; and

(4) Such cruelty or harassment should be for or in connection with demand for dowry.

Alongside insertion of Section 304-B in IPC, the legistature also introduced Section 113-B of the Evidence Act, which lays down when the question as to

whether a pesson has committed the dowry death of a woman and it is shown that soon before her death such woman had been subjected by such person to cruelty or harassment for, or in connection with, any demond for dowry, the Court shall presume that such person had caused the dowry death.

If Section 304-B IPC is read together with Section 113B of the Evidence Act, a comprehensive picture emerges that if a married woman dies in an unnatural circumstances at her matrimonial home within 7 years from her marriage and there are allegations of cruelty or harassment upon such married woman for or in connection with demand of dowry by the husband or relatives of the husband, the case would squarely come under "dowry death" and there shall be a presumption against the husband and the relatives.

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159. INDIAN PENAL CODE, 1860 – Section 366-A

S. 366-A, ingredients of.

Iqbal v. State of Kerala

Reported in 2008 CrLJ 436 (SC)

Held:

The residual question is of applicability of Section 366-A IPC. In order to attract Section 366A IPC, essential ingredients are (1) that the accused induced a girl; (2) that the person induced was a girl under the age of eighteen years; (3) that the accused has induced her with intent that she may be or knowing that it is likely that she will be forced or seduced to illicit intercourse; (4) such intercourse must be with a person other than the accused; (5) that the inducement caused the girl to go from any place or to do any act.

In the instant case, the admitted case of the prosecution is that girl had left in the company of the accused of her own will and that she was not forced to sexual intercourse with any person other than the accused. The admitted case is that she had sexual intercourse with the accused for which, considering her age, conviction under Section 376 IPC has been maintained. Since the essential ingredient that the intercourse must be with a person other than the accused has not been established, Section 366A has no application.

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***160. INDIAN PENAL CODE, 1860 – Section 376**

If the statement of prosecutrix is reliable and of sterling worth, then a conviction for the offence of rape can be sustained solely on her testimony without any corroboration.

Prosecutrix was returning home – On the way, accused threw her on the ground and committed sexual intercourse – Soon after the incident, she narrated it to her mother and father – FIR was lodged promptly – Testimony of prosecutrix corroborated by her mother and father – Case not established to be either of consent or of false implication – Accused convicted by the Trial Court for offence of rape

punishable u/s 376 IPC – Held, no interference called for – Accused rightly convicted.

Jandel Singh v. State of M.P.

Reported in 2008 (1) MPHT 133

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***161. INDIAN PENAL CODE, 1860 – Section 379**
ELECTRICITY ACT, 1910 – Sections 39 & 50
Person aggrieved – Junior Engineer, who was an officer-in-charge, was competent to file a complaint of theft of electricity committed in the concerned area – As an aggrieved person, prosecution could be initiated at his instance – Conviction of appellant u/s 379 IPC r/w/s 39 of Electricity Act does not suffer from any legal or factual infirmity – Conviction maintained – However, being a very old case sentence reduced to the period already undergone.

Kaluram. v. State of M.P.

Reported in I.L.R (2008) M.P. 17

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162. INSURANCE ACT, 1938 – Section 45
Insurance Policy may be repudiated within two years on the ground of misrepresentation or false statement – After expiry of two years, policy cannot be questioned on the ground of suppression of material fact – Contracts of Insurance, nature of – Law explained.

P.C. Chacko and another v. Chairman, Life Insurance Corporation of India and others

Judgment dated 20.11.2007 passed by the Supreme Court in Civil Appeal No. 5322 of 2007 reported in (2008) 1 SCC 321

Held:

Section 45 of the Insurance Act reads as under:

> *"45. Policy not to be called in question on ground of mis-statement after two years,* – No policy of life insurance effected before the commencement of this Act shall after the expiry of two years from the date of commencement of this Act and no policy of life insurance effected after the coming into force of this Act shall after the expiry of two years from the date on which it was effected, be called in question by an insurer on the ground that a statement made in the proposal for insurance or in any report of a medical officer, or referee, or friend of the insured, or in any other document leading to the issue of the policy, was inaccurate or false, unless the insurer shows that such statement was on a material matter or suppressed facts which it was material to disclose and that it was fraudulently made by the policy-

holder and that the policy-holder knew at the time of making it that the statement was false or that it suppressed facts which it was material to disclose:

Provided that nothing in this section shall prevent the insurer from calling for proof of age at any time if he is entitled to do so, and no policy shall be deemed to be called in question merely because the terms of the policy are adjusted on subsequent proof that the age of the life insured was incorrectly stated in the proposal."

Section 45 postulates repudiation of such policy within a period of two years. By reason of the aforementioned provision, a period of limitation of two years had, thus, been specified and on the expiry thereof the policy was not capable of being called in question, inter alia, on the ground that certain facts have been suppressed which were material to disclose or that it was fraudulently been made by the policy-holder or that the policy-holder knew at the time of making it that the statement was false. Statute, therefore, itself provides for the limitation for valid repudiation of an insurance policy. It takes into account the social security aspect of the matter.

There are three conditions for application of second part of Section 45 of the Insurance Act which are:

"(a) the statement must be on a material matter or must suppress facts which it was material to disclose;

(b) the suppression must be fraudulently made by the policy-holder; and

(c) the policy-holder must have known at the time of making the statement that it was false or that it suppressed facts which it was material to disclose." (See *Mithoolal Nayak v. LIC of India, AIR 1962 SC 814,* AIR p. 819, para 8.)

In *Life Insurance Corporation of India v. Asha Goel (Smt), (2001) 2 SCC 160,* it was held: (SCC p. 168, para 12)

"12. .....The contracts of insurance including the contract of life assurance are contracts uberrima fides and every fact of material (sic material fact) must be disclosed, otherwise, there is good ground for rescission of the contract. The duty to disclose material facts continues right up to the conclusion of the contract and also implies any material alteration in the character of the risk which may take place between the proposal and its acceptance. If there are any misstatements or suppression of material facts, the policy can be called into question. For determination of the question whether there has been suppression of any material facts it may be necessary to also examine whether

the suppression relates to a fact which is in the exclusive knowledge of the person intending to take the policy and it could not be ascertained by reasonable enquiry by a prudent person."

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163. LAND ACQUISITION ACT, 1894 – Section 23

Where acquired land is large in area, generally rate of small plots is not a safe criteria to determine compensation – However, in the absence of other material, after necessary deduction/adjustment, it may be made the basis of adjudication – Fixation of market value with reference to comparable sales – Principles explained.

Deduction towards development charges – Normally, it is 1/3rd of amount of compensation – It may vary on the ground of its nature, location, expenditure involved etc. – Merely the fact that adjacent area is developed does not mean that every land situated in the area is also developed.

Lucknow Development Authority v. Krishna Gopal Lahori and ors.
Reported in AIR 2008 SC 399

Held:

Where large area is the subject-matter of acquisition, rate at which small plots are sold cannot be said to be a safe criteria. Reference in this context may be made to three decisions of this Court in The Collector of *Lakhimpur v. Bhuban Chandra Dutta, AIR 1971 SC 2015; Prithvi Raj Taneja (dead) by LRs. v. The State of Madhya Pradesh and Anr., AIR 1977 SC 1560 and Smt. Kausalya Devi Bogra and Ors. etc. v. Land Acquisition Officer, Aurangabad and Anr., AIR 1984 SC 892.*

It cannot, however, be laid down as an absolute proposition that the rates fixed for the small plots cannot be the basis for fixation of the rate. For example, where there is no other material it may in appropriate cases be open to the adjudicating Court to make comparison of the prices paid for small plots of land. However, in such cases necessary deductions/adjustments have to be made while determining the prices.

In the case of *Suresh Kumar v. Town Improvement Trust, Bhopal 1989 (1) SVLR (C) 399* in a case under the Madhya Pradesh Town Improvement Trust Act, 1960 this Court held that the rates paid for small parcels of land do not provide a useful guide for determining the market value of the land acquired. While determining the market value of the land acquired it has to be correctly determined and paid so that there is neither unjust enrichment on the part of the acquirer nor undue deprivation on the part of the owner. It is an accepted principle as laid down in the case of *Vyricherla Narayana Gajapatiraju v. Revenue Divisional Officer, Vizagapatam AIR 1939 P.C. 98* that the compensation must be determined by reference to the price which a willing vendor might reasonably expect to receive from the willing purchaser. While considering the market value,

disinclination of the vendor to part with his land, and the urgent necessity of the purchaser to buy it must alike be disregarded, neither must be considered as acting under any compulsion. The value of the land is not to be estimated as its value to the purchaser. But similarly this does not mean that the fact that some particular purchaser might desire the land more than others is to be disregarded. The wish of a particular purchaser, though not his compulsion may always be taken into consideration for what it is worth. Section 23 of the Act enumerates the matters to be considered in determining compensation. The first criterion to be taken into consideration is the market value of the land on the date of the publication of the notification under Section 4(1). Similarly, Section 24 of the Act enumerates the matters which the Court shall not take into consideration in determining the compensation. A safeguard is provided in Section 25 of the Act that the amount of compensation to be awarded by the Court shall not be less than the amount awarded by the Collector under Section 11. Value of the potentiality is to be determined on such materials as are available and without indulgence in any fits of imagination. Impracticability of determining the potential value is writ large in almost all cases. There is bound to be some amount of guess work involved while determining the potentiality. It can be broadly stated that the element of speculation is reduced to minimum if the underlying principles of fixation of market value with reference to comparable sales are made:

(i) when sale is within a reasonable time of the date of notification under Section 4(1);

(ii) it should be a bona fide transaction;

(iii) it should be of the land acquired or of the land adjacent to the land acquired; and

(iv) it should possess similar advantages.

It is only when these factors are present, it can merit a consideration as a comparable case (See *The Special Land Acquisition Officer, Bangalore v. T. Adinarayan Setty, AIR 1959 SC 429*).

These aspects have been highlighted in *Ravinder Narain and Anr. v. Union of India, (2003) 4 SCC 481.*

The deduction to be made towards development charges cannot be proved in any strait-jacket formula. It would depend upon the facts of each case.

It is well settled that in respect of agricultural land or undeveloped land which has potential value for housing or commercial purposes, normally 1/3rd amount of compensation has to be deducted out of the amount of compensation payable on the acquired land subject to certain variations depending on its nature, location, extent of expenditure involved for development and the area required for roads and other civic amenities to develop the land so as to make the plots for residential or commercial purposes. A land may be plain or uneven, the soil of the land may be soft or hard bearing on the foundation for the purpose of making construction; may be the land is situated in the midst of a developed

area all around but that land may have a hillock or may be low-lying or may be having deep ditches. So the amount of expenses that may be incurred in developing the area also varies. A claimant who claims that his land is fully developed and nothing more is required to be done for developmental purposes, must show on the basis of evidence that it is such a land and it is so located. In the absence of such evidence, merely saying that the area adjoining his land is a developed area, is not enough particularly when the extent of the acquired land is large and even if a small portion of the land is abutting the main road in the developed area, does not give the land the character of a developed area. In 84 acres of land acquired even if one portion on one side abuts the main road, the remaining large area where planned development is required, needs laying of internal roads, drainage, sewer, water, electricity lines, providing civil amenities etc. However, in cases of some land where there are certain advantages by virtue of the developed area around, it may help in reducing the percentage of cut to be applied, as the developmental charges required may be less on that account. There may be various factual factors which may have to be taken into consideration while applying the cut in payment of compensation towards developmental charges, maybe in some cases it is more than 1/3rd and in some cases less than 1/3rd. It must be remembered that there is difference between a developed area and an area having potential value, which is yet to be developed. The fact that an area is developed or adjacent to a developed area will not ipso facto make every land situated in the area also developed to be valued as a building site or plot, particularly, when vast tracts are acquired, as in this case, for development purpose.

The aforesaid aspects were highlighted in *Kasturi and Ors. v. State of Haryana, (2003) 1 SCC 354.*

A reference may also be made to what has been stated in *Kiran Tandon v. Allahabad Development Authority and Anr., (2004) 10 SCC 745, State of West Bengal v. Kedarnath Rajgarhia Charitable Trust Estate, (2004) 12 SCC 425* and *V. Hanumantha Reddy (dead) by LRs. v. Land Acquisition Officer & Mandal R. Officer, (2003) 12 SCC 642.*

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***164. LAND REVENUE CODE, 1959 (M.P.) – Section 250**

(i) Mutation order does not confer or decide any title or right – Such order does not operate as res judicata in a civil suit and jurisdiction of civil court in that regard is not barred by S. 250 r/w/s 257 of the Code.

(ii) Plea of estoppel is a rule of evidence and it does not create interest in property.

Bhawarlal v. Kasturibai and others

Reported in 2008 (1) MPLJ 216

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*165. **LIMITATION ACT, 1963 – Section 5**
CIVIL PROCEDURE CODE, 1908 – Order 41 Rule 30
Appellate Court has no jurisdiction to decide appeal on merit without condoning the delay in filing the appeal.
Dr. V.K. Verma v Dawoodi Bohra Masjid Committee thr. the Secretary
Reported in 2008 (1) MPHT 416

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166. **LIMITATION ACT, 1963 – Article 65**
ADVERSE POSSESSION:
Mere long possession for period of more than 12 years is not sufficient – *Animus Possidendi* must be shown to exist at the commencement of possession from where limitation is to be counted.
Annakili v. Vedanayagam & Ors.
Reported in AIR 2008 SC 346

Held:

Claim by adverse possession has two elements : (1) the possession of the defendant should become adverse to the plaintiff; and (2) the defendant must continue to remain in possession for a period of 12 years thereafter. *Animus possidendi* as is well known is a requisite ingredient of adverse possession. It is now a well settled principle of law that mere possession of the land would not ripen into possessory title for the said purpose. Possessor must have animus possidendi and hold the land adverse to the title of the true owner. For the said purpose, not only animus possidendi must be shown to exist, but the same must be shown to exist at the commencement of the possession. He must continue in said capacity for the period prescribed under the Limitation Act. Mere long possession, it is trite, for a period of more than 12 years without anything more do not ripen into a title.

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167. **LIMITATION ACT, 1963 – Article 136**
Execution of decree – As soon as decree is passed it becomes enforceable – Review filed against judgment – Doctrine of merger will have no application if review is dismissed – However, if review is allowed wholly or in part, application for execution of the decree can be filed in terms of the modified decree – If operation of the decree is not stayed at any stage, an execution application must be filed within 12 years.
Manohar and others v. Jaipalsingh and others
Judgment dated 20.11.2007 passed by the Supreme Court in Civil Appeal No. 5323 of 2007 reported in (2008) 1 SCC 520

Held:

It is one thing to say that the respondent was entitled to file an application

for review in terms of Section 114 read with Order 47 Rule 1 of the Code of Civil Procedure, but it is another thing to say that the decree passed in favour of the respondent merged with the order dismissing the review application. Matter might have been different, if the review application had been allowed either wholly or in part in terms whereof an application for execution of the decree could have been filed only in terms of the modified decree.

The decree of possession passed in favour of the respondent became enforceable immediately on its passing. An execution petition therefor was required to be filed within a period of 12 years.

In *W.B. Essential Commodities Supply Corporation v. Swadesh Agro Farming & Storage Pvt. Ltd., (1999) 8 SCC 315,* this Court opined;

> (1) "7. ..... A decree or order is said to be enforceable when it is executable. For a decree to be executable, it must be in existence. A decree would be deemed to come into existence immediately on the pronouncement of the judgment. But it is a fact of which judicial notice may be taken of that drawing up and signing of the decree takes some time after the pronouncement of the judgment; the Code of Civil Procedure itself enjoins that the decree shall be drawn up expeditiously and in any case within 15 days from the date of the judgment. If the decree were to bear the date when it is actually drawn up and signed then that date will be incompatible with the date of the judgment. This incongruity is taken care of by Order 20 Rule 7 CPC which, inter alia, provides that the decree shall bear the date and the day on which the judgment was pronounced." (SCC p. 321, para 7)
>
> (2) "9. Rule 6A enjoins that the last paragraph of the judgment shall state in precise terms the relief which has been granted by such judgment. It has fixed the outer time-limit of 15 days from the date of pronouncement of the judgment within which the decree must be drawn up. In the event of the decree not so drawn up, clause (a) of sub-rule (2) of Rule 6-A enables a party to make an appeal under Rule 1 of Order 41 CPC without filing a copy of the decree appealed against and for that purpose the last paragraph of the judgment shall be treated as a decree. For the purpose of execution also, provision is made in Clause (b) of the said sub-rule which says that so long as the decree is not drawn up, the last paragraph of the judgment shall be deemed to be a decree. Clause (b) has thus enabled the party interested in executing the decree before it is drawn up to apply for a copy of the last paragraph only,

without being required to apply for a copy of the whole of the judgment. It further lays down that the last paragraph of the judgment shall cease to have the effect of the decree for purposes of execution or for any other purposes when the decree has been drawn up." (SCC pp. 321-22, para 9)

(3) "10 It follows that the decree became enforceable the moment the judgment is delivered and merely because there will be delay in drawing up of the decree, it cannot be said that the decree is not enforceable till it is prepared. This is so because an enforceable decree in one form or the other is available to a decree-holder from the date of the judgment till the expiry of the period of limitation under Article 136 of the Limitation Act." (SCC p. 322, para 10)

(See also *Hasham Abbas Sayyad v. Usman Abbas Sayyad and Ors., (2007) 2 SCC 355.*)

In *Raghunath Rai Bareja v. Punjab National Bank, (2007) 2 SCC 230,* this Court opined: (SCC p. 237, para 9)

"9. Under Article 136 to the Schedule of the Limitation Act, 1963 the period for applying for execution of any decree is 12 years from the date when the decree becomes enforceable. Since in the present case the final decree was passed and became enforceable on 15.1.1987, the period of limitation for filing an execution application expired on 15.1.1999"

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***168. MOTOR VEHICLES ACT, 1988 – Sections 140 & 149 (2)**

Enquiry u/s 140 of the Act, scope of – Dispute of liability on the basis of breach of policy condition is foreign to the scope of enquiry u/s 140 of the Act – No fault liability is a statutory liability and defence u/s 149 (2) of the Act is not available to Insurance Company at the stage of interim compensation provided that the vehicle is insured with the Insurance Company.

Oriental Insurance Co. Ltd. v. Kantidevi and others

Reported in 2008 (1) MPLJ 633

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***169. MOTOR VEHICLES ACT, 1988 – Section 147**

Liability of insurer – Insurer has no liability in respect of passengers travelling in goods carriage.

Smt. Thokchom Ongoi Sangeeta & Anr. v. Oriental Insurance Co. Ltd. & Ors.

Reported in AIR 2008 SC 245

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170. MOTOR VEHICLES ACT, 1988 – Section 147

Goods carriage, liability in respect of owner of goods or his authorized representative, scope of – It depends upon the mode of travel and number of persons – 'Owner of goods' means the person travelling in cabin and not with the goods.

National Insurance Co. Ltd. v. Cholleti Bharatamma and others

Judgment dated 12.10.2007 passed by the Supreme Court in Civil Appeal No. 4845 of 2007 reported in (2008) 1 SCC 423

Held:

The Act does not contemplate that a goods carriage shall carry a large number of passengers with a small percentage of goods as the insurance policy considerably covers the death or injuries either of the owner of the goods or his authorized representative. The provisions thereof do not enjoin any statutory liability on the owner of a vehicle to get his vehicle insured for any passenger travelling in a goods vehicle, and the insurers would not be liable therefor. The words "injury to any person" in Section 147 (1) (b) would only mean a third party and not a passenger travelling in a goods carriage whether gratuitous or otherwise.

It is now well settled that the owner of the goods means only the person who travels in the cabin of the vehicle.

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171. MOTOR VEHICLES ACT, 1988 – Sections 147, 149, 2 (14), 2 (47), 3, 5, 10 & 15

Transport vehicle met with an accident – Driver holding licence to ply only light motor vehicle – Insurer's liability – Held, Insurance Company is not liable to pay compensation – *Ashok Gangadhar Maratha v. Oriental Insurance Company, (1999) 6 SCC 62,* distinguished – *National Insurance Co. v. Kusum Rai, (2006) 4 SCC 250,* upheld.

New India Assurance Company Limited v. Prabhu Lal

Judgment dated 30.11.2007 passed by the Supreme Court in Civil Appeal No. 5539 of 2007 reported in (2008) 1 SCC 696

Held:

In our judgment, *Ashok Gangadhar Maratha v. Oriental Insurance Co. Ltd., (1999) 6 SCC 620* did not lay down that the driver holding licence to drive a Light Motor Vehicle need not have an endorsement to drive transport vehicle and yet he can drive such vehicle. It was on the peculiar facts of the case, as the Insurance Company neither pleaded nor proved that the vehicle was transport vehicle by placing on record the permit issued by the Transport Authority that the Insurance Company was held liable.

The matter can be looked from another angle also. Section 14 referred to above, provides for currency of licence to drive motor vehicles. Sub-section (2) thereof expressly enacts that:

"14. (2) A driving licence issued or renewed under the Act shall,

(a) in the case of a licence to drive a transport vehicle, be effective for a period of three years:

★ ★ ★

It also states that

"14 (2) (b) in the case of any other licence,—

(i) if the person obtaining the licence, either originally or on renewal thereof, had not attained the age of fifty years on the date of issue or, as the case may be, renewal thereof,—

(A) be effective for a period of twenty years from the date of such issue or renewal;"

It is thus clear that if a licence is issued or renewed in respect of a transport vehicle, it can be done only for a period of three years. But, in case of any other vehicle, such issuance or renewal can be for twenty years provided the person in whose favour licence issued or renewed had not attained the age of 50 years. In the present case, the licence was renewed on November 17, 1995 upto November 16, 2015 i.e. for a period of twenty years. From this fact also, it is clear that the licence was in respect of 'a motor vehicle other than the transport vehicle'.

The learned Counsel for the Insurance Company also referred to a decision of this Court in *National Insurance Company v. Kusum Rai, (2006) 4 SCC 250* wherein this Court held that if the vehicle is a taxi which is being driven by a driver holding licence for driving Light Motor Vehicle only without there being any endorsement for driving transport vehicle, the Insurance Company cannot be ordered to pay compensation.

We may also refer to a decision of the High Court of Himachal Pradesh in *New India Assurance Co. Ltd., v. Suraj Prakash, AIR 2000 HP 91.* There the vehicle involved in an accident was taxi, a public service vehicle. But the licence issued in favour of the driver was to ply light motor vehicle and there was no endorsement to drive transport vehicle. It was, therefore, held by the High Court that the Insurance Company cannot be saddled with the liability to pay compensation to the claimant. There too, the claimant placed reliance on *Ashok Gangadhar* (supra). The Court, however, distinguished it observing that *[Suraj Prakash case* (supra) AIR p. 95, para 11]

> "there was neither any evidence therein nor was there any claim for insurer that the vehicle concerned therein was having a permit for goods carriage or that it had a permit or authorization for plying the vehicle as a transport vehicle".

In our considered view, the High Court was right in taking the above view.

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172. MOTOR VEHICLES ACT, 1988 – Sections 147, 166 & 173

Tractor was registered in the name of father of the deceased daughter – Tractor at the time of incident was stationed with the running condition of its engine negligently by its driver – Resultantly, it proceeded and ran over the deceased daughter of owner/insured – On the death of the daughter, her mother had a right to claim compensation against owner/insured – Subsequently, wife of the owner/insured also died – Held, the owner of the vehicle is entitled to recover compensation from Insurance Company for the accident as one of the legal representatives of the deceased and on account of death of his wife as sole representative of the deceased, though in the absence of additional premium, he may himself be incompetent to recover compensation as an owner.

The New India Assurance Co. Ltd. v. Nandram Prajapati and another

Reported in 2008 (1) MPHT 361

Held:

It is undisputed fact on record that in the alleged road accident the daughter of the respondent No.1 died and subsequent to it, his wife, the mother of the deceased also died. Before giving any finding, I would like to mention here that on the death of the daughter, her mother had a right to file the claim petition against the appellant, respondent No.2 the driver and respondent No.1 the registered owner of the tractor. On demise of the mother of the deceased, the respondent No.1 being her husband, inherited all rights as her legal representative and was also having the right to file the claim as one of the legal representatives of the deceased as the deceased was the third party for which the policy was issued by the appellant. In such circumstances, the respondent No.1 had three different capacities; (i) the registered owner of the alleged vehicle; (ii) one of the legal representatives of the deceased Priyanka; and (iii) the sole legal representative of his wife who died due to shock of the death of her daughter deceased Priyanka. Thus, in any case, in the aforesaid (ii) and (iii) capacities, respondent No. 1 had the right to file the claim and get compensation regarding death of his daughter. Although the Tribunal has not examined the case deeply with the aforesaid approach but the ultimate approach of Tribunal in awarding the claim appears to be correct.

I deem fit to mention here that if any injury was sustained by No.1 himself in the alleged accident and his personal risk was not covered by the insurer in the lack of additional premium, in such situation the claim of respondent No.1 could not be awarded but his claim could not be defeated when the same is filed by the respondent No.1 as one of the legal representatives of deceased Priyanka and also the sole legal representative of the mother of the deceased Priyanka and not as registered owner of the tractor. It is undisputed fact that the deceased was the third party for whom the vehicle was duly insured and in view of settled

proposition that the legal representatives and dependent of the deceased of vehicular accident are entitled for the award of compensation. In such premises the claim of respondent No.1 was rightly awarded by the Tribunal.

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***173. MOTOR VEHICLES ACT, 1988 – Section 147 (2)**

Horse died in vehicular accident – Tribunal awarded cost of horse as Rs. 35,000/- plus Rs. 10,000/- for loss of its future income – Insurer challenged the award – Held, no extra premium for covering additional risk of the property of third party was paid – Insurer's liability limited upto Rs. 6,000/- as per provision of S. 147 (2).

New India Insurance Co. Ltd. v. Santosh

Reported in I.L.R. (2008) M.P. 322

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***174. MOTOR VEHICLES ACT, 1988 – Sections 147 & 166**

Liability – Van belongs to a partnership firm – Being a partner of that firm, driver (deceased) was also owner of ill-fated van – Risk of owner not insured as no premium paid to insurer in this respect – Held, Insurer not liable to pay compensation to legal heir of deceased/driver (owner).

K.N. Agrawal v. M.R. Portfolio Services

Reported in I.L.R. (2008) M.P. 16

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***175. MOTOR VEHICLES ACT, 1988 – Section 166**

Composite negligence – In case of head-on collusion between two vehicles on middle of road, doctrine of *res ipsa loquitor* attracted – Case of composite negligence proved.

Ratna Parashar v. Kusumlata

Reported in I.L.R. (2008) M.P. 26

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176. MOTOR VEHICLES ACT, 1988 – Sections 166 & 2 (30)

Liability to pay compensation by the owner and insurer – Motor vehicle was requisitioned under statute by the statutory authority (for election purpose) – Motor vehicle met with an accident during the period of requisition – Held, State, and not the registered owner and insurer, is liable to pay compensation.

National Insurance Co. Ltd. v. Deepa Devi and others

Judgment dated 11.12.2007 passed by the Supreme Court in Civil Appeal No. 5796 of 2007 reported in (2008) 1 SCC 414

Held:

Parliament either under the 1939 Act or the 1988 Act did not take into consideration a situation of this nature. No doubt, Respondent Nos. 3 and 4 continued to be the registered owner of the vehicle despite the fact that the same was requisitioned by the District Magistrate in exercise of its power

conferred upon it under the Representation of People Act. A vehicle is requisitioned by a statutory authority, pursuant to the provisions contained in a statute. The owner of the vehicle cannot refuse to abide by the order of requisition of the vehicle by the Deputy Commissioner. While the vehicle remains under requisition, the owner does not exercise any control thereover. The driver may still be the employee of the owner of the vehicle but he has to drive it as per the direction of the officer of the State, who is put in-charge thereof. Save and except for legal ownership, for all intent and purport, the registered owner of the vehicle loses entire control thereover. He has no say as to whether the vehicle should be driven at a given point of time or not. He cannot ask the driver not to drive a vehicle on a bad road. He or the driver could not possibly say that the vehicle would not be driven in the night. The purpose of requisition is to use the vehicle. For the period the vehicle remains under the control of the State and/ or its officers, the owner is only entitled to payment of compensation therefor in terms of the Act but he cannot not exercise any control thereupon. In a situation of this nature, this Court must proceed on the presumption that the Parliament while enacting the 1988 Act did not envisage such a situation. If in a given situation, the statutory definitions contained in the 1988 Act cannot be given effect to in letter and spirit, the same should be understood from the common sense point of view.

We may also notice at this stage certain judgments of some High Courts.

In *The National Insurance Co. Ltd. v. Durdadahya Kumar Samal and Ors. (1988) 2 TAC 25* where the vehicle was requisitioned by the Collector for election duty, the High Court of Orissa held:

> "In a vehicle requisitioned, the driver remains under the control of the Collector and by such driving the vehicle he can be accepted to have been employed by the Collector. Thus, the Collector would be vicariously liable for the act of the driver in the present case."

[See also *New India Assurance Co. Ltd. v. S. Ramulamma and Ors. 1989 ACJ 596 (AP)*]

In *Chief Officer, Bhavnagar Municipality and Anr. v. Bachubhai Arjanbhai, AIR 1996 Guj 51* the High Court of Gujarat held: (AIR p. 54, para 7)

> "7. The facts on record clearly indicate that the vehicle in question which belonged to the State of Gujarat was entrusted to the Municipality for distribution of water to the citizens. It was implicit in allowing the vehicle being used for such purpose that the State of Gujarat which owned the vehicle also caused or allowed any driver of the Municipality who was engaged in the work of distribution of water to the citizens, to use motor vehicle for the purpose. Therefore, when the vehicle was driven by the driver of the Municipality

and the accident resulted due to his negligence, the insurer of the vehicle became liable to pay the compensation under the provisions of the Act. It is, therefore, held that the State, as the owner of the vehicle and the respondent Insurance Company as its insurer were also liable to pay the compensation awarded by the Tribunal."

We, therefore, are of the opinion that the State shall be liable to pay the amount of compensation to the claimants and not the registered owner of the vehicle and consequently the appellant herein.

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***177. MOTOR VEHICLES ACT, 1988 – Section 166**

Bread winner of the family died in a motor accident – His handicapped brother was dependant on him for living – Held, the Motor Vehicles Act is a beneficiary piece of legislation enacted for granting compensation to family members of a person who dies in a motor accident – Compensation is awarded to the claimants to meet the hardship which falls on the family due to death of the earning member or on whom the family was dependant – Further held, brother of the deceased is a legal representative within the meaning of S. 166 (1) (c) of the Act as the legislative intent for enacting the Act was only to grant compensation and benefit to a person like claimant brother.

Amna Bi and another v. Royal Transport Service and others

Reported in 2008 (1) MPLJ 334

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178. MOTOR VEHICLES ACT, 1988 – Section 166

WORDS & PHRASES:

(i) 'Public place', definition of – It is to be construed liberally, broadly and pragmatically with a view to advance course of justice and not to defeat the same.

(ii) Third party risk, scope of – Vehicle was duly insured and apart from normal premium, extra premium for the liability of the owner of the vehicle was also paid – Vehicle was parked at the courtyard of the house – While cleaning, the vehicle suddenly started and dashed against owner, who received severe injuries and died – The Claims Tribunal, treating the deceased owner as third party, awarded compensation – Held, the deceased vehicle owner was not driving the vehicle whereas he was standing on the street when he was hit by the vehicle – Therefore, the deceased falls within the definition of 'third party' – Insurance Company, held liable to indemnify the whole award.

Kusum Thagele and others v. National Insurance Co. Ltd. and another

Reported in 2007 (1) MPLJ 134

Held:

In the case of *Oriental Insurance Co. Ltd. VS. Jamna Bai and others, (2003) ACJ 127 (DB),* the Division Bench of M. P. High Court, Indore Bench has held "that the definition of 'public place' has to be construed liberally, broadly and pragmatically and not in a pedantic and narrow sense with a view to advance the cause of justice and not to defeat the same. Assuming, the vehicle may have crossed the 'public place' to some extent, and was getting to the field of Shivgiri Maharaj, it cannot be construed that the field of Shivgiri Maharaj was private place in the strict sense of the term. Generally, fields in villages may be owned and possessed by a particular landowner but that does not mean that no one can pass through the same unless there is a specific prohibition from doing so. We do not feel any difficulty in holding that the place where the accident took place was 'public place' and the contention to the contrary is liable to be rejected."

Here, in the present case, AW-I Ku. Rachna and AW-2 Balram Kushwaha in their evidence very specifically stated that at the time of accident, deceased Balmukund was standing on the street and, therefore, it cannot be said that accident did not occur at a public place. The street is a public place as defined under section 2 (34) of the Act.

Learned counsel for Insurance Company further submitted that deceased was owner of the insured vehicle and Insurance Company is not liable, for the death of owner and liability of the Insurance Company is to the extent of indemnification of the insured or injured person, a third person or in respect of damages of property. In respect of the said contention, he placed reliance on two decisions of the Apex Court in the case of *Dhanraj vs. New India Assurance Co. Ltd. and another, 2005 ACJ 1 (SC)* and Oriental *Insurance Co. Ltd. VS. Jhuma Saha and others, (2007) ACJ 818.*

In *Dhanraj (supra),* it is stated as follows :-

> "(8) Thus, an insurance policy covers the liability incurred by the insured in respect of death of or bodily injury to any person (including an owner of the goods or his authorised representative) carried in the vehicle or damage to any property of a third party caused by or arising out of the use of the vehicle. Section 147 does not require an insurance company to/, assume risk for death or bodily injury to the owner of the vehicle.
>
> (10) In this case, it has not been shown that the policy covered any risk for injury to the owner himself. We are unable to accept the contention that the premium of Rs. 4,989 paid under the heading 'own damage' is for covering liability towards personal injury. Under the heading 'own damage', the words 'premium on vehicle and non-electrical accessories' appear. It is thus clear that this premium is

towards damage to the vehicle and not for injury to the person of the owner. An owner of a vehicle can only claim provided a personal accident insurance has been taken out. In this case, there is no such insurance."

In the case of *Jhuma Saha* (supra), the Apex Court has held that section 147 of the Act does not require for an insurance company to assume risk to the owner of vehicle and additional premium was not paid in respect of the entire risk of death or bodily injury of the owner of the vehicle and, therefore, Insurance Company is not liable for the death of the owner of the insured.

The contract between the insured and insurer is that if any accident occurred out of the use of motor vehicle then only third party is entitled to get compensation. The insurer and insured is the first and second party and other than them, all are third parties.

In the present case, the deceased-vehicle owner was not driving the vehicle whereas he was standing on the street when he was hit by the offending vehicle driven by the respondent No.4. In the case of *Jamna Bai* (supra), the deceased was owner of the vehicle along with Apa and it was being driven by driver appointed by Apa and apart from the payment of normal premium towards damage of the vehicle, the deceased has paid Rs. 150 against 'own damages'. The Division Bench has held that the deceased falls within the definition of 'third party' and Insurance Company is liable to pay the compensation. This question again cropped up for consideration in the case of *National Insurance Co. Ltd vs. Kishore Kumar Lalwani and others, 2007(1) TAC 418.* In the case of Kishore Kumar Lalwani (supra), owner was travelling in offending vehicle as a passenger being a member of marriage party and not as an owner to supervise and control the bus. Since the owner was a passenger in a public service vehicle, may owned by him, which met with an accident at public place, therefore, the respondent No. 1 ought to have been treated as a third party as laid down by the Division Bench of this Court in the case of *Jamna Bai* (supra) and his claim petition cannot be dismissed on the ground that he was owner of the vehicle.

As per IMT-15, the Insurance Company had taken an additional premium of Rs. 700/- for third party risk cover and maximum liability of the company is in respect of anyone claim or are series of claim arising out of one event is Rs. 7,50,000/-.

That DW -1 Pushpak Joshi, who is administrative officer in the insurance company had admitted that as per policy (Ex.D/I), a premium of Rs.700/- has been taken for the third party and the amount of limits of liability has been stated as Rs. 7,50,000/-. It is also admitted that as per EX.D/2 Policy, personnel accident is also covered. In view of the clear admission made by him and as the deceased falls within the category of third party as held above, as per IMT 15, the limits of liability of Insurance Company is Rs. 7,50,000/- and, therefore, the appellant is liable to indemnify the whole award awarded by the Claims Tribunal. Accordingly, the appeal filed by the appellant-insurance company has no merit

and is liable to be dismissed and the appeal of the respondents No. 1 to 3 is liable to be allowed. The appellant is directed to pay the rest of the compensation amounting to Rs. 4,03,500/- with interest at the rate of 6% per annum from the date of filing of the claim petition till its realisation.

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*179. **N.D.P.S. Act, 1985 – Sections 42 & 50**

(i) **In search of a bag/brief case or any such article or container etc. which is being carried by accused, is not a search of a person – S. 50 of the Act would not apply in such a case.**

(ii) **Search and seizure in a public place made in the presence of a Gazetted Officer – S. 42 (2) of the Act would not be applicable in such a case.**

(iii) **Conscious possession, illustration of – 'S' was carrying two bus tickets of herself and the other passenger 'G' who was sitting in seat adjacent to her in the bus – A bag containing heroin was seized from the possession of 'G' – Held, association of 'S' and 'G' could be just of a chance – Merely because both the appellants were travelling in one public bus, sitting adjacent to each other and the tickets were seized from 'S', it would be very difficult to presume that she was knowing that 'G' was possessing heroin and kept the same with the consent and connivance of 'S'.**

Gopal Sharma and another v. Central Bureau of Narcotics, Indore
Reported in I.L.R. (2008) M.P. 131 = 2008 (2) MPHT 299

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*180. **NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 80**

M.P. Electricity Board executed promissory notes in favour of Private Limited Company for supply of transformers – Promissory notes did not specify rate of interest on the amounts due under promissory notes – Held, Board liable to pay interest @ 18% p.a.

M.P. State Electricity Board and another v. Anand Transformers Pvt. Ltd. and others
Reported in 2008 (1) MPLJ 193 (DB)

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181. **NEGOTIABLE INSTRUMENT ACT, 1881 – Section 138, Proviso (b)**

Dishonour of cheque – Notice of demand – Proviso (b) do not contemplate 15 days notice – Payment has to be made within 15 days from receipt of the notice – Complainant demanding payment within 10 days – Notice cannot be said to be invalid on this ground – Service of notice is imperative – Notice without specifying the amount due under the dishonoured cheque is not a valid notice – Complainant not demanded to pay the amount which was payable under the cheque

but the outstanding amounts of the bills – Notice do not subserve the requirement of law.

M/s Rahul Builders v M/s Arihant Fertilizers & Chemical & Anr.
Reported in 2008 CrLJ 452 (SC)

Held:

Section 138 does not speak of a 15 days' notice. It contemplates service of notice and payment of the amount of cheque within 15 days from the date of receipt thereof. When the statute prescribes for service of notice specifying a particular period, it should be expressly stated. In absence of any such stipulation, it is difficult to hold that 15 days' notice was thereby contemplated.

We have noticed hereinbefore the notice dated 31.10.2000 issued by the appellant to Respondent No. 1. An information thereby was only given that the cheque when presented was returned "unpassed" by the bank authorities on the plea that the account had been closed. It was averred that in such a situation the complainant was free to take any legal steps against the accused to get the amount of his pending bills. By the operative portion of the said notice, the respondent was called upon to remit the payment of his pending bills, otherwise suitable action shall be taken.

Service of a notice, it is trite, is imperative in character for maintaining a complaint. It creates a legal fiction. Operation of Section 138 of the Act is limited by the proviso. When the proviso applies, the main Section would not. Unless a notice is served in conformity with Proviso (b) appended to Section 138 of the Act, the complaint petition would not be maintainable. The Parliament while enacting the said provision consciously imposed certain conditions. One of the conditions was service of a notice making demand of the payment of the amount of cheque as is evident from the use of the phraseology "payment of the said amount of money". Such a notice has to be issued within a period of 30 days from the date of receipt of information from the bank in regard to the return of the cheque as unpaid. The statute envisages application of the penal provisions. A penal provision should be construed strictly; the condition precedent wherefor is service of notice. It is one thing to say that the demand may not only represent the unpaid amount under cheque but also other incidental expenses like costs and interests, but the same would not mean that the notice would be vague and capable of two interpretations. An omnibus notice without specifying as to what was the amount due under the dishonoured cheque would not subserve the requirement of law. Respondent No. 1 was not called upon to pay the amount which was payable under the cheque issued by it. The amount which it was called upon to pay was the outstanding amounts of bills, i.e., Rs. 8,72,409/-. The noticee was to respond to the said demand. Pursuant thereto, it was to offer the entire sum of Rs. 8,72,409/-. No demand was made upon it to pay the said sum of Rs. 1,00,000/- which was tendered to the complainant by cheque dated 30.04.2000. What was, therefore, demanded was the entire sum and not a part of it.

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*182. **NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 138 (c)**

Service of notice is one of the statutory requirements – Service of notice is part of cause of action – Notice is not only required to be dispatched, but its contents were also required to be communicated regarding dishonour of the cheques and calling upon him to make payment of the amount of cheques – Service of notice is sought to be served by private agent – Agent filing affidavit that premises of accused company were closed and deliberately shifted by its Director to avoid service of notice – No presumption is available u/s 27 of General Clauses Act – Affirmation of affidavit before competent authority is doubtful – Offence by company – Director of the company is vicariously liable – He could be prosecuted only if ingredients of S.141 are satisfied.

M/s Sarav Investment & Financial Consultants Pvt. Ltd. & Anr. v. Lloyds Register of Shipping Indian Office Staff Provident Fund & Anr.

Reported in 2008 CrLJ 377

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183. **REGISTRATION ACT, 1908 – Sections 17 & 49**

Whether a document which requires compulsory registration and had not been so registered and once has been held to be inadmissible on account of non-registration can be relied upon by a party for collateral purpose? Held, Yes.

Mangilal and others v. Dambarlal and another

Reported in 2008 (1) MPHT 68

Held:

The only question remains to be considered by this Court is as to whether once a document, which requires a compulsory registration and had not been so registered and has been held to be inadmissible on account of non-registration, whether such a document cannot be even relied upon by the party for collateral purposes.

In my considered view, the answer to the aforesaid question has to be in the affirmative. Even if, on account of non-registration of a document, the document is held to be inadmissible in evidence, the said document can always be looked into for collateral purposes by the Court and for the aforesaid collateral purposes, a party can always rely upon such an unregistered document. The provisions of Section 49 of the Act always come into play, once it is found that under Section 17 of the Act, a document requiring compulsory registration has not been registered and therefore, under Section 17(2) of the Act cannot be held to be admissible. This aspect of the matter has been clearly lost sight of by the learned trial Court. The learned trial Court has fallen into a clear error,

when it has observed that allowing the application filed by the plaintiffs would actually amount to review of the earlier order dated December 21, 2004.

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184. RENT CONTROL & EVICTION:

Bonafide requirement of landlord, whether survive after his death during the pendency of appeal ? Held, Yes.

Usha P. Kuvelkar and others v. Ravindra Subrai Dalvi

Judgment dated 20.11.2007 passed by the Supreme Court in Civil Appeal No. 5326 of 2007 reported in (2008) 1 SCC 330

Held:

It was tried to be argued by the learned Counsel for the respondent that since the landlord had died, the need had expired with him and that the question will have to be examined again regarding the bonafide personal need of the landlord. The question is no more res integra and is covered by the decision of this Court in *Shakuntala Bai v. Narayan Das, (2004) 5 SCC 772.* This Court has observed: (SCC p. 780, para 11)

> "11. ...the bonafide need of the landlord has to be examined as on the date of institution of the proceedings and if a decree for eviction is passed, the death of the landlord during the pendency of the appeal preferred by the tenant will make no difference as his heirs are fully entitled to defend the estate."

In the same decision a contrary note expressed by this Court in *P.V. Papanna v. Padmanabhaiah, (1994) 2 SCC 316* was held to be in the nature of an obiter. This Court in *Shakuntala Bai* (supra) referred to the decision in *Shantilal Thakordas v. Chimanlal Maganlal Telwala, (1976) 4 SCC 417* and specifically observed that the view expressed in *Shantilal Thakordas's case* (supra) did not, in any manner, affect the view expressed in *Phool Rani v. Naubat Rai Ahluwalia, (1973) 1 SCC 688* to the effect that where the death of landlord occurs after the decree for possession has been passed in his favour, his legal heirs are entitled to defend the further proceedings like an appeal and the benefit accrued to them under the decree. Here in this case also it is obvious that the original landlord Prabhakar Govind Sinai Kuvelkar had expired only after the eviction order passed by the Additional Rent Controller. This is apart from the fact that the landlord had sought the possession not only for himself but also for his family members. There is a clear reference in Section 23 (1) (a) (i) of the Act regarding occupation of the family members of the landlord. In that view the contention raised by the learned Counsel for the respondent must be rejected.

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***185. SCHEDULED CASTES & SCHEDULED TRIBES (PREVENTION OF ATROCITIES) ACT, 1989 – Section 3 (1) (x)**

Offence punishable u/s 3 (1) (x), essential ingredients of – Law explained.

Members of the Scheduled Caste assaulted and abused by calling them 'chamra' – Incident occurred as one of the members lodged report against accused – Held, as there was no intention to insult or humiliate the member of Scheduled Caste and the incident took place on account of earlier lodging of report, offence u/s 3 (1) (x) of the Act not made out – Charge framed in respect of offence punishable u/s 3 (1) (x) of the Act quashed.

Surendra Kaurav and others v. State of M.P.

Reported in 2008 (1) MPHT 317

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186. SERVICE LAW:

Government servant removed from service without conducting D.E. upon his conviction for certain offences – Appeal against conviction was pending – Held, no manifest or patent illegality committed – It is settled principle of Service Jurisprudence that the continuance of a convicted employee in service is not conducive for good administration.

Shiv Babu v. State of M.P.

Reported in 2008 (1) MPHT 418

Held:

It is an admitted fact that the petitioner's service is governed by the provisions of Madhya Pradesh Civil Services (Classification, Control and Appeal)Rules, 1966 (for short, 'M.P. CS (CCA) Rule, 1966'). Rule 19 of the M.P. CS (CCA) Rule,1966 provides that notwithstanding anything contained in Rule 14 to Rule 18 (which provide and prescribe the procedure for conducting a Departmental Inquiry) where any penalty is imposed on a Government servant on account of his conduct which has led to his conviction on a criminal charge, the disciplinary authority may consider the circumstances of the case and make such orders thereon as it deems fit. Apparently, in view of the *non-abstantee* Clause in Rule 19, the detailed procedure prescribed for conducting a Departmental Inquiry under Rule 14 to 18 of the M.P. CS (CCA) Rule, 1966 is excluded where orders are passed under Rule 19 on the basis of conviction of a Government servant on criminal charges. In the present case the disciplinary authority has exercised powers under Rule 19 and has dispensed with the services of the petitioner on account of his conviction in the present case without a departmental inquiry and rightly so, as in such a case the rule empowers the disciplinary authority to pass orders as it deems fit without following the procedure prescribed in Rules 14 to 18 of the M.P. (CCA) Rule,1966.

The next submission of the learned counsel for the petitioner is that in view of pending appeal of the petitioner, the disciplinary authority could not

have passed the impugned order of removal. Regulation 238 cannot be read in isolation as is being read by the petitioner. It has to be read subservient to Rule 19 of the M.P. CS (CCA) Rule, 1966 and along with Regulation 240 which clearly authorize and empower the disciplinary authority to pass appropriate orders on conviction of a government servant by a competent criminal Court without awaiting for decision of the pending criminal appeal. The said powers conferred on the disciplinary authority are apparently in consonance with settled principle of service Jurisprudence that the continuance of a convicted employee in service is not conducive for good administration.

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187. SERVICE LAW:

FUNDAMENTAL RULES – Rule 54-B

Salary and allowances to a Government servant on his re-instatement after revocation of suspension, factors to be considered for payment – Law explained.

Smt. Mahmoodan Khan v. State of Madhya Pradesh and others

Reported in 2008 (2) MPHT 26 (DB)

Held:

It will be clear from the provisions of Fundamental Rule 54-B quoted above that the aforesaid Fundamental Rule makes elaborate provisions how a Government servant will be dealt with after revocation of his suspension and on re-instatement in service. Sub-rule (1) of Fundamental Rule 54-B provides that when a Government servant who has been suspended is re-instated or would have been so re-instated, the authority competent to order re-instatement shall consider and make a specific order; (a) regarding the pay and allowances to be paid to the Government servant for the period of suspension ending with re-instatement and (b) whether or not the period of suspension shall be treated as period spent on duty. Sub-rule (3) of Fundamental Rule 54-B further provides that where the authority competent to order re-instatement is of the opinion that the suspension was wholly unjustified, the Government Servant Shall subject to the provisions of sub-rule (8), be paid the full pay and allowances to which he would have been entitled, had he not been suspended. Sub-rule (4) of Fundamental Rule 54-B states that in a case falling under sub-rule (3), the period of suspension shall be treated as a period spent on duty for all purposes. Sub-rule (5) of Fundamental Rule 54-B further states that in cases other than those falling under sub-rule (3), the Government servant shall subject to the provisions of sub-rules (8) and (9) be paid such amount of the pay and allowances to which he would have been entitled had he not been suspended, as the Competent Authority may determine, after giving notice to the Government servant of the quantum proposed and after considering the representation, if any, submitted by him in that connection within such period as may be specified in the notice. Sub-rule (7) of Fundamental Rule 54-B states that in a case falling under sub-rue (5), the period of suspension shall not be treated as a period

spent on duty, unless the Competent Authority specifically directs that it shall be so treated for any specified purpose.

It is, thus, clear that the authority competent to order re-instatement has to form an opinion whether the suspension was justified or unjustified and if he finds that the suspension was wholly unjustified, he will treat the period of suspension as spent on duty for all purposes and in that case the Government servant would be entitled to his full pay and allowances subject to the provisions of sub-rule (8). But in cases where he finds some justification for the suspension of the Government servant he has to pass a specific order indicating therein what amount of pay and allowances he would be entitled during the period of suspension after giving notice to the Government servant of the quantum of pay and allowances proposed and after considering the representation, if any, submitted by the Government servant in that connection.

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***188. SPECIFIC RELIEF ACT, 1963 – Section 20**

Suit for specific performance of contract – Imposition of condition with regard to payment of additional amount, permissibility of – Court in its discretion can impose any reasonable condition including payment of an additional amount by one party to the other while granting or refusing decree of specific performance.

Khemchand Sahu v. Chhingelal Rai

Reported in 2008 (1) MPLJ 379

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189. SPECIFIC RELIEF ACT, 1963 – Section 34

SUCCESSION ACT, 1925 – Section 217

Suit for declaration of title and permanent injunction is maintainable even though the Probate Court granted the probate of Will as the Probate Court is not competent to decide whether testator had or had not the authority to dispose of the suit properties.

Kanwaljit Singh Dhillon v. Hardyal Singh Dhillon & Ors.

Reported in AIR 2008 SC 306

Held:

In our view, the High Court as well as the Civil Court have acted illegally and with material irregularity in the exercise of their jurisdiction in dismissing the suit on the aforesaid preliminary issue by holding that after the probate having been granted by the competent probate court and affirmed by this Court, the Civil Court had no jurisdiction to proceed with the suit.

The High Court by the impugned order, relying on a decision of this Court in the case of *Smt. Rukmani Devi and Ors. v. Narendra Lal Gupta, (1985) 1 SCC 144,* affirmed the order of the civil court by holding that a probate granted by a competent probate court was conclusive of the validity of the Will of late S. Kirpal Singh until it was revoked and no evidence could be admitted to impeach

the said Will except in a proceeding taken for revoking the probate. According to the High Court, a decision of the probate court would be a judgment in rem which would not only be binding on the parties to the probate proceeding but would be binding on the whole world. Upon the aforesaid finding, the High Court had affirmed the order of the civil court holding that the suit must be dismissed in view of the fact that the probate court had already granted probate in respect of the Will executed by late S. Kirpal Singh relating to the suit properties. We are not in a position to agree with the views expressed by the High Court in the impugned order nor are we in agreement with the order passed by the civil court. As noted herein earlier, the suit for declaration of title and injunction has been filed by the appellant *inter alia* on the allegations that the suit properties are joint family properties of the HUF of which the appellant and his two brothers Hardyal Singh Dhillon and Harbans Singh Dhillon, mother Surjit Kaur and unmarried daughter Amarjit Kaur are members. It has also been claimed by the appellant in the suit that by utilizing the income from the ancestral agricultural land, various properties including the suit properties were acquired. Such being the allegations made in the plaint which can only be decided on trial after parties are permitted to adduce evidence in respect of their respective claims, it is difficult to hold that only because probate of the Will of late S. Kirpal Singh has been granted, the suit for title and injunction must be held to be not maintainable in law. It is well settled law that the functions of a probate court are to see that the Will executed by the testator was actually executed by him in a sound disposing state of mind without coercion or undue inference and the same was duly attested. It was, therefore, not competent for the probate court to determine whether late S. Kirpal Singh had or had not the authority to dispose of the suit properties which he purported to have bequeathed by his Will. The probate court is also not competent to determine the question of title to the suit properties nor will it go into the question whether the suit properties bequeathed by the Will were joint ancestral properties or acquired properties of the testator.

In *Chiranjilal Shrilal Goenka v. Jasjit Singh and Ors., (1993) 2 SCC 507,* this Court while upholding the above views and following the earlier decisions of this Court as well as of other High Courts in India observed in paragraph 15 at page 515 which runs as under:

> "In *Ishwardeo Narain Singh v. Smt. Kamta Devi, AIR 1954 SC 280* this Court held that the court of probate is only concerned with the question as to whether the document put forward as the last will and testament of a deceased person was duly executed and attested in accordance with law and whether at the time of such execution the testator had sound disposing mind. The question whether a particular bequest is good or bad is not within the purview of the probate court. Therefore, the only issue in a probate proceeding relates to the genuineness and due execution

of the will and the court itself is under duty to determine it and perverse the original will in its custody. The Succession Act is a self-contained code insofar as the question of making an application for probate, grant or refusal of probate or an appeal carried against the decision of the probate court. This is clearly manifested in the fascicule of the provisions of the Act. The probate proceedings shall be conducted by the probate court in the manner prescribed in the Act and in no other ways. The grant of probate with a copy of the will annexed establishes conclusively as to the appointment of the executor and the valid execution of the will. Thus, it does no more than establish the factum of the will and the legal character of the executor. Probate court does not decide any question of title or of the existence of the property itself."

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190. STAMP ACT, 1899 – Section 17 (2) (12)

Assessment of stamp duty – Relevant date of market value is date of execution of sale deed – It is not material that purchaser had to litigate for getting sale deed executed.

State of Rajasthan & Ors. v. M/s Khandaka Jain Jewellers

Reported in AIR 2008 SC 509

Held:

Learned Counsel for the respondent strenuously urged before us that in fact when the agreement to sell was not executed by the vendor, the respondent had no option but to file a suit and a long time was taken for obtaining a decree for execution of the agreement. He was not at fault and as such the valuation given in the instrument should be taken into consideration because during the litigation the valuation of the property has shot up. In this connection, learned Counsel has invited our attention to the principle *"Actus curie neminem gravabit"* meaning thereby that no person shall suffer on account of litigation. Hence learned Counsel submitted that since the matter had been in the litigation for a long time, the respondent cannot be made to suffer. He invited our attention to the decision of the Andhra Pradesh High Court *Sub- Registrar, Kodad Town and Mandal, AIR 1998 AP 252.* It is true that no one should suffer on account of the pendency of the matter but this consideration does not affect the Principles of interpretation of a taxing statute. A taxing statute has to be construed as it is all these contingencies that the matter was under litigation and the value of the property by that time shot up cannot be taken into account for interpreting the provisions of a taxing statute. As already mentioned above a taxing statute has to be construed strictly and if it is construed strictly then the plea that the incumbent took a long time to get a decree for execution against the vendor that consideration cannot weigh with the Court for interpreting the provisions of the taxing statutes. Therefore, simply because the matter have been in the

litigation for a long time that cannot be a consideration to accept the market value of the instrument when the agreement to sale was entered. As per Section 17, it clearly says at the time when registration is made, the valuation is to be seen on that basis.

In the case of *Sub-Registrar, Kodad Town and Mandal* (supra), the learned single Judge of the Andhra Pradesh High Court felt persuaded on account of 30 years' long litigation and therefore, declined to send the papers back to the Collector for valuation at the market value. With great respect, the view taken by the learned single Judge is against the principles of interpretation of a taxing statute. Therefore, we are of the opinion that the view taken by the learned single Judge of the Andhra Pradesh High Court is not correct.

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***191. SUCCESSION ACT, 1925 – Section 63**

Will, execution of – A person, who scribed the Will may also be attesting witness – Held, it is not correct to contend scriber that could not have been the attesting witness – He in his deposition categorically stated that he had seen the Will being read over to the propounder – The witnesses and he had seen the propounder putting his signature on the Will – The propounder had also seen the witnesses putting their signatures – This satisfies the requirements of the provisions of S. 63 of the Indian Succession Act, 1925 and S.68 of the Indian Evidence Act, 1872 (See- *Apoline D'Souza v. John D'Souza, 2007 (7) SCALE 766*).

Savithri & Ors. v. Karthyayani Amma & Ors.

Reported in AIR 2008 SC 300

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192. SUCCESSION ACT, 1925 – Sections 263 & 283

Probate Court is a limited jurisdiction Court not concerned with the question of title – Grant of Probate is judgment in rem – It binds not only parties but the entire world – Grant of Probate is final subject to appeal or revocation – Person aggrieved having no knowledge of proceeding and proper citations having not made is entitled to file an application for revocation.

Basanti Devi v. Ravi Prakash Ram Prasad Jaiswal

Judgment dated 12.10.2007 passed by the Supreme Court in Civil Appeal No. 4896 of 2007 reported in (2008) 1 SCC 267

Held:

The Probate Court, indisputably, exercises a limited jurisdiction. It is not concerned with the question of title. But if the probate has been granted subject to compliance with the provisions of the Act, an application for revocation would also lie.

Reliance has been placed by learned counsel of respondent on a decision of this Court in *Ishwardeo Narain Singh v. Smt. Kamta Devi and Ors. AIR 1954 SC 280* wherein, inter alia, it was held: (AIR p. 281, para 2)

> "The Court of Probate is only concerned with the question as to whether the document put forward as the last will and testament of a deceased person was duly executed and attested in accordance with law and whether at the time of such execution the testator had sound disposing mind. The question whether a particular bequest is good or bad is not within the purview of the probate Court."

In *Chiranjilal Shrilal Goenka v. Jasjit Singh and Ors. (1993) 2 SCC 507,* this Court held: (SCC pp. 519-20, para 20)

> "20. On a conspectus of the above legal scenario we conclude that the Probate Court has been conferred with exclusive jurisdiction to grant probate of the will of the deceased annexed to the petition (suit); on grant or refusal thereof, it has to preserve the original Will produced before it. The grant of probate is final subject to appeal, if any, or revocation if made in terms of the provisions of the Succession Act. It is a judgment in rem and conclusive and binds not only the parties but also the entire world. The award deprives the parties of statutory right of appeal provided under Section 299. Thus the necessary conclusion is that the Probate Court alone has exclusive jurisdiction and the Civil Court on original side or the Arbitrator does not get jurisdiction, even if consented to by the parties, to adjudicate upon the proof or validity of the Will propounded by the executrix, the applicant. It is already seen that the executrix was nominated expressly in the will is a legal representative entitled to represent the Estate of the deceased but the heirs cannot get any probate before the Probate Court. They are entitled only to resist the claim of the executrix of the execution and genuineness of the Will. The grant of probate gives the executrix the right to represent the estate of the deceased, the subject-matter in other proceedings. We make it clear that our exposition of law is only for the purpose of finding the jurisdiction of the arbitrator and not an expression of opinion on merits in the 'probate suit."

It is now well settled that an application for grant of probate is a proceeding in rem. A probate when granted not only binds all the parties before the Court but also binds all other persons in all proceedings arising out of the Will or claims under or connected therewith. Being a judgment in rem, a person, who is aggrieved thereby and having had no knowledge about the proceedings and proper citations having not been made, is entitled to file an application for revocation of probate on such grounds as may be available to him. We are, therefore, of the opinion that the application for revocation of the grant of probate should have been entertained.

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*193. SUCCESSION ACT, 1925 – Sections 372 & 387

Succession certificate granted to son of deceased – Objector lady held not entitled to certificate as she was not found to be legally wedded wife of deceased by the Court – Held, objector lady can file a suit for declaration that she is the legal heir of the deceased – A separate suit is maintainable challenging succession certificate.

Leena v. Devesh Kumar and another

Reported in 2008 (1) MPLJ 482

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*194. SUCCESSION ACT, 1925 – Chapters II & III

CIVIL PROCEDURE CODE, 1908 – Section 141 and Order 9 Rule 13

(i) Probate proceedings, applicability of provisions under 0.9 R.13 of CPC – Though the provision of Order 9 of the Civil Procedure Code has not been made specifically applicable, but Section 263 of the Act provides that the grant of probate may be revoked or annulled for just cause and just cause shall be deemed to exist where the proceedings were defective in substance. If the probate was obtained by non-service or defected service or by a fraudulent service on the other side, it can very well be treated as a just cause within the meaning of Section 263 (a) of the Act. So where the provisions of Section 263 of the Act are wide in nature and meet out all the exigencies including the exigencies enumerated in Order 9 Rule 13 of the Civil Procedure Code it may very well be found that the provision of Order 9 Rule 13, Civil Procedure Code can be invoked in a proceeding for revocation or annulment – Grant of probate on showing that the proceedings were defective in substance can be revoked or annulled. In the opinion of this Court, the provisions of Order 9 Rule 13 of the Civil Procedure Code are not directly applicable, but to show that the service on the defendant was defective or there was a sufficient cause to the defendant for non-appearing before the Court when an ex parte proceedings were directed against the applicant and for this limited purpose, the provisions of Order 9 Rule 3 r/w/s 263 of the Act can be invoked.

(ii) Mere mention of wrong provision of law when the power can be exercised under a different provision by itself is not sufficient ground to deny justice in the matter.

Bablu Mandal v. Vandana Bhowmik

Reported in 2008 (1) MPLJ 522

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195. TRANSFER OF PROPERTY ACT, 1882 – Section 54
LIMITATION ACT, 1963 – Article 64

(i) Transfer by sale, requirement of – Law explained.

(ii) Suit for possession of immovable property based on previous possession, requirement of – Plaintiff must at the outset show that he had been in possession within 12 years before institution of suit – However he is not required to prove his title.

Munnalal and others v. Atmaram and others

Reported in 2008 (1) MPLJ 328

Held:

There are three requisites to complete a transfer by sale :-

(i) one person must agree to transfer his ownership to another person and that other person must agree to accept such a transfer;

(ii) a price must be paid or agreed to be paid by the latter to the former; and

(iii) both persons must be competent to contract.

In my view the requirements, namely, the registration, etc. are procedural but the substantive part of the sale was already effected between the two parties. In this context I may profitably place reliance on the decision of this court *Sayyad Ibne Hasan vs. Mehtab 1960 JLJ 222.* Though the transfer of the property by vendor (Munnalal) in favour of vendee (Atmaram) is a complete sale, but, unless and until it is registered under Section 17 of the Act, there cannot be any valid conveyance.

Article 64 of Indian Limitation Act, 1963 (in short the Act of 1963) throws sufficient light to bring a suit for possession. According to this article, a suit for possession of immovable property based on previous possession and not on title can be brought by plaintiff within 12 years from the date of dispossession. On going through the objects and reasons to introduce this article it is clear that this article has replaced article 142 of old Act and has been introduced to bring the suit on the basis of possessory title. In a case falling under this article, the plaintiff must at the outset show that he had been in possession within 12 years before suit, however he is not at all bound to prove his title. The only requirement is that he has to prove his previous possession and is further required to prove that while he was in possession he has been dispossessed by defendants.

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PART - III

CIRCULARS/NOTIFICATIONS

म.प्र. सिविल न्यायालय नियम, 1961 में न्यायालयों के समय में संशोधन संबंधी अधिसूचना

क्र. सी.613–तीन–1–5–57 अध्याय–1 :– (मध्यप्रदेश राजपत्र (असाधारण) दिनांकित 14 मार्च 2008 में प्रकाशित) मध्यप्रदेश सिविल न्यायालय अधिनियम, 1958 (क्रमांक 19 सन् 1958) की धारा 23 के साथ पठित भारत के संविधान के अनुच्छेद 227 द्वारा प्रदत्त शक्तियों और सामर्थ्यकारी अन्य समस्त शक्तियों को प्रयोग में लाते हुए, मध्यप्रदेश उच्च न्यायालय, राज्यपाल के पूर्व अनुमोदन से, एतद, द्वारा अपनी अधिसूचना क्रमांक 1924–तीन– 1–5–57, दिनांक 15 फरवरी 1961 द्वारा प्रकाशित किये गये मध यप्रदेश सिविल न्यायालय नियम, 1961 में निम्नलिखित संशोधन करती है, अर्थात् :–

संशोधन

1. उक्त नियमों में, भाग–एक में, सिविल प्रक्रिया संहिता, से संबंधित नियम, अध्याय–1 (न्यायालय का समय, प्रकरणों की सूचियां, वाद–प्रतिवाद याचिकायें आदि) में :–

   (1) नियम 1 के उपनियम (1) के स्थान पर, निम्नलिखित उप–नियम स्थापित किया जाए, अर्थात :–

   "(1) समस्त न्यायालयों के लिए बैठक का सामान्य समय 11.00 बजे पूर्वान्ह से 5.00 बजे अपरान्ह तक होगा"

   (2) नियम 1 के उपनियम (2) के स्थान पर, निम्नलिखित उपनियम स्थापित किया जाए, अर्थात :–

   "(2) सामान्य तौर पर मध्यान्तर 2 बजे अपरान्ह से 2.30 बजे अपरान्ह तक आधे घंटे का होगा"

   (3) नियम 4 में अंक तथा शब्द "5.30 बजे अपरान्ह" जहां कहीं भी वे आए हों, के स्थान पर अंक तथा शब्द "5.00 बजे अपरान्ह" स्थापित किए जाएं,

   (4) नियम 5 के उपनियम (1) के स्थान पर, निम्नलिखित उपनियम स्थापित किया जाए, अर्थात :–

   "(1) प्रत्येक न्यायिक कार्यालय में कार्य के घंटे 10.30 बजे पूर्वान्ह से 5.30 बजे अपरान्ह तक होंगे"

2. यह अधिसूचना उसके "राजपत्र" में प्रकाशन की तारीख से प्रवृत्त होगी ।

NOTIFICATION FOR AMENDMENT IN M.P. CIVIL COURT RULES, 1961 REGARDING TIMINGS OF COURTS

No. C-613-III-1-5-57 Ch. 1-A. (*Published in M.P. Rajpatra (Asadharan) dated 14.03.2008.* – In exercise of the powers conferred by Article 227 of the Constitution of India, read with Section 23 of Madhya Pradesh Civil Courts Act 1958 (No. 19 of 1958) and all other powers enabling, the High Court of Madhya Pradesh, with the previous approval of Governor, hereby, makes the following amendment in Madhya Pradesh Civil Courts Rules, 1961, publish *vide* its Notification No. 1924-III-1-5-57, dated 15th February, 1961, as under :

AMENDMENT

1. In the said Rules in Part-I, Rules relating to Civil Procedure Code, Chapter-I (Court-Hours, Cause Lists, Pleadings, Petitions, etc.)
   (1) For sub-rule (1) of Rule 1, the following sub-rule shall be substituted namely :–
      "(1) The ordinary hours of sitting for all Courts shall be 11.00 A.M. to 5.00 P.M."
   (2) For sub-rule (2) of Rule 1, the following sub-rule shall be substituted namely :–
      "(2) There shall ordinarily be an interval of half an hour between 2.00 P.M. to 2.30 P.M."
   (3) In Rule 4 the figure and words "5.30 P.M." where ever they occur the figure and words "5.00 P.M." shall be substituted.
   (4) For sub-rule (1) of Rule 5, the following sub-rule shall be substituted, namely :–
      "(1) The working hours in every Judicial Office shall be from 10.30 A.M. to 5.30 P.M"
2. This Notification shall come into force on the date of its publication in the Official Gazette.

उच्च न्यायालय के आदेशानुसार,

रजिस्ट्रार जनरल

ORDER OF HIGH COURT OF MADHYA PRADESH REGARDING NORMS FOR PROMOTION AND CRITERIA FOR GRANT OF HIGHER SCALES

No. 115/Confdl.06/
II-2-21/63 (Pt.IV)

Dated 2nd March, 2006

High Court of Madhya Pradesh hereby makes following norms for promotion of officers of Higher Judicial Service to the Higher Grade and criteria for grant of Super Time Scale and Selection Grade Scale as was laid in Full Court Meeting dated 25.3.1995 and amended later vide Full Court Meeting dated 26.2.2006 :-

"(1) The following should be the criteria for grant for Selection Grade and Super Time Scale;

(a) Reputation regarding integrity and performance of the officer during his career in his present grade.

(b) Quantity of work done by the Officer in his present grade.

(c) Quality of judgements delivered by him in his persent grade:

(2) An Officer securing grade "C" or above during the last five years should be considered fit for promotion subject to assessment mentioned in clause (1) above.

(3) Ordinarily, however, an officer –

(i) In case of Selection Grade, the officers should not have been graded "E" and should not have been graded D" more than twice during the last five years.

(ii) In case of Super Time Scale the officer should not have been graded "E" and also should not have been graded "D" more than once and should have been graded "B" or "A" atleast for one year during the last five years.

Provided that the fulfillment of the aforesaid criteria would not entitle an Officer to Secure promotion on a higher grade automatically, if in the opinion of the competent authority, he is otherwise unfit for promotion.

Provided further that in exceptional circumstances, criteria relating to grading may be relaxed.

Note : Grading shall be as follows :

A - Outstanding
B - Very Good
C - Good
D - Average
E - Poor

By Order

Registrar General

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NOTIFICATION REGARDING AMENDMENT IN THE NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES (AMENDMENT) RULES, 2007

No. G.S.R. 2 (E), dated January 1, 2008.– *(Published in the Gazette of India, (Extraordinary), Part II, Section 3(i), No. 2 dated 1st January, 2008.)–* In exercise of the powers conferred by Section 76 read with Sections 8 and 9 of **the Narcotic Drugs and Psychotropic Substances Act, 1985** (61 of 1985), the Central Government hereby makes the following rules further to amend the Narcotic Drugs and Psychotropic Substances Act (*sic* Rules), 1985, namely :–

1. (1) These rules may be called the **Narcotic Drugs and Psychotropic Substances (Amendment) Rules, 2007.**

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

2. In the Narcotic Drugs and Psychotropic Substances Rules, 1985-in the second proviso to sub-rule (2) of Rule 66, after the words "the quantity of exceeding one hundred dosage units at a time" and before the words 'for his personal long term medical use", the words, "but not exceeding three hundred dosage units at a time" shall be inserted.

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NOTIFICATION REGARDING DATE OF ENFORCEMENT IN RESPECT OF THE DUTY PAYABLE ON INSTRUMENT OF CONVEYANCE CHARGEABLE UNDER ARTICLE 22 OF SCHEDULE 1-A OF STAMP ACT, 1899

Notification No. (62) B-4-2-08-2-V dated the 29th March, 2008. *(Published in M.P. Rajpatra (Asadharan) dated 29-3-2008 Page 273)–* In exercise of the powers conferred by clause (a) of sub-section (1) of Section 9 of the **Indian Stamp Act, 1899 (No. II of 1899)** the State Government, hereby directs that with effect from 1st April 2008, the duty on instruments of conveyance chargeable under Article 22 of Schedule 1-A of the said Act shall be reduceed by 0.5 percent.

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मध्यप्रदेश शासन, विधि और विधायी कार्य विभाग द्वारा विवाह के अनिवार्य रजिस्ट्रीकरण हेतु जारी अधिसूचना

फा क्रमांक 6–2–2005– इक्कीस–ब (दो) [मध्यप्रदेश राजपत्र (असाधारण) दिनांकित 23 जनवरी 2008 में पृष्ठ क्रमांक 78 (6–11) में प्रकाशित] – यतः, भारत के सर्वोच्च न्यायालय ने अंतरण याचिका ***(सिविल) क्रमांक 291/2005, श्रीमती सीमा विरूद्ध अश्वनी कुमार में*** दिनांक ***14 फरवरी, 2006*** तथा 25 अक्टूबर, 2007 को विवाह के लिए पक्षकार के धर्म या जाति को विचार में लिये बिना समस्त व्यक्तियो के विवाहों का अनिवार्य रजिस्ट्रीकरण करने के लिए नियम विरचित करने हेतु निर्देश दिया है,

और, यतः, राज्य सरकार ने यह आवश्यक समझा है कि उक्त आदेश को दृष्टि में रखते हुए नियम विरचित किए जाने चाहिए;

और यतः, विवाहों के अनिवार्य रजिस्ट्रीकरण हेतु नियमों का एक प्रारूप, पूर्व में मध्यप्रदेश शासन, विधि और विधायी कार्य विभाग, ने फा. क्रमांक 6–2–2005– इक्कीस– ब(2), दिनांक 29 नवम्बर 2007 को अधिसूचना द्वारा "मध्यप्रदेश राजपत्र (असाधरण)" दिनांक 30 नवम्बर, 2007 के पृष्ठ क्रमांक 1141 से 1142 (11) पर प्रकाशित किया था;

और, यतः उससे प्रभावित होने वाले संभावित समस्त व्यक्तियों से 29 दिसम्बर 2007 तक आपत्तियाँ तथा सुझाव आमंत्रित किए गए थे;

और यतः, उक्त प्रारूप नियमों के संबंध में जनता से प्राप्त आपत्तियों तथा सुझावों पर राज्य सरकार द्वारा सम्यकरूप से विचार किया गया है;

अतएव, विशेष विवाह अधिनियम, 1954 (1954 का 43) की धारा 4 से 14 के साथ पठित धारा 50 द्वारा प्रदत्त शक्तियो को प्रयोग में लाते हुए, राज्य सरकार, एतद द्वारा विवाहों के अनिवार्य रजिस्ट्रीकरण के लिए निम्नलिखित नियम बनाती है, अर्थात् :–

1. **संक्षिप्त नाम, विस्तार लागू होना और प्रारंभ**.– (1) इन नियमों का संक्षिप्त नाम मध्यप्रदेश विवाहों का अनिवार्य रजिस्ट्रीकरण नियम, 2008 है;

(2) इसका विस्तार सम्पूर्ण मध्यप्रदेश राज्य पर है.

(3) ये नियम विवाह के अनिवार्य रजिस्ट्रीकरण के लिए लागू होंगे तथा विशेष विवाहों के रजिस्ट्रीकरण के लिए पूर्व में जारी किए गए नियमों या अधिसूचना पर अभिभावी नहीं होंगे किन्तु विवाहों के रजिस्ट्रीकरण से संबंधित किसी अन्य अधिनियम के अधीन पूर्व में बनाये गये नियमों पर अभिभावी होंगे।

(4) ये "राजपत्र" में उनके प्रकाशन की तारीख से प्रवृत्त होंगे।

2. **परिभाषाएं**.– (1) इन नियमों में, जब तक संदर्भ से अन्यथा अपेक्षित न हो;–

(क) "अधिनियम" से अभिप्रेत है, विशेष विवाह अधिनियम 1954 (1954 का 43);

(ख) "विवाह" से अभिप्रेत है, एक पुरूष तथा एक स्त्री के बीच पक्षकारों के धर्म या जाति को विचार में लाये बिना, अनुष्ठापित, संपादित या संविदाकृत समस्त विवाह तथा इसमें सम्मिलित हैं वे विवाह जो किसी विधि, रूढ़ि, प्रथा या किसी परम्परा के अनुसार संपादित हों और इसमें पुनर्विवाह भी सम्मिलित हैं;

(ग) "विवाह रजिस्ट्रार" से अभिप्रेत है, अधिनियम की धारा 3 में यथाविनिर्दिष्ट तथा इन नियमों के नियम 5 के अधीन नियुक्त किया गया, कोई विवाह अधिकारी;

(घ) "धारा" से अभिप्रेत है, अधिनियम की धारा

(2) उन शब्दों तथा अभिव्यक्तियों का, जो इन नियमों में प्रयुक्त की गई हैं किन्तु इसमें परिभाषित नहीं है वही अर्थ होगा जो अधिनियम में उनके लिए दिया गया है।

3. विवाहों का अनिवार्य रजिस्ट्रीकरण – इन नियमों के प्रारंभ होने पर, मध्यप्रदेश के राज्य क्षेत्र के भीतर ऐसे विवाहों को प्रशासित करने वाली किसी विधि या रूढ़ि के अधीन, भारत के नागरिकों के बीच अनुष्ठापित या संविदाकृत प्रत्येक विवाह इन नियमों के अनुसार अनिवार्य रूप से रजिस्ट्रीकृत किया जाएगा।

4. विवाह के अरजिस्ट्रीकरण का प्रभाव. – इन नियमों के प्रारंभ होने पर किसी विधि या रूढ़ि के अधीन अनुष्ठापित तथा संविदाकृत विवाह और इन नियमों के अधीन रजिस्ट्रीकृत न किए गये विवाह, विवाह के निश्चायक सबूत नहीं समझे जायेंगे।

5. विवाह रजिस्ट्रार – (1) राज्य सरकार अधिसूचना द्वारा, ग्राम पंचायत या नगरपालिका या नगर निगम या छावनी बोर्ड क्षेत्रों में विवाह रजिस्ट्रार के रूप में ऐसे विवाह अधिकारी नियुक्त कर सकेगा, जो कि वह इन नियमों के प्रयोजनों के लिए उचित समझे।

(2) जब तक उपनियम (1) के अधीन अधिसूचना जारी नहीं कर दी जाती है, तब तक स्थानीय प्राधिकारी, जो जन्म तथ मृत्यु रजिस्ट्रीकृत करने के लिए सक्षम है, स्थानीय क्षेत्र के लिए विवाह रजिस्ट्रार होगा।

6. विवाह रजिस्ट्रार का कार्यालय – विवाहों के प्रत्येक रजिस्ट्रार का अपना कार्यालय होगा तथा वह अपना नाम, पदाभिधान तथा नियमित कार्य के घंटे हिन्दी में लिखवाएगा तथा उस भवन के, जिसमें उसका कार्यालय स्थित है, सहजदृश्य भाग में प्रदर्शित करवाएगा।

7. विवाह का रजिस्ट्रीकरण – (1) (क) विवाह के पक्षकार प्ररूप क्रमांक 1 में ज्ञापन प्रस्तुत करेंगे और विवाह की तारीख से तीस दिन की कालावधि के भीतर उस क्षेत्र के विवाह रजिस्ट्रार को, जिसके क्षेत्र में विवाह अनुष्ठापित या संपादित हुआ हो, दो प्रतियों में व्यक्तिशः परिदत्त करेंगे या रजिस्ट्रीकृत डाक द्वारा भेजेंगे.

(ख) विवाह रजिस्ट्रार विहित की गई परिसीमा से परे विवाह का ज्ञापन स्वीकार कर सकेगा, यदि विवाह का पक्षकार यह सिद्ध कर देता है कि वह, उसके नियंत्रण से परे किन्हीं पर्याप्त कारणें से निवारित किया गया था।

(ग) पक्षकारों द्वारा प्रस्तुत ज्ञापन का परीक्षण करने के पश्चात विवाह रजिस्ट्रार, प्रारूप क्रमांक 2 में विनिर्दष्ट रजिस्टर में ज्ञापन की प्रविष्टियों को दर्ज करेगा।

(घ) रजिस्टर में प्रविष्ट किया गया प्रत्येक ज्ञापन, एक पृथक प्रविष्टि समझा जावेगा और प्रत्येक प्रविष्टि एक क्रमवार सीढ़ी में क्रमांकित की जावेगी जो प्रत्येक कैलेण्डर वर्ष के साथ प्रारंभ और समाप्त होगी और प्रत्येक कैलेण्डर वर्ष के आरंभ में एक नई श्रेणी प्रारंभ होगी।

(2) जहां विवाह रजिस्ट्रार का, जिसके समक्ष ज्ञापन प्रस्तुत किया गया है, ज्ञापन के साथ प्रस्तुत दस्तावेजों की छानबीन करने या उसकी जानकारी में कोई अन्य तथ्य आने पर या लाये जाने पर यह समाधान हो जाता है, या उसके पास यह विश्वास करने का कारण है कि –

(क) पक्षकारों के बीच विवाह, तत्समय प्रवृत्त किसी विधि के अनुसार संपादित नहीं हुआ है;

(ख) पक्षकारों के बीच विवाह, पक्षकारों की स्वीय विधि के अनुसार संपादित नहीं हुआ है;

(ग) पक्षकारों या साक्षियों या पक्षकारों की पहचान प्रमाणित करने वाले व्यक्तियों की पहचान और विवाह का अनुष्ठापन युक्तियुक्त संदेह से परे सिद्ध नहीं किया जा सका है; या

(घ) उसके समक्ष प्रस्तुत किये गये दस्तावेज पक्षकारों की वैवाहिक प्रास्थिति साबित नहीं करते हैं तो वह पक्षकारों को सुनने और कारणें को लेखबद्ध करने के पश्चात विवाह को रजिस्ट्रीकृत करने से इंकार कर सकेगा; और –

(एक) पक्षकारों से ऐसी अतिरिक्त जानकारी या दस्तावेज प्रस्तुत करने की अपेक्षा कर सकेगा जैसी कि पक्षकारों और साक्षियों की पहचान या उसे प्रस्तुत की गई जानकारी या दस्तावेजों की शुद्धता सिद्ध करने के लिए आवश्यक समझी जाए; या

(दो) यदि आवश्यक समझा जाए तो, कागज पत्रों को स्थानीय पुलिस स्टेशन को, जिसकी अधिकारिता के भीतर पक्षकार निवास करता है, सत्यापन के लिए निर्दिष्ट कर सकेगा।

(3) जहां उपनियम (2) में यथा उपबंधित, और सत्यापन होने पर विवाह रजिस्ट्रार का यह समाधान हो जाता है कि विवाह को रजिस्ट्रीकृत करने में कोई आपत्ति नहीं है, तो वह उसको रजिस्ट्रीकृत कर सकेगा और यदि उसकी राय में विवाह रजिस्ट्रीकरण के लिए उपयुक्त नहीं है तो वह कारणें को लेखबद्ध करते हुए इंकार करने का आदेश पारित कर सकेगा.

(4) उपनियम (3) के अधीन विवाह का रजिस्ट्रीकरण या विवाह के रजिस्ट्रीकरण से इंकार विवाह के रजिस्ट्रीकरण के ज्ञापन की प्राप्ति की तारीख से दो मास की कालावधि के भीतर किया जाएगा।

(5) उपनियम (3) के अधीन रजिस्ट्रीकृत विवाह के विघटन पर, विवाह के दोनों में से किसी पक्षकार पर, विवाह रजिस्ट्रार को विवाह के विघटन के ब्यौरे की सूचना देना बाध्यकारी होगा तथा ऐसे ब्यौरे प्राप्त होने पर विवाह रजिस्ट्रार प्रारूप क्रमांक 2 में विर्निदिष्ट विवाह रजिस्टर के कॉलम (16) में ऐसे ब्यौरे प्रविष्ट करेगा, विवाह के विघटन के पश्चात यदि कोई व्यक्ति विवाह रजिस्ट्रीकरण प्रमाणपत्र की एक प्रति की अपेक्षा करता है, तो विवाह रजिस्ट्रीकरण प्रमाणपत्र में विवाह के विघटन के तथ्य उल्लिखित किये जायेंगे।

8. आयु का सबूत – विवाह रजिस्ट्रार अपना समाधान करने के प्रयोजन के लिये कि विवाह के पक्षकारों ने, धारा 4 के खण्ड (ग) में विनिर्दिष्ट आयु पूरी कर ली है, उनसे यह अपेक्षा करेगा कि उनकी आयु को साबित करने के लिए जन्म प्रमाणपत्र या कोई अन्य समाधानप्रद साक्ष्य पेश करे।

9. विवाह रजिस्ट्रार के आदेश के विरूद्ध अपील – (1) नियम 7 के अधीन विवाह का रजिस्ट्रीकृत करने से इंकार करने वाले विवाह रजिस्ट्रार के आदेश से व्यथित कोई व्यक्ति, ऐसे आदेश की प्राप्ति की तारीख से 30 दिन की कालावधि के भीतर जिला न्यायाधीश को अपील कर सकेगा।

(2) जिला न्यायाधीश पक्षकारों को सुनवाई का अवसर देने के पश्चात उसके कारणों को लेखबद्ध करते हुए एक आदेश पारित करेगा और विवाह रजिस्ट्रार को विवाह को रजिस्टर करने या विवाह रजिस्ट्रार के आदेश की पुष्टि करने का निर्देश देगा।

(3) उपनियम (2) के अधीन जिला न्यायाधीश द्वारा पारित आदेश अंतिम होगा।

10. विवाहों का रजिस्टर – (1) विवाह रजिस्ट्रार उस स्थानीय क्षेत्र में जिसके लिए उसकी नियुक्ति हुई है, अनुष्ठापित या संपादित किये गये विवाहों का एक रजिस्टर प्रारूप क्रमांक 2 में संधारित करेगा और ज्ञापन में पक्षकारों द्वारा दिये गये विवरणें की प्रविष्टि करेगा और उसे अधिप्रमाणित करेगा।

(2) विवाह रजिस्ट्रार विवाह के रजिस्ट्रीकरण के समय नगद में तीस रूपये की फीस का भुगतान करने पर प्रारूप क्रमांक 3 में विहित पक्षकारों को विवाह के रजिस्ट्रीकरण का प्रमाण–पत्र और प्रमाण–पत्र की दूसरी प्रति, जब अपेक्षित हो जारी करेगा। विवाह के रजिस्ट्रीकरण का प्रमाण–पत्र प्रारूप क्रमांक 3 में हिन्दी में जारी किया जायेगा किन्तु यदि विवाह का पक्षकार यह अपेक्षा करे कि उसका अंग्रेजी पार्ट जारी किया जाए तो वह उपलब्ध कराया जाएगा।

(3) विवाह के किसी पक्षकार द्वारा अपेक्षा किए जाने पर विवाह के रजिस्ट्रीकरण का प्रमाण पत्र आवेदक द्वारा दिये गये पते पर रजिस्ट्रीकृत डाक द्वारा भेजा जाएगा और डाक प्रभार आवेदक द्वारा वहन किया जाएगा।

11. रजिस्टर सार्वजनिक निरीक्षण के लिए खुला रहेगा – विवाहों का रजिस्टर, समस्त युक्तियुक्त समयों पर निरीक्षण के लिए खुला रहेगा और आवेदन करने पर उसके प्रमाणित उद्धरण नगद में बीस रूपये की फीस का भुगतान करने पर विवाह रजिस्ट्रार द्वारा आवेदक को दिए जाएंगे।

12. विवाह रजिस्ट्रीकरण प्रमाण–पत्र का सत्यापन करने के लिए नियोजक आदि के दायित्व – कोई भी नियोजक या शासकीय या अर्द्धशासकीय प्राधिकारी या कंपनी या सार्वजनिक उपक्रम या स्थानीय प्राधिकारी अपने कार्यालय अभिलेख में या किसी कार्यालय दस्तावेज में कोई परिवर्तन जैसे उसके कर्मचारी की वैवाहिक परिस्थिति में परिवर्तन या नाम निर्देशन में परिवर्तन तब तक नहीं करेगा जब तक कि कर्मचारी या यथास्थिति ऐसे परिवर्तन को क्रियान्वित करने के लिए या अभिलिखित करने के लिए आवेदन करने वाला आवेदक, नियम 9 के उपनियम (2) के अधीन अनुदत्त या तत्समय प्रवृत्त किसी अन्य विधि के अधीन अनुदत्त विवाह के रजिस्ट्रीकरण के प्रमाण–पत्र की प्रमाणित प्रति प्रस्तुत नहीं कर देता है।

13. विवाह के ज्ञापन में मिथ्या कथन करने के लिए शास्ति– कोई व्यक्ति जो विवाह के ज्ञापन में मिथ्या कथन करता है या सत्यापित करता है, जिसके बारे में वह जानता/जानती है या उसके मिथ्या होने का विश्वास है, तो उसे तत्समय प्रवृत्त प्रचलित विधि के अनुसार दंडित किया जाएगा।

14. रजिस्टर को नष्ट करने या परिवर्तित करने पर शास्ति– जो कोई भी रजिस्टर को नष्ट करता है या छेड़छाड़ करता है, तो वह तत्समय प्रवृत्त किसी प्रचलित विधि के अनुसार दंडित किया जाएगा।

15. विवाह रजिस्ट्रार लोक सेवक होगा – प्रत्येक विवाह रजिस्ट्रार भारतीय दंड संहिता 1860 (1860 का 45) की धारा 21 के अंतर्गत लोक सेवक समझे जाएंगे।

16. इन नियमों के अधीन कार्य कर रहे व्यक्तियों का संरक्षण – विवाह रजिस्ट्रार या उसके अधीनस्थ किसी कर्मचारी के विरूद्ध इन नियमों के अधीन सदभावपूर्वक की गई या की जाने के लिए तात्पर्यित किसी बात के लिए कोई वाद, अभियोजन या अन्य विधिक कार्यवाही नहीं होगी।

17. राज्य सरकार द्वारा निदेश जारी करने की शक्ति – राज्य सरकार समय–समय पर इन नियमों के उपबंधों के प्रभावी तथा सुकर क्रियान्वयन हेतु विवाह रजिस्ट्रार को ऐसे निदेश जारी कर सकेगी जो इन नियमों के उपबंधों से असंगत न हों तथा संबंधित जिले के विवाह रजिस्ट्रार पर कलेक्टर का अधीक्षण होगा।

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IMPORTANT CENTRAL/STATE ACTS & AMENDMENTS

THE MAINTENANCE AND WELFARE OF PARENTS AND SENIOR CITIZENS ACT, 2007

No. 56 of 2007

{Received the assent of the President on the 29th December, 2007 and Act published in the Gazette of India (Extraordinary) Part II Section 1 dated 31-12-2007 Pages 1-8 [S.No. 67].

An Act to provide for more effective provisions for the maintenance and welfare of parents and senior citizens guaranteed and recognised under the Constitution and for matters connected therewith or incidental thereto.

Be it enacted by Parliament in the Fifty-eighth Year of the Republic of India as follows :–

Notes

Statement of Objects and Reasons. – Traditional norms and values of the India society laid stress on providing care for the elderly. However, due to withering of the joint family system, a large number of elderly are not being looked after by their family. Consequently, many older persons, particularly widowed women are now forced to spend their twilight years all alone and are exposed to emotional neglect and to lack of physical and financial support. This clearly reveals that ageing has become a major social challenge and there is a need to give more attention to the care and protection for the older persons. Though the parents can claim maintenance under the Code of Criminal Procedure, 1973, the procedure is both time consuming as well as expensive. Hence, there is need to have simple, inexpensive and speedy provisions to claim maintenance for parents.

2. The Bill proposes to cast an obligation on the persons who inherit the property of their aged relatives to maintain such aged relatives and also proposes to make provisions for setting up oldage homes for providing maintenance to the indigent older persons.

The Bill further proposes to provide better medical facilities to the senior citizens and provisions for protection of their life and property.

3. The Bill, therefore, proposes to provide for :–

(a) appropriate mechanism to be set up to provide need-based maintenance to the parents and senior citizens;

(b) providing better medical facilities to senior citizens;

(c) for institutionalization of a suitable mechanism for protection of life and property of older persons;

(d) setting up of oldage homes in every district.

4. The Bill seeks to achieve the above objectives.

CHAPTER I
Preliminary

1. Short title, extent, application and commencement.– (1) This Act may be called the Maintenance and Welfare of Parents and Senior Citizens Act, 2007.

(2) It extends to the whole of India except the State of Jammu and Kashmir and it applies also to citizens of India outside India.

(3) It shall come into force in a State on such date as the State Government may, by notification in the Official Gazette, appoint.

2. Definitions. – In this Act, unless the context otherwise requires, –

(a) "children" includes son, daughter, grandson and granddaughter but does not include a minor;

(b) "maintenance" includes provision for food, clothing, residence and medical attendance and treatment;

(c) "minor" means a person who, under the provisions of the Majority Act, 1875 (9 of 1875) is deemed not to have attained the age of majority;

(d) "parent" means father or mother whether biological, adoptive or step father or step mother, as the case may be, whether or not the father or the mother is a senior citizen;

(e) "prescribed" means prescribed by rules made by the State Government under this Act;

(f) "property" means property of any kind, whether movable or immovable, ancestral or self acquired, tangible or intangible and includes rights or interests in such property;

(g) "relative" means any legal heir of the childless senior citizen who is not a minor and is in possession of or would inherit his property after his death;

(h) "senior citizen" means any person being a citizen of India, who has attained the age of sixty years or above;

(i) "State Government", in relation to a Union territory, means the administrator thereof appointed under article 239 of the Constitution;

(j) "Tribunal" means the Maintenance Tribunal constituted under section 7;

(k) "welfare" means provision for food, health care, recreation centres and other amenities necessary for the senior citizens.

3. Act to have overriding effect. – The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act, or in any instrument having effect by virtue of any enactment other than this Act.

CHAPTER II

Maintenance of Parents and Senior Citizens

4. Maintenance of parents and senior citizens, – (1) A senior citizen including parent who is unable to maintain himself from his own earning or out of the property owned by him, shall be entitled to make an application under section 5 in case of –

(i) parent or grand-parent, against one or more of his children not being a minor;

(ii) a childless senior citizen, against such of his relative referred to in clause (g) of section 2.

(2) The obligation of the children or relative, as the case may be, to maintain a senior citizen extends to the needs of such citizen so that senior citizen may lead a normal life.

(3) The obligation of the children to maintain his or her parent extends to the needs of such parent either father or mother or both, as the case may be, so that such parent may lead a normal life.

(4) Any person being a relative of a senior citizen and having sufficient means shall maintain such senior citizen provided he is in possession of the property of such senior citizen or he would inherit the property of such senior citizen:

Provided that where more than one relatives are entitled to inherit the property of a senior citizen, the maintenance shall be payable by such relative in the proportion in which they would inherit his property.

5. Application for maintenance. – (1) An application for maintenance under section 4, may be made –

(a) by a senior citizen or a parent, as the case may be; or

(b) if he is incapable, by any other person or organisation authorised by him; or

(c) the Tribunal may take cognizance *suo motu.*

Explanation. – For the purposes of this section "organisation" means any voluntary association registered under the Societies Registration Act, 1860 (21 of 1860), or any other law for the time being in force.

(2) The Tribunal may, during the pendency of the proceeding regarding monthly allowance for the maintenance under this section, order such children or relative to make a monthly allowance for the interim maintenance of such senior citizen including parent and to pay the same to such senior citizen including parent as the Tribunal may from time to time direct.

(3) On receipt of an application for maintenance under sub-section (1), after giving notice of the application to the children or relative and after giving the parties an opportunity of being heard, hold an inquiry for determining the amount of maintenance.

(4) An application filed under sub-section (2) for the monthly allowance for the maintenance and expenses for proceeding shall be disposed of within ninety days from the date of the service of notice of the application to such person:

Provided that the Tribunal may extend the said period, once for a maximum period of thirty days in exceptional circumstances for reasons to be recorded in writing.

(5) An application for maintenance under sub-section (1) may be filed against one or more persons:

Provided that such children or relative may impaled the other person liable to maintain parent in the application for maintenance.

(6) When a maintenance order was made against more than one person, the death of one of them does not affect the liability of others to continue paying maintenance.

(7) Any such allowance for the maintenance and expenses for proceeding shall be payable from the date of the order, or if so ordered, from the date of the application for maintenance or expenses or proceeding, as the case may be.

(8) If, children or relative so ordered fail, without sufficient cause to comply with the order, any such Tribunal may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person for the whole, or any part of each month's allowance for the maintenance and expenses of proceeding, as the case may be, remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made whichever is earlier:

Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the tribunal to levy such amount within a period of three months from the date on which it became due.

6. Jurisdiction and procedure. – (1) The proceedings under section 5 may be taken against any children or relative in any district –

(a) where he resides or last resided; or

(b) where children or relative resides.

(2) On receipt of the appellation under section 5, the Tribunal shall issue a process for procuring the presence of children or relative against whom the application is filed.

(3) For securing the attendance of children or relative the Tribunal shall have the power of a Judicial Magistrate of first class as provided under the Code of Criminal Procedure, 1973 (2 of 1974).

(4) All evidence to such proceedings shall be taken in the presence of the children or relative against whom an order for payment of maintenance is proposed to be made, and shall be recorded in the manner proscribed for summons cases:

Provided that if the Tribunal is satisfied that the children or relative against whom an order for payment of maintenance is proposed to be made is wilfully avoiding service, or wilfully neglecting to attend the Tribunal, the Tribunal may proceed to hear and determine the case *ex parte*.

(5) Where the children or relative is residing out of India, the summons shall be served by the Tribunal through such authority, as the Central Government may be notification in the official Gazette, specify in this behalf.

(6) The Tribunal before hearing an application under section 5 may, refer the same to a Conciliation Officer and such Conciliation Officer shall submit his findings within one month and if amicable settlement has been arrived at, the Tribunal shall pass an order to that effect.

Explanation.– For the purposes of this sub-section "Conciliation Officer" means any person or representative of an organisation referred to in Explanation to sub-section (1) of section 5 or the Maintenance Officers designated by the State Government under sub-section (1) of section 18 or any other person nominated by the Tribunal for this purpose.

7. Constitution of Maintenance Tribunal. – (1) The State Government shall within a period of six months from the date of the commencement of this Act, by notification in the Official Gazette, constitute for each Sub-division one or more Tribunals as may be specified in the notification for the purpose of adjudicating and deciding upon the order for maintenance under section 5.

(2) The Tribunal shall be presided over by an officer not below the rank of Sub-Divisonal Officer of a State.

(3) Where two or more Tribunals are constituted for any area, the State Government may, by general or special order, regulate the distribution of business among them.

8. Summary procedure in case of inquiry. – (1) In holding any inquiry under section 5, the Tribunal may, subject to any rules that may be prescribed by the State Government in this behalf, follow such summary procedure as it deems fit.

(2) The Tribunal shall have all the powers of a Civil Court for the purpose of taking evidence on oath and of enforcing the attendance of witnesses and of compelling the discovery and production of documents and material objects and for such other purposes as may be prescribed; and the Tribunal shall be deemed to be a Civil Court for all the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974).

(3) Subject to any rule that may be made in this behalf, the Tribunal may, for the purpose of adjudicating and deciding upon any claim for maintenance, choose one or more persons possessing special knowledge of any matter relevant to the inquiry to assist it in holding the inquiry.

9. Order for maintenance.– (1) If children or relatives, as the case may be, neglect or refuse to maintain a senior citizen being unable to maintain himself, the Tribunal may, on being satisfied of such neglect or refusal, order such children or relatives to make a monthly allowance at such monthly rate for the maintenance of such senior citizen, as the Tribunal may deem fit and to pay the same to such senior citizen as the Tribunal may, from time to time, direct.

(2) The maximum maintenance allowance which may be ordered by such Tribunal shall be such as may be prescribed by the State Government which shall not exceed ten thousand rupees per month.

10. Alternation in allowance. – (1) On proof of misrepresentation or mistake of fact or a change in the circumstances of any person, receiving a monthly allowance under section 9, for the maintenance ordered under that section to pay a monthly allowance for the maintenance, the Tribunal may make such alteration, as it thinks fit, in the allowance for the maintenance.

(2) Where it appears to the Tribunal that, in consequence of any decision of a competent Civil Court, any order made under section 9 should be cancelled or varied, it shall cancel the order or, as the case may be, very the same accordingly.

11. Enforcement of order of maintenance.– (1) A copy of the order of maintenance and including the order regarding expenses of proceedings, as the case may be, shall be given without payment of any fee to the senior citizen or to parent, as the case may be, in whose favour it is made and such order may be enforced by any Tribunal in any place where the person against whom it is made, such Tribunal on being satisfied as to the identity of the parties and the non-payment of the allowance, or as the case may be, expenses, due.

(2) A maintenance order made under this Act shall have the same force and effect as an order passed under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974) and shall be executed in the manner prescribed for the execution of such order by that Code.

12. Option regarding maintenance in certain cases.– Notwithstanding anything contained in Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974), where a senior citizen or a parent is entitled for maintenance under the said Chapter and also entitled for maintenance under this Act may, without prejudice to the provisions of Chapter IX of the said Code, claim such maintenance under either of those Acts but not under both.

13. Deposit of maintenance amount.– When an order is made under this Chapter, the children or relative who is required to pay any amount in terms of such order shall, within thirty days of the date of announcing the order by the Tribunal, deposit the entire amount ordered in such manner as the Tribunal may direct.

14. Award of interest where any claim is allowed.– Where any Tribunal makes an order for maintenance made under this Act, such Tribunal may direct that in addition to the amount of maintenance, simple interest shall also be paid at such rate and from such date not earlier than the date of making the application as may be determined by the Tribunal which shall not be less than five per cent and not more than eighteen per cent :

Provided that where any application for maintenance under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974) is pending before a Court at the commencement of this Act, then the Court shall allow the withdrawal of such application on the request of the parent and such parent shall be entitled to file an application for maintenance before the Tribunal.

15. Constitution of Appellate Tribunal. – (1) The State Government may, by notification in the Official Gazette, constitute one Appellate Tribunal for each district to hear the appeal against the order of the Tribunal.

(2) The Appellate Tribunal shall be presided over by an officer not below the rank of District Magistrate.

16. Appeals. – (1) Any senior citizen or a parent, as the case may be, aggrieved by an order of a Tribunal may, within sixty days from the date of the order, prefer an appeal to the Appellate Tribunal:

Provided that on appeal, the children or relative who is required to pay any amount in terms of such maintenance order shall continue to pay to such parent the amount so ordered, in the manner directed by the Appellate Tribunal:

Provided further that the Appellate Tribunal may, entertain the appeal after the expiry of the said period of sixty days, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal in time.

(2) On receipt of an appeal, the Appellate Tribunal shall, cause a notice to be served upon the respondent.

(3) The Appellate Tribunal may call for the record the proceedings from the Tribunal against whose order the appeal is preferred.

(4) The Appellate Tribunal may, after examining the appeal and the records called for either allow or reject the appeal.

(5) The appellate Tribunal shall, adjudicate and decide upon the appeal filed against the order of the Tribunal and the order of the Appellate Tribunal shall be final:

Provided that no appeal shall be rejected unless an opportunity has been given to both the parties of being heard in person or through a duly authorised representative.

(6) The Appellate Tribunal shall make an endeavour to pronounce its order in writing within one month of the receipt of an appeal.

(7) A copy of every order made under sub-section (5) shall be sent to both the parties free of cost.

17. Right to legal representation. – Notwithstanding anything contained in any law, no party to a proceeding before a Tribunal or Appellate Tribunal shall be represented by a legal practitioner.

18. Maintenance Officer.– (1) The State Government shall designate the District Social Welfare Officer or an officer not below the rank of a District Social Welfare Officer, by whatever name called as Maintenance Officer.

(2) The Maintenance Officer referred to in sub-section (1), shall represent a parent if he so desires, during the proceedings of the Tribunal, or the Appellate Tribunal, as the case may be.

CHAPTER III

Establishment of Oldage Homes

19. Establishment of oldage homes.– (1) The State Government may establish and maintain such number of oldage homes at accessible places, as it may deem necessary, in a phased manner, beginning with at least one in each district to accommodate in such homes a minimum of one hundred fifty senior citizens who are indigent.

The State Government may, prescribe a scheme for management of oldage homes, including the standards and various types of services to be provided by them which are necessary for medical care and means of entertainment to the inhabitants of such homes.

Explanation.– For the purposes of this section, "indigent" means any senior citizen who is not having sufficient means, as determined by the State Government, from time to time, to maintain himself.

CHAPTER IV

Provisions for Medical care of senior citizen

20. Medical support for senior citizens. – The State Government shall ensure that, –

(i) the Government hospitals or hospitals funded fully or partially by the Government shall provided beds for all senior citizens as far as possible;

(ii) separate queues be arranged for senior citizens;

(iii) facility for treatment of chronic, terminal and degenerative diseases is expanded for senior citizens;

(iv) research activities for chronic elderly diseases and ageing is expanded;

(v) there are earmarked facilities for geriatric patients in every district hospital duly headed by a medical officer with experience in geriatric care.

CHAPTER V

Protection of life and property of senior citizen

21. Measures for publicity, awareness, etc., for welfare of senior citizens. – The State Government shall, take all measures to ensure that –

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

(ii) the Central Government and State Government Officers, including the police officers and the members of the judicial service, are given periodic sensitization and awareness training on the issues relating to this Act;

(iii) effective co-ordination between the services provided by the concerned Ministries or Departments dealing with law, home affairs, health and welfare, to address the issues relating to the welfare of the senior citizens and periodical review of the same is conducted.

22. Authorities who may be specified for implementing the provisions of this Act. – (1) The State Government may, confer such powers and impose such duties on a District Magistrate as may be necessary, to ensure that the provisions of this Act are properly carried out and the District Magistrate may specify the officer, subordinate to him, who shall exercise all or any of the powers, and perform all or any of the duties, so conferred on imposed and the local limits within which such powers or duties shall be carried out by the officer as may be prescribed.

(2) The State Government shall prescribe a comprehensive action plan for providing protection of life and property of senior citizens.

23. Transfer of property to be void in certain circumstances.– (1) Where any senior citizen who, after the commencement of this Act, has transferred by way of gift or otherwise, his property, subject to the condition that the transferee shall provide the basic amenities and basic physical needs to the transferor and such transferee refuses or fails to provide such amenities and physical needs, the said transferor of property shall be deemed to have been made by fraud or coercion or under influence and shall at the option of the transferor be declared void by the Tribunal.

(2) Where any senior citizen has a right to receive maintenance out of an estate and such estate or part thereof is transferred, the right to receive maintenance may be enforced against the transferee if the transferee has notice of the right, or if the transfer is gratuitious; but not against the transferee for consideration and without notice of right.

(3) If, any senior citizen is incapable of enforcing the rights under sub-sections (1) and (2), action may be taken on his behalf by any of the organisation referred to in Explanation to sub-section (1) of section 5.

CHAPTER VI

Offences and Procedure for trial

24. Exposure and abandonment of senior citizen. – Whoever, having the care or protection of senior citizen leaves, such senior citizen in any place with the intention of wholly abounding such senior citizen, shall be punishable with imprisonment of either description for a term which may extend to three months or fine which may extend to five thousand rupees or with both.

25. Cognizance of offences. – (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), every offence under this Act shall be cognizable and bailable.

(2) An offence under this Act shall be tried summarily by a Magistrate.

CHAPTER VII

Miscellaneous

26. Officers to be public servants.– Every officer or staff appointed to exercise functions under this Act shall be deemed to be a public servant within the meaning of section 21 of the Indian Penal Code (45 of 1860).

27. Jurisdiction of civil courts barred. – No Civil Court shall have jurisdiction in respect of any matter to which any provision of this Act applies and no injunction shall be granted by any Civil Court in respect of anything which is done or intended to be done by or under this Act.

28. Protection of action taken in good faith. – No suit, prosecution or other legal proceeding shall lie against the Central Government, the State Government or the local authority or any officer of the Government in respect of

anything which is done in good faith or intended to be done in pursuance of this Act and any rules or orders made thereunder.

29. Power to remove difficulties. – If any difficulty arises in giving effect to the provisions of this Act, the State Government may, by order published in the Official Gazette, make such provisions not inconsistent with the provisions of this Act, as appear to it be necessary or expedient for removing the difficulty:

Provided that no such order shall be made after the expiry of a period of two years from the date of the commencement of this Act.

30. Power of Central Government to give directions.– This Central Government may give directions to State Government as to the carrying into execution of the provisions of this Act.

31. Power of Central Government to review. – The Central Government may make periodic review and monitor the progress of the implementation of the provisions of this Act by the State Governments.

32. Power of State Government to make rules. – (1) The State Government may, by notification in the Official Gazette, make rules for carrying out the purposes of this Act.

(2) Without prejudice to the generality of the foregoing power, such rules may provide for –

(a) the manner of holding inquiry under section 5 subject to such rules as may be prescribed under sub-section (1) of section 8;

(b) the power and procedure of the Tribunal for other purposes under sub-section (2) of section 8;

(c) the maximum maintenance allowance which may be ordered by the Tribunal under sub-section (2) of section 9;

(d) the scheme for management of oldage homes, including the standards and various types of services to be provided by them which are necessary for medical care and means of entertainment to the inhabitants of such homes under sub-section (2) of section 19;

(e) the powers and duties of the authorities for implementing the provisions of this Act, under sub-section (1) of the section 22;

(f) a comprehensive action plan for providing protection of life and property of senior citizens under sub-section (2) of section 22;

(g) any other matter which is to be, or may be, prescribed.

(3) Every rule made under this Act shall be laid, as soon as may be after it is made, before each House of State Legislature; where it consists of two Houses or where such legislature consists of one House, before that House.

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THE COURT-FEES (MADHYA PRADESH AMENDMENT) ACT, 2008

No. 6 of 2008

[Received the assent of the Governor on the 2nd April, 2008; assent first published in the "Madhya Pradesh Gazette (Extra-ordinary)", dated the 2nd April, 2008.]

An Act further to amend the Court-fees Act, 1870 in its application to the State of Madhya Pradesh.

Be it enacted by the Madhya Pradesh Legislature in the Fifty-Ninth year of the Republic of India as follows :–

Notes

Statement of objects and reasons.– In order to rationalise the court fees leviable on plaint, written statement pleading a set-off or counter claim, or memorandum of appeal presented to any Civil or Revenue Court, it is decided to amend article 1-A of Schedule I to the Court-fees Act, 1870 (No. 7 of 1870) in its application to the State of Madhya Pradesh.

2. At present incidences of dishounoured cheques are in abundance and there is no provision of levy of court fees in such complaints. Therefore, it is decided to levy court fees on application for complaint of an offence triable under Section 138 of the Negotiable Instruments Act, 1881 (No. 26 to 1881), by suitable amendment of article 1 of Schedule II to the principal Act in its application to the State of Madhya Pradesh.

3. It is also decided to provide for levy of court fees on memorandum of appeal when presented to the High Court by the Claimant for enhancement of award passed by the Motor Accident Claims Tribunal, by suitable amendment of article 11 of Schedule II to the principal Act in its application to the State of Madhya Pradesh.

4. Hence this Bill.

1. Short title. – This Act may be called the Court-fees (Madhya Pradesh Amendment) Act, 2008.

2. Amendment of Central Act No. VII of 1870 in its applications to the State of Madhya Pradesh.– The Court-fees Act, 1870 (No. VII of 1870) (hereinafter referred to as the principal Act), in its application to the State of Madhya Pradesh be amended in the manner hereinafter provided.

3. Amendment of Schedule I to the principal Act, for Article 1-A, the following article shall be substituted, namely –

"1-A. Plaint, written statement pleading a set-off or counter claim, or memorandum of appeal (not otherwise provided for in this Act) presented to any Civil or Revenue Court except those mentioned in Section 3.		Twelve percent subject to a minimum of one hundred rupees.
	When the amount or value of the subject matter in dispute does not exceed five lacs rupees.	Sixty thousand rupees plus seven percent on the amount or value in excess of five lacs rupees.
	When such amount or value exceeds five lacs rupees but does not exceed ten lacs rupees.	
	When such amount or value exceeds ten lacs rupees:	
	Provided that minimum fee leviable on a memorandum of appeal shall be one hundred ruees.".	Ninety five thousand rupees plus three percent on the amount or value in excess of ten lacs rupees subject to a maximum of one lac and fifty thousand rupees.

4. **Amendment of Schedule II.** – In schedule II to the principal Act, –

(i) in article 1, in clause (b), before the opening paragraph and entry relating thereto, the following paragraph and entries relating thereto shall be inserted, namely :–

"When containing a complaint of an offence triable under Section 138 of the Negotiable Instruments Act, 1881 (No. 26 of 1881) –

(i)	When the amount of dishonoured cheque involved in the complaint is up to fifty thousand rupees	Two hundred rupees
(ii)	When the amount of dishonoured cheque involved in the complaint is more than fifty thousand rupees but up to two lacs rupees.	Five hundred rupees

(iii)	When the amount of dishonoured cheque involved in the complaint is more than two lacs rupees.	One thousand rupees

OR",

(ii) in article 11, for clause (a) and entry relating thereto, the following clause and entries relating thereto shall be substituted, namely :–

"(a) when presented to the High Court –

(i)	By the claimant for enhancemnt of the amount of award passed by the Motor Accident Claims Tribunal.	Ten percent of the enhanced amount claimed in appeal.
(ii)	In matters other than sub-clause (i) above	Thirty rupees.".

●

Reach for the stars, even if you have to stand on a cactus.

– SUSAN LONGACRE

Nobody can make you feel inferior without your consent.

– ELEANOR ROOSEVELT