JOTI JOURNAL

APRIL 2012 (BI-MONTHLY)

न्यायिक अधिकारी प्रशिक्षण एवं अनुसंधान संस्थान
मध्य प्रदेश उच्च न्यायालय, जबलपुर - 482 007

JUDICIAL OFFICERS' TRAINING & RESEARCH INSTITUTE
HIGH COURT OF MADHYA PRADESH, JABALPUR - 482 007

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FROM THE PEN OF THE EDITOR

Manohar Mamtani,
Director, JOTRI

Esteemed Readers

With this issue, I again have an opportunity to share my views with you all.

Fair trial is sine qua non of Article 21 of the Constitution of India. It is a well recognized principle that justice should not only be done but it should also be seen to be done. If the criminal trial is not fair and not free from bias then criminal justice system will be at stake, shaking the very confidence of the public in the system and woe would be the Rule of Law.

Fair trial would mean a trial before an impartial Judge, a fair prosecutor and an atmosphere of judicial calm. Assurance of fair trial is the first imperative of criminal justice. In these days when crime is on the upsurge and humanity is suffering and society is affected by that, duties of the Courts have become much more. Now the maxim "let hundred guilty persons be acquitted but not a single innocent be convicted" is, in practice changing the world over and Courts have been compelled to accept, "society suffers from wrong convictions and it equally suffers from wrong acquittals".

In its quest to achieve judicial excellence, the Institute, under the approved Scheme of Development of Additional Faculties under the approved Action Plan of Grant-in-Aid recommended by the XIII Finance Commission, is in the process of developing Additional Faculties for imparting Induction and Refresher Course training to the Civil Judges Class-II and also for imparting Foundation/Advance Course and Refresher Course training to the newly recruited/promoted Additional District Judges as well as for preparing study material on the given topics. In this regard, a letter alongwith two lists of Topics for (i) Induction and Refresher Course Training of Civil Judges-Class II and (ii) Foundation/Advance and Refresher Course Training of Additional District Judges has been sent to all the District Judges of the State for getting consent of the willing Judicial Officers of H.J.S. cadre.

Let me give you an insight of the activities of the Institute in the months of March and April. We imparted Refresher Course training to the Fourth Batch of Civil Judges Class II of 2008 from 12.03.2012 to 16.03.2012. The Institute also conducted Final Phase Induction Training Programme for the newly appointed Civil Judges Class II of 2011 batch from 26.03.2012 to 20.04.2012.

Apart from the above training programmes, the Institute under the approved Scheme of Grant-in-Aid provided under the recommendations of the XIII Finance Commission, also conducted Regional Training Progammes on Protection of Women from Domestic Violence Act, 2005 and Negotiable Instruments Act, 1881 at Hoshangabad, Morena, Khargone and Satna.

In addition to the above, under the approved Scheme of Grant-in-Aid provided under the recommendations of the XIII Finance Commission, training programme for imparting training to the employees of Anuppur, Ashoknagar, Jhabua, Mandla, Satna, Sagar, Jabalpur, Bhopal, Rewa & Ujjain districts has been approved and this training will be imparted at their respective headquarters upto the end of December, 2012.

A detailed Report regarding activities undertaken under the Grant-in-Aid recommended by the XIII Finance Commission is being included in Part I of this issue. As we are all aware of the factual position of the number of pending execution matters in civil suits which is quite alarming, the Institute sent various topics pertaining to execution for discussion in bi-monthly training at district level and on the basis of the articles received, a consolidated article on the topic was prepared and is being included in this Part.

Part II is packed with the pronouncements of the Apex Court as well as our own High Court.

Under the approved Scheme for utilization of Grant-in-Aid recommended by the XIII Finance Commission, all Judicial Officers of the State have been provided with law books and most of the books have been delivered in the districts which are to be kept in safe custody in their respective courts after the same being provided to them by the concerned District Judge. Though for safe keeping of these books, certain guidelines have been sent to all the District Judges and also uploaded in the M.P. High Court website, still for ready reference, the same is also being published in Part III of the Journal.

I hope that this issue will be truly useful for enhancing the legal acumen to do effective justice to all the concerned for whom we are determined to serve.

I also solicit suggestions from the readers to make this Journal better.

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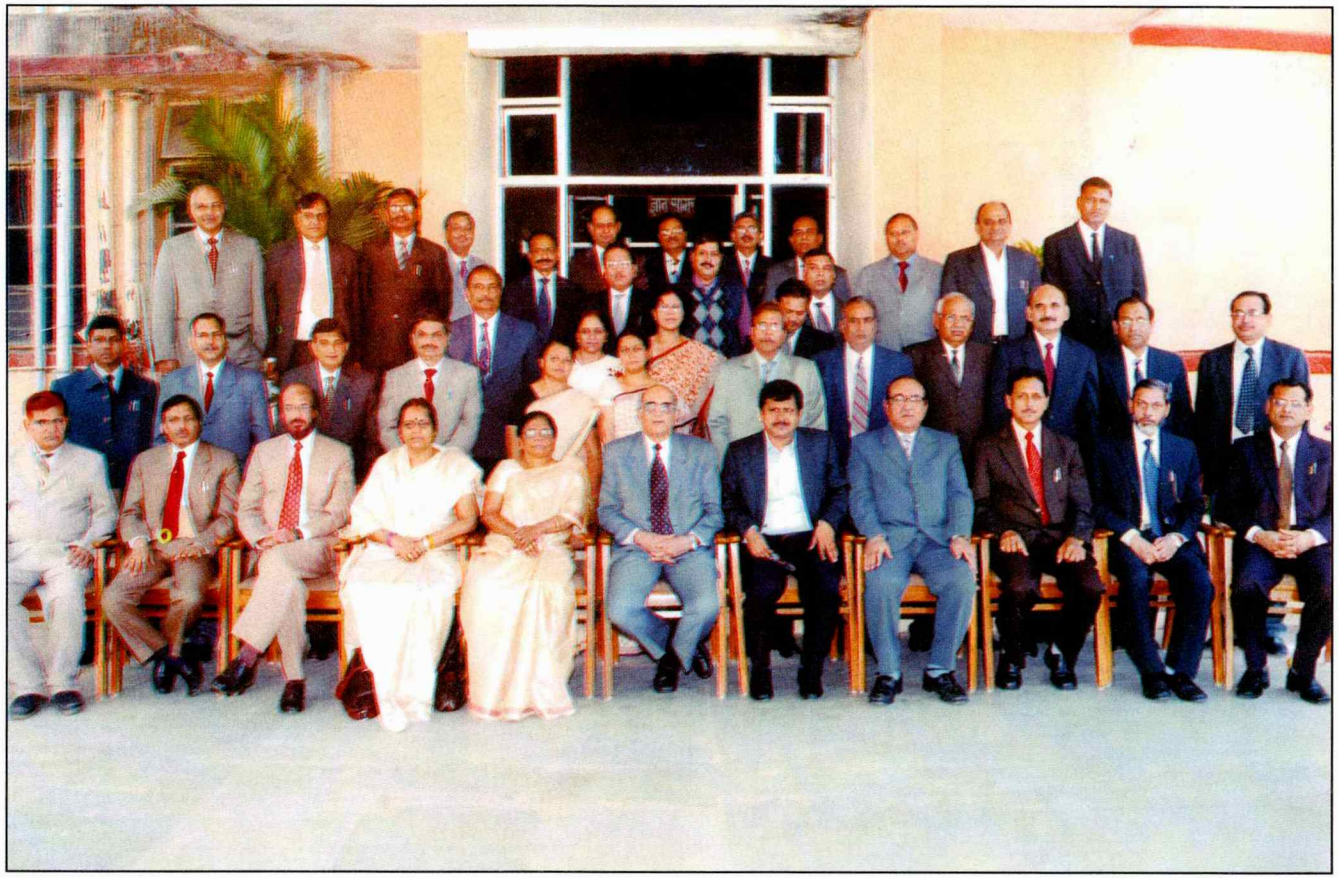
Hon'ble the Acting Chief Justice Shri Sushil Harkauli addressing the participants during the Foundation/Advance Course Training for ADJs in the Institute on 03.03.2012. Sitting on the right is Hon'ble Shri Justice Rajendra Menon, Chairman, High Court Training Committee

Group photograph of the participant ADJs alongwith Acting Chief Justice Shri Sushil Harkauli and Hon'ble Shri Justice Rajendra Menon, Chairman, High Court Training Committee and flanked by former Directors Shri Ved Prakash Sharma and Shri J.P. Gupta and present Director Shri Manohar Mamtani. On the extreme left is Shri Pradeep Kumar Vyas, OSD, JOTRI and extreme right is Shri Ramkumar Choubey, OSD, JOTRI



Participants at the one day consultation on 'Role of Judiciary on matters related to Adoption' organized by the Central Adoption Resource Authority (CARA), Ministry of Women and Child Development, Government of India, New Delhi in collaboration with JOTRI held in the Institute on 04.03.2012

PART - I

GRANT-IN-AID FOR JUDICIAL EDUCATION : A REPORT

(With reference to the recommendations of FC-XIII)

Ramkumar Choubey
HJS
OSD, J.O.T.R.I.

The Law Commission of India, in its 117th Report on ***Training of Judicial Officers*** has said "expectation from the Judiciary by the society is very high. An honest, intelligent and upright Judge inspires so much confidence in the society that any investment in producing such Judges should not be viewed from the standpoint of cost benefit syndrome."

It is conceded that training can significantly upgrade the capability of every one called upon to perform a duty in the Government or in a private sector. The necessity for imparting training, both pre-service (induction) and in-service (continuing) to the members of the judiciary at Subordinate Court level with a view to improving performance and efficiency cannot be denied. Nevertheless, a need of training and its instrumentality have always been placed next in importance in the system. In this backdrop, recommendations of 13th Finance Commission (FC-XIII) for "Improving Justice Delivery" are commendable which provides for various initiatives including Training of Judicial Officers and to Strengthen State Judicial Academies.

FC-XIII and conferment of improving Justice Delivery System

In pursuance of clause (1) of Article 280 of the Constitution of India read with the provisions contained in the Finance Commission (Miscellaneous Provisions) Act, 1951, the President of India has constituted the Thirteenth Finance Commission on 13th November, 2007 to give recommendations on specified aspects of Centre-State fiscal relations during the years 2010-2015. The Commission submitted its report to the President on 30th December, 2009 covering all aspects of its mandate. The Commission has also recommended for "Improving Justice Delivery." In Paragraphs 12.76 to 12.89 of Chapter 12 of the Report, it has elaborately discussed about support required to improve judicial outcome. The Government of India has accepted the said recommendations as per the Explanatory Memorandum dated 25th February, 2010 as action to be taken thereon.

The Commission in its Report has considered a number of initiatives identified by the Department of Justice, Government of India which are part of the action plan and need support to improve the justice delivery system. The Commission has agreed to support the proposals made by the Department of Justice by approving a total grant of ₹ 5000 crore to be allocated proposal-wise to the States for the period 2010-2015. Enhancing capacity of Judicial Officers and Public Prosecutors through training programmes and supporting creation of a Judicial Academy in every State to facilitate such training are also included in the said proposals.

Grant-in-aid for Training of Judicial Officers & State Judicial Academies

The 13th Finance Commission ((FC-XIII) was of the view that capacity building measures in the judiciary is a critical need. At present, Judicial Officers are trained in the State Judicial Academies for one year after their induction and thereafter, in-service training programmes are organised to further build their capacity. Such programmes need to be accelerated through provision of additional support for these initiatives. Therefore, the Commission has made a provision of ₹ 250 crore for the award period 2010-2015 and allocated to States in proportion to the number of Courts in their jurisdiction. The Commission also observed that the main vehicle for training of judges is the State Judicial Academy. It is necessary to support the state judicial academies to enable them to operate programmes throughout the year to promptly complete the training of judges. Hence, the Commission has proposed an amount of ₹ 15 crore per High Court for 20 High Courts, which works out to ₹300 crore that is to be utilised for creation of new academies in States where they do not exist, or for providing additional facilities where they do exist.

Guidelines for release and utilisation of Grant-in-aid

The Finance Commission Division (Department of Expenditure) of Ministry of Finance, Government of India vide F. No. 32 (30) FCD/2010 has issued detailed guidelines for release and utilisation of Grant-in-aid for improvement in justice delivery as recommended by the 13th Finance Commission (FC-XIII). These guidelines inter alia ruled for monitoring through the High Level Monitoring Committee (HLMC) at State Government level and the Review Committee at Union Government level and also lays various conditions for release of grants including the condition of putting in place a State Litigation Policy (SLP) by State Government to be eligible to draw down the instalment of grant.

Constitution and Role of HLMC

As per the guidelines for release and utilisation of Grant-in-aid recommended by the FC-XIII, it is mandatory for every State to set up a High Level Monitoring Committee (HLMC) to approve the perspective and annual action plans for utilisation of the grants recommended by the FC-XIII and for regular monitoring of the progress made in implementation of these plans. The HLMC so set up, shall be responsible for monitoring both the physical and financial targets, ensuring adherence to specific conditions in respect of the grant.

Hence, a High Level Monitoring Committee (HLMC) has been constituted in the State of Madhya Pradesh which is being presided over by the Chief Secretary of the State. The HLMC has, amongst its members, Registrar General, High Court of Madhya Pradesh, Principal Secretaries of the Departments of Finance, Law & Legislative Affairs, Home and Public Works Department, Director, JOTRI, Director of Public Prosecution and Member-Secretary of the State Legal Service Authority.

Allocation of funds to the State of Madhya Pradesh

As per the recommendations of the 13th Finance Commission (FC-XIII), the State of Madhya Pradesh has been provided with Grant-in-aid of ₹ 407.38 crore in total for the award period of five years viz. 2010-2015 which is to be utilised for diverse constituent parts of the justice dispensation system. The Grant is aimed at providing support to improve judicial outcome and is allocated through various initiatives. Let's have a glance at the allocation of funds which is given below:

Allocation of Grants for Improving Delivery of Justice

State	Number of Sanctioned Courts	Number of Judicial Districts	Morning/ evening Courts	Lok Adalat and Legal Aid	Training of Judicial Officers	Training of Public Prosecutors	Heritage Court Buildings	State Judicial Academy	ADR centers	Court Managers	Total
			(₹crore)								
M.P.	1307	50	204.91	24.59	**20.49**	12.29	36.88	**15**	66.58	26.63	407.38

Release and utilisation of Grant-in-aid provided to JOTRI

From the allocation of Grant-in-aid for improving justice delivery system in the State of Madhya Pradesh, the provision of an amount of ₹ 20.49 crore for ***Training of Judicial Officers*** and ₹ 15 crore for ***Strengthening State Judicial Academy (JOTRI)*** have been made by the Government of India in order to implement the recommendations of the 13th Finance Commission (FC-XIII).

Submission of Action Plan

The five year Action Plan(s) for utilisation of amount for ***Training of Judicial Officers*** and for ***Strengthening State Judicial Academy (JOTRI)***, showing head-wise expenditure and financial year-wise summary of proposals, were prepared by JOTRI according to the guidelines issued by the Government of India for release and utilisation of the said Grant-in-aid and same were submitted to the High Level Monitoring Committee (HLMC) for approval on 23rd August, 2011.

In the year 2010-2011, no fund was utilised due to delay in completion of formalities of drawing down the installment of grant. Therefore, the fund allotted for the year 2010-2011 was carried forward to the financial year 2011-2012.

Accordingly, in all for 19 Schemes the total estimated amount of ₹ 14.20 crore were prepared by JOTRI for these two years. The details of some of them are given below:

S.No.	Proposed Schemes/Works	Estimated Amount (in lakh)	
		for Financial Years 2010-11 & 2011-12	for award period of 2010-15
1.	Training by Video Conferencing at all District Training Centres of JOTRI	200	500
2.	Tours for study of best practices to other States	020	140
3.	Specialised Trainings in other Institutes (FSL, Medico Legal, Cyber laws, Forest, Management, Revenue, Accounts, Language, etc.)	012	077
4.	Books/Reading Material including Software to all the Judicial Officers	300	350
5.	Books/Reading Material including Software with operational facility to JOTRI and all the District & Regional Training Centres of JOTRI	150	150
6.	Books/Reading Material including Software with operational facility to all the District Bars	050	050
7.	Training Programmes for Judicial Officers: (i) Induction (ii) Refresher (iii) Regional	015	138
8.	Training Programmes for staff at district level	005	048
9.	Development of Faculties	002	015
10.	Construction/Development of Regional Training Centres at Gwalior and Indore	200	600
11.	Development of Infrastructure of the building of State Judicial Academy (JOTRI) - Furniture & Equipments to furnish the new building of JOTRI, Jabalpur	100	500
12.	Development of Video-Conferencing Facility with all District Training Centres of JOTRI	200	200

Approval of HLMC

Law and Legislative Affairs Department, Government of Madhya Pradesh, Vide memo Nos. 3654 dated 22.09.2011 and 3659 dated 05.10.2011, has apprised that perspective plan (five years Action Plan) and annual plan (Action Plan for the Financial Years 2010-11 & 2011-12) with regard to imparting ***Training to Judicial Officers*** **and** ***Strengthening of State Judicial Academy (JOTRI)*** have been approved by the High Level Monitoring Committee (HLMC) with some modifications.

Constitution of Monitoring Committee

For working out the proposals approved by the High Level Monitoring Committee (HLMC) as per Action Plan(s) submitted to it and to ensure effective implementation of the schemes proposed under the said plan(s), Hon'ble the Acting Chief Justice of Madhya Pradesh was pleased to constitute a Monitoring Committee comprising of Hon'ble Judges of the High Court of Madhya Pradesh namely Hon'ble Shri Justice Rajendra Menon and Hon'ble Shri Justice N. K. Gupta. The funds are being channelised through the said Monitoring Committee to ensure maximum benefits to the Judicial Officers of Madhya Pradesh by way of judicial excellence in justice delivery system.

Financial and physical progress in the Year 2011-12

JOTRI has taken various steps for implementation of Schemes/works and proper utilisation of funds allocated therefor in the Financial Years 2011-12 including the funds allotted for the year 2010-2011 which was carried forward to the next financial year 2011-2012 according to approved Schemes/works under Action Plan(s) for ***Training of Judicial Officers and Strengthening State Judicial Academy (JOTRI)***. The financial and physical progress in the Year 2011-2012 may be described as follows:

Specialised Training Programmes

The budgetary allocation for this purpose was ₹ 12 lakh for the year 2011-12. JOTRI has organised four programmes of Specialised Training in the year, two each at Medico-legal Institute, Bhopal and at State Forensic Science Laboratory, Sagar in the months of January and February, 2012 respectively. In the said Specialised Training Programmes, 140 Judicial Officers of the Higher Judicial Services cadre were imparted training on Medico-legal and Forensic Science respectively.

Regional Training Programmes

In this head, the budgetary provision was ₹ 5 lakhs for the relevant years i. e. 2010-2011 & 2011-2012. In all, 12 Regional Training Programmes were conducted at District level in which nearly 400 Judicial Officers of all cadres were imparted training on topics like Negotiable Instruments Act, 1881 and Protection of Women from Domestic Violence Act, 2005 covering 33 districts.

Training Programmes for staff of all District Courts

The budgetary allocation for organising training programmes for the staff of Subordinate Courts was ₹ 5 lakh in the current financial year. In this programme, workshop and training programme of two days duration were organised at 11 districts to impart training to the ministerial staff of the Subordinate Courts regarding their working as stakeholder of the Justice Delivery System. Near about 700 employees of the District Courts have been imparted training under this scheme.

Tours for study of best practices to other States

For the Financial Years 2010-2011 & 2011-2012 the budgetary allocation was ₹ 20 lakhs for visiting other States for study of best practices. JOTRI has sent in all four groups each comprising of five Judicial Officers of all cadres to Chennai and Madurai in the State of Tamil Nadu and Mumbai and Pune in the State of Maharashtra for study of best practices. By visiting the said places, 20 Judicial Officers have studied various courts at visiting places and submitted detailed reports.

Books and reading material including softwares to the Judicial Officers

As per the approved Action Plan for the Training of Judicial Officers, the initial budgetary allocation for providing law books, study material including legal data base software was ₹ 300 lakhs which has been revised and increased by ₹ 150 lakhs. Under this scheme, each Judicial Officer of the State will be provided

with law books, study material including legal data base software with search engine. Under this scheme, necessary purchase orders to Publishers and installation order to the legal data based company has been issued and the scheme is under progress.

Development of Video-conferencing facility with all District Training Centres

As per the approved Action Plan, the Budgetary Allocation for training by video conferencing at all district training centers of JOTRI for the Financial Year 2010-2011 & 2011-2012 is ₹ 400 lakh and further, for the rest of the plan period, under the head ***Training of Judicial Officers*** ₹ 300 crore have been allocated. Necessary installation order in this regard have been issued and the scheme is under progress.

Construction of Regional Training Centres at Gwalior and Indore

An amount of ₹ 600 lakhs for the entire five year period has been allocated under this head. For development of Regional Training Centres at Gwalior and Indore, land at High Court premises, Gwalior Bench and land allocated for construction of District Court at Indore at Pipliyahana has been identified.

Development of Library of JOTRI

In this Head a fund of ₹ 100 lakhs was allocated in this Financial Year. Out of this amount, nearly, ₹ 18.05 lakh has been utilized for purchase of books for the Library of JOTRI.

Development of Infrastructure of the building of JOTRI

For furniture and equipments to furnish the new building of JOTRI, Jabalpur, an amount of ₹ 500 lakh has been allocated under this Head for the entire five year period. As the construction of Institute's new building is likely to be completed shortly, the allocated fund will be utilized accordingly.

Development of in-service faculties

As per the Scheme of Development of Additional Permanent Faculties, under the approved Action Plan, the Institute is going to develop faculties from the in-service Judicial Officers for imparting Induction and Refresher Course training to the Civil Judges Class II and also for imparting Foundation/Advance Course and Refresher Course training to the newly recruited/promoted Additional District Judges as well as for preparing study material on the given topics based on curriculum. For the award period i.e. 2010-2015, some fulltime faculties amongst Judicial Officers have also been approved and necessary action is under progress for their engagement in the Institute.

As, the Grant-in-aid provided by the Government of India as recommended by the 13th Finance Commission (FC-XIII) is for the award period of 2010-2015, the process of improving Judicial Education and its conductivity will continue with consistent effort and cooperation of all concerned so that better output in this field can be ensured.

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आज्ञप्तियों का निष्पादनः विधि एवं प्रक्रिया

जिला स्तरीय द्वि–मासिक प्रशिक्षण कार्यक्रम के अंतर्गत आदेश 21 सिविल प्रक्रिया संहिता, 1908 के संदर्भ में आज्ञप्ति के निष्पादन से संबंधित विधि एवं प्रक्रिया से जुड़ें प्रश्न विचार–विमर्श के लिए प्रेषित किये गये थे। यहाँ विभिन्न जिलों के न्यायिक अधिकारियों की ओर से प्राप्त आलेखों को संस्थान द्वारा संपादित कर समेकित रूप में प्रस्तुत किया जा रहा है।

–संचालक

खण्ड–अ

धन के भुगतान एवं चल सम्पत्ति के आधिपत्य की आज्ञप्ति के निष्पादन की पद्धति

(न्यायिक अधिकारीगण, जिला देवास द्वारा प्रेषित आलेख पर आधारित)

(i) धन के भुगतान की डिक्री के निष्पादन की पद्धति

धन के भुगतान की डिक्री के निष्पादन की पद्धति से सम्बंधित उपबंध संहिता के आदेश 21 नियम 30 में दिए गए हैं जिनके अनुसार– धन के संदाय की हर डिक्री निर्णीतऋणी से सिविल कारागार में निरोध द्वारा या उसकी सम्पत्ति की कुर्की और विक्रय द्वारा या दोनों रीति से निष्पादित की जा सकेगी।

आदेश 21 नियम 30 में वर्णित धन के भुगतान की डिक्री के निष्पादन की पद्धतियां अत्यांतिक नहीं हैं जिससे वह संहिता के अन्य प्रावधनों में वर्णित डिक्री के निष्पादन की, अन्य पद्धतियों को अधिष्ठित नहीं करती हैं ***(सरस्वतीबाई बनाम गोविन्दराव, ए.आई.आर. 1961 एम.पी. 145)।*** संहिता की धारा 51 में निष्पादन कराने की न्यायालय की शक्तियों के रूप में डिक्री के निष्पादन की विभिन्न पद्धतियां उपबंधित है। उक्त धारा के अनुसार विहित परिसीमाओं और शर्तों के अधीन रहते हुए डिक्रीधारी के आवेदन पर डिक्री का निष्पादन –

(क) विनिर्दिष्ट रूप से डिक्रीत किसी सम्पत्ति के परिदान द्वारा,

(ख) किसी सम्पत्ति की कुर्की और विक्रय द्वारा या उसकी कुर्की के बिना विक्रय द्वारा,

(ग) गिरफ्तारी और कारागार में निरोध द्वारा,

(घ) रिसीवर की नियुक्ति द्वारा अथवा

(च) ऐसी अन्य रीति जिसकी दिए गए अनुतोष की प्रकृति अपेक्षा करे, से किया जा सकता है।

इसी प्रकार संहिता के आदेश 21 नियम 11 (2) के अनुसार निष्पादन आवेदन में डिक्रीधारी द्वारा विहित अन्य विशिष्टियों के साथ वह ढंग जिसमें डिक्री का निष्पादन अपेक्षित है, का वर्णन किया जाना आवश्यक है। उक्त उपबंध के अनुसार निष्पादन आवेदन में यह वर्णित होना चाहिए कि निष्पादन – (1) किसी विनिर्दिष्टतः डिक्रीत सम्पत्ति के परिदान द्वारा, (2) किसी सम्पत्ति की कुर्की द्वारा या कुर्की और विक्रय द्वारा या कुर्की के बिना विक्रय द्वारा, (3) किसी व्यक्ति की गिरफ्तारी और कारागार में निरोध द्वारा, (4) रिसीवर की नियुक्ति द्वारा, (5) अन्यथा, जो अनुदत्त अनुतोष की प्रकृति से अपेक्षित है, किया जाय।

इस प्रकार धन के भुगतान की डिक्री का निष्पादन धारा 51 में उपबंधित अन्य रीतियों जैसे रिसीवर की नियुक्ति द्वारा निर्णीतऋणी की सम्पत्ति की कुर्की के बिना विक्रय द्वारा अनुदत्त अनुतोष की प्रकृति की अपेक्षा के अनुसार अन्य रीति से, किया जा सकता है भले ही आदेश 21 नियम 30 में इनका कोई उल्लेख न हो।

संहिता की धारा 51 व आदेश 21 नियम 30 में इस प्रकार का कोई दायित्व अधिरोपित नहीं है कि ऊपर वर्णित किसी एक रीति से निष्पादन की कार्यवाही किए जाने पर दूसरी रीति से यह कार्यवाही नहीं की जा सकती। यह भी उपबंधित नहीं है कि गिरफ्तारी व निरोध के द्वारा डिक्री का निष्पादन करने के पहले चल या अचल सम्पत्ति की कुर्की व विक्रय द्वारा या अन्य उपबंधित रीति से निष्पादन किया जाना अनिवार्य है। यह भी उपबंधित नहीं है कि अचल सम्पत्ति की कुर्की व विक्रय के पूर्व चल सम्पत्ति की कुर्की व विक्रय के द्वारा डिक्री का निष्पादन किया जाना चाहिए। इस प्रकार एक साथ कई रीतियों से या समकालीन एक या अधिक रीति से निष्पादन की कार्यवाही की जा सकती है। ***(पडरौना राज कृष्णा सुगर वर्क्स लि. बनाम लैंड रिफार्म कमिश्नर यू.पी., ए.आई.आर. 1969 एस.सी. 897)***।

फूड कार्पोरेशन आफ इण्डिया बनाम सुखदेव प्रसाद, ए.आई.आर. 2009 एस.सी. 2330 में यह अभिनिर्धारित किया गया है कि धन की डिक्री का पालन न किए जाने पर निर्णीत ऋणी के विरूद्ध न्यायालय की अवमानना या आदेश 39 नियम 2ए सी.पी.सी. के अंतर्गत आदेश के उल्लंघन की, कार्यवाही नहीं की जा सकती हैं। यदि निर्णीतऋणी डिक्री का पालन नहीं करता उस अवस्था में डिक्रीधारी केवल निष्पादन आवेदन पेश करके संहिता में विहित ढंग से डिक्री के निष्पादन की कार्यवाही कर सकता है।

धन के संदाय की डिक्री के डिक्रीधारी की मृत्यु हो जाने पर उसके विधिक प्रतिनिधियों द्वारा निष्पादन–

यदि डिक्री धन की वसूली से संबधित है तथा डिक्रीधारी की निष्पादन कार्यवाही प्रारंभ होने के पूर्व अथवा निष्पादन कार्यवाही के अनुक्रम में मृत्यु हो जाती है तो ऐसी डिक्री के निष्पादन हेतु आवेदन प्रस्तुत करने/कार्यवाही जारी रखने हेतु डिक्रीधारी के विधिक प्रतिनिधियों को निष्पादन न्यायालय में उत्तराधिकार प्रमाणपत्र प्रस्तुत करना होगा क्योंकि ऐसी डिक्री ऋण की परिभाषा में नहीं आती हैं। (देखे– ***तेजराज राजमल मारवाड़ी बनाम रामप्यारी, ए.आई.आर. 1938 नागपुर 528, ताराबाई बनाम शिवनारायण, 1997 (2) एम.पी.एल.जे. 287, मथुरा प्रसाद बनाम घासीदास, 1997 (1) एम.पी.एल.जे. 187 एवं हरिकृष्ण बनाम भारत संघ,1997 (1) एम.पी.एल.जे. 322)*** यद्यपि जहाँ केवल परिव्यय दिलाया गया है वहां ऐसी धन की डिक्री ऋण की परिभाषा में नहीं आयेगी इसके लिए उत्ताधिकार प्रमाण पत्र की आवश्यकता नहीं होगी जैसे कि ***राजलक्ष्मी बनाम एस. सीतामहालक्ष्मी, ए.आई.आर. 1976 आंध्रप्रदेश 361 एवं व्ही.टी.व्ही.आर. स्वामी बनाम एस.आर. गनेशवर, ए. आई.आर. 1973 आंध्रप्रदेश 38*** में प्रतिपादित किया गया हैं।

सिविल कारागार में निरोध के द्वारा धन के भुगतान की डिक्री का निष्पादन

डिक्री के निष्पादन के लिए निर्णीतऋणी की गिरफ्तारी व सिविल कारागार में निरोध के उपबंध संहिता की धारा 51 व धारा 55 से 59 एवं आदेश 21 के नियम 37 से नियम 40 में है। आदेश 21 नियम 11 (2) के अनुसार पेश निष्पादन आवेदन में डिक्रीधारी के द्वारा उन ढंगों जिनके द्वारा डिक्री का निष्पादन वांछित है, का उल्लेख किया जाना आवश्यक है। इसी के साथ आदेश 21 नियम 11क के अनुसार जहां निर्णीतऋणी की गिरफ्तारी और कारागार में निरोध के लिए आवेदन किया जाता है वहां उसमें उन आधारों पर जिन पर गिरफ्तारी और कारागार में निरोध के लिए आवेदन किया गया है, कथन होगा या उसके साथ एक शपथपत्र होगा जिसमें उन आधारों का जिन पर गिरफ्तारी के लिए आवेदन किया गया है, कथन होगा।

आदेश 21 नियम 37 के अनुसार जहां डिक्री धन के संदाय के लिए है, वहां यदि निर्णीतऋणी की गिरफ्तारी व उसे सिविल कारागार में निरोध करके डिक्री के निष्पादन के लिए आवेदन है वहां निष्पादन न्यायालय उसे गिरफ्तार करने के वारण्ट निकालने के बदले उसे उपसंजात होकर हेतुक दर्शित करने कि उसे सिविल कारागार के सुपुर्द क्यों न किया जाय, की सूचना निकालेगा। सूचना का प्रारूप संहिता के परिशिष्ट ड़ कें संख्या– 12 पर दिया गया है।

उक्त सूचना के पालन में निर्णीतऋणी के उपस्थित होने पर न्यायालय के लिए आदेश 21 नियम 40 में उपबंधित अनुसार डिक्रीधारी को उसके आवेदन में उल्लिखित आधारों पर व निर्णीतऋणी को दर्शित हेतुक पर साक्ष्य व सुनवाई का अवसर देना आज्ञापक है। उक्तानुसार निर्णीतऋणी को हेतुक दर्शित करने का अवसर देने, जांच, साक्ष्य व सुनवाई उपरांत संहिता की धारा 51 के परंतुक के अनुसार धन के संदाय की डिक्री के निष्पादन के लिए निर्णीतऋणी को सिविल कारागार में निरूद्ध करने के पूर्व निष्पादन न्यायालय को अभिलिखित कारणों से यह समाधान होना चाहिए कि –

(क) निर्णीतऋणी इस उद्देश्य से या यह परिणाम पैदा करने के लिए कि डिक्री के निष्पादन में बाधा या बिलम्ब हो–

  (1) न्यायालय की अधिकारिता की स्थानीय सीमाओं से फरार होने वाला है या उन्हें छोडने वाला है, अथवा

  (2) उस वाद के संस्थित किए जाने के पश्चात् जिसमें डिक्री पारित की गई थी अपनी सम्पत्ति के किसी भाग को अंतरित कर चुका है, छिपा चुका है या हटा चुका है अथवा अपनी सम्पत्ति के सम्बंध में असद्भावपूर्ण कोई अन्य कार्य कर चुका है, अथवा

(ख) डिक्री की रकम या उसके पर्याप्त भाग का संदाय करने के साधन निर्णीतऋणी के पास हैं या डिक्री की तारीख के पश्चात् रह चुके हैं और वह उसे संदत्त करने से इंकार या संदत्त करने में उपेक्षा करता है या कर चुका है,

(ग) डिक्री उस राशि के लिए है, जिसका लेखा देने के लिए निर्णीऋणी वैश्वासिक हैसियत में आबद्ध था।

इस प्रकार निर्णीतऋणी की गिरफ्तारी व सिविल कारागार में निरोध के द्वारा धन के संदाय की डिक्री के निष्पादन के लिए संहिता की धारा 51 के परंतुक में वर्णित 3 परिस्थितियों में कोई एक होनी

चाहिए एवं आदेश 21 नियम 37 व नियम 40 के अंतर्गत निर्णीतऋणी को हेतुक दर्शित करने के अवसर के साथ जांच, साक्ष्य व सुनवाई की कार्यवाही होनी चाहिए। यदि उक्त शर्तों की पूर्ति नहीं होती है तब निर्णीत ऋणी को सिविल जेल में निरूद्ध करने का आदेश अवैध होने से अपास्त योग्य होता है। (***सुभाष चन्द जैन बनाम सेंट्रल बैंक आफ इण्डिया, ए.आई.आर. 1999 एम.पी. 195 एवं अनिल राठी बनाम महालक्ष्मी फिल्म डिस्ट्रीव्यूटर्स, ए.आई.आर. 2007 एम0पी0 33***)

आदेश 21 नियम 37 (1) के परंतुक में वह आपवादिक परिस्थितियां दी गई हैं जिनके अंतर्गत निर्णीतऋणी को हेतुक दर्शित करने की सूचना देना आवश्यक नहीं है। निम्नलिखित परिस्थितियों में धन की डिक्री के निष्पादन में निर्णीतऋणी को हेतुक दर्शित करने की सूचना दिए बिना उसे सिविल कारागार में निरूद्ध किया जा सकता है– यदि शपथपत्र द्वारा या अन्यथा न्यायालय का समाधान हो जाता है कि –

(1) यह सम्भाव्यता है कि निर्णीतऋणी डिक्री के निष्पादन में बिलम्ब करने के उद्देश्य से फरार हो जाय या न्यायालय की अधिकारिता की स्थानीय सीमाओं को छोंड दे, या

(2) उसके ऐसा करनें का परिणाम यह होगा कि डिक्री के निष्पादन में बिलम्ब होगा।

आदेश 21 नियम 11 (1) में भी वह परिस्थिति दी गई है जिसके अन्तर्गत निर्णीतऋणी को हेतुक दर्शित करने की सूचना के बिना गिरफ्तार किया जा सकता है। उक्त उपबंध के अनुसार जहां डिक्री धन के संदाय के लिए है वहां, यदि निर्णीतऋणी न्यायालय की परिसीमाओं के भीतर है तो, न्यायालय डिक्री पारित करने के समय डिक्रीधारी द्वारा दिए गए मौखिक आवेदन पर आदेश दे सकेगा कि वारण्ट की तैयारी के पूर्व ही डिक्री का अविलम्ब निष्पादन निर्णीतऋणी की गिरफ्तारी द्वारा किया जाय। डिक्रीध ारी व निर्णीतऋणी को सिविल कारागार में भेजने के वारंट का प्ररूप परिशिष्ट ड़ संख्या–13 पर दिया गया है।

निर्णीतऋणी को अपराधी के समान मानना उचित नहीं है। उसका दोष केवल यह होता है उसने अपने सिविल दायित्व को पूरा नहीं किया। व्यक्ति के जीवन की स्वतंत्रता उसे संविधान के द्वारा प्रदत्त मौलिक अधिकार है इसलिए सिविल दायित्व को पूरा न करने पर विधिक प्रक्रिया के अंतर्गत आपवादिक परिस्थितियों में उसे सिविल कारागार में निरूद्ध करके उसके जीवन की स्वतंत्रता बाधित की जानी चाहिए। धारा 51 के परंतुक में सिविल निरोध की जो परिस्थितियां दी गई हैं उनसे यही प्रकट है कि जहां निर्णीतऋणी साधन सम्पन्न होते हुए दुर्भावनापूर्वक डिक्री का पालन करने से बचना चाहता है उसी अवस्था में उसकी गिरफ्तारी व सिविल कारागार में निरोध द्वारा डिक्री का निष्पादन कराया जाना चाहिए। माननीय उच्चतम् न्यायालय के न्याय दृष्टांत ***जॉली जार्ज वर्गीज बनाम द बैंक ऑफ कोचीन, ए.आई.आर. 1980 एस.सी. 470*** में अभिनिर्धारित किया गया है कि ऋणों का भुगतान न होने पर कारागार के संदर्भ में भारतीय संविधान के अनुच्छेद 21 का तात्पर्य समान रूप से अर्थपूर्ण है। मानव की गरिमा व प्रतिष्ठा के उच्च मूल्यों को अनुच्छेद 21 में मान्य किया गया है। इसलिए मात्र धन की डिक्री का अपालन, चूक या धन का भुगतान न करना निर्णीतऋणी को सिविल कारागार में निरूद्ध करने के लिए पर्याप्त कारण नहीं है। इसके साथ ही उसका दुराशय, दुराग्रह या दुर्भावना भी होनी चाहिए जिससे यह प्रकट हो कि निर्णीतऋणी साधन सम्पन्न होने के बावजूद गलत आशय से डिक्री का पालन नहीं करना चाहता है।

संहिता की धारा 55 में निर्णीतऋणी को गिरफ्तार करने व उसको निरोध में लेने के समय अपनाई जाने वाली प्रक्रिया व पालनीय शर्तें उपबंधित हैं। गिरफ्तारी हेतु कब निवास गृह में प्रवेश किया जा सकता है के बावत् भी उपबंध हैं। धारा 58 में निर्णीतऋणी को सिविल जेल में रखे जाने की अधिकतम् अवधि का उल्लेख है। उक्त धारा के अनुसार जहां डिक्री पांच हजार रूपए से अधिक धनराशि के संदाय के लिए है वहां तीन मास तक, जहां डिक्री दो हजार रूपए से अधिक किन्तु पांच हजार रूपए से अनधिक धनराशि के संदाय के लिए है वहां छह सप्ताह तक के लिए निर्णीतऋणी को सिविल कारागार में निरूद्ध किया जा सकता है। जहां डिक्री की कुल रकम दो हजार रूपए से अनधिक है वहां निर्णीतऋणी को सिविल कारागार में निरूद्ध नहीं किया जा सकता है।

उक्त धारा में यह भी उपबंध है कि निर्णीतऋणी को सिविल कारागार में छोड़ना ऋण से उन्मोचित होना नहीं है किन्तु वह उस डिक्री के निष्पादन में पुनः सिविल जेल में निरूद्ध नहीं किया जाएगा। उक्त उपबंध का स्पष्ट आशय है कि धन के संदाय की डिक्री के निष्पादन में निर्णीतऋणी के सिविल कारागार में निरोध के बाद भी उसकी चल व अचल सम्पत्ति को कुर्क व विक्रय करके डिक्री धन की वसूली की जा सकेगी।

संहिता की धारा 58 व 59 निर्णीतऋणी को सिविल कारागार से रिहा किए जाने से सम्बंधित है। धारा 57 व नियम 38 व 39 निर्वाह भत्ता से संबंधित हैं।

निर्णीतऋणी की गिरफ्तारी निरोध एवं निर्मुक्ति के संबंध में म.प्र. सिविल न्यायालय नियम, 1961 के नियम 226 से 231 तक में वर्णित प्रक्रिया का पालन अपेक्षित है। नियम 232 की टीप ध्यातव्य है जिसके अधीन निष्पादन न्यायालय के लिए यह निर्देश है कि निर्णीतऋणी की गिरफ्तारी हेतु पुलिस सहायता नहीं ली जा सकती है।

धन की डिक्री के निष्पादन में गिरफ्तारी व सिविल कारागार से छूट प्राप्त व्यक्ति–

संहिता की धारा 56 के अंतर्गत धन के संदाय की डिक्री के निष्पादन में स्त्रियों की गिरफ्तारी या निरोध निषेधित है। संहिता की धारा 135 (1) के अंतर्गत कोई भी न्यायाधीश, मजिस्ट्रेट या अन्य न्यायिक अधिकारी उस समय सिविल आदेशिका के अधीन गिरफ्तार नहीं किया जा सकेगा जब वह अपने न्यायालय को जा रहा हो, उसमें पीठासीन हो या वहां से लौट रहा हो। इसी प्रकार धारा 135 क के अंतर्गत विधायी निकाय के सदस्यों– अर्थात संसद के किसी भी सदन के सदस्यों, किसी राज्य की विधान सभा या विधान परिषद के सदस्यों, संघ राज्य क्षेत्र की विधान सभा के सदस्यों, संसद आदि की समितियों के सदस्यों को अधिवेशन, बैठक आदि चालू रहने के दौरान और अधिवेशन आदि के चालीस दिन पूर्व और पश्चात् सिविल आदेशिका के अधीन गिरफ्तार नहीं किया जा सकता है। इस प्रकार धारा 135 (1) व 135 क में वर्णित व्यक्तियों को उपबंधित अवधि में धन की डिक्री के निष्पादन में न तो गिरफ्तार किया जा सकता है न ही सिविल कारागार में निरूद्ध किया जा सकता है।

मूल ऋणी के विधिक प्रतिनिधियों के विरूद्ध गिरफ्तारी व सिविल कारागार में निरोध द्वारा धन की डिक्री का निष्पादन–

प्रश्न यह है कि क्या मूल निर्णीतऋणी (जिसके जीवनकाल में डिक्री पारित की गई है) की मृत्यु होने पर उसके विधिक प्रतिनिधियों के विरूद्ध गिरफ्तारी व सिविल कारागार में निरोध के द्वारा धन

की डिक्री का निष्पादन कराया जा सकता है। संहिता की धारा 50 व 52 उक्त सम्बंध में अवलोकनीय है। धारा 50 के अनुसार जहां डिक्री के पूर्णतः तुष्ट किए जाने के पहले निर्णीतऋणी की मृत्यु हो जाती है अर्थात् जहाँ निष्पादन कार्यवाही के दौरान निर्णीतऋणी की मृत्यु हो जाती है वहां डिक्री का निष्पादन उसके विधिक प्रतिनिधियों के विरूद्ध किया जा सकता है। वे मृतक की सम्पत्ति के उस परिणाम तक ही दायी होते हैं जितने परिणाम तक वह सम्पत्ति उनके हाथ में आई है और सम्यक रूप से व्ययनित नहीं कर दी गई। उक्त उपबंध यह स्पष्ट करते हैं कि मूल ऋणी के विरूद्ध डिक्री पारित होने के बाद उसकी (निर्णीतऋणी की) मृत्यु होने पर उसके विधिक प्रतिनिधियों को सिविल कारागार में निरोध के द्वारा डिक्री का निष्पादन नहीं किया जा सकता है।

संहिता की धारा 52 उस परिस्थिति से सम्बंधित है जहां मूल ऋणी की मृत्यु वाद के अंतिम निराकरण के पूर्व अर्थात् वादलम्बित रहते हुए हो जाती है और उसके विधिक प्रतिनिधियों को वाद में पक्षकार के रूप में संयोजित करते हुए विधिक प्रतिनिधियों के विरूद्ध डिक्री पारित की जाती है। इस स्थिति में मृतक (मूल ऋणी) की सम्पत्ति जो विधिक प्रतिनिधियों को प्राप्त हुई है, उसकी कुर्की व विक्रय से धन की डिक्री का निष्पादन किया जा सकता है। धारा 52 (2) के अधीन यदि सम्पत्ति निर्णीतऋणी के कब्जे में आना साबित कर दिया जाता है और यदि निर्णीतऋणी उस सम्पत्ति का सम्यक रूप में उपयोजन करना साबित करने में असफल रहता है तो डिक्री का निष्पादन ऐसे किया जा सकता है जैसे वह डिक्री ***वैयक्तिक रूप से उसके विरूद्ध पारित की गई है।*** इस उपबंध से यह स्पष्ट है कि यदि मृतक निर्णीत ऋणी से प्राप्त सम्पत्ति विधिक प्रतिनिधि के पास शेष नहीं बची हो एवं वह उसका लेखा जोखा प्रस्तुत नहीं करता है तो केवल इसी परिस्थिति में ही मूल ऋणी के विधिक प्रतिनिधियों को सिविल कारागार में निरूद्ध करके धन की डिक्री का निष्पादन कराया जा सकता है।

सम्पत्ति की कुर्की व विक्रय द्वारा धन के संदाय की डिक्री का निष्पादन

आदेश 21 नियम 30 के अनुसार धन के संदाय की डिक्री का निष्पादन निर्णीतऋणी की सम्पत्ति की कुर्की व विक्रय द्वारा भी किया जा सकता है। उक्त उपबंध में विशिष्ट रूप में यह लेख नहीं है कि सम्पत्ति चल होगी या अचल। केवल सम्पत्ति शब्द लेख होने से विधायिका का आशय चल व अचल दोनों प्रकार की सम्पत्तियों से है। सम्पत्ति की कुर्की व विक्रय के संबंध में आगे जो उपबंध हैं वे चल व अचल दोनों प्रकार की सम्पत्तियों से सम्बंधित हैं। इस प्रकार यह स्पष्ट है कि डिक्रीधारी की स्थावर या जंगम दोनों प्रकार की सम्पत्तियों की कुर्की व विक्रय द्वारा धन के भुगतान की डिक्री का निष्पादन किया जा सकता है।

डिक्री के निष्पादन में कौन सम्पत्ति कुर्क व विक्रय की जा सकेगी/नहीं की जा सकेगी–

संहिता की धारा 60 (1) के प्रथम भाग में कौन सम्पत्ति डिक्री के निष्पादन में कुर्क व विक्रय की जा सकती है, के बावत् सामान्य उपबंध है। धारा 60 के प्रथम भाग के परंतुक में उन सम्पत्तियों की विस्तृत सूची दी गई है जो डिक्री के निष्पादन में कुर्क व विक्रय नहीं की जा सकती है। धारा 60 की उपधारा (1क) के अनुसार तत्समय प्रवृत्त किसी अन्य विधि में किसी बात के होते हुए भी, वह करार, जिसके द्वारा वह व्यक्ति इस धारा के अधीन छूट के फायदे का अभित्यजन करने का करार करता है, शून्य होगा। इस प्रकार किसी करार के द्वारा भी संहिता में दी गई उक्त छूट को समाप्त नहीं किया

जा सकता है। संहिता की धारा 61 में कृषि उपज को भागतः डिक्री के निष्पादन में छूट प्रदान की गई है। इस सम्बंध में म.प्र. भू–राजस्व संहिता के उपबंध उल्लेखनीय हैं धारा 146 में कृषि भूमि के रकबे की सीमा दी गई है जो भू–राजस्व की वसूली में कुर्क नहीं की जा सकती है, इस कारण विधायिका की मंशा के अनुरूप धन की डिक्री के निष्पादन में उक्त सीमा तक कृषि भूमि की कुर्की व उसका विक्रय नहीं किया जा सकता। यदि निर्णीत ऋणी के पास विहित रकबा से अधिक कृषि भूमि है, वहीं अधिक रकबा धन की डिक्री के निष्पादन में कुर्क व विक्रय किया जा सकता है। इसी प्रकार उक्त अधिनियम की धारा 165 में आदिम जाति के सदस्य की भूमि के अंतरण पर प्रतिबंध हैं व इसी धारा के अंतर्गत शासन से प्राप्त भूमि का अंतरण कलेक्टर से अनिम्न पद श्रेणी के राजस्व अधिकारी की पूर्व अनुमति के बिना नहीं किया जा सकता है इसलिए उक्त प्रतिबंध डिक्री के निष्पादन में की जा रही कृषि भूमि की कुर्की व विक्रय को भी प्रभावित करेंगे।

संहिता के आदेश 21 नियम 43 से नियम 53 एवं म.प्र. सिविल न्यायालय नियम, 1961 के नियम 197 से 202 तक के उपबंध जंगम सम्पत्ति की कुर्की से सम्बंधित हैं। उनके अनुसार धन की डिक्री के निष्पादन के लिए कृषि–उपज, कृषि–उपज से भिन्न जंगम संपत्ति, पशुधन, ऋण, अंश, परक्राम्य लिखत, वेतन भत्तों, भागीदारी फर्म की सम्पत्ति व हिस्सा, डिक्री आदि की कुर्की की जा सकती है। उक्त उपबंध विशिष्ट वर्णित जंगम सम्पत्ति की कुर्की किस प्रकार की जाएगी, कुर्क सम्पत्ति की अभिरक्षा, भुगतान आदि से सम्बंधित हैं।

डिक्री के निष्पादन में कुर्क की गई सम्पत्ति की कुर्की का प्रभाव–

प्रश्न यह है कि डिक्री के निष्पादन में सम्पत्ति को कुर्क करने पर कुर्की का क्या विधिक प्रभाव होगा? धारा 64 के अनुसार कुर्की के पश्चात् प्राइवेट अन्य संक्रामण शून्य होंगे। अर्थात् कुर्की के उपरांत कुर्की के प्रभावशील रहने की अवधि में निर्णीत ऋणी कुर्क की गई सम्पत्ति को किसी भी प्रकार से अंतरित करने से व उस सम्पत्ति पर भार सृजित करने से निवारित रहता है। धारा 64 में प्रयुक्त शब्दावली प्राइवेट यह स्पष्ट करती है कि निर्णीतऋणी की सम्पत्ति भू–राजस्व के बकाया आदि की वसूली में शासन, न्यायालय या लोक निकायों के द्वारा विधिक प्रक्रिया के अंतर्गत कार्यवाही/डिक्री के निष्पादन में अंतरित की जा सकती है या उस पर भार सृजित किए जा सकते हैं।

धारा 64 का एक अपवाद भी है। यदि कुर्की के पूर्व पंजीकृत अनुबंध पत्र के माध्यम से कुर्क की गई सम्पत्ति के अंतरण की संविदा हो चुकी थी तो उस संविदा के अनुसरण में कुर्की के उपरांत अंतरण या अन्य संक्रामण किया जा सकता है।

(ii) विनिर्दिष्ट चल सम्पत्ति के आधिपत्य की डिक्री के निष्पादन की पद्धति

विनिर्दिष्ट जंगम सम्पत्ति से ऐसी वस्तुऐं आशयित है जो विनिर्दिष्ट एवं पहचान योग्य हों। आदेश 21 नियम 31 में विनिर्दिष्ट सम्पत्ति की डिक्री के निष्पादन की रीति उपबंधित है। ऐसी डिक्री का निष्पादन–

(1) चल सम्पत्ति जिसके सम्बंध में डिक्री पारित की गई है के अधिग्रहण यदि अधिग्रहण साध्य हो व डिक्रीधारी को उस सम्पत्ति के परिदान द्वारा, या

(2) निर्णीतऋणी के–(ए) सिविल कारागार में निरोध द्वारा, या (बी) उसकी सम्पत्ति की कुर्की द्वारा या (सी) दोनों के द्वारा किया जा सकता है।

उक्त उपबंध में यह उल्लेख नहीं कि डिक्री की विषय–वस्तु चल सम्पत्ति जिसका आधिपत्य **डिक्रीधारी को दिया जाना है, यदि निर्णीतऋणी के कब्जे में नहीं हो उस अवस्था में** डिक्री के निष्पादन में उस सम्पत्ति का अधिग्रहण नहीं किया जाएगा। इसके लिए केवल एक शर्त है कि अधिग्रहण साध्य होना चाहिए। इसलिए यदि वह सम्पत्ति निर्णीतऋणी से भिन्न व्यक्ति के कब्जे में है व उस सम्पत्ति का अधिग्रहण साध्य है, तब उसका अधिग्रहण करके व उसका परिदान डिक्रीधारी को करके डिक्री का निष्पादन किया जा सकता है। विनिर्दिष्ट जंगम सम्पत्ति के अधिग्रहण के वारंट का प्ररूप प्रथम अनुसूची के परिशिष्ट–ड के संख्या–9 पर उल्लिखित है।

चल सम्पत्ति के आधिपत्य या वापसी की आज्ञप्ति के निष्पादन में निर्णीतऋणी की अन्य सम्पत्ति कुर्क किए जाने पर जहां कुर्की तीन माह (म.प्र. उच्च न्यायालय संशोधन, 1960 के अनुसार छह माह) के लिए प्रवृत्त रह चुकी है व निर्णीत ऋणी ने डिक्री का आज्ञानुवर्तन नहीं किया उस अवस्था में डिक्रीधारी के आवेदन करने पर कुर्क सम्पत्ति का विक्रय करके व विक्रय से प्राप्त आगमों में से चल सम्पत्ति के परिदान के अनुकल्प स्वरूप डिक्री में निश्चित की गई रकम या यदि ऐसी रकम निश्चित नहीं है तब न्यायालय के विवेकानुसार उचित प्रतिकर डिक्रीधारी को भुगतान किया जाएगा। यदि उपर्युक्त विहित कालावधि के अंदर निर्णीत–ऋणी डिक्री का पालन कर देता है या विहित कालावधि में डिक्रीधारी कुर्क सम्पत्ति के विक्रय के लिए आवेदन नहीं करता उस अवस्था में कुर्की समाप्त हो जाती है।

संहिता के आदेश 20 नियम 10 के अनुसार जहां वाद जंगम सम्पत्ति के परिदान के लिए है वहां डिक्री में धन के उस परिणाम का भी कथन किया जाएगा जो उस जंगम सम्पत्ति का परिदान नहीं कराए जाने के अनुकल्पतः दिया जाएगा। उक्त उपबंध यह स्पष्ट करते हैं कि जंगम सम्पत्ति के परिदान/आधिपत्य के वाद में विचारण न्यायालय द्वारा वैकल्पिक राशि के संबंध में साक्ष्य लेकर निर्णय में निष्कर्ष लेख करना चाहिए व उसका उल्लेख डिक्री में भी किया जाना आवश्यक है जिससे निष्पादन के समय उस जंगम सम्पत्ति का परिदान संभव न होने पर डिक्रीधारी को डिक्री में निश्चित वैकल्पिक राशि निर्णीतऋणी से दिलाई जा सके।

यहां यह उल्लेखनीय है कि धन के संदाय की डिक्री के बावत् निर्णीतऋणी के सिविल कारागार में निरोध व सम्पत्ति की कुर्की व विक्रय के सम्बंध में जो उपबंध ऊपर उल्लिखित किए गए हैं वे चल सम्पत्ति के आधिपत्य या वापसी की आज्ञाप्ति पर भी लागू होंगे।

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खण्ड–ब

आज्ञप्ति के निष्पादन के अधीन स्थावर संपत्ति की कुर्की की प्रक्रिया

(न्यायिक अधिकारीगण, जिला शिवपुरी एवं बैतूल द्वारा प्रेषित आलेखों पर आधारित)

इस विषय में मुख्य रूप से आदेश 21 नियम 13, 14, 17, 41, 54, 55 एवं 57 तथा आदेश 38 नियम 11ए व्यवहार प्रक्रिया संहिता, 1908 एवं म.प्र. व्यवहार न्यायालय नियम, 1961 के नियम 197

व 232 तथा म.प्र. भू–राजस्व संहिता, 1959 की धारा 165 (7) (ए) (बी) के प्रावधान ध्यान में रखना चाहिये।

जहां आज्ञप्तिधारी निर्णित ऋणी की अचल संपत्ति की जानकारी रखता है वहां वह न्यायालय से उस अचल संपत्ति की कुर्की के लिये आवेदन कर सकता है।

आदेश 21 नियम 13 व्यवहार प्रक्रिया संहिता के अनुसार जहां निर्णित ऋणी की किसी अचल संपत्ति की कुर्की के लिये आवेदन किया जाता है वहां उस आवेदन के पाद भाग या नीचे के भाग में निम्नलिखित बाते अंतरविष्ट करना होती है :–

ए. ऐसी संपत्ति का ऐसा वर्णन जो उसे पहचानने के लिये पर्याप्त है और उस दशा में जिसमें ऐसी संपत्ति सीमाओं द्वारा या भू–व्यवस्थापन या सर्वेक्षण के अभिलेख के संख्याओं के द्वारा पहचानी जा सकती है वहां ऐसी सीमाओं और संख्याओं का उल्लेख तथा

बी. निर्णित ऋणी का ऐसी संपत्ति में जो अंश या हित आज्ञप्तिधारी के सर्वोत्तम विश्वास के अनुसार है और जहां तक वह उसका अभिनिश्चय कर पाया हो वहां तक उस अंश या हित का उल्लेख।

आदेश 21 नियम 14 व्यवहार प्रक्रिया संहिता के अनुसार जहां किसी ऐसी भूमि की कुर्की के लिये आवेदन किया जाता है जो कलेक्टर के कार्यालय में रजिट्रीकृत है वहां न्यायालय आज्ञप्तिधारी से अपेक्षा कर सकेगा कि वह उस भूमि के स्वत्वधारी के रूप में या उस भूमि में या उसके राजस्व से कोई अंतरणीय हित रखने वाले के रूप में या उस भूमि के लिये राजस्व देने के दायी के रूप में रजिस्टर में दर्ज व्यक्तियों का और रजिस्टर में दर्ज स्वत्वधारियों के अंशों को स्पष्ट करने वाला प्रमाणित उद्धरण ऐसे कार्यालय के रजिस्टर से पेश करें।

आदेश 21 नियम 17 व्यवहार प्रक्रिया संहिता के अनुसार डिक्री के निष्पादन के लिये आवेदन प्राप्त होने पर न्यायालय उसकी जांच कर लेगा और यदि कोई कमी पाई जाती है तो उसे ठीक करवा सकेगा अतः जब भी आदेश 21 नियम 13 सी.पी.सी. के तहत आवेदन प्रस्तुत होते है तब न्यायालय को उसी समय उनकी जांच करके आवश्यक सुधार करवा लेना चाहिये।

नियम 197 म.प्र. व्यवहार न्यायालय नियम 1961 के तहत अचल संपत्ति की कुर्की हेतु प्रार्थना पत्र में संपत्ति का विवरण जो उसकी स्पष्ट पहचान हेतु पर्याप्त हो, उल्लेख होना चाहिये। इस प्रयोजन के लिये भूमि का सर्वे क्रमांक, क्षेत्रफल एवं लगान बतलाया जाना चाहिये प्रार्थना पत्र में यह भी दर्शाया जाना चाहिये की उस संपत्ति में निर्णित ऋणी का कितना और कैसा हित है।

नियम 223 (2) म.प्र. व्यवहार न्यायालय नियम में बतलाये विवरण जो विक्रय प्रमाण पत्र में उल्लेख करना होते है उनमें से भी आवश्यक विवरण का उल्लेख अचल संपत्ति की कुर्की के लिये प्रस्तुत आवेदन पत्रों में करवा लेना चाहिये।

जहां आज्ञप्तिधारी निर्णित ऋणी की अचल संपत्ति की जानकारी नहीं रखता है और डिक्री **धन के संदाय के लिये हो वहां वह आदेश 21 नियम 41 सी.पी.सी.** के तहत आवेदन कर सकता है और ऐसा आवेदन प्राप्त होने पर न्यायालय को निर्णित ऋणी को सूचना पत्र जारी करके उससे

उसकी संपत्ति के बारे में आवश्यक जानकारी, उसकी मौखिक परीक्षा करके या उसे दस्तावेज प्रस्तुत करने के निर्देश देकर, लेना चाहिये।

आदेश 21 नियम 13 सी.पी.सी. के तहत आवेदन आ जाने के बाद या आदेश 21 नियम 41 सी.पी.सी. की कार्यवाही के बाद संपत्ति की जानकारी आ जाने के बाद यदि अचल संपत्ति कृषि भूमि हो तो न्यायालय को यह विचार करना चाहिये कि क्या उक्त अचल संपत्ति कुर्की किये जाने योग्य है इस संबंध में **धारा 165 (7) म.प्र. भू–राजस्व संहिता** के निम्न प्रावधान ध्यान रखना चाहिये :–

165 (7) म.प्र. भू–राजस्व संहिता के अनुसार उप धारा (1) में या तत्समय प्रवृत्त अन्य विधि में उल्लेखित किसी बात के होते हुये भी :–

ए. जहां किसी भूमि स्वामी के खाते में समाविष्ट भूमि का क्षेत्रफल या उस भूमि स्वामी के एक से अधिक खाते होने की दशा में उसके समस्त खातों का कुल क्षेत्रफल सिंचित भूमि की दशा में **5 एकड़** या असिंचित भूमि की दशा में **10 एकड़** से अधिक हो वहां उसके खाते या खातों में ही भूमि का केवल उतना क्षेत्रफल जितना की सिंचित भूमि के 5 एकड़ या असिंचित भूमि के 10 एकड़ से अधिक हो उसी को किसी डिक्री या आदेश के निष्पादन में कुर्क या विक्रय के दायित्वाधीन होगी।

बी. किसी ऐसी जन जाति के जिसे उप धारा (6) के अधीन **आदिम जन जाति** होना घोषित किया गया हो, उस भूमि स्वामी के खाते में समाविष्ट कोई भूमि किसी डिक्री या आदेश के निष्पादन में कुर्क किये जाने या विक्रय के **दायित्वाधीन नहीं होगी।**

न्यायालय को धारा **60 (सी) सी.पी.सी.** के प्रावधान भी कृषक या श्रमिक या घरेलू नौकर के गृह और अन्य निर्माण के कुर्की और विक्रय के समय ध्यान रखना चाहिये।

निर्णित ऋणी को सूचना पत्र :– अचल संपत्ति की कुर्की के लिये आवेदन प्राप्त होने के बाद और उसकी उक्त अनुसार जांच और उसके कुर्की योग्य होने के बारे में समाधान हो जाने के बाद न्यायालय को निर्णित ऋणी को सूचना पत्र जारी करना चाहिये और यह एक आज्ञापक प्रावधान है।

न्याय दृष्टांत ***मेसर्स महाकाल आटो मोबाईलस् विरूद्ध किशन स्वरूप शर्मा, ए.आई.आर. 2008 एस.सी. 2061*** में यह प्रतिपादित किया गया है कि आदेश 21 नियम 54 एवं 66 सी.पी.सी. की अवस्था में जिस व्यक्ति की संपत्ति कुर्क और विक्रय की जाना है उसे सूचना पत्र दिया जाना आज्ञापक है और यदि ऐसे सूचना पत्र के बिना विक्रय किया जाता है तो ऐसा विक्रय दूषित हो जाता है।

न्याय दृष्टांत ***गुरबेज सिंह खनूजा विरूद्ध यूनियन ऑफ इंडिया, आई.एल.आर. 2009 एम.पी. 476*** के मामले में 10 लाख रूपये से अधिक मूल्य का मकान न्यायालय ने एक 75,305 रूपये की एक पक्षीय आज्ञप्ति के निष्पादन में कुर्क और विक्रय किया था मामले में निर्णित ऋणी को वाद में या निष्पादन कार्यवाही में सूचना पत्र तामील नहीं हुआ था। यह प्रतिपादित किया गया कि एक पक्षीय आज्ञाप्ति के निष्पादन में न्यायालय को अतिरिक्त सावधानी रखना चाहिये विधि के आज्ञापक प्रावधानों की पालना नहीं की गई विक्रय कुछ शर्तो के साथ अपास्त किया गया।

निर्णित ऋणी को सूचना पत्र करने के बाद और सुनकर अचल संपत्ति कुर्क की जा सकती है जिसके संबंध में **आदेश 21 नियम 54 सी.पी.सी.** में प्रावधान है :–

(1) जहां संपत्ति स्थावर या अचल है, वहां कुर्की ऐसे आदेश द्वारा की जायेगी जो संपत्ति को किसी भी प्रकार से अंतरित या भारित करने से निर्णित ऋणी को और ऐसे अंतरण और भार से कोई भी फायदा उठाने से सभी व्यक्तियो को निषेधित करता है।

(1ए) आदेश में निर्णित ऋणी से यह अपेक्षा की जायेगी की वह विक्रय की उद्घोषणा की शर्तो को तय करने के लिये नियत की जाने वाली तारीख की सूचना प्राप्त करने के लिये किसी विर्निदिष्ट तारीख को न्यायालय में उपस्थित रहे।

(2) वह आदेश ऐसी संपत्ति में या उसके लगे हुये किसी स्थान पर डोंडी पिटवाकर या अन्य रूढ़िक ढंग से उद्घोषित किया जायेगा और ऐसे आदेश की प्रति संपत्ति के किसी सहज दृश्य या आसानी से देखे जा सकने वाले भाग पर और न्याय सदन के किसी सहज दृश्य भाग पर और जहां संपत्ति सरकार को राजस्व देने वाली भूमि है वहां उस जिले के जिसमें वह भूमि स्थित है, कलेक्टर के कार्यालय में भी लगाई जायेगी और जहां संपत्ति किसी गांव में स्थित भूमि है वहां उस गांव पर अधिकारिता रखने वाली कोई ग्राम पंचायत हो तो उसके कार्यालय में भी लगाई जायेगी।

इस तरह आदेश 21 नियम 54 सी.पी.सी. के तहत उक्त अनुसार उद्घोषणा जारी करके अचल संपत्ति की कुर्की उक्त समस्त तथ्यों की पालना करते हुये की जायेगी।

न्याय दृष्टांत ***एम. मारथा चलम पिल्लई विरूद्ध पदमावती अम्माल, 1971 (3) एस.सी.सी. 878*** में तीन न्याय मूर्तिगण की पीठ ने यह प्रतिपादित किया है कि धारा 64 सी.पी.सी. के तहत कुर्क की गई संपत्ति के बारे में किया गया प्राईवेट अंतरण शून्य बनाया गया है अतः धारा 64 के वर्जन को लागू करने के लिये कुर्की प्रभावी ढंग से की जाना चाहिये।

इस न्याय दृष्टांत में प्रतिपादित विधि को ध्यान में रखते हुये आदेश 21 नियम 54 सी.पी.सी. के प्रावधानों का कठोरता से पालन करके ही अचल संपत्ति की कुर्की की जाना चाहिये।

आदेश 38 नियम 11 ए सी.पी.सी. के अनुसार डिक्री के निष्पादन में की गई कुर्की के प्रावधान निर्णय के पूर्व की गई कुर्की पर जहां तक हो सके लागू होंगे क्योंकि ऐसी कुर्की निर्णय के पश्चात भी आदेश 38 नियम 11 सी.पी.सी. के तहत प्रभावी रहती है और उसे डिक्री के निष्पादन में पुनः कुर्क करने की आवश्यकता नहीं रहती है।

नियम 232 म.प्र. व्यवहार न्यायालय नियम 1961 के तहत आवश्यक होने पर अचल संपत्ति की कुर्की में पुलिस सहायता भी ली जा सकती है और ऐसी दशा में पुलिस सहायता लेने के लिये नियम 232 में बतलाई प्रक्रिया अपनाना चाहिये।

इस प्रकार आज्ञप्ति के निष्पादन में स्थावर या अचल संपत्ति की कुर्की हेतु आवेदन प्राप्त होने पर उसकी आवश्यक जांच कर लेना चाहिये और यदि संपत्ति कृषि भूमि है तो वह म.प्र. भू–राजस्व संहिता के उक्त प्रावधानों अनुसार कुर्की योग्य है या नहीं यह समाधान कर लेना चाहिये। निर्णित ऋणी

को आवेदन का सूचना पत्र दिया जाना चाहिये और आदेश 21 नियम 54 सी.पी.सी. में बतलाई गई प्रक्रिया का पूर्ण पालन करते हुये अचल संपत्ति कुर्क किया जाना चाहिये।

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खण्ड– स

आज्ञप्ति के निष्पादन में कुर्क की गई किसी संपत्ति के संबंध में आपत्तियों एवं दावों के निराकरण के संबंध में विधि एवं प्रक्रिया

(न्यायिक अधिकारीगण, जिला विदिशा, कटनी, हरदा एवं झाबुआ द्वारा प्रेषित आलेखों पर आधारित)

इस विषय में मुख्य रूप से आदेश 21 नियम 58 एवं 59 तथा धारा 47, 60 एवं 61 व्यवहार प्रक्रिया संहिता, 1908 तथा म.प्र. व्यवहार न्यायालय नियम 1961 के नियम 203, 204 को ध्यान में रखना चाहिये।

आदेश 21 नियम 58 सी.पी.सी. के प्रावधान अनुसार :–

(1) जहां डिक्री के निष्पादन में कुर्क की गई किसी संपत्ति पर कोई दावा या उसकी कुर्की के बारे में कोई आपत्ति इस आधार पर की जाती है कि ऐसी संपत्ति ऐसी कुर्की किये जाने के दायित्व के अधीन नहीं है वहां न्यायालय ऐसे दावे या आपत्ति का न्याय निर्णयन करने के लिये अग्रसर होगा :

परंतु कोई ऐसा दावा या आपत्ति उस दशा में ग्रहण नहीं की जायेगी जिसमें :–

ए. दावा या आपत्ति करने से पूर्व कुर्क की गई संपत्ति का विक्रय कर दिया गया है या

बी. न्यायालय का यह विचार है कि दावा या आपत्ति करने में परिकल्पना पूर्वक (Designedly) या अनावश्यक रूप से विलंब किया गया है।

(2) इस नियम के अधीन कार्यवाही के पक्षकारों के बीच या उनके प्रतिनिधियों के बीच पैदा होने वाले तथा दावा या आपत्ति के न्याय निर्णयन से सुसंगत सभी प्रश्न (जिनके अंतर्गत कुर्क की गई संपत्ति में अधिकार, हक या हित से संबंधित प्रश्न भी है) दावे या आपत्ति के संबंध में कार्यवाहियॉ करने वाले न्यायालय द्वारा अवधारित किये जायेंगे न कि पृथक वाद द्वारा।

(3) उप नियम 2 में उल्लेखित प्रश्नों के अवधारण पर न्यायालय ऐसे अवधारण के अनुसार :–

ए. दावे या आपत्ति को स्वीकार करेगा और न्यायालय या तो पूर्णतः या अंशतः कुर्की से निर्मुक्त कर देगा या

बी. दावे या आपत्ति को अस्वीकार करेगा या

सी. कुर्की को किसी व्यक्ति के पक्ष में किसी बंधक भार या अन्य हित के अधीन जारी रखेगा या

डी. ऐसा आदेश पारित करेगा जो मामले के परिस्थितियों में उचित समझे।

(4) जहां किसी दावे या आपत्ति पर न्याय निर्णय इस नियम के अधीन किया गया है वहां उस पर किये गये आदेश का वही बल होगा और वह अपील या अन्य बातों के बारे में वैसी ही शर्तों के अधीन होगा जैसे वह डिक्री हो।

(5) जहां कोई दावा या आपत्ति की जाती है और न्यायालय उसे उप नियम 1 के परंतुक के अधीन ग्रहण करने से इंकार करता है वहां वह पक्षकार जिसके विरूद्ध ऐसा आदेश किया जाता है उस अधिकार को सिद्ध करने के लिये जिसके लिये वह विवादग्रस्त संपत्ति में दावा करता है, वाद संस्थित कर सकेगा किन्तु ऐसे वाद के, यदि कोई हो, परिणाम के अधीन रहते हुये दावे या आपत्ति को ग्रहण करने से इस प्रकार इंकार करने वाला आदेश निश्चायक होगा।

साक्ष्य प्रस्तुत करने का अवसर देना :– जब कभी आदेश 21 नियम 58 सी.पी.सी. के तहत कोई दावा या आपत्ति प्रस्तुत होती है तब उसकी जांच की जाना चाहिये और संबंधित पक्षों को साक्ष्य प्रस्तुत करने का अवसर देना चाहिये न्याय निर्णयन शब्द में जांच या साक्ष्य अंकित करना शामिल है इस संबंध में न्याय दृष्टांत ***श्रीमती लक्ष्मी सारडा विरूद्ध मेसर्स कौशल चंद खीमजी एण्ड कंपनी, 2008 (5) एम.पी.एच.टी. 428*** अवलोकनीय है।

न्याय दृष्टांत ***मुकेश कुमार संघवी विरूद्ध सैफउद्दीन, 2009 (2) एम.पी.एल.जे. 475*** में यह विवाद उठाया गया था कि आपत्तिकर्ता द्वारा नीलामी में खरीदी गई संपत्ति क्या वहीं संपत्ति है जो कुर्की और निष्पादन मामले की है आक्षेपित कार्यवाही की विषय वस्तु थी या वह कोई अलग संपत्ति थी। यह प्रतिपादित किया गया कि पक्षकारों को साक्ष्य पेश करने का अवसर देने के बाद विवाद की जांच करके आपत्ति का निराकरण करना था।

न्याय दृष्टांत ***प्रतिभा सिंह विरूद्ध शांति देवी, (2003) 2 एस.सी.सी. 330*** में यह प्रतिपादित किया है कि अचल संपत्ति की पहचान के बारे में कोई त्रुटि हो तो उसे धारा 152 या धारा 47 सी.पी.सी. की मदद से सुधारा जा सकता है।

विक्रय पूर्ण होने के बाद की आपत्ति :– सामान्य नियम यह है कि यदि दावा या आपत्ति करने के पूर्व संपत्ति का विक्रय कर दिया गया हो तब ऐसा दावा या आपत्ति ग्रहण नहीं की जाती है लेकिन न्याय दृष्टांत ***कनछेरला लक्ष्मीनारायण विरूद्ध मात्ता पार्थी श्यामला, ए.आई.आर. 2008 एस.सी. 2069*** में यह प्रतिपादित किया गया है कि विक्रय आत्यंतिक (Absolute) न हुआ हो उसके पूर्व आदेश 21 नियम 58 सी.पी.सी. के तहत आपत्ति की जा सकती है।

निष्पादन न्यायालय का क्षेत्र :– निष्पादन न्यायालय आदेश 21 नियम 58 सी.पी.सी. के तहत दावे और आपत्ति के निराकरण के समय मूल डिक्री के बाहर नहीं जा सकती है इस संबंध में न्याय दृष्टांत ***टी.सी.आई. फायनेंस लिमिटेड विरूद्ध कलकत्ता मेडिकल सेन्टर लिमिटेड (2005) 8 एस.सी.सी. 41*** अवलोकनीय हैं।

परिसीमा :– न्याय दृष्टांत ***एन्थोनी विरूद्ध के. हाजी, ए.आई.आर. 2003 केरल 45 डी.बी.*** में यह प्रतिपादित किया गया है कि आदेश 21 नियम 58 सी.पी.सी. के तहत आपत्ति के लिये कोई परिसीमा निर्धारित नहीं है केवल विक्रय पूर्ण होने के पहले आवेदन दिया जाना चाहिये और आवेदन

अनावश्यक रूप से विलंब से प्रस्तुत किया गया हो ऐसा मामला नहीं होना चाहिये अनुच्छेद 137 परिसीमा अधिनियम, 1963 लागू नहीं होता हैं।

न्याय दृष्टांत ***मोहम्मद युसूफ विरूद्ध श्रीमती ज्योत्सना बेन, ए.आई.आर. 1996 एम.पी. 197*** भी अवलोकनीय है।

सामान्य बंधक के मामले :– संपत्ति जो कुर्क की गई वह सामान्य बंधक की विषय वस्तु थी मोर्टगेजी संपत्ति की वास्तविक या रचनात्मक आधिपत्य में भी नहीं था उसकी आपत्ति आदेश 21 नियम 58 सी.पी.सी. के तहत चलने योग्य नहीं पाई गई इस संबंध में न्याय दृष्टांत ***कबीदी वेन्कू साह विरूद्ध सैयद अब्दुल हाई, ए.आई.आर. 1984 एस.सी. 117*** तीन न्याय मूर्तिगण की पीठ अवलोकनीय हैं।

पूर्व न्याय के बारे में :– न्याय दृष्टांत ***लगन जूट मशीनरीज कंपनी लिमिटेड विरूद्ध केण्डल वुड होल्डिंग लि. (2007) 8 एस.सी.सी. 487*** में यह प्रतिपादित किया गया है कि कंस्ट्रेक्टिव रेस ज्यूडीकेटा का सिद्धांत निष्पादन कार्यवाहियों में भी लागू होता है।

नियम 203 म.प्र. व्यवहार न्यायालय नियम के अनुसार आदेश 21 नियम 58 के उप नियम 1 के प्रावधान ध्यान रखना चाहिये जिसके अनुसार यदि आपत्ति योजनात्मक रूप से अनावश्यक विलंब से की गई हो तब कोई जांच आवश्यक नहीं होती है।

नियम 204 के अनुसार ऐसी जांच संक्षिप्त प्रकार की होती है और उसे अविलंब पूरा करना चाहिये उसे महिनों तक नहीं चलने देना चाहिये।

धारा 60 एवं 61 सी.पी.सी. में उन संपत्तियों के विषय में उल्लेख किया गया है जिन्हें डिक्री के निष्पादन में कुर्क और विक्रय नहीं किया जा सकता है अतः दावे या आपत्ति के निराकरण के समय इन दोनों प्रावधानों को भी ध्यान में रखना चाहिये।

आदेश 21 नियम 59 सी.पी.सी. के अनुसार जहां कुर्क की गई संपत्ति दावे या आपत्ति किये जाने से पूर्व विक्रय के लिये विज्ञापित की जा चुकी हो वहां न्यायालय :–

ए. यदि संपत्ति जंगम या चल है तो दावे या आपत्ति के न्याय निर्णयन तक के लिये विक्रय को स्थगित करने का आदेश दे सकेगा या

बी. यदि संपत्ति स्थावर या अचल है तो यह आदेश दे सकेगा कि दावे या आपत्ति के न्याय निर्णयन तक संपत्ति का विक्रय नहीं किया जायेगा या विक्रय को पुष्ट या कंफर्म नहीं किया जायेगा,

और ऐसा कोई आदेश प्रतिभूति या अन्य बातों के बारे में ऐसी शर्तों के अधीन किया जा सकेगा जो न्यायालय ठीक समझे।

इस तरह दावे या आपत्ति की जांच के लंबित रहने तक न्यायालय आदेश 21 नियम 59 सी.पी.सी. की उक्त शक्तियों का प्रयोग कर सकता है।

इस तरह जब कभी आदेश 21 नियम 58 सी.पी.सी. के तहत आज्ञप्ति के निष्पादन में कुर्क की गई किसी संपत्ति के संबंध में कोई दावा या आपत्ति प्रस्तुत होती है तब न्यायालय को उभय पक्ष को साक्ष्य प्रस्तुत करने का अवसर देकर शीघ्रता से आपत्ति का निराकरण करना चाहिये लेकिन यदि विक्रय पुष्ट या कंफर्म हो चुका हो या आपत्ति योजनात्मक तरीके से अनावश्यक विलंब से की गई हो तब आपत्ति ग्रहण नहीं की जाना चाहिये और उक्त वैधानिक स्थितियों को ध्यान में रखना चाहिये।

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खण्ड–द

आज्ञप्ति के निष्पादन में विक्रय के संबंध में सामान्य प्रक्रिया

(न्यायिक अधिकारीगण, जिला शहडोल, दमोह, मुरैना एवं धार द्वारा प्रेषित आलेखों पर आधारित)

इस विषय में आदेश 21 नियम 64 से नियम 73 सी.पी.सी. 1908 में विक्रय की सामान्य प्रक्रिया आदेश 21 नियम 74 से नियम 81 सी.पी.सी. में जंगम या चल संपत्ति के विक्रय के बारे में जबकि आदेश 21 नियम 82 से नियम 96 सी.पी.सी. स्थावर या अचल संपत्ति के विक्रय के बारे में तथा म.प्र. व्यवहार न्यायालय नियम, 1961 के नियम 205 से 225 नियम 421, 426 व 427 जिन्हें आगे नियम कहां जायेगा, के प्रावधान ध्यान में रखना चाहिये।

विक्रय के साधारण प्रावधान

आदेश 21 नियम 64 सी.पी.सी. के अनुसार डिक्री का निष्पादन करने वाला कोई भी न्यायालय आदेश कर सकेगा की उसके द्वारा कुर्क की गई और विक्रय के दायित्व के अधीन किसी भी संपत्ति या उसके ऐसे भाग का जो डिक्री की तुष्टि के लिये आवश्यक हो, विक्रय किया जाये और ऐसे विक्रय के आगम या उनका पर्याप्त भाग उस पक्षकार को दे दिया जाये जो डिक्री के अधीन उन्हें पाने का हकदार है।

न्याय दृष्टांत ***तक्का सीला पेडा सुब्बा रेड्डी विरूद्ध पुजारी पदमावथम्मा, ए.आई.आर. 1977 एस.सी. 1789*** में यह प्रतिपादित किया गया है कि आदेश 21 नियम 64 सी.पी.सी. के तहत "डिक्री की तुष्टि के लिये आवश्यक" शब्द यह स्पष्ट रूप से दर्शाता है कि डिक्री धन से अधिक का विक्रय नहीं किया जाना चाहिये और यदि ऐसा किया गया है तो विक्रय दूषित हो जाता है।

न्याय दृष्टांत ***बाल कृष्णन विरूद्ध एम. कोनार, ए.आई.आर. 2006 एस.सी. 1458*** में यह प्रतिपादित किया गया है कि यह न्यायालय का दायित्व है, विवेकाधिकार नहीं है कि वह संपत्ति का उतना ही भाग विक्रय करावे जो की डिक्री की तुष्टि के लिये पर्याप्त हो और इस तथ्य का परीक्षण किये बिना विक्रय किया जाता है तो वह अवैध है।

न्याय दृष्टांत ***साई इंटर प्राइजेस विरूद्ध भीम रेड्डी (2007) 13 एस.सी.सी. 576*** में भी यह प्रतिपादित किया गया है कि यह निष्पादन न्यायालय का कर्त्तव्य है कि वह यह विचार करे कि संपत्ति का एक भाग का विक्रय क्या डिक्री की तुष्टि के लिये पर्याप्त रहेगा क्योंकि आदेश 21 नियम 64 सी.पी.सी. में शब्द "डिक्री की तुष्टि के लिये आवश्यक" का एक विशेष अर्थ है और विधायीका का

आशय इन शब्दों के प्रयोग में यह है कि डिक्री धन से अधिक का विक्रय अनुमत नहीं किया जा सकता। इस संबंध में न्याय दृष्टांत ***लालचंद विरूद्ध आठवे अतिरिक्त जिला जज, ए.आई.आर. 1997 एस. सी. 2106*** निर्णय चरण आठ भी अवलोकनीय हैं।

अतः प्रत्येक निष्पादन न्यायालय को यह ध्यान रखना चाहिये कि कुर्क की गई संपत्ति में से उतना भाग ही विक्रय करवाना चाहिये जो डिक्री की तुष्टि के लिये पर्याप्त है उससे अधिक नहीं। **आदेश 21 नियम 65 सी.पी.सी.** के अनुसार डिक्री के निष्पादन में किया जांने वाला हर विक्रय न्यायालय के अधिकारी द्वारा या किसी ऐसे अन्य व्यक्ति द्वारा जिसे न्यायालय इसके लिये नियुक्त करें, संचालित किया जायेगा और विहित रीति से लोक नीलाम द्वारा किया जायेगा।

नियम 210 के अनुसार अचल संपत्ति का विक्रय आज्ञप्ति के निष्पादन में निम्न अधिकारियों द्वारा किया जायेगा :–

1. जिला न्यायालय के भवन पर किये जाने वाले विक्रय की दशा में सेल अमीन या किसी अधिकारी जो नायब नाजिर के पद से नीचे का न हो के द्वारा,
2. जिला न्यायालय के भवन के अतिरिक्त किसी अन्य स्थान पर विक्रय की स्थिति में सेल अमीन अथवा नायब नाजिर या अन्य अधिकारी जो आदेशिका वाहक के पद से उच्च पद श्रेणी का हो के द्वारा।

न्याय दृष्टांत ***गुलाब सिंह विरूद्ध चन्द्रपाल सिंह, ए.आई.आर. 1987 बॉम्बे 90*** में यह प्रतिपादित किया गया है कि जहां विज्ञापन द्वारा विक्रय के प्रस्ताव आमंत्रित किये गये वहां यह नहीं कहां जा सकता की विक्रय लोक नीलाम द्वारा किया गया था क्योंकि लोक नीलाम में प्रत्येक बोली लगाने वाले को बोली लगाने का अधिकार रहता है जबकि विज्ञापन से विक्रय के प्रस्ताव आमंत्रित करने में ऐसा नहीं होता है।

अतः विक्रय के संचालन करने वाले अधिकारी को यह ध्यान रखना चाहिये की वह लोक नीलाम के द्वारा ही विक्रय करे।

आदेश 21 नियम 66 (1) सी.पी.सी. के तहत जहां किसी संपत्ति का किसी डिक्री के निष्पादन में लोक नीलाम द्वारा विक्रय किये जाने का आदेश किया गया है वहां न्यायालय विक्रय की उद्घोषणा न्यायालय की भाषा में करायेगा।

(2) ऐसी उद्घोषणा डिक्रीधारी और निर्णित ऋणी को सूचना दिये जाने के पश्चात तैयार की जायेगी और उसमें विक्रय का समय और स्थान अंकित होगा और निम्नलिखित बाते यथासंभव स्पष्ट और वास्तविक रूप से अंकित होगी :–

ए. वह संपत्ति जिसका विक्रय किया जाना है या जहां संपत्ति का कोई भाग डिक्री की तुष्टि के लिये पर्याप्त हो वहां वह भाग,

बी. जहां वह संपत्ति जिसका विक्रय किया जाना है सरकार को राजस्व देने वाली किसी संपदा में या संपदा के भाग में कोई हित है वहां उस संपदा के भाग पर निर्धारित राजस्व,

सी. कोई विल्लंगम जिसके लिये वह संपत्ति दायी हो,

डी. वह रकम जिसकी वसूली के लिये विक्रय का आदेश किया गया है तथा,

ई. हर अन्य बात जिसके बारे में न्यायालय का विचार है कि संपत्ति की प्रकृति और मूल्य का निर्णय करने के लिये उसकी जानकारी क्रेता के लिये तात्विक है,

परंतु जहां उद्घोषणा की शर्तो को तय करने की तारीख की सूचना नियम 54 के अधीन किसी आदेश के माध्यम से निर्णित ऋणी को दी गई है वहां जब तक की न्यायालय अन्यथा निदेश न दे निर्णित ऋणी को इस नियम के अधीन सूचना देना आवश्यक नहीं होगा,

परंतु यह और की इस नियम की किसी बात का यह अर्थ नहीं लगाया जायेगा की वह न्यायालय से यह अपेक्षा करती है कि वह विक्रय की उद्घोषणा में संपत्ति के मूल्य के बारे में अपना प्राक्कलन या स्टीमेट दर्ज करे, किन्तु उद्घोषणा में दोनों पक्षकारों या उनमें से किसी के द्वारा दिया गया प्राक्कलन यदि कोई हो, दर्ज किया जायेगा।

(3) इस नियम के अधीन विक्रय के आदेश के लिये हर आवेदन के साथ ऐसा कथन होगा जो अभिवचनों की तरह हस्ताक्षरित और सत्यापित होगा और उसमें उद्घोषणा में अंकित किये जाने के लिये उक्त उप नियम 2 में अपेक्षित बाते दर्ज होगी और उनका सत्यापन होगा।

(4) न्यायालय उद्घोषणा में अंकित की जाने वाली उक्त बातों के अभिनिश्चय के लिये किसी व्यक्ति को संमन कर सकेगा उसकी परीक्षा कर सकेगा और उससे उसके कब्जे या शक्ति के दस्तावेज पेश करने की अपेक्षा कर सकेगा।

न्याय दृष्टांत ***गजाधर प्रसाद विरूद्ध बाबू मक्त रतन, ए.आई.आर. 1973 एस.सी. 2593*** में यह प्रतिपादित किया गया है कि विक्रय उद्घोषणा में डिक्रीधारी द्वारा बताया गया संपत्ति का मूल्य दर्शाया गया निर्णित ऋणी द्वारा बतलाया गया मूल्यांकन नहीं दर्शाया और ऐसा करने के कोई कारण भी नहीं दिये यह एक तात्विक अनियमितता है और इससे निर्णित ऋणी को तात्विक हानि होना भी पाया गया।

न्याय दृष्टांत ***देश बंधु गुप्ता विरूद्ध एन.एल. आनंद, (1994) 1 एस.सी.सी. 131*** में यह प्रतिपादित किया गया है कि आदेश 21 नियम 66 (2) और 54 (1ए) सी.पी.सी. के तहत निर्णित ऋणी को सूचना पत्र देना आज्ञापक है बिना सूचना पत्र के विक्रय शून्यवत है न्यायालय को विक्रय उद्घोषणा में सुसंगत एवं आवश्यक तथ्य के बारे में अपने मस्तिष्क का प्रयोग करना चाहिये अभिलेख से यह दर्शित होना चाहिये की न्यायालय ने न्यायिक मस्तिष्क का प्रयोग किया है। संपत्ति का मूल्य और प्रकृति जो डिक्रीधारी और निर्णित ऋणी ने बतलाई है उस मूल्यांकन को उद्घोषणा में कथन करने का न्यायालय का दायित्व होता है।

न्याय दृष्टांत ***मेसर्स शालीमार सिनेमा विरूद्ध मसीन फिल्म कॉर्पोरेशन, ए.आई.आर. 1987 एस.सी. 2081*** में तीन न्याय मूर्तिगण की पीठ ने यह प्रतिपादित किया है कि आदेश 21 नियम 66 के प्रावधानों की अनुपालना हुई है यह देखना न्यायालय का कर्त्तव्य है।

न्याय दृष्टांत ***मेसर्स सुश्री बिल्डर्स प्राईवेट लिमिटेड विरूद्ध रिकवरी ऑफिसर डी.आर.टी., ए.आई.आर. 2007 उड़ीसा 115*** (डी.बी.) में यह प्रतिपादित किया गया है कि संपत्ति के मूल्यांकन के पूर्व चूककर्ता को सूचना पत्र जारी किया गया पहले विक्रय में पर्याप्त बोली लगाने वाले नहीं आये तब दूसरी उद्घोषणा जारी की गई उस वक्त चूककर्ताओं को पुनः सूचना पत्र देना आवश्यक नहीं माना गया।

न्याय दृष्टांत ***गन्ना मान्थी पेड्डा विरूद्ध सी. नारायणा रेड्डी, ए.आई.आर. 2006 ए.पी. 89*** में यह प्रतिपादित किया गया है कि बंधक संपत्ति के उद्घोषणा एवं विक्रय के समय ऑफिसियल रिसीवर को सूचना पत्र देना चाहिये और यदि आवश्यक हो तो उसे निष्पादन कार्यवाही में पक्षकार भी बना लेना चाहिये।

न्याय दृष्टांत ***जयकिशन दास बालचंद पमनानी विरूद्ध म्युनिसिपल कार्पोरेशन, ए.आई.आर. 1991 बॉम्बे 341*** में यह प्रतिपादित किया गया है कि विक्रय की उद्घोषणा में संपत्ति के गलत विवरण के दर्ज करने से विक्रय दूषित हो जाता है।

इस तरह आदेश 21 नियम 66 के तहत लोक नीलाम द्वारा विक्रय की उद्घोषणा जारी करते समय न्यायालय को अत्यंत सावधानी से कार्य करना चाहिये और उक्त वैधानिक स्थितियों को ध्यान में रखते हुये और संपत्ति के उक्त आवश्यक विवरण दर्ज करते हुये उद्घोषणा जारी करना चाहिये।

आदेश 21 नियम 67 (1) सी.पी.सी. के तहत हर उद्घोषणा यथासंभव ऐसी विधि से की जायेगी और प्रकाशित की जायेगी जैसी नियम 54 (2) द्वारा विहित है।

(2) जहां न्यायालय ऐसा निर्देश देता है वहां ऐसी उद्घोषणा का राजपत्र या स्थानीय समाचार पत्र में भी या दोनो में प्रकाशित की जायेगी और ऐसे प्रकाशन के खर्च विक्रय के खर्च समझे जायेंगे।

(3) जहां संपत्ति पृथक रूप से विक्रय किये जाने के प्रयोजन से लाटों में विभाजित की गई है वहां हर एक लाट के लिये पृथक उद्घोषणा करना तब तक आवश्यक नहीं होगा जब तक की न्यायालय की यह राय न हो कि विक्रय की उचित सूचना अन्यथा नहीं दी जा सकती है।

आदेश 21 नियम 54 (2) सी.पी.सी. के तहत आदेश संपत्ति में या उसके समीप किसी स्थान पर डोंडी पिटवाकर या अन्य रूढ़िक ढंग से उद्घोषित किया जायेगा और ऐसे आदेश की प्रति संपत्ति के किसी सहज दृश्य भाग या आसानी से देखे जा सकने वाले भाग पर और न्याय सदन के किसी सहज दृश्य भाग पर और जहां संपत्ति सरकार को राजस्व देने वाली भूमि है वहां संबंधित जिले के कलेक्टर कार्यालय में भी लगाई जायेगी और जहां संपत्ति किसी गांव में स्थित है वहां उस गांव की ग्राम पंचायत के कार्यालय में भी लगाई जायेगी।

नियम 205 के अनुसार जब विक्रय की जाने वाली संपत्ति अधिक मूल्य की हो तो उनके विक्रय का विज्ञापन स्थानीय समाचार पत्र में किया जाना उचित समझा जा सकता है विक्रय नियत करने में निर्णित ऋणी के हितों और अच्छी कीमत प्राप्त होने की संभावनाओं का ध्यान रखा जाना चाहिये।

न्याय दृष्टांत ***लालचंद विरूद्ध आठवे अपर जिला जज, (पूर्वोक्त)*** में यह भी प्रतिपादित किया गया है कि गांव में डोंडी पिटवाने के बाद विक्रय की उद्घोषणा प्रकाशित की गई इसे उचित सूचना नहीं माना गया।

इस तरह निष्पादन न्यायालय को जहां अधिक मूल्य की संपत्ति हो वहां स्थानीय समाचार पत्र में भी विक्रय का विज्ञापन प्रकाशित करवाना चाहिये और प्रकाशन आदेश 21 नियम 54 सी.पी.सी. में बतलाई उक्त विधि के अनुसार करवाना चाहिये।

आदेश 21 नियम 68 सी.पी.सी. के अनुसार जहां कुर्क संपत्ति शीघ्र नष्ट होने वाली हो या उसे अभिरक्षा में रखने का खर्च उसके मूल्य से ज्यादा होता हो उस दशा को छोड़कर विक्रय निर्णित ऋणी की लिखित सहमति के बिना तब तक न होगा जब तक, उद्घोषणा की प्रति संबंधित न्यायालय की न्याय सदन में लगाने के बाद अचल संपत्ति की दशा में 15 दिन और चल संपत्ति की दशा में 7 दिन व्यतीत न हो गये हो।

नियम 205 के अनुसार प्रत्येक सप्ताह में एक नियत दिन पर आदेश 21 नियम 64 सी.पी.सी. के अधीन विक्रय होना चाहिये।

नियम 206 (1) के अनुसार कुर्क संपत्ति के विक्रय के लिये रविवार, राजपत्रित अवकाश या व्यवहार न्यायालय के अवकाश के दिन नियत नहीं करना चाहिये लेकिन जहां संपत्ति शीघ्र नष्ट होने वाली है या किसी अन्य कारण से शीघ्र विक्रय जरूरी है वहां ये निर्देश लागू नहीं होते है।

नियम 206 (2) के अनुसार अवकाश का दिन यदि नियत करना न्यायालय आवश्यक समझती है तब निर्णित ऋणी से आपत्ति बावत् पूछना चाहिये और उसका उत्तर लिखना चाहिये।

नियम 207 के अनुसार आदेश 21 नियम 66 एवं 67 सी.पी.सी. की घोषणा और विज्ञापन के अलावा अचल संपत्ति का प्रत्येक विक्रय न्यायालय भवन पर होना चाहिये और विक्रय के एक दिन पूर्व डोंडी पिटवाकर विज्ञापन करवाना चाहिये।

नियम 208 में भी लोक नीलाम द्वारा विक्रय के पूर्व पर्याप्त विज्ञापन की प्रक्रिया बतलाई गई है जिसका पालन करना चाहिये और विक्रय का सूचना पत्र चस्पा करवाना चाहिये इस संबंध में नियम 209 भी ध्यान में रखना चाहिये जिसमें नोटिस बोर्ड के बारे में निर्देश है।

नियम 211 के अनुसार प्रत्येक नियत तिथि, पर नियत समय पर विक्रय की कार्यवाही प्रारंभ की जाना चाहिये सूर्यास्त के पश्चात विक्रय जारी नहीं रखना चाहिये।

आदेश 21 नियम 69 (1) सी.पी.सी. के अनुसार न्यायालय विक्रय को किसी विशिष्ट दिन और समय तक के लिये अपने विवेक से स्थगित कर सकेगा और विक्रय का संचालन करने वाला अधिकारी भी कारणों को लिखते हुये उसके विवेक से विक्रय स्थगित कर सकेगा,

परंतु जहां विक्रय न्याय सदन में या उसके सीमाओं के भीतर किया जा रहा है वहां न्यायालय के अनुमति के बिना विक्रय स्थगित नहीं किया जायेगा।

(2) जहां विक्रय 30 दिन से अधिक की अवधि के लिये उप नियम 1 के अधीन स्थगित किया जाता है वहां नियम 67 के अधीन नई उद्घोषणा की जायेगी जब तक की निर्णित ऋणी उसका अधित्यजन करने के लिये सहमति न दे दे।

(3) यदि लाट के लिये बोली के समाप्त होने से पहले ही ऋण और खर्चे विक्रय का संचालन करने वाले अधिकारी को निविदा कर दिये जाते है या न्यायालय में जमा करने का समाधानप्रद सबूत दे दिया जाता है तब विक्रय रोक दिया जायेगा।

आदेश 21 नियम 71 सी.पी.सी. के अनुसार क्रेता के व्यतीक्रम के कारण होने वाले पुनर्विक्रय में जो कमी किमत में हो जाये, वह और ऐसे पुनर्विक्रय में हुये सब व्यय उस अधिकारी द्वारा प्रमाणित किये जायेंगे और डिक्रीधारी या निर्णित ऋणी की प्रेरणा से व्यतीक्रम करने वाले से वसूल किया जा सकेंगे।

आदेश 21 नियम 72 (1) सी.पी.सी. के तहत जिस डिक्री के निष्पादन में संपत्ति का विक्रय किया जाता है उस डिक्री का कोई भी धारक न्यायालय की अभिव्यक्त अनुमति के बिना संपत्ति के लिये न तो बोली लगायेगा न उसका क्रय करेगा।

(2) जहां डिक्रीधारी ऐसी अनुज्ञा से संपत्ति क्रय करता है वहां क्रय धन और डिक्री के पेटे बकाया धारा 73 के अधीन रहते हुये एक दूसरे के विरूद्ध मुजरा की जा सकेगी और निष्पादन न्यायालय डिक्री की पूर्णतः या भागतः तुष्टि प्रविष्टि करेंगा।

(3) जहां डिक्रीधारी ऐसी अनुमति के बिना स्वयं या किसी अन्य के माध्यम से संपत्ति क्रय करता है वहां यदि न्यायालय निर्णित ऋणी के या किसी अन्य प्रभावित व्यक्ति के आवेदन पर विक्रय के आदेश को अपास्त कर सकेगा और तत्संबंधी व्यय डिक्रीधारी द्वारा दिये जायेंगे।

नियम 213 के अनुसार डिक्रीधारी विक्रय में बोली लगाने की अनुमति के प्रार्थना पत्र में उन तथ्यों का विवरण देगा जिनसे यह जानकारी हो सके की अन्यथा लाभप्रद विक्रय नहीं हो सकेगा।

नियम 214 के अनुसार सामान्यतः लेखबद्ध कारणों के सिवाय और न्यूनतम राशि से कम धन की बोली डिक्रीधारी नहीं लगा सकेगा अर्थात न्यूनतम राशि निश्चित करके ही डिक्रीधारी को बोली लगाने की अनुमति देना चाहिये और संपत्ति के बाजार मूल्य के अनुसार न्यूनतम राशि निर्धारित करना चाहिये।

लालचंद विरूद्ध आठवे अपर जिला जज, (पूर्वोक्त) वाले मामले में यह प्रतिपादित किया गया है कि बोली लगाने वाले डिक्रीधारी ने आदेश 21 नियम 72 के तहत उचित अनुमति प्राप्त नहीं की ऐसा विक्रय आदेश 21 नियम 72 के स्पष्ट उल्लंघन में था।

न्याय दृष्टांत ***नेदूनगडी बैंक लि. विरूद्ध एजीमाला एग्रीकल्चर, ए.आई.आर. 2004 केरल 62*** में अपसेट प्राईज और रिजर्व प्राईज को स्पष्ट किया गया है जो अवलोकनीय है।

आदेश 21 नियम 72 ए सी.पी.सी. के प्रावधान बंधक संपत्ति के विक्रय के समय बंधकदार द्वारा विक्रय में बोली लगाने की अनुमति देते समय ध्यान में रखना चाहिये और इस संबंध में **नियम 212** भी ध्यान में रखना चाहिये।

आदेश 21 नियम 73 सी.पी.सी. के अनुसार कोई भी अधिकारी या अन्य व्यक्ति जिसे विक्रय के संबंध में किसी कर्त्तव्य का पालन करना हो, विक्रय की गई संपत्ति में किसी हित के लिये न तो प्रत्यक्ष और न अप्रत्यक्ष रूप से बोली लगायेगा और न उसे अर्जित करेगा और न अर्जित करने का प्रयत्न करेगा।

इस संबंध में **नियम 220** में भी प्रावधान है जिसके अनुसार संबंधित जिला जज के अधीन लिपिक वर्गीय या भृत्य वर्गीय सेवा में नियोजित कोई भी व्यक्ति जिला जज के लिखित अनुमति के बिना ऐसे विक्रय में बोली नहीं लगा सकता हैं।

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जंगम या चल संपत्ति का विक्रय

आदेश 21 नियम 74 (1) सी.पी.सी. के अनुसार जहां विक्रय की जाने वाली संपत्ति कृषि उपज है वहां विक्रय :–

ए. यदि ऐसी उपज उगती फसल है तो उस भूमि पर या उसके पास किया जायेगा जिसमें ऐसी फसल उगी है अथवा

बी. यदि ऐसी उपज काटी जा चुकी है या इकट्ठी की जा चुकी है तो उस खलिहान पर या अनाज रखने के स्थान या चारे के ढेर पर या उसके पास जिसमें फसल रखी गई है किया जायेगा,

परंतु यदि न्यायालय की राय है कि लोक स्थान के समीप के स्थान पर विक्रय से अधिक मूल्य आ सकेगा तो वह ऐसे निकटतम स्थान पर विक्रय का आदेश दे सकेगा।

(2) जहां उपज विक्रय के लिये प्रस्तुत किये जाने पर :–

ए. विक्रय करने वाले व्यक्ति के अनुमान से उसके लिये उचित मूल्य की बोली नहीं लगाई गई है तथा

बी. उस उपज का स्वामी या उसकी ओर से कार्य करने वाला व्यक्ति विक्रय को आगामी दिन या साप्ताहिक बाजार के दिन तक स्थगित करने के लिये आवेदन करता है,

वहां विक्रय स्थगित कर दिया जायेगा और उसके बाद जो भी किमत लगे उस पर विक्रय पूर्ण कर दिया जायेगा।

नियम 205 के अनुसार पशुधन, कृषि उपज और अन्य वस्तुएँ जो न्यायालय में नहीं लाई गई है और सामान्यतः देशी बाजारों में बेची जाती है उनका जब तक न्यायालय अन्यथा निर्देश न करे विक्रय पास वाले बाजार में किया जाना चाहिये।

आदेश 21 नियम 75 (1) सी.पी.सी. के अनुसार जहां विक्रय की जाने वाली संपत्ति उगती फसल है और फसल ऐसी प्रकृति की है जो भण्डार में रखने के योग्य है किन्तु तब तक भण्डार में नहीं रखी गई है वहां विक्रय का दिन ऐसे नियत किया जायेगा की उस दिन के आने के पहले वह भण्डार में

रखने के योग्य हो जाये और विक्रय तब तक नहीं किया जायेगा जब तक फसल काट नहीं ली गई है या इकट्ठी न कर ली गई है और भण्डार में रखने के योग्य नहीं हो गई है।

(2) जहां फसल ऐसी प्रकृति की नहीं है जो भण्डार में रखने के योग्य हो वहां उसे काटी जाने और इकट्ठी की जाने से पहले विक्रय किया जा सके और क्रेता भूमि पर प्रवेश करके फसल को काटने और इकट्ठी करने के लिये सभी आवश्यक बाते करने का हकदार होगा।

आदेश 21 नियम 76 सी.पी.सी. के तहत निगोशिएबल इंस्ट्रूमेंट या निगम के अंश को न्यायालय दलाल या ब्रोकर के माध्यम से विक्रय का निर्देश दे सकता है।

आदेश 21 नियम 77 (1) सी.पी.सी. के अनुसार जहां चल संपत्ति का लोक नीलाम के द्वारा विक्रय किया जाता है वहां हर एक लाट का मूल्य विक्रय के समय पर अदा किया जायेगा या उसके पश्चात शीघ्र ही ऐसे समय पर किया जायेगा जो वह अधिकारी या अन्य व्यक्ति जो विक्रय संचालित कर रहा है निर्देश करे, और संदाय में चूक होने पर उसी समय फिर विक्रय किया जायेगा।

(2) क्रय धन का संदाय कर दिये जाने के बाद उसकी रसीद विक्रय का संचालन करने वाला अधिकारी देगा और विक्रय आत्यंतिक हो जायेगा।

(3) जहां विक्रय की जाने वाली संपत्ति ऐसे माल में अंश है जो माल निर्णित ऋणी और सह–स्वामी का है और दो या अधिक व्यक्ति एक सी राशि की बोली लगाते है जिनमें एक व्यक्ति सह–स्वामी है तो वह बोली सह–स्वामी की बोली समझी जायेगी।

न्याय दृष्टांत ***सेठ बनारसी दास विरूद्ध डिस्ट्रिक्ट मजिस्ट्रेट एण्ड कलेक्टर मेरठ, ए.आई. आर. 1996 एस.सी. 2311*** में यह प्रतिपादित किया गया है लोक नीलाम में चल संपत्ति/शेयर का विक्रय में क्रय धन के भुगतान के लिये समय दिया जा सकता है और दिये गये समय में यदि क्रय मूल्य जमा करा दिया जाता है तो नीलाम दोषपूर्ण नहीं होता हैं।

आदेश 21 नियम 78 सी.पी.सी. के अनुसार चल संपत्ति के विक्रय के प्रकाशन या संचालन में कोई भी अनियमितता विक्रय को दूषित नहीं करेगी लेकिन ऐसी अनियमितता से किसी व्यक्ति को क्षति हुई है तो वह प्रतिकर के लिये या यदि वह क्रेता है तो संपत्ति के रिकवरी के लिये और रिकवरी न होने पर प्रतिकर के लिये वाद ला सकेगा।

आदेश 21 नियम 79 (1) सी.पी.सी. के अनुसार जहां विक्रय की गई संपत्ति ऐसी चल संपत्ति है जिसका वास्तविक अभिग्रहण कर लिया गया है वहां वह क्रेता को दे दी जायेगी।

(2) जहां संपत्ति निर्णित ऋणी के अलावा किसी अन्य व्यक्ति के कब्जे में है वहां वह व्यक्ति क्रेता के अलावा किसी अन्य को कब्जा न दे ऐसी सूचना देकर पालना करवाई जायेगी।

(3) जहां विक्रय की गई संपत्ति ऋण है या निगम अंश है वहां न्यायालय ऐसा लिखित आदेश करेगी कि क्रेता को ही ऋण या ब्याज अदा किया जाये और निगम अंश के बारे में भी न्यायालय क्रेता के पक्ष में आदेश करेगी।

आदेश 21 नियम 80 (1) सी.पी.सी. के अनुसार निगोशिएबल इंस्ट्रूमेंट और अंशों के अंतरण के बारे में आवश्यक पृष्ठांकन का प्रावधान करते है जो निष्पादन न्यायालय को ध्यान में रखना चाहिये।

आदेश 21 नियम 81 सी.पी.सी. के अनुसार अन्य चल संपत्ति क्रेता में निहित हो जायेगी ऐसा आदेश न्यायालय करेगा।

स्थावर या अचल संपत्ति के विक्रय के बारे में

आदेश 21 नियम 82 सी.पी.सी. के तहत लघुवाद न्यायालय से भिन्न किसी भी न्यायालय द्वारा डिक्री के निष्पादन में स्थावर संपत्ति के विक्रय का आदेश किया जा सकेगा।

आदेश 21 नियम 83 (1) सी.पी.सी. के अनुसार जहां अचल संपत्ति के विक्रय के लिये आदेश किया जा चुका है और निर्णित ऋणी न्यायालय का समाधान करा सके की यह विश्वास करने के लिये कारण है कि डिक्री का धन ऐसी संपत्ति या उसके किसी भाग के या निर्णित ऋणी के किसी स्थावर संपत्ति के बंधक, पट्टे या प्राईवेट विक्रय द्वारा जुटाया जा सकता है तो उसके आवेदन करने पर न्यायालय विक्रय के आदेश में समाविष्ट संपत्ति के विक्रय को ऐसी शर्तो पर और ऐसी अवधि के लिये स्थगित कर सकता है कि निर्णित ऋणी रकम जुटाने में समर्थ हो जाये।

(2) न्यायालय निर्णित ऋणी को ऐसा प्रमाण पत्र देगा जो उसमें वर्णित अवधि के भीतर और धारा 64 की बात के होते हुये भी प्रस्तावित बंधक, पट्टा या विक्रय करने के लिये उसे प्राधिकृत करता है,

परंतु ऐसे बंधक, पट्टे या विक्रय के अधीन संदेय सभी धन न्यायालय को दिये जायेंगे न की निर्णित ऋणी को,

परंतु ऐसे बंधक पट्टे या विक्रय तब तक आत्यंतिक नहीं होंगे जब तक की न्यायालय द्वारा उनकी पुष्टि न कर दी जाये।

इस तरह न्यायालय निर्णित ऋणी को डिक्री धन जुटाने के लिये समय दे सकता है लेकिन उसे आदेश 21 नियम 83 (3) सी.पी.सी. को भी ध्यान में रखना चाहिये।

आदेश 21 नियम 84 (1) सी.पी.सी. के तहत अचल संपत्ति के हर विक्रय पर वह व्यक्ति जिसे क्रेता होना घोषित किया गया है क्रय धन की रकम का 25 प्रतिशत विक्रय का संचालन करने वाले अधिकारी को उसके क्रेता घोषित होते ही तुरंत पश्चात देगा और ऐसे न देने पर संपत्ति का उसी समय पुनः विक्रय किया जायेगा।

(2) जहां डिक्रीधारी क्रेता है और क्रय धन को उक्त नियम 72 के अधीन मुजरा करने का हकदार है वहां न्यायालय इस नियम की अपेक्षाओं से डिक्रीधारी को मुक्ति दे सकेगा।

न्याय दृष्टांत ***रोसाली विरूद्ध टैको बैंक, ए.आई.आर. 2007 एस.सी. 998*** में "तुरंत पश्चात" (immediately) शब्द को स्पष्ट किया गया है और इसे युक्तियुक्त समय के भीतर कहा गया है।

आदेश 21 नियम 85 सी.पी.सी. के तहत क्रय धन की पूरी रकम क्रेता 15 दिन में न्यायालय में जमा करेगा,

न्यायालय में ऐसे जमा की जाने वाली रकम की गणना करने में क्रेता किसी भी ऐसे मुजरा का फायदा उठा सकेगा जिसे वह नियम 72 के अधीन पाने का हकदार हो।

न्याय ***दृष्टांत बलराम विरूद्ध इलम सिंह, ए.आई.आर. 1996 एस.सी. 2781*** में यह प्रतिपादित किया गया है क्रेता डिक्रीधारी आदेश 21 नियम 85 में वर्णित समय के भीतर पूर्ण विक्रय मूल्य जमा करवाने में असफल रहा विक्रय शून्य हो जायेगा क्रेता का यह बचाव कि न्यायालय की त्रुटि से कम धन जमा हुआ यह विक्रय के शून्य होने के प्रभाव को नहीं बचा सकता।

आदेश 21 नियम 86 सी.पी.सी. के तहत यदि क्रय धन नियत अवधि में जमा नहीं होता है तो संपत्ति का फिर से विक्रय किया जायेगा और व्यतीक्रमकर्ता द्वारा जमा धन फोरफिट कर लिया जायेगा।

आदेश 21 नियम 87 सी.पी.सी. के तहत पुनः विक्रय पर नई उद्घोषणा निकाली जाने के प्रावधान है जबकि **आदेश 21 नियम 88 सी.पी.सी.** के तहत सह–अंशधारी की बोली को अधिमान्यता देने के प्रावधान है।

आदेश 21 नियम 89 (1) सी.पी.सी. के तहत जहां अचल संपत्ति का किसी डिक्री के निष्पादन में विक्रय किया गया है वहां विक्रित संपत्ति में विक्रय के समय या आवेदन करते समय किसी हित का दावा करने वाला व्यक्ति विक्रय को अपास्त कराने के लिये आवेदन कर सकता है यदि वह :–

ए. क्रय धन के 5 प्रतिशत के बराबर रकम क्रेता को अदा करने के लिये,

बी. विक्रय की उद्घोषणा में ऐसी रकम के रूप में जिसकी वसूली के लिये विक्रय का आदेश दिया गया था विनिर्दिष्ट रकम डिक्रीधारी को अदा करने के लिये, न्यायालय में जमा करावे।

(2) जहां कोई व्यक्ति उसकी अचल संपत्ति के विक्रय को अपास्त करवाने के लिये आवेदन निम्न नियम 90 के अधीन करता है वहां वह जब तक उसका आवेदन विड्रा न कर ले वह इस नियम के अधीन आवेदन देने या उसे आगे चलाने का हकदार नहीं होगा।

(3) इस नियम की कोई भी बात निर्णित ऋणी को ऐसे किसी दायित्व से मुक्त नहीं करेंगी जिसके अधीन वह उन खर्चो और ब्याज के संबंध में हो जो विक्रय के उद्घोषणा के अंतर्गत नहीं आते हैं।

न्याय दृष्टांत ***सी. एच. गोडा विरूद्ध एम.आर. त्रिरूमाला, (2004) 1 एस.सी.सी. 453*** में यह प्रतिपादित किया गया है कि आदेश 21 नियम 89 सी.पी.सी. का आवेदन जो विक्रय को अपास्त करने के लिये है उसका कोई निर्धारित प्रारूप नियमों में नहीं है यदि एक मेमो जिसमें विक्रय अपास्त करने की प्रार्थना की गई हो दिया जाता है तो वह भी पर्याप्त है।

आदेश 21 नियम 90 (1) सी.पी.सी. के अनुसार जहां किसी डिक्री के निष्पादन में किसी अचल संपत्ति का विक्रय किया गया है वहां डिक्रीधारी या क्रेता या ऐसा कोई अन्य व्यक्ति जो आस्तियों के अनुपातिक वितरण में अंश पाने का हकदार है या जिसके हित विक्रय के द्वारा प्रभावित हुये है विक्रय को उसके प्रकाशन या संचालन में हुई तात्विक अनियमितता या कपट के आधार पर अपास्त कराने के लिये न्यायालय से आवेदन कर सकेगा।

(2) विक्रय के प्रकाशन या संचालन में हुई अनियमितता या कपट के आधार पर कोई भी विक्रय अपास्त नहीं किया जायेगा जब तक साबित किये गये तथ्यों के आधार पर न्यायालय का यह समाधान नहीं हो जाता की ऐसी अनियमितता या कपट के कारण आवेदक को सारवान क्षति हुई है।

(3) इस नियम के अधीन विक्रय को अपास्त करवाने के लिये कोई आवेदन ऐसे किसी आधार पर ग्रहण नहीं किया जायेगा जिसे आवेदक उस तारीख को या उसके पूर्व आधार मान सकता था जिस तारीख को विक्रय की उद्घोषणा तैयार की गई थी।

स्पष्टीकरण :– विक्रित संपत्ति की कुर्की का न होना या कुर्की में त्रुटि अपने आप में इस नियम के अधीन किसी विक्रय को अपास्त करने के लिये कोई आधार नहीं होगी।

नियम 219 के अनुसार मात्र यह तथ्य की संपत्ति को असमूचित मूल्य पर विक्रय किया गया है डिक्री के निष्पादन में किये जाने वाले विक्रय को अपास्त किये जाने का आधार नहीं होता है। आदेश 21 नियम 90 सी.पी.सी. के अंतर्गत आवेदन के समर्थन में यह दर्शाया जाना चाहिये की विक्रय के प्रकाशन और संचालन में सारवान अनियमितता है अथवा कपट हुआ है और आवेदक को ऐसी सारवान अनियमितता के कारण सारवान क्षति हुई है।

न्याय दृष्टांत ***नेदूनगडी बैंक लि. विरूद्ध मे. एजीमाला एग्रीकल्चर प्रोडेक्ट, (पूर्वोक्त)*** के न्याय दृष्टांत में यह भी प्रतिपादित किया गया है कि संपत्ति का बहुत कम मूल्य बतलाया गया एक क्रेता निर्णित ऋणी का पुत्र और दूसरा उसका रिश्तेदार था ऐसे में कपट होना पाया गया विक्रय को कुछ शर्तो के साथ अपास्त किया गया।

आदेश 21 नियम 91 सी.पी.सी. के अनुसार डिक्री के निष्पादन में ऐसे किसी भी विक्रय में का क्रेता विक्रय को अपास्त कराने के लिये आवेदन इस आधार पर कर सकेगा की विक्रय की गई संपत्ति में निर्णित ऋणी का कोई विक्रय हित नहीं था।

आदेश 21 नियम 92 (1) सी.पी.सी. के अनुसार जहां उक्त नियम 89, 90 एवं 91 के अधीन कोई आवेदन नहीं किया गया है या ऐसा आवेदन किया गया है लेकिन निरस्त कर दिया गया है वहां न्यायालय विक्रय को पुष्ट या कंफर्म करने वाला आदेश करेगा और तब विक्रय आत्यंतिक हो जायेगा,

परंतु जहां किसी संपत्ति का, ऐसी संपत्ति के किसी दावे का अंतिम निपटारा होने तक उसकी कुर्की के लिये आपत्ति के लंबित रहने तक डिक्री के निष्पादन में विक्रय किया गया है वहां न्यायालय ऐसे विक्रय को ऐसे दावे या आपत्ति के अंतिम निपटारे तक पुष्ट नहीं करेगा।

(2) जहां ऐसा आवेदन किया गया है और स्वीकार कर लिया जाता है और जहां नियम 89 के अधीन आवेदन की दशा में वह निक्षेप या डिपोजिट जो उस नियम द्वारा आपेक्षित है विक्रय की तारीख से 60 दिन के भीतर कर दिया गया है या नियम 89 के अधीन जमा रकम जमाकर्ता की ओर से हुई किसी लिपिकीय या गणित संबंधी भूल के कारण कम पाई जाती है वहां न्यायालय द्वारा नियत समय के भीतर ऐसी कमी पूरी कर दी जाती है वहां न्यायालय विक्रय को अपास्त करने का आदेश देगा,

लेकिन आवेदन की सूचना जब तक प्रभावित सभी व्यक्तियों को न दे दी गई हो ऐसा कोई आदेश नहीं किया जायेगा,

परंतु जहां 30 दिन की अवधि सिविल प्रक्रिया संहिता संशोधन अधिनियम, 2002 के प्रारंभ होने के पहले ही समाप्त नहीं हुई है वहां 60 दिन के भीतर निक्षेप या जमा किया जा सकेगा।

(3) जिस व्यक्ति के विरूद्ध इस नियम के अधीन आदेश पारित किया गया है उस आदेश को अपास्त कराने के लिये वह कोई वाद नहीं ला सकेगा।

(4) जहां कोई अन्य पक्षकार नीलाम क्रेता के विरूद्ध वाद प्रस्तुत करके निर्णित ऋणी के हक को चुनौती देता है वहां डिक्रीधारी और निर्णित ऋणी वाद के आवश्यक पक्षकार होंगे।

(5) यदि उप नियम 4 में उल्लेखित वाद की डिक्री दे दी जाती है तो न्यायालय डिक्रीधारी को निर्देश देगा की वह नीलाम क्रेता को धन वापस कर दे और जहां ऐसा आदेश किया जाता है वहां निष्पादन की कार्यवाहियॉ जिसमें विक्रय किया गया था उसी स्टेज पर पुनः प्रवर्तित की जायेगी जिस पर विक्रय का आदेश किया गया था।

न्याय दृष्टांत ***डाडी जगन्नाधम विरूद्ध जम्मलू रामालू, ए.आई.आर. 2001 एस.सी. 2699*** में पांच न्याय मूर्तिगण की पीठ में यह प्रतिपादित किया गया है कि विक्रय को अपास्त करवाने के लिये आवेदन आदेश 21 नियम 89 के तहत 60 दिन के भीतर किया जा सकता है और राशि भी 60 दिन के भीतर जमा करवाई जा सकती है परिसीमा अधिनियम, 1963 के अनुच्छेद 127 और आदेश 21 नियम 92 (2) एवं आदेश 21 नियम 89 सी.पी.सी. पर विचार करते हुये यह विधि प्रतिपादित की गई।

जहां नीलाम क्रेता तृतीय पक्ष हो और डिक्री का निष्पादन स्थगित नहीं किया गया हो और नीलाम जारी रहता है और क्रेता के पक्ष में विक्रय प्रमाण पत्र जारी कर दिया जाता है और डिक्री अपास्त कर दी जाती है वहां ऐसे तृतीय पक्ष के हित संरक्षित किये जाते है लेकिन जहां नीलाम क्रेता खुद डिक्रीधारी हो वहां वह किसी संरक्षण का अधिकारी नहीं होता है इस संबंध में न्याय दृष्टांत ***सरदार गोविंद राव महादिक विरूद्ध देवी सहाय, ए.आई.आर. 1982 एस.सी. 989*** अवलोकनीय हैं।

न्याय दृष्टांत ***घनश्यामं दास विरूद्ध ओमप्रकाश, ए.आई.आर. 1994 एस.सी. 1292, व्ही. के. पी. चेट्टीयार विरूद्ध रामास्वामी, ए.आई.आर. 2001 एस.सी. 2186*** उक्त ***सी.एच. गोडा विरूद्ध एम.आर. त्रिमुल्ला, सेथी अम्माल विरूद्ध एस. फायनेंस, ए.आई.आर. 1996 एस.सी. 1551*** भी अवलोकनीय है।

आदेश 21 नियम 93 सी.पी.सी. के अनुसार जहां अचल संपत्ति का विक्रय उक्त नियम 92 के अधीन अपास्त कर दिया जाता है वहां क्रेता अपना क्रय धन ब्याज सहित या रहित जैसा भी न्यायालय आदेश करे वापस पाने का आदेश उस व्यक्ति के विरूद्ध प्राप्त करने का हकदार होगा जिसे क्रय धन दे दिया गया है।

आदेश 21 नियम 94 सी.पी.सी. के तहत जहां अचल संपत्ति का विक्रय आत्यंतिक हो गया है वहां न्यायालय जिस व्यक्ति को क्रेता घोषित किया गया है उसके नाम और विक्रित संपत्ति को

विनिर्दिष्ट करते हुये प्रमाण पत्र देगा ऐसे प्रमाण पत्र में उस दिन की तारीख होगी जिस दिन विक्रय आत्यंतिक हुआ था।

नियम 221 के अनुसार जहां बंदुके या अन्य शस्त्र जिनके संबंध में अनुज्ञा पत्र या लाईसेंस लेना आवश्यक है डिक्री के प्रवर्तन में सार्वजनिक घोष विक्रय द्वारा विक्रय किये जाते है तब न्यायालय संबंधी जिले के जिला मजिस्ट्रेट को क्रेताओं के नाम, पते और क्रेताओं को उन अस्त्रों को दिये जाने का स्थान व समय की उचित सूचना देंगे ताकि आवश्यक कार्यवाही की जा सके।

नियम 222 के अनुसार नियमित मुद्रा पत्र पर ही विक्रय का प्रमाण पत्र लिखा जाना आवश्यक होगा जो कि नीलाम क्रेता ऐसा मुद्रा पत्र लायेगा।

नियम 223 (1) के अनुसार विक्रय प्रमाण पत्र न्यायालय निर्धारित प्रारूप के शब्दों के अनुसार बनाईगी। इस संबंध में सी.पी.सी. के एपेन्डिक्स ई प्रारूप नंबर 38 को ध्यान में रखना चाहिये। प्रमाण पत्र का ड्राफ्ट न्यायालय द्वारा अनुमोदित एवं हस्ताक्षरित होने के पश्चात प्रवर्तन प्रकरण में सम्मिलित कर दिया जायेगा और उसकी प्रतिलिपि नीलाम क्रेता को दी जायेगी और उसे देने की तिथि और दिन उस पर अंकित की जायेगी।

नियम 224 के अनुसार पंजीकरण अधिनियम, 1908 की धारा 89 (2) के तहत विक्रय प्रमाण पत्र की एक प्रति संबंधित रजिस्ट्रार कार्यालय को भेजना आवश्यक है ताकि आवश्यक कार्यवाही की जा सके।

आदेश 21 नियम 95 सी.पी.सी. के अनुसार जहां विक्रित अचल संपत्ति निर्णित ऋणी के या उसकी ओर से किसी व्यक्ति के या ऐसे हक के अधीन जिसे निर्णित ऋणी ने ऐसी संपत्ति के कुर्की हो जाने के पश्चात सृर्जित किया है, दावा करने वाले किसी व्यक्ति के आधिपत्य में और उसके बारे में प्रमाण पत्र उक्त नियम 94 के अधीन दिया गया है वहां न्यायालय क्रेता के आवेदन पर यह आदेश करेगा की उस संपत्ति पर ऐसे क्रेता का या ऐसे किसी व्यक्ति का जिसे क्रेता अपनी ओर से परिदान पाने के लिये नियुक्त करे कब्जा करा कर और यदि आवश्यक हो तो ऐसे व्यक्ति को हटाकर, जो संपत्ति को रिक्त करने से इंकार करता है, परिदान किया जाये।

यहां यह बात ध्यान रखना चाहिये कि परिसीमा अधिनियम, 1963 के अनुच्छेद 134 के तहत विक्रय के आत्यंतिक होने के 1 वर्ष के भीतर ही डिक्री के निष्पादन में हुये विक्रय की अचल संपत्ति का क्रेता को कब्जा दिलवाया जा सकता है और यदि आवेदन 1 वर्ष के बाद आता तो वह अवधि वाधित होता है।

न्याय ***दृष्टांत रतन बापू पाटिल विरूद्ध दोधू, ए.आई.आर. 2005 एस.सी. 1500*** में यह प्रतिपादित किया गया है कि विक्रय के पुष्ट होने या कंफर्म होने की तारीख से परिसीमा काल प्रारंभ हो जाता है यही विधि ***बाल किशन विरूद्ध एम. कोनार, (पूर्वोक्त)*** के मामले में भी प्रतिपादित की गई है और यह कहा गया है की यदि एक वर्ष की अवधि निकल जाने के बाद आधिपत्य लेने के लिये आवेदन दिया जाता है तो आवेदक को कोई अनुतोष नहीं दिलाया जा सकता है।

आदेश 21 नियम 96 सी.पी.सी. के अनुसार जहां विक्रित संपत्ति किसी किरायेदार के या उस पर आधिपत्य रखने के हकदार अन्य व्यक्ति के आधिपत्य में है और वह उस संपत्ति के संबंध में उक्त नियम 94 के तहत प्रमाण पत्र दिया गया है वहां न्यायालय क्रेता के आवेदन पर आदेश करेगा की विक्रय के प्रमाण पत्र की एक प्रति संपत्ति के किसी सहज दृश्य स्थान पर लगाकर और डोंडी पिटवाकर या अन्य रूढ़िक ढंग से यह बात आधिपत्यधारी को उद्घोषित करके कि निर्णित ऋणी का हित क्रेता को अंतरित हो गया है संपत्ति का परिदान क्रेता को किया जाये।

इस संबंध में नियम 225 भी ध्यान में रखना चाहिये।

नियम 421 के अनुसार जहां विक्रय भूमि कृषि प्रयोजन के लिये उपयोग में आने वाली भूमि के हितों के या भवन के या ऐसी कृषि के उपभोग में आने वाली भूमि या हितों के संबंधित अचल संपत्ति है तब प्रथम 1 हजार रूपये पर 5 प्रतिशत उसके पश्चात अगले 4 हजार रूपये पर 3.5 प्रतिशत और शेष राशि पर 2 प्रतिशत पाउण्डेज शुल्क वसूला जाना चाहिये।

यदि विक्रय अन्य संपत्ति से संबंधित है तब :–

ए. यदि संपत्ति निगोशिएबल इंस्ट्रूमेंट या किसी सार्वजनिक कंपनी या निगम के शेयर है तब प्रथम 1 हजार रूपये पर 1 प्रतिशत और शेष राशि पर आधा प्रतिशत।

बी. अन्य संपत्ति की स्थिति में विक्रय धन का 5 प्रतिशत परंतु निम्न दशाओं में पाउण्डेज शुल्क वसूल नहीं की जायेगी :–

1. दिवालियों के संबंध में रिसीवर द्वारा किये गये विक्रय के बारे में
2. म.प्र. सहकारी समिति अधिनियम, 1960 की धारा 70 (1) के अधीन नियुक्त समापक द्वारा आज्ञप्ति के प्रवृर्तन में विक्रय की गई संपत्ति के संबंध में, जबकि वह संपत्ति डिक्रीधारण करने वाली सहकारी केन्द्रीय बैंक द्वारा क्रय न की गई हो।

नियम 426 के अनुसार संपूर्ण विक्रय धन पर देय पाउण्डेज फीस टिकटों के रूप में अर्थात स्टाम्प के रूप में दी जायेगी।

नियम 427 के अनुसार यह रीडर या निष्पादन लिपिक का कर्त्तव्य है कि वह यह जांच करे की पाउण्डेज शुल्क का नियमानुसार भुगतान किया है की नहीं और उसका नियमानुसार संबंधित रजिस्टर में इंद्राज करेंगा।

इस तरह निष्पादन न्यायालय को अज्ञाप्ति के निष्पादन में विक्रय के समय उक्त सामान्य नियम और चल और अचल संपत्ति के संबंध में उक्त नियमों और वैधानिक स्थितियों को ध्यान में रखते हुये कार्यवाही करना चाहिये।

खण्ड–इ

संविदा के विनिर्दिष्टतः पालन की आज्ञप्ति, जिसमें विक्रय पत्र निष्पादन की आज्ञप्ति भी शामिल है, के निष्पादन की पद्धति

(संस्थानिक आलेख– अवधेश कुमार गुप्ता, उप–संचालक)

संविदा के विनिर्दिष्ट अनुपालन की डिक्री के निष्पादन की रीति आदेश 21 नियम 32 मे विहित है। नियम 32 में वस्तुतः ऐसी डिक्री के निष्पादन की प्रक्रिया वर्णित नहीं है वरन् ऐसी प्रविधियाँ विहित की गई है जिनसे निर्णीत ऋणी को ऐसी डिक्री के आज्ञानुवर्तन हेतु विवश/बाध्य किया जा सके। संविदा का विनिर्दिष्ट पालन विनिर्दिष्ट अनुतोष अधिनियम, 1963 के अध्याय 2 (धारा 9 से धारा 25) में विहित प्रावधानों से विनियमित होता है।

संविदा के विनिर्दिष्ट पालन की आज्ञाप्ति के निष्पादन के संबंध में सिविल प्रक्रिया संहिता, 1908 का आदेश 21 नियम 32 प्रयोज्य है इस प्रावधान का सुसंगत भाग निम्नवत हैः–

"**32. विनिर्दिष्ट पालन के लिये डिक्री** – (1) जहां उस पक्षकार को, जिसके विरूद्ध संविदा के विनिर्दिष्ट पालन के लिये, ..., कोई डिक्री पारित की गई है, उस डिक्री के आज्ञानुवर्तन के लिए अवसर मिल चुका है और उसका आज्ञानुवर्तन करने में वह जानबूझकर असफल रहा है, वहां वह डिक्री ..... संविदा के विनिर्दिष्ट पालन के लिए ..... डिक्री की दशा में सिविल कारागार में उसके निरोध या उसकी सम्पत्ति की कुर्की द्वारा, या दोनों रीति से प्रवृत्त की जा सकेगी।

(2) जहाँ वह पक्षकार जिसके विरूद्ध विनिर्दिष्ट पालन के लिए ..... डिक्री पारित की गई है, कोई निगम है, वहां डिक्री उस निगम की सम्पत्ति की कुर्की द्वारा या न्यायालय की इजाजत से उसके निदेशकों या अन्य प्रधान अधिकारियों के सिविल कारागार में निरोध द्वारा या कुर्की और निरोध दोनों रीति से प्रवृत्त की जा सकेगी।

(3) जहां उपनियम (1) या उपनियम (2) के अधीन की गयी कोई कुर्की छह मास के लिए प्रवृत्त रह चुकी है वहां यदि निर्णीतऋणी ने डिक्री का आज्ञानुवर्तन नहीं किया है और डिक्रीदार ने कुर्क की गयी सम्पत्ति का विक्रय किये जाने के लिए आवेदन किया है तो ऐसी सम्पत्ति का विक्रय किया जा सकेगा और आगमों में से न्यायालय डिक्रीदार को ऐसा प्रतिकर दे सकेगा जो वह ठीक समझे और बाकी (यदि कोई हो) निर्णीत ऋणी के आवेदन पर उसे देगा {**और न्यायालय भी, दर्शित किए गए उपयुक्त हेतुक से कुर्की के समय में विस्तार कर सकेगा, जो एक वर्ष से अनधिक अवधि के लिए प्रवर्तन में रहेगा**}[1]

(4) जहां निर्णीतऋणी ने डिक्री का आज्ञानुवर्तन कर दिया है और उसका निष्पादन करने के लिए सभी खर्चों का संदाय करने के लिए वह आबद्ध है या जहाँ कुर्की की तारीख से छह मास के {**या ऐसे अतिरिक्त समय जिसे न्यायालय ने उपनियम (3) के अधीन नियत किया है**}[2] का अंत होने तक सम्पत्ति के विक्रय किये जाने के लिए कोई आवेदन नहीं किया गया है या यदि किया गया है तो नामंजूर कर दिया गया है वहां कुर्की नहीं रह जायेगी।

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* 1 एवं 2 कोष्ठक में दर्शित भाग म.प्र. राज्य के संशोधन द्वारा जोड़ा गया है ।

(5) जहां संविदा के विनिर्दिष्ट पालन की ..... किसी डिक्री का आज्ञानुवर्तन नहीं किया गया है वहां न्यायालय पूर्वोक्त सभी आदेशिकाओं के या उनमें से किसी के बदले में या उनके साथ–साथ निदेश दे सकेगा कि वह कार्य, जिसके किये जाने की अपेक्षा की गयी थी, जहां तक हो सके, डिक्रीदार या न्यायालय द्वारा नियुक्त किये गये किसी अन्य व्यक्ति द्वारा निर्णीतऋणी के खर्चे पर किया जा सकेगा और कार्य कर दिये जाने पर जो व्यय उपगत हुए हों वे ऐसी रीति से अभिनिश्चित किये जा सकेंगे जो न्यायालय निर्दिष्ट करे और इस प्रकार वसूल किये जा सकेंगे मानो वे डिक्री में ही सम्मिलित हों।

स्पष्टीकरण ....."

आदेश 21 नियम 32 के उपनियम (1) के अधीन संविदा के विनिर्दिष्ट अनुपालन की डिक्री के निष्पादन की पूर्व अपेक्षाऐं तथा ऐसी डिक्री के निष्पादन की रीति विहित की गई है।

(अ) **निष्पादन की पूर्व अपेक्षाऐं** – आदेश 21 नियम 32 (1) के अधीन ऐसी डिक्री के निष्पादन के संबंध में निम्नलिखित दो नियम है–

(i) **डिक्री के आज्ञानुवर्तन का अवसर**– नियम 32 के अधीन निष्पादन अनुज्ञात करने के पूर्व निष्पादन न्यायालय को संतुष्ट होना चाहिए कि निर्णीत ऋणी को ऐसी डिक्री के आज्ञानुवर्तन का अवसर प्राप्त था तथा वह जानबूझकर उसका आज्ञानुवर्तन करने में असफल रहा था। यह प्रश्न कि क्या किसी पक्षकार को डिक्री के आज्ञानुवर्तन का अवसर था अथवा नहीं, तथ्य का प्रश्न है तथा प्रत्येक मामले के तथ्यों तथा परिस्थितियों के परिप्रेक्ष्य में विनिश्चित किया जाना चाहिए। तत्संबंध में कोई सार्वभौम नियम प्रतिपादित नहीं किया जा सकता है। (देखे– ***केदारनाथ खेतान विरूद्ध जयनारायण राम लूनिया, ए.आई.आर.1954 पटना 497, पैरा 6 पृष्ठ क्र. 499***)

यदि न्यायालय इस निष्कर्ष पर पहुंचता है निर्णीत ऋणी को डिक्री के आज्ञानुवर्तन का कोई भी अवसर प्राप्त नहीं था तो वह ऐसे निष्पादन के आवेदन को खारिज कर सकता है। यहॉ यह उल्लेखनीय है कि निष्पादन आवेदन की ऐसी खारिजी पूर्वन्याय के रूप में प्रवृत्त नहीं होती है तथा विधि के अनुसार अपेक्षित अवसर प्रदान किए जाने के उपरांत नवीन आवेदन प्रस्तुत किया जा सकता है।

यदि निर्णीत ऋणी को ऐसा अवसर प्राप्त था तो उसे डिक्री के आज्ञानुवर्तन का आगे अवसर दिए बिना निष्पादन हेतु अग्रसर हुआ जा सकता है। न्यायालय उसे डिक्री के आज्ञानुवर्तन की सूचना देने के लिए आबद्ध नहीं है।

(ii) **आज्ञानुवर्तन करने में जानबूझकर असफल रहना**– नियम 32 (1) की दूसरी अपेक्षा है कि डिक्री के आज्ञानुवर्तन करने में निर्णीत ऋणी जानबूझकर असफल रहा हो। डिक्री की अवज्ञा मात्र पर्याप्त नहीं है यह साबित करना होगा कि पक्षकार के द्वारा ऐसी अवज्ञा या असफलता जानबूझकर, आशयित या विमर्शित थी। (देखे– ***नीलकांत विरूद्ध शंकरन,***

1988 क्रि. लॉ. जर्नल 1600 एवं राम नाथ विरूद्ध श्रीमती तपेसरा, ए.आई.आर. 1985 इलाहाबाद 26) जानबूझकर से आशय, सदभाव (Bonafide) की अनुपस्थिति से है।

(ब) **निष्पादन की रीति**– नियम 32 (1) के अधीन संविदा के विनिर्दिष्ट अनुपालन की डिक्री का निष्पादन निम्नलिखित रीतियों द्वारा कराया/प्रभावी बनाया जा सकता है :–

(i) सिविल कारागार में निरोध द्वारा

(ii) निर्णीत ऋणी की सम्पत्ति की कुर्की द्वारा

(iii) दोनों रीतियों से अर्थात् निर्णीत ऋणी की सम्पत्ति की कुर्की एवं उसके सिविल कारागार में निरोध द्वारा

(iv) कुर्क सम्पत्ति के विक्रय द्वारा (आदेश 21 नियम 32 (3))

इस प्रकार जहाँ निर्णीत ऋणी जानबूझकर और विमर्शित रूप से विनिर्दिष्ट अनुपालन की डिक्री का आज्ञानुवर्तन करने में असफल रहता है तो वहाँ ऐसी डिक्री का निष्पादन निर्णीत ऋणी को सिविल कारागार में निरूद्ध कर या उसकी सम्पत्ति की कुर्की या दोनों रीतियों से किया जा सकता हैं। नियम 32 में ऐसा कुछ भी नहीं है जिसमें यह दर्शित होता है कि न्यायालय निरोध के स्थानपर निर्णीत ऋणी की सम्पत्ति की कुर्की हेतु अग्रसर होने को बाध्य हो।

संविदा के विनिर्दिष्ट पालन की डिक्री धन के भुगतान की डिक्री से भिन्न है ऐसी डिक्री डिक्रीधारी एवं निर्णीतऋणी दोनों पक्षों के पारस्परिक अधिकार एवं दायित्व सृजित करती है और इस प्रकार ऐसी डिक्री दोनों के पक्ष में होती है। चूकिं ऐसी डिक्री धन की डिक्री से भिन्न होती है अतएव आदेश 21 नियम 30 की कोई प्रयोज्यता विनिर्दिष्ट अनुपालन की डिक्री पर नही होती है। इसका एक कारण यह भी है कि विनिर्दिष्ट पालन की डिक्री के निष्पादन की विनिर्दिष्ट रीति आदेश 21 नियम 32 में विहित की गई है तथा दूसरा कारण यह है कि विनिर्दिष्ट पालन के वाद में धन की कोई डिक्री पारित नहीं की जाती। इस विधि को प्रतिपादित करते हुये उच्चतम न्यायालय ने **हंगरफोर्ड इन्वेस्टमेंट ट्रस्ट लि. विरूद्ध हरिदास मूंधरा, ए.आई.आर. 1972 एस.सी. 1826** के मामले में यह अवधारित किया की जहॉ एक कम्पनी के विनिर्दिष्ट अंशों के विक्रय की संविदा के विनिर्दिष्ट अनुपालन की डिक्री पारित किये जाने के उपरांत क्रेता द्वारा क्रय धन के भुगतान से इंकार कर दिया गया था वहां विक्रेता डिक्री के विखण्डन के लिए आवेदन कर सकता है।

यह स्पष्ट किया जाना अपेक्षित है कि विनिर्दिष्ट अनुपालन की डिक्री के अनुपालन में जानबूझकर असफल रहने की दशा में सिविल कारागार में निरोध डिक्री की संतुष्टि नहीं है तथा व्यतिक्रमी निर्णीत ऋणी के कारागार के निरोध के बावजूद डिक्री का अनुपालन करने का उसका दायित्व विद्यमान रहता है।

संपत्ति की बिक्री– उपनियम 3 के अधीन निर्णीत ऋणी द्वारा उसकी सम्पत्ति की कुर्की के उपरांत भी डिक्री का आज्ञानुवर्तन करने में असफल रहने पर उसे बाध्य करने की प्रक्रिया विहित की गई है। इस नियम के अधीन ऐसी कुर्की के 6 माह की अवधि तक प्रवृत्त रहने के उपरांत भी पालन

न होने पर डिक्रीदार ऐसी संपत्ति के विक्रय का आवेदन दे सकता है तथा स्वयं को प्रतिकर दिलाने की मांगकर सकता है। म.प्र. संशोधन के अधीन न्यायालय पर्याप्त हेतुक विद्यमान होने पर कुर्की की अवधि 1 वर्ष हेतु विस्तारित कर सकता है।

चूंकि यह प्रावधान शास्तिक प्रकृति का है अतएवं इसका कठोर निर्वचन किया जाना चाहिए। जब तक निम्नलिखित शर्तों की पूर्ति नहीं होती तब तक विक्रय का आदेश नहीं दिया जाना चाहिए:–

(i) वैध कुर्की हो;

(ii) निर्णीत ऋणी ने ऐसी कुर्की की तिथि से छह माह या यदि न्यायालय ने म.प्र. संशोधन के अधीन इस समाप्ति के पूर्व अवधि को विस्तारित किया है तो उस अवधि की विक्रय का आवेदन प्रस्तुत किया हो; तथा

(iii) निर्णीतऋणी ने डिक्री का आज्ञानुवर्तन नहीं किया हो।

कुर्की की समाप्ति (उपनियम 4) – निम्नलिखित स्थितियों में नियम–1 के अधीन की गई कुर्की समाप्त हो जाती है :–

(i) जहां निर्णीतऋणी ने डिक्री का आज्ञानुवर्तन किया है और डिक्रीधारी को निष्पादन के सभी खर्चों का भुगतान किया हैं।

(ii) जहां सम्पत्ति के विक्रय का कोई आवेदन डिक्रीधारी ने कुर्क की तिथि से छह माह या यदि न्यायालय ने म.प्र. संशोधन अधिनियम अवधि को विस्तारित किया है तो उस अवधि की समाप्ति के पूर्व प्रस्तुत/नहीं किया है।

(iii) जहां ऐसा आवेदन निरस्तकर दिया गया है ।

यदि निर्णीत ऋणी निगम है तब निष्पादन की रीति **(उपनियम 2)**:–

जहां निर्णीतऋणी कोई निगम है और वह विनिर्दिष्ट अनुपालन की डिक्री का आज्ञानुवर्तन नहीं करता है वहां उपनियम (2) में वर्णित प्रक्रिया का अनुसरण किया जाएगा। उपनियम 2 के अनुसार निगम के विरूद्ध डिक्री का निष्पादन निम्नलिखित रीतियों से किया जा सकता है।

निगम की सम्पत्ति की कुर्की द्वारा;

न्यायालय की अनुमति से निगम के निदेशकों/अन्य प्रधान अधिकारियों के सिविल कारागार में निरोध द्वारा;

कुर्की और निरोध दोनों रीतियों से;

नटबर परिदा विरूद्ध बिहारी चरण मोहंती, (2001) 1 सी.सी.सी. 234 (उड़ीसा उच्च न्यायालय) के मामले में यह अवधारित किया गया है कि जब तक डिक्री का अनुपालन गंभीर दर्शित नहीं होता हो तब तक ऐसे निरोध का आदेश नहीं किया जाना चाहिए।

विक्रय पत्र का निष्पादन – आदेश 21 नियम 34 (5) निष्पादन न्यायालय को अधिकृत करता है कि वह निर्णीत ऋणी को डिक्री का जानबूझकर आज्ञानुवर्तन नहीं कर रहा है तो वह निर्णीतऋणी के स्थान पर डिक्री का प्रवर्तन करने हेतु उपर्युक्त कार्यवाही करे।

इस नियम के अधीन न्यायालय वह कार्य, जिसके लिए किए जाने की अपेक्षा डिक्री के अधीन निर्णीत ऋणी से की गई थी तथा निर्णीत ऋणी ने उसकी अवहेलना की है, आदेश 21 नियम 34 में वर्णित रीतियों के साथ–साथ/उनके स्थान पर यह निर्देश दे सकता है कि वह कार्य डिक्रीधारी द्वारा/न्यायालय द्वारा नियुक्त किसी व्यक्ति द्वारा किया जा सकेगा। ऐसे कार्य के किए जाने का खर्च एवं व्यय निर्णीत ऋणी से वसूलनीय होगे।

जहाँ विक्रय पत्र निष्पादित किए जाने की डिक्री पारित की गई है तथा डिक्रीधारी द्वारा प्रतिफल का संदाय निर्णीत ऋणी को कर दिया गया है या न्यायालय में जमा कर दिया गया है और निर्णीतऋणी द्वारा विक्रय पत्र का निष्पादन नहीं किया जा रहा है वहाँ आदेश 21 नियम 32 (5) के निर्णीत ऋणी की ओर से डिक्री की शर्तों के अनुसार विक्रय पत्र निष्पादित करने हेतु अपनी ओर से किसी व्यक्ति को अधिकृत कर सकता है। विक्रय पत्र के निष्पादन की प्रक्रिया आदेश 21 नियम 34 के अनुसार होगी।

आदेश 21 नियम 34 के अनुसार जहाँ डिक्री किसी दस्तावेज के निष्पादन के लिए है और निर्णीतऋणी उसके आज्ञानुवर्तन से इंकार करता है या उपेक्षा करता है वहाँ न्यायालय डिक्रीधारी एवं निर्णीतऋणी को डिक्री के निबंधनों के अनुसार दस्तावेज का प्रारूप तैयार करने का अवसर देने के उपरांत विहित प्रारूप में दस्तावेज का निष्पादन करेगा। इस दस्तावेज का वही प्रभाव होगा जो निर्णीत ऋणी द्वारा निष्पादित करने पर होता। यह उल्लेखनीय है कि नियम 34 एवं प्रक्रियात्मक तथा निदेशात्मक उपबंध है। इसमें वर्णित प्रक्रिया का पालन न्यायालय के आदेशानुसार निष्पादित दस्तावेज को तब तक दूषित नहीं करेगा जब तक कि उससे निर्णीतऋणी को कोई हानि न होती हो। (देखे– ***दर्शन कौर विरूद्ध गुरूदयाल सिंह, ए.आई.आर. 1990 पंजाब – हरियाणा 231***)

नियम 34 के अधीन विक्रय पत्र के निष्पादन के निम्न चरण होंगे–

1. निर्णीत ऋणी द्वारा अस्वीकार या उपेक्षा किये जाने पर डिक्रीधारी डिक्री की शर्तों के अनुसार विक्रय पत्र का प्रारूप तैयार कर निष्पादन न्यायालय के समक्ष प्रस्तुत करेगा।
2. यह प्रारूप संहिता के परिशिष्ट–ड़ प्ररूप क्र. 10 की सूचना के साथ निर्णीत ऋणी पर निर्वाह कराया जाएगा जिसमें उसे निर्देशित किया जाएगा कि यदि उसे प्रारूप के संबध में कोई आपत्ति हो तो वह न्यायालय द्वारा नियत समय के भीतर न्यायालय के समक्ष प्रस्तुत कर सकता है।
3. यदि निर्णीत ऋणी कोई आपत्ति लिखित रूप में प्रस्तुत करता है तो न्यायालय उनका निपटारा करेगा तथा अपेक्षित होने पर प्रारूप में रूपांतरण/परिवर्तन कर सकता है। न्यायालय के समक्ष निर्णीत ऋणी द्वारा लिखित रूप में उठायें गये ऐसे आक्षेप/आपत्ति पर विचार करना आवश्यक है। यदि ऐसे ड्राफ्ट पर निर्णीत ऋणी द्वारा कोई लिखित आक्षेप नहीं उठाया जाता और न्यायालय ऐसे प्रारूप दस्तावेज के अनुसार दस्तावेज का निष्पादन कर देता है तो वह दस्तावेज अंतिम होगा तथा पूर्व न्याय के रूप में प्रर्वतित होगा (कृपया देखें– ***वाई. सुब्बाराव विरूद्ध अमीजुननिशा बेगम, ए.आई.आर. 1984 एन.ओ.सी. 300 आंध्रप्रदेश***) यह भी उल्लेखनीय है कि निर्णीतऋणी ऐसे आक्षेप केवल प्रारूप दस्तावेज के संबंध में ही उठा सकता है डिक्री की प्रकृति के संबंध में नहीं। (देखें– ***रसिक विरूद्ध माउण्ट मेरी बैकुण्ठ कोआप. हाउसिंग सोसायटी, 2003 ए. आई.एच.सी. 3727***)

4. स्टॉम्प अधिनियम, 1899 के अधीन अपेक्षित स्टॉम्प को डिक्रीधारी न्यायालय को परिदत्त करेगा।

5. निर्णीत ऋणी द्वारा ऐसे दस्तावेज को निष्पादित करने से इंकार करने या उपेक्षा करने पर न्यायाधीश स्वयं या उसकी ओर से नियुक्त अधिकारी द्वारा निष्पादित किया जायेगा जो नियम 34(5) में विहित प्रारूप में होगा।

6. दस्तावेज का रजिस्ट्रेशन न्यायालय स्वयं या उसकी ओर से अधिकृत किसी अनुसचिवीय कर्मचारी द्वारा संपादित किया जायेगा। ऐसे विक्रय पत्र के पंजीयन के खर्चे के संबंध में न्यायालय यथोचित आदेश पारित कर सकता है।

निष्पादन न्यायालय के समक्ष प्रायः अपेक्षित स्टॉम्प शुल्क का प्रश्न उठाया जाता है इस संबंध में यह उल्लेखनीय है कि स्टॉम्प शुल्क का निर्धारण राजस्व प्राधिकारियों के अधिकार का विषय है जहां तक इस प्रश्न का संबंध है कि ऐसे शुल्क के अवधारण की विधि क्या है इस संबंध में स्टॉम्प अधिनियम 1899 में म.प्र. संशोधन के माध्यम से योजित धारा 47.। पर ध्यान दिया जाना आपेक्षित है। इस प्रावधान पर विचार करते हुए म.प्र. उच्च न्यायालय ने ***श्रीमती हरविंदर कौर विरूद्ध मध्यप्रदेश राज्य, ए.आई.आर. 2007 एम.पी. 86*** के मामले में प्रतिपादित किया है कि दस्तावेज जिस दिनांक को पंजीकरण हेतु प्रस्तुत किया गया है उस दिनांक को सम्पत्ति के बाजार मूल्य पर स्टॉम्प शुल्क देय होगा। सम्पत्ति के बाजार मूल्य अवधारित करने में संविदा की तिथि का कोई सरोकार नहीं है।

विनिर्दिष्ट पालन की डिक्री के निष्पादन में आधिपत्य प्रदान किया जाना

यह सुस्थापित है कि विनिर्दिष्ट अनुपालन के अनुतोष में आधिपत्य का अनुतोष विवक्षित होता है तथा सामान्य रूप से स्थावर संपत्ति के विक्रय की संविदा के विनिर्दिष्ट पालन के वाद में आधिपत्य के अनुतोष की प्रार्थना किया जाना आवश्यक नहीं है। यदि डिक्री आधिपत्य के बिन्दु पर मौन है तब भी ऐसी डिक्री का निष्पादन करते समय निष्पादन न्यायालय डिक्रीधारी को संपत्ति पर आधिपत्य प्रदान कर सकता है क्योंकि ऐसी डिक्री में आधिपत्य अंतर्निहित होता है। (कृपया देखें– ***बाबूलाल विरूद्ध मे. हजारीलाल किशोरीलाल, ए.आई.आर. 1982 एस.सी. 818, सुन्दरलाल विरूद्ध गोपाल शरण, 2003 (1) एम.पी.एच.टी. 330, दादूलाल हनुमानलाल विरूद्ध देवकुँवर, ए.आई.आर. 1963 एम.पी. 86, श्रीकृष्ण गुप्ता विरूद्ध सीताराम मोहन स्वरूप निगम, 1997 (2) एम.पी.एल. जे. 501 एवं मो. याकूब विरूद्ध अब्दुल रऊफ, 2002 (1) एम.पी.एच.टी. 216***)

इस प्रकार इस संबंध में कोई विवाद नहीं है कि निष्पादन न्यायालय स्थावर संपत्ति के विक्रय की संविदा के विनिर्दिष्ट अनुपालन की डिक्री के निष्पादन में डिक्रीधारी को स्थावर संपत्ति का आधिपत्य दिला सकता है भले ही डिक्री के अधीन ऐसे आधिपत्य दिलाये जाने का अनुतोष प्रदान नहीं किया गया हो। इस संबंध में विनिर्दिष्ट अनुतोष अधिनियम, 1963 की धारा 22 का उल्लेख किया जाना आवश्यक है जो निम्नवत है–

> "22. कब्जा, विभाजन, अग्रिम धन, के प्रतिदाय आदि के लिए अनुतोष अनुदत्त करने की शक्ति– (1) सिविल प्रक्रिया संहिता, 1908 में किसी तत्प्रतिकूल बात के अन्तर्विष्ट होते हुए भी, स्थावर सम्पत्ति के अन्तरण की संविदा के विनिर्दिष्ट पालन का वाद लाने वाला कोई व्यक्ति, **समुचित मामले में**

(क) ऐसा पालन के अतिरिक्त सम्पत्ति का कब्जा या विभाजन और पृथक कब्जा मांग सकेगा; अथवा

(ख) उस दशा में जिसमें कि उसका विनिर्दिष्ट पालन का दावा नामंजूर कर दिया गया हो कोई भी अन्य अनुतोष, जिसका वह हकदार हो और जिसके अन्तर्गत उस द्वारा दिए गए किसी अग्रिम धन या निक्षेप का प्रतिदाय भी आता है, मांग सकेगा।

(2) **उपधारा (1) के खण्ड (क) या खण्ड (ख) के अधीन कोई भी अनुतोष न्यायालय द्वारा अनुदत्त नहीं किया जाएगा जब तक कि उसका विनिर्दिष्टतः दावा न किया गया हो:**

परन्तु जहाँ कि वाद पत्र में वादी ने किसी ऐसे अनुतोष का दावा न किया हो वहाँ न्यायालय **कार्यवाही के किसी भी प्रक्रम में** वादी को वादपत्र में ऐसे अनुतोष का दावा अन्तर्विष्ट करने के लिए संशोधन करने की अनुज्ञा ऐसे निर्बन्धनों पर देगा जैसा न्याय संगत हों।"

इस प्रावधान से किंचित यह भ्रम उत्पन्न होता है कि जैसे कि स्थावर संपत्ति के आधिपत्य का अनुतोष मांगा जाना आवश्यक है तथा जहां ऐसा अनुतोष न मांगा गया हो वहां निष्पादन न्यायालय आधिपत्य प्रदान करने में सक्षम नहीं है और ऐसी आपत्ति सिविल प्रक्रिया संहिता की धारा 47 के अधीन निष्पादन न्यायालय के समक्ष प्रस्तुत की जाती है। परन्तु उच्चतम न्यायालय ने ***बाबूलाल विरूद्ध मे. हजारीलाल किशोरीलाल, ए.आई.आर. 1982 एस.सी. 818*** के मामले में तत्संबंध में स्थिति स्पष्ट करते हुये व्यक्त किया है कि जहॉ संविदा के दूसरे पक्ष के पास वाद ग्रस्त संपत्ति का अनन्य कब्जा है वहां विनिर्दिष्ट रूप से आधिपत्य प्रदान किये जाने के अनुतोष की याचना किए बिना मात्र विक्रय की संविदा का विनिर्दिष्ट अनुपालन डिक्रीधारी को पूर्ण एवं प्रभावी अनुतोष प्रदान कर सकता है। निर्णीत ऋणी डिक्री की पूर्णतः संतुष्टि हेतु न केवल विक्रय पत्र संपादित करने बल्कि संपत्ति का आधिपत्य प्रदान करने हेतु आबद्ध है। विक्रय की संविदा के विनिर्दिष्ट अनुपालन के सभी मामलों मे आधिपत्य के अनुतोष की याचना करना आवश्यक नहीं है। उपर्युक्त धारा 22 में पद "समुचित मामले में" प्रयोग किया गया है। यह पद स्पष्ट करता है कि प्रत्येक मामले में यह आवश्यक नहीं है कि वादी विक्रय की संविदा के विनिर्दिष्ट अनुपालन के साथ साथ आधिपत्य प्राप्ति का विनिर्दिष्ट रूप से दावा करे। आधिपत्य प्रदान किया जाना विक्रय की संविदा के विनिर्दिष्ट अनुपालन के अनुतोष में ही अंर्तनिहित है।

उपर्युक्त धारा 22 के अधीन ऐसे मामले आते है जिनमें आधिपत्य का अनुतोष तब तक प्रभावी रूप से प्रदान नहीं किया जा सकता है जब तक कि उसका विनिर्दिष्ट रूप से दावा न किया गया हो जैसे– जहां संविदा के अधीन संपत्ति प्रतिवादी तथा अन्य व्यक्ति द्वारा संयुक्त रूप से धारित की गई हो अथवा जहां वादी एवं प्रतिवादी के मध्य विक्रय की संविदा संपन्न होने के पश्चात् संपत्ति का आधिपत्य तीसरे पक्षकार के पास चला गया हो। (निर्णय की कंडिका 13 एवं 14)

ऐसे मामलों में वादी को पूर्ण एवं प्रभावी अनुतोष प्राप्त करने हेतु संपत्ति के विभाजन एवं अपने अंश के आधिपत्य की प्राप्ति का दावा करना चाहिए। ऐंसे मामलों में आधिपत्य के अनुतोष को विनिर्दिष्ट रूप से अभिविचित किया जाना चाहिए। संपत्ति के आधिपत्य में अभिधारी या पश्चातवर्ती क्रेता या अतिचारी या स्वतंत्र स्वत्व दावा करने वाला व्यक्ति हो सकता है। जो स्वतंत्र स्वत्व का दावा कर रहा हो यदि ऐसे व्यक्ति को पक्षकार बनाया जाता है तो आधिपत्य के परिदान की प्रार्थना अंर्तविष्ट की जानी चाहिए। ऐसे मामले उपर्युक्त धारा के अधीन समुचित मामले की परीधि में आते है। यदि डिक्रीधारी द्वारा वादपत्र में आधिपत्य के अनुतोष की मांग नहीं की है तो वह निष्पादन के प्रक्रम पर भी उपर्युक्त धारा 22 (2) के परंतुक के अधीन ऐसे अनुतोष की मांग के संबंध में अनुज्ञात किया जाना चाहिए। उपर्युक्त मामले में उच्चतम न्यायालय ने स्पष्टतः अवधारित किया है कि धारा 22 (2) के परंतुक में प्रयुक्त पद "कार्यवाही" में निष्पादन कार्यवाहियाँ सम्मलित है। (निर्णय का पैरा 19)

(निम्न न्यायदृष्टांत भी अवलोकनीय है :– ***यासा विरूद्ध श्रीमती रिसालो, ए.आई.आर. 1977 इलाहाबाद 156, श्रीमती सूलुगुरू विजया विरूद्ध पुलुमति मंजुला, ए.आई.आर. 2007 आंध्रप्रदेश 35, लोटू बंदू सोनवाने विरूद्ध पुण्डलिक निम्बा कोली, ए.आई.आर. 1985 बाम्बे 412, श्रीमती धीरज बाला कारिया विरूद्ध जेठिया एस्टेट प्राईवेट लि0 ए.आई.आर. 1983 कलकत्ता 166, रामजी लाल विरूद्ध रामप्रसाद, ए.आई.आर. 1979 दिल्ली 129*** एवं ***हेमचंद विरूद्ध करीलाल, ए.आई.आर. 1987 राजस्थान 117***)

स्थावर संपत्ति के आधिपत्य की डिक्री के निष्पादन की रीति

सिविल प्रक्रिया संहिता, 1908 के आदेश 21 के नियम 35 एवं 36 स्थावर सम्पत्ति के आधिपत्य की डिक्री के निष्पादन की रीति विहित करते है। इन धाराओं की योजना के अनुसार डिक्रीधारी को स्थावर सम्पत्ति के आधिपत्य का परिदान निम्नलिखिल दो रीतियों से किया जा सकता हैं :–

(i) वास्तविक अथवा भौतिक आधिपत्य का परिदान नियम 35 (1) तथा 35 (3)

(ii) औपचारिक, प्रतीकात्मक अथवा प्रलक्षित आधिपत्य का परिदान – नियम 35 (2) तथा 36

स्थावर सम्पत्ति के आधिपत्य के परिदान का वारंट बेलिफ को परिशिष्ट–ड़ के प्ररूप–11" के रूप में जारी किया जाना चाहिए। यहाँ म.प्र. सिविल न्यायालय नियम, 1961 का नियम 192 का उल्लेख अपेक्षित है जिसके अधीन ऐसे वारण्ट पर न्यायाधीश को स्वयं हस्ताक्षर करना चाहिए। यह कार्य अनुसचिवीय कर्मचारी को प्रत्यायोजित नहीं किया जा सकता हैं।

नियम 35 के अधीन आवेदन प्रस्तुत होने पर निष्पादन न्यायालय को मात्र यह अवेक्षा करनी होगी की क्या डिक्री के अधीन डिक्रीधारी उस संपत्ति का आधिपत्य प्राप्त करने का अधिकारी है जिसका उसने दावा किया है। यदि डिक्रीधारी द्वारा ऐसा किया गया है तो निष्पादन न्यायालय द्वारा आधिपत्य के परिदान का वारण्ट जारी कर देना चाहिए।

भूमि के आधिपत्य के परिदान में खड़ी हुई फसलों का आधिपत्य प्रदत्त किया जाना भी सम्मिलित है अर्थात जहाँ डिक्रीधारी को ऐसी संपत्ति का आधिपत्य दिलाया जाता है जिस पर फसलें खड़ी हुई है वहां निर्णीतऋणी उस भूमि पर उस फसल को काटने के लिए प्रवेश नहीं कर सकता है जो उसने उपजाई है। (देखे– ***बेनीप्रसाद विरूद्ध मानकलाल, ए.आई.आर. 1953 नागपुर 9***)

वास्तविक अथवा भौतिक आधिपत्य का परिदान

स्थावर सम्पत्ति पर से किसी व्यक्ति को प्रकट रूप से आधिपत्य से हटाकर उसके स्थान पर डिक्रीधारी को आधिपत्य मे प्रतिस्थापित कर देना डिक्रीधारी को वास्तविक अथवा भौतिक आधिपत्य का परिदान कहलाता है। नियम 35 के उपनियम 1 एवं 3 इस संबंध में प्रक्रिया विहित करते है।

नियम 35 (1) के अधीन स्थावर सम्पत्ति के आधिपत्य के परिदान की डिक्री का निष्पादन 'ऐसी डिक्री से आबद्ध व्यक्ति' का आधिपत्य उस स्थावर सम्पत्ति से हटाकर, डिक्रीधारी या उसकी ओर से अधिकृत व्यक्ति को उसका आधिपत्य प्रदान कर किया जाएगा। इस नियम के अधीन डिक्रीधारी या उसके अधिकृत अभिकर्ता को स्थावर सम्पत्ति का वास्तविक अथवा भौतिक आधिपत्य प्रदान किया जाना चाहिए।

नियम 35 (3) ऐसे निर्माण या अहाते से संबंधित है जिन तक आधिपत्यधारी एवं "डिक्री से आबद्ध व्यक्ति" स्वतंत्र पहुंच प्रदान नहीं करता है। ऐसी सम्पत्ति की दशा में न्यायालय के अधिकारी पर्दानशीन महिलाओं को हटाने की युक्तियुक्त सुविधा एवं चेतावनी देने के उपरांत ऐसे स्थान का ताला/चटकनी हटाकर/खोलकर/द्वार तोड़कर/अन्य आवश्यक कार्यवाही कर सम्पत्ति का कब्जा डिक्रीधारी को प्रदान करेगा।

'डिक्री से आबद्ध व्यक्ति' से आशय – डिक्री से आबद्ध व्यक्ति में निर्णीतऋणी के अतिरिक्त ऐसा व्यक्ति भी सम्मिलित है जो ऐसे निर्णीतऋणी के अधीन दावा करता है या जिसे न्यायालय द्वारा डिक्री से आबद्ध व्यक्ति अवधारित किया गया है।

सम्पत्ति की पहचान

वास्तविक आधिपत्य प्रदान किये जाने हेतु संपत्ति की पहचान सुनिश्चित होना आवश्यक है यदि संपत्ति की पहचान सुनिश्चित नहीं है तब आधिपत्य के परिदान का वारंट जारी नहीं किया जाना चाहिए। निष्पादन न्यायालय संपत्ति की पहचान सुनिश्चित किये जाने हेतु संक्षिप्त जाँच कर सकता है अथवा डिक्री की शर्तों के अनुसार संपत्ति की पहचान सुनिश्चित करने हेतु कमिश्नर नियुक्त कर सकता हैं निर्णीतऋणी संपत्ति के पहचान का प्रश्न उठा सकता है। (देखे– ***मान कुमार चंद विरूद्ध मोहनलाल ए.आई.आर. 1948 प्रिवी काउंसिल 180, शफीकर्रहमान खान विरूद्ध मोहम्मद जहाँ बेगम, 1982 (2) एस.सी.सी. 456 एवं रविंदर कौर विरूद्ध अशोक कुमार, ए.आई.आर. 2004 एस.सी. 904***)

औपचारिक, प्रतीकात्मक अथवा प्रलक्षित आधिपत्य का परिदान

जब स्थावर सम्पत्ति पर निर्णीतऋणी किसी अन्य व्यक्ति के साथ संयुक्त अधिभोग रखता हो या उस पर ऐसा व्यक्ति अधिभोग में है जो स्थावर सम्पत्ति के आधिपत्य के परिदान की डिक्री से बाध्य नहीं है तो वहाँ ऐसी सम्पत्ति के आधिपत्य का डिक्रीधारी को भौतिक रूप से परिदान न कर विधिक औपचारिकताओं की पूर्ति कर सांकेतिक परिदान किया जाता हैं। इस प्रकार जहाँ परिदान की जाने वाली स्थावर सम्पत्ति निर्णीत ऋणी के वास्तवित आधिपत्य में नहीं है वरन् ऐसे व्यक्ति के आधिपत्य में है जो उस पर अधिभोग बनाए रखने का अधिकारी है जैसे अभिधारी, अनुज्ञाप्तिधारी, बंधकदार या ऐसा अन्य व्यक्ति जो डिक्री से आबद्ध नहीं है डिक्रीधारी को वास्तविक या भौतिक आधिपत्य प्रदान

नहीं किया जा सकता है। ऐसे मामलों में मात्र औपचारिक, प्रतीकात्मक या प्रलक्षित आधिपत्य ही डिक्रीधारी को प्रदान किया जा सकता है।

नियम 35 (2) एवं 36 इस संबंध में प्रक्रिया विहित करते है नियम 35 (2) के अधीन संयुक्त आधिपत्य के मामले आते है तथा नियम 36 के अधीन ऐसे मामले आते हैं जिनमें डिक्रीधारी ऐसी सम्पत्ति के आधिपत्य का दावा करता है जो अभिधारी के अधिभोग में है, निर्णीतऋणी के नहीं।

नियम 35 (2) के अनुसार जहां डिक्री स्थावर सम्पत्ति के संयुक्त आधिपत्य की है वहॉ आधिपत्य का परिदान सम्पत्ति के सहज दृश्य भाग पर वारंट की प्रति चिपकार तथा उपयुक्त स्थान पर डिक्री के सारांश की डोंडी पिटवाकर घोषणा कर किया जाएगा।

जहॉ डिक्री संयुक्त आधिपत्य के लिए है वहां निष्पादन न्यायालय केवल प्रतीकात्मक आधिपत्य ही डिक्रीधारी को प्रदान कर सकता है भौतिक आधिपत्य नहीं क्योंकि डिक्रीधारी वादग्रस्त संपत्ति में अपने अंश के पृथक आधिपत्य का अधिकारी नहीं है। (देखे– ***हसीमथुंनिशा बेगम विरूद्ध बिठल राव गंगाजी, ए.आई.आर. 1979 आंध्रप्रदेश 273***)

नियम 36 के अधीन जब स्थावर सम्पत्ति अभिधारी के अधिभोग में है अथवा ऐसे व्यक्ति के अधिभोग में है जो उस पर अधिभोग रखने का हकदार है तथा वह डिक्री द्वारा इस बात के लिए आबद्ध नहीं है कि वह ऐसा अधिभोग त्याग दे वहॉ डिक्री के अधीन स्थावर सम्पत्ति का परिदान सम्पत्ति के सहजदृश्य भाग पर वारंट की प्रति चिपकाकर तथा उपयुक्त स्थान डिक्री के सारांश की डोड़ी पिटवाकर घोषणा कर अथवा अन्य रूढ़िक ढंग से अधिभोगी घोषित कर किया जाएगा।

औपचारिक, प्रतीकात्मक अथवा प्रलक्षित आधिपत्य का प्रभाव

जब औपचारिक, प्रतीकात्मक अथवा प्रलक्षित आधिपत्य प्रदान किये जाने में विधिक प्रक्रिया का पूर्णतः पालन किया गया है अर्थात् वारण्ट की एक प्रति संपत्ति के सहज दृश्य भाग पर लगाई गई है और डिक्री के सारांश की उद्घोषणा डोड़ी पिटवाकर की गई है तो ऐसे आधिपत्य का निर्णीतऋणी के विरूद्ध वही प्रभाव होता है जैसा कि वास्तविक आधिपत्य का। (देखे– ***सईद अबरार अहमद अनवर अहमद विरूद्ध बाबूलाल नर्मदाप्रसाद, 1968 एम.पी.एल.जे. 293***)

बाधा हटाना– जहां आधिपत्य के परिदान का आदेश दिया गया है वहां निष्पादन न्यायालय किसी भी बाधा को हटाने के लिए नियम 35 (3) के अधीन सशक्त है ऐसे अधिकार का प्रयोग डिक्री के निष्पादन में संपत्ति के आधिपत्य के परिदान का परिणामिक है। यदि बाधा करने वाला व्यक्ति यह दावा करता है कि वह डिक्री से आबद्ध नहीं है तथा वह संपत्ति के विधिक आधिपत्य में है वहां निष्पादन न्यायालय ऐसी जांच करेगा तथा स्वयं को संतुष्ट करेगा की क्या ऐसा व्यक्ति डिक्री से आबद्ध है अथवा नहीं। (देखें– ***बी. गंगाधर विरूद्ध बी.जी. राजलिंगम, ए.आई.आर. 1996 एस.सी. 780 एवं ब्रह्मदेव विरूद्ध ऋषिकेश, ए.आई.आर. 1997 एस.सी. 856***)

आवश्यक होने पर म.प्र. सिविल न्यायालय नियम, 1961 के नियम 232 अधीन ऐसी डिक्री के निष्पादन में पुलिस सहायता अपेक्षित होने पर प्रदान की जा सकती है।

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विधिक समस्याएं 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 स्तंभ के माध्यम से हम ऐसी कुछ महत्वपूर्ण समस्याओं के विषय में नियमित रूप से विचार विमर्श करते आ रहे हैं। प्रयास यह होगा कि समस्या के सम्यक समाधान के विषय में विश्लेषणात्मक दृष्टिकोण अपनाया जावे)

समस्या : क्या मोटर दुर्घटना दावा अधिकरण द्वारा अधिनिर्णीत ब्याज राशि पर देय आयकर की कटौती बीमा कंपनी द्वारा स्त्रोत पर (भुगतान के समय) की जा सकती है? ऐसे मामले में आयकर के प्रयोजन से ब्याज राशि की गणना एवं दावाकर्ता के हित की सुरक्षा हेतु क्या प्रक्रिया अपनायी जाना चाहिए?

समाधान : जहाँ कोई मोटर दुर्घटना दावा अधिकरण, मोटर यान अधिनियम, 1988 के अधीन किये गये प्रतिकर के दावे को स्वीकार कर दावाकर्ता के पक्ष में अधिनिर्णय पारित करता है वहां अधिकरण यह निर्देश भी दे सकता है कि प्रतिकर की राशि के अतिरिक्त विनिर्दिष्ट दर एवं विनिर्दिष्ट तारीख (जो दावा संस्थित करने की तारीख से पहले की नहीं होगी) से साधारण ब्याज राशि भी अदा की जाए। वस्तुतः दावाकर्ता का प्रतिकर प्राप्त करने का अधिकार मोटर दुर्घटना घटित होने के तुरंत बाद ही उत्पन्न हो जाता है। दावा प्रस्तुती उपरान्त प्रतिकर निर्धारण और तत्पश्चात् उसकी अदायगी में लगने वाले समय के लिए ब्याज राशि दिलाई जाती है। (संदर्भ– धारा 166 एवं 171 मोटर यान अधिनियम, 1988)

आयकर अधिनियम, 1961 में "ब्याज" को आय माना गया है। उक्त अधिनियम की धारा 2 (28.।) के अधीन "ब्याज" को परिभाषित किया गया है। आयकर अधिनियम की धारा 194.। यह उपबंध करती है कि व्यक्ति या हिन्दू अविभाजित परिवार से भिन्न कोई व्यक्ति जब ब्याज के रूप में आय का भुगतान करने के लिए उत्तरदायी है तब ऐसे भुगतान के समय वह ऐसे ब्याज की आय पर प्रभावी दर से आयकर कटौत्रा करेगा। धारा 194.। की उपधारा (3) उन अपवादों को निरूपित करती है जिनमें उक्तानुसार ब्याज पर आयकर कटौत्रा (एक सीमा तक) नहीं किया जाएगा। उपधारा (3) के खण्ड (ix) के अनुसार जहाँ मोटर दावा दुर्घटना अधिकरण द्वारा अधिनिर्णीत ब्याज राशि के रूप में ऐसी किसी आय का भुगतान किया जाता है वहां जब तक की भुगतान किये जाने वाले वित्त वर्ष के दौरान ऐसी ब्याज की आय ₹ 50,000 से अधिक नहीं हो, भुगतानकर्ता (बीमा कम्पनी) द्वारा ब्याज राशि पर आयकर नहीं काटा जाएगा। (संदर्भ– धारा 2 (28.।) एवं धारा 194.।(1) (3) (ix) आयकर अधिनियम, 1961)

जहां तक अधिनिर्णीत ब्याज राशि पर देय आयकर के प्रयोजन से ब्याज की गणना का प्रश्न है, अधिनिर्णीत ब्याज को प्रतिकर का दावा प्रस्तुत किये जाने के दिनांक से संदाय के दिनांक तक वर्षों (वित्त वर्षों) में विभाजित कर ब्याज की गणना की जानी चाहिए एवं सुसंगत वित्त वर्ष के लिए यदि ऐसी संगणित ब्याज राशि ₹ 50,000 से अधिक है तब ही स्त्रोत पर आयकर कटौती की जाएगी। प्रतिकर के दावा दिनांक से संदाय दिनांक तक के अवधि के लिए देय कुल ब्याज राशि को एक मुश्त राशि मानकर आयकर कटौती नहीं की जा सकती है। यहाँ यह समझ लेना भी आवश्यक है कि जहाँ मोटर दुर्घटना दावा अधिकरण ने अधिनिर्णय के अधीन देय राशि एक से अधिक दावाकर्ताओं के पक्ष में अधिनिर्णीत की है वहाँ प्रत्येक व्यक्तिगत दावाकर्ता को अनुपातिक रूप से संदाय की जाने वाली प्रतिकर राशि पर देय ब्याज की गणना की जावेगी और ऐसे प्रत्येक दावाकर्ता को संदेय प्रतिकर पर देय ब्याज की राशि ₹ 50,000 रूपये से अधिक होने की दशा में ही स्त्रोत पर आयकर कटौती की जा सकेगी क्योंकि आयकर अदायगी का दायित्व प्रत्येक दावाकर्ता का पृथक होगा। इस संबंध में न्यायदृष्टांत ***यूनाईटेड इंडिया इंश्योरेंस कं. लि. विरूद्ध रामलाल, 2011 (2) जेएलजे 178*** अवलोकनीय है।

ब्याज राशि पर स्त्रोत पर आयकर कटौत्रा के साथ–साथ दावाकर्ता के हित को ध्यान में रखा जाना चाहिए। जहाँ कि दावाकर्ता, अधिनिर्णय के अधीन उसे प्राप्त होने वाली ब्याज राशि ₹ 50,000 की सीमा से अधिक होने की दशा में भी यदि सुसंगत वित्त वर्ष के लिए अपनी अन्य स्त्रोत से प्राप्त समस्त आय और छूटों को संगणित करते हुए, स्वयं को आयकर अदा करने के उत्तरदायित्व की परिधि में न आने वाला साबित करता है तो ऐसी स्थिति में बीमा कंपनी आयकर कटौती की बाध्यता से मुक्त होगी लेकिन इसके लिए दावाकर्ता को धारा 197–9 (1) (।) आयकर अधिनियम, 1961 सहपठित नियम 29 आयकर नियम के अनुसार संबंधित बीमा कंपनी में प्रारूप क्रमांक 15–G के अधीन लिखित घोषणा करनी होगी।

उक्त विधिक स्थिति को देखते हुये मोटर दुर्घटना दावा अधिकरण के लिए यह विधिपूर्ण और उपर्युक्त होगा की प्रतिकर राशि पर ब्याज अधिनिर्णीत किये जाने की दशा में दावाकर्ता/दावाकर्ताओं द्वारा बीमा कंपनी में उक्तानुसार प्रारूप क्रमांक 15–G की घोषणा करने और ऐसा किये जाने की पुष्टि में दावाकर्ता/दावाकर्ताओं द्वारा अधिकरण के समक्ष शपथ पत्र प्रस्तुत किये जाने पर ही ब्याज राशि का भुगतान जारी किया जाये। अधिकरण के लिए यह उपयुक्त होगा की अधिनिर्णय (अवार्ड) में स्वीकृत ब्याज राशि पर देय आयकर कटौत्रा के संबंध में दावाकर्ता और बीमा कंपनी के अधिकार और दायित्वों को दृष्टिगत रखते हुए समुचित निर्देश दिये जाये।

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PART - II

NOTES ON IMPORTANT JUDGMENTS

71. ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Section 12 (1)
CIVIL PROCEDURE CODE, 1908 – Order 23 Rule 3
CONTRACT ACT, 1872 – Sections 2 (g), 2(h), 10 and 28
Compromise restraining legal proceedings – Earlier eviction proceeding initiated before Rent Controlling Authority ended in a compromise that no eviction suit shall be filed before the expiry of 30 years – Held, the agreement to compromise was void under the provisions of Contract Act and hence, was not lawful within the meaning of Order 23 Rule 3 of CPC – Landlord can file suit for eviction even prior to the expiry of 30 years.

Poonam Khandelwal and others v. Pankaj Khandelwal and others
Judgment dated 09.09.2011, passed by the High Court of M.P. in S.A. No. 857 of 2009, reported in 2012 (1) MPLJ 109

Held:

Under Section 12 (1) of the M.P. Accommodation Control Act, 1961, it has been specifically enacted that notwithstanding anything to the contrary contained in any other law or contract, no suit shall be filed in any Civil Court against a tenant for his eviction from any accommodation except on one or more of the grounds which are mentioned in clauses (a) to (p) to Section 12 (1) of the Act. The contention of the learned counsel is that there is distinction between the "contract" and the "compromise" and because on 23.01.1991 before the Rent Controlling Authority a compromise was arrived at between the parties and it was agreed that for 30 years the suit will not be filed and further because a compromise decree has been passed, it should be given effect to. I do not find any substance in this contention for the simple reason that if the explanation to Rule 3 of the Order XXIII, Civil Procedure Code is considered in its proper perspective it would reveal that an agreement to compromise which is void or voidable under the Indian Contract Act shall not be deemed to be lawful within the meaning of Order XXIII, Rule 3, Civil Procedure Code and if that would be the position, since the agreement arrived at between the parties before the Rent Controlling Authority was ab initio void because the condition so stipulated in the compromise is prohibited under the law in view of Section 12 (1) of the Act, therefore, there was no bar to the plaintiff to file present suit even prior to the expiry of 30 years. Indeed, by the said compromise decree the contractual tenancy was extended for a period of 30 years. According to me, there is no bar, rather the non obstante clause in Section 12 (1) of the Act authorizes a landlord to bring a suit of eviction on any of the grounds envisaged under the said section even when the contractual tenancy has not come to an end. Hence, Section 12 (1) of the Act would override the condition of fixed tenancy.

Even otherwise, under Section 2 (h) of the Indian Contract Act an agreement enforceable by law is a contract and as per Section 2 (g) of an agreement not enforceable by law is said to be void and therefore, in the compromise decree the condition which was made that no eviction suit shall be filed earlier to 30 years, that condition was void since it is not enforceable by law.

The decision of Division Bench of this Court in ***Shanti Devi Agarwal (Smt) and others v. Punjab National Bank, Rajgarh, 1999 (1) MPLJ 615 = 1999 (2) JLJ 185*** in which similar situation was there and which has also been placed reliance by learned First Appellate Court is fully applicable. The only distinction between the Division Bench decision in ***Shanti Devi*** (supra) and the present case is that in the case of ***Shanti Devi*** (supra) there was an agreement between the parties not to file the suit within a particular period and in the present case there is a compromise decree of the Rent Controlling Authority stipulating the condition of not filing the suit for 30 years. Since the condition embodied in the compromise recorded by the Rent Controlling Authority on 23.01.1991 was void because it was in contravention to Section 12 (1) of the Act, I am of the view that there is no distinction in the present case and the case of ***Shanti Devi*** (supra).

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72. ARBITRATION ACT, 1940 – Section 30
LIMITATION ACT, 1963 – Article 119 (b)
From which date limitation for filing objection for setting aside an award starts? Limitation starts from the date of service of notice of filing of the award and not from the date of its knowledge.

Union of India & Anr. v. M/s Deepak Electric & Trading Company & Anr.

Judgment dated 20.10.2011 passed by the Supreme Court in Civil Appeal No. 1734 of 2006, reported in AIR 2012 SC 41

Held:

In support of the view that the starting point of limitation for filing objections to an award under the Limitation Act is the date of service of notice of the filing of the award, we may cite an authority. In ***Deo Narain Choudhury v. Shree Narain Choudhaury, (2008) 8 SCC 626,*** the facts were that on 16.07.1996 the Court sent a notice to the parties about filing of the award and the notice was received by the respondent on 25.07.1996 and the respondent filed his objections to the award on 21.08.1996. The appellant contended that the objections had been filed beyond the period of limitation as the respondent had received the notice from the arbitrator that the award had been filed and the respondent had also filed a caveat on 11.06.1996. This Court held that mere filing of the caveat did not start the period of limitation and as the notice was received by the respondent on 25.07.1996, the period of limitation started running from that date and, therefore, the objections filed on 21.08.1996 were within the period of 30 days as provided by Article 119 of the Limitation Act, 1963.

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*73. CIVIL PROCEDURE CODE, 1908 – Section 9
REGISTRATION ACT, 1908 – Section 49
Civil suit – preponderance of probability – In civil cases, the preponderance of probability in the facts and circumstances of that particular case has a vital and important role in order to arrive at a correct decision to the case.
Non-Registration – Effect of – A document which is compulsorily registerable, if not registered, could be used for proving collateral purposes – Nature of possession can be looked upon and for the purpose of admission of plaintiff that entire money was paid by the appellant, can be taken into consideration to prove his admission.

Shantabai v. Pushkarlal & Anr.

Judgment dated 11.08.2011, passed by the High Court of M.P. in S.A. No. 271 of 1997, reported in ILR (2012) M.P. S.N. 9

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*74. CIVIL PROCEDURE CODE, 1908 – Sections 15 and 19
CONTRACT ACT, 1872 – Section 4
Place of suing – Where an offer was made by telephonic conversation from place 'A' and the same was accepted by the same conversation from place 'B', the contract is made at place 'A' and a part of cause of action for suit for recovery of consideration arises within the jurisdiction of place 'A' – Court at place 'A' has jurisdiction to try the suit. (*Bhagwandas v. Giridharilal, AIR 1966 SC 543* relied on)

Narsinghlal v. M/s Fatehchand Jaidev and others

Judgment dated 8.8.2011 passed by the High Court of M.P in Misc. Appeal No. 520 of 2005, reported in 2012 (1) MPHT 83

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75. CIVIL PROCEDURE CODE, 1908 – Sections 35, 35-A and 35-B
(i) Imposition of costs – Object thereof – A plaintiff/petitioner/appellant who is driven to the court by the illegal acts of the defendant/respondent, if he succeeds, should be reimbursed of his expenses – Similarly, a defendant/respondent who is dragged to court unnecessarily or vexatiously, if he succeeds, should be reimbursed of his expenses in accordance with law.
(ii) Awarding of costs – Duty of the Court – Unless the Courts develop practice of awarding costs in accordance with Section 35, that is costs following the event, and also give reasons where costs are not awarded, the object of the provisions would be defeated.
(iii) Compensatory costs – The costs awarded for false or vexatious claims should be punitive and not merely compensatory.

(iv) Award of realistic cost – Courts in regard to a litigation include (a) the court fee and process fee; (b) the advocate's fee; (c) expenses of witnesses; and (d) other expenses allowable under the Rules – Apex Court suggested that the Rules be amended to provide for actual realistic costs.

Sanjeev Kumar Jain v. Raghubir Saran Charitable Trust and others Judgment dated 12.10.2011 passed by the Supreme Court in Civil Appeal No. 8610 of 2011, reported in (2012) 1 SCC 455

Held:

The discretion vested in the courts in the matter of award of costs is subject to two conditions, as is evident from Section 35 of the Code:

(i) The discretion of the court is subject to such conditions and limitations as may be prescribed and to the provisions of law for he time being in force [vide sub-section (1)]

(ii) Where the court does not direct that costs shall follow the event, it shall state the reasons in writing [vide sub-section (2)].

The mandate of sub-section (2) of Section 35 of the Code that where the Court directs that any costs shall not follow the event, the Court shall state its reasons in writing is seldom followed in practice by courts. Many courts either do not make any order as to costs or direct the parties to bear their respective costs without assigning or recording the reasons for giving such exemption from costs. Unless the Courts develop the practice of awarding costs in accordance with Section 35 (that is, costs following the event) and also give reasons where costs are not awarded, the object of the provision for costs would be defeated. Prosecution and defence of cases is a time consuming and costly process. A plaintiff/petition/ appellant who is driven to the court, by the illegal acts of the defendant/respondent, or denial of a right to which he is entitled, if he succeeds, to be reimbursed of his expenses in accordance with law. Similarly a defendant/ respondent who is dragged to court unnecessarily or vexatiously, if he succeeds, should be reimbursed of his expenses in accordance with law. Further, it is also well recognised that levy of costs and compensatory costs is one of the effective ways of curbing false or vexatious litigations.

Section 35A refers to compensatory costs in respect of false or vexatious claims or defenses. The maximum amount that could be levied as compensatory costs for false and vexatious claims used to be ₹ 1,000. In the year 1977, this was amended and increased to ₹ 3,000. At present, the maximum that can be awarded as compensatory costs in regard to false and vexatious claims is ₹ 3,000. Unless the compensatory costs is brought to a realistic level, the present provision authorizing levy of an absurdly small sum by present day standards may, instead of discouraging such litigation, encourage false and vexatious claims. At present Courts have virtually given up awarding any compensatory costs as award of such a small sum of ₹ 3,000 would not make much difference.

We are of the view that the ceiling in regard to compensatory costs should be at least ₹1,00,000.

We may also note that the description of the costs awardable under Section 35A "as compensatory costs" gives an indication that is restitutive rather than punitive. The costs awarded for false or vexatious claims should be punitive and not merely compensatory. In fact, compensatory costs is something that is contemplated in Section 35B and Section 35 itself. Therefore, the Legislature may consider award of 'punitive costs' under Section 35A.

In ***Salem Advocate Bar Assn. (2) v. Union of India, (2005) 6 SCC 344,*** this Court suggested to the High Courts that they should examine the Model Case Flow Management Rules and consider making rules in terms of it, with or without modification so that a step forward is taken to provide to the litigating public a fair, speedy and inexpensive justice. The relevant rules therein relating to costs are extracted below:

> ***"Re: Trial Courts***
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> 8. Costs. – So far as awarding of costs at the time of judgment is concerned, awarding of costs must be treated generally as mandatory in as much as the liberal attitude of the Courts in directing the parties to bear their own costs had led parties to file a number of frivolous cases in the Courts or to raise frivolous and unnecessary issues. Costs should invariably follow the event.
>
> Where a party succeeds ultimately on one issue or point but loses on number of other issues or points which were unnecessarily raised, costs must be appropriately apportioned. Special reasons must be assigned if costs are not being awarded. Costs should be assessed according to rules in force. If any of the parties has unreasonably protracted the proceedings, the Judge should consider exercising discretion to impose exemplary costs after taking into account the expense incurred for the purpose of attendance on the adjourned dates.
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> ★ ★ ★
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> ***Re: Appellate Courts***
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> 7. Costs. – Awarding of costs must be treated generally as mandatory in as much as it is the liberal attitude if the Courts in not awarding costs that has led to frivolous points being raised in appeals or frivolous appeals being filed in the courts. Costs should invariably follow the event and reasons must be assigned by the appellate Court for not awarding costs. If any of the parties have unreasonably protracted

the proceedings, the Judge shall have the discretion to impose exemplary costs after taking into account the costs that may have been imposed at the time of adjournments."

The costs in regard to a litigation include (a) the court fee and process fee; (b) the advocate's fee; (c) expenses of witnesses; and (d) other expenses allowable under the Rules. We have already referred to the need to revise and streamline the court fee. Equally urgent is the need to revise the advocate's fee provided in the Schedule to the Rules, most of which are outdated and have no correlation with the prevailing rates of fees. In regard to money suits, specific performance suits and other suits where ad valorem court fee is payable, the Advocate's fee is also usually ad valorem. We are more concerned with the other matters, which constitute the majority of the litigation, where fixed Advocates' fees are prescribed.

There is need to provide for awarding realistic advocates' fee by amending the relevant rules periodically. This Court, of course, in several cases has directed payment of realistic costs. But this Court could do so, either because of the discretion vested under the Supreme Court Rules, 1966 or having regard to Article 142 of the Constitution under which this Court has the power to make such orders as are necessary to do complete justice between the parties.

A serious fallout of not levying actual realistic costs should be noted. A litigant, who starts the litigation, after sometime, being unable to bear the delay and mounting costs, gives up and surrenders to the other side or agrees to settlement which is something akin to creditor who is not able to recover the debt, writing off the debt. This happens when the costs keep mounting and he realizes that even if he succeeds he will not get the actual costs. If this happens frequently, the citizens will lose confidence in the civil justice system. When a civil litigant is denied effective relief in Courts, he tries to take his grievances to 'extra judicial' enforcers (that is goons, musclemen, underworld) for enforcing his claims/right thereby criminalising the civil society. This has serious repercussions on the institution of democracy.

We therefore, suggest that the Rules be amended to provide for 'actual realistic costs'. The object is to streamline the award of costs and simplify the process of assessment, while making the cost 'actual and realistic'. While ascertainment of actuals in necessary in regard to expenditure incurred (as for example travel expenses of witnesses, cost of obtaining certified copies etc.) in so far as advocates' fee is concerned, the emphasis should be on 'realistic' rather than 'actual'. The courts are not concerned with the number of lawyers engaged or the high rate of day fee paid to them. For the present, the Advocate fee should be a realistic normal single fee.

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76. CIVIL PROCEDURE CODE, 1908 – Section 96

Duty of First Appellate Court – Being the final court of fact, First Appellate Court is duty bound to discuss the entire evidence of parties and after marshalling the same, should come to a conclusion as to why a particular set of evidence of particular party is believable and the evidence of another party is not.

Saleha Bi (since deceased) now by L.Rs. v. Najar Ali Hashmi

Judgment dated 20.10.2011 passed by the High Court of M.P in S.A. No. 113 of 2007, reported in 2012 (1) MPHT 175

Held:

It be seen that the suit of eviction filed by plaintiff-respondent has been dismissed by learned Trial Court in toto. The first appeal was filed by plaintiff but the same has been allowed only on the ground envisaged under Section 12 (1) (d) of the Act and other grounds were not found to be proven. On bare perusal of Paras 24 and 25 of the judgment passed by learned First Appellate Court it is seen that the testimony of plaintiff and his witness has been taken into consideration. Nowhere in the entire judgment the testimony of defendant or her witnesses has been considered. According to me, the learned First Appellate Court being a Final Court of fact was duty bound to discuss the evidence of parties and after marshalling it *vis-à-vis* to each other should have come to a conclusion that why particular set of evidence of particular party is believable and the evidence of another party is not believable. Since the learned First Appellate court has totally deviated from this well established procedure prescribed under the law, I am of the view that impugned judgment cannot be allowed to remain stand.

The substantial question of law is thus answered that learned First Appellate Court erred in substantial error of law in decreeing the suit of plaintiff under Section 12(1) (d) of the Act without marshalling the evidence and further without giving any finding that why the evidence of defendant and her witnesses is not reliable.

Resultantly, this appeal succeeds and is hereby allowed. The impugned judgment and decree passed by learned First Appellate Court is hereby set aside and the case is sent back to learned First Appellate Court to decide the appeal afresh only on the ground under Section 12 (1) (d) of the Act (because other grounds have not been found to be proved before the learned First Appellate Court) by marshalling the evidence of the parties vis-à-vis to each other. The parties are hereby directed to appear before the learned First Appellate Court on 23-11-2011 and no separate notice shall be issued to either of the parties for this date. The learned First Appellate Court is also directed to decide the appeal as early as possible preferably within six months from 23-11-2011.

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77. **CIVIL PROCEDURE CODE, 1908 – Order 6 Rule 2 and Order 8 Rule 2**

(i) A party has to take proper pleading and prove it by adducing sufficient evidence.

(ii) Defendant was under an obligation under O.8 R.2 CPC to take a specific plea regarding maintainability of suit – Vague plea does not meet the requirement of law.

National Textile Corporation Ltd. v. Nareshkumar Badrikumar Jagad & Ors.

Judgment dated 05.09.2011 passed by the Supreme Court in Civil Appeal No. 7448 of 2011, reported in AIR 2012 SC 264

Held:

Pleadings and particulars are necessary to enable the court to decide the rights of the parties in the trial. Therefore, the pleadings are more of help to the court in narrowing the controversy involved and to inform the parties concerned to the question in issue, so that the parties may adduce appropriate evidence on the said issue. It is a settled legal proposition that "as a rule relief not founded on the pleadings should not be granted". A decision of a case cannot be based on grounds outside the pleadings of the parties. The pleadings and issues are to ascertain the real dispute between the parties to narrow the area of conflict and to see just where the two sides differ. (Vide: ***M/s. Trojan & Co. v. RM N.N. Nagappa Chettiar, AIR 1953 SC 235, State of Maharashtra v. M/s. Hindustan Construction Company Ltd., AIR 2010 SC 1299*** and ***Kalyan Singh Chouhan v. C.P. Joshi, AIR 2011 SC 1127***).

In ***Ram Sarup Gupta (dead) by L.Rs. v. Bishun Narain Inter College & Ors., AIR 1987 SC 1242,*** this Court held as under:

> "..... in the absence of pleadings, evidence if any, produced by the parties cannot be considered..... no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it."

Similar view has been reiterated in ***Bachhaj Nahar v. Nilima Mandal & Ors., AIR 2009 SC 1103.***

In ***Kashi Nath (Dead) through L.Rs.v. Jaganath, (2003) 8 SCC 740,*** this Court held that where the evidence is not in line of the pleadings and is at variance with it, the said evidence cannot be looked into or relied upon.

Same remain the object for framing the issues under Order XIV CPC and the court should not decide a suit on a matter/point on which no issue has been framed. [Vide: ***Biswanath Agarwalla v. Sabitri Bera & Ors., (2009) 15 SCC 693*** and ***Kalyan Singh Chouhan*** (supra)].

In ***Syed and Company & Ors.v. State of Jammu & Kashmir & Ors., 1995 Supp (4) SCC 422,*** this Court held as under:

> "Without specific pleadings in that regard, evidence could not be led in since it is settled principle of law that no amount of evidence can be looked unless there is a pleading. Therefore, without amendment of the pleadings merely trying to lead evidence is not permissible."

In ***Chinta Lingam & Ors. v. The Govt. of India & Ors., AIR 1971 SC 474,*** this Court held that unless factual foundation has been laid in the pleadings no argument is permissible to be raised on that particular point.

In ***J. Jermons v. Aliammal & Ors, AIR 1999 SC 3041,*** while dealing with a similar issue, this Court held as under:

> "..... there is a fundamental difference between a case of raising additional grounds based on the pleadings and the material available on record and a case of taking a new plea not borne out of the pleadings. In the former case no amendment of pleadings is required, whereas in the latter it is necessary to amend the pleadings...The respondents cannot be permitted to make out a new case by seeking permission to raise additional grounds in revision."

It is not permissible for the appellant to canvass that the Central Government has any concern so far as the tenancy rights are concerned. Right vested in the Central Government stood transferred and vested in the appellant. Both are separate legal entities and are not synonymous. The appellant being neither the government nor government department cannot agitate that as it has been substituted in place of the Central Government, and acts merely as an agent of the Central Government, thus protection of the New Rent Act 1999 is available to it. Appellant cannot be permitted to say that though ***all the rights vested*** in it but it merely remained the agent of the Central Government. Acceptance of such a submission would require interpreting the expression 'vesting' as holding on behalf of some other person. Such a meaning cannot be given to the expression 'vesting'.

It is a settled legal proposition that an agent cannot be sued where the principal is known. In the instant case, the appellant has not taken plea before either of the courts below. In view of the provisions of Order VIII Rule 2 CPC, the appellant was under an obligation to take a specific plea to show that the suit was not maintainable which it failed to do so. The vague plea to the extent that the suit was bad for non-joinder and, thus, was not maintainable, did not meet the requirement of law. The appellant ought to have taken a plea in the written statement that it was merely an 'agent' of the Central Government, thus the suit against it was not maintainable. More so, whether A is an agent of B is a question of fact and has to be properly pleaded and proved by adducing evidence. The appellant miserably failed to take the required pleadings for the purpose.

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78. **CIVIL PROCEDURE CODE, 1908 – Order 7 Rule 3, Order 20 Rule 9 and Order 41 Rule 11**

Description of property – Sufficient to identify – Sufficient description of suit property was given in the plaint, therefore, a decree as per provisions of Order 20 Rule 9 can be passed in compliance of Order 7 Rule 3.

Dismissal of appeal without notice to respondent – Appellate Court is required to consider the correctness of the judgment and decree challenged before it – Lower Appellate Court had considered all the objections after summoning and examining the record of the Trial Court – Findings were tested and thereafter First Appellate Court after marshalling the evidence came to the conclusion that there was no error of law or facts committed by trial Court in passing the judgment and decree – Appeal dismissed.

Anand alias Chhotelal Soni v. Mahavir Prasad Shukla & Anr.
Judgment dated 28.09.2011, passed by the High Court of M.P. in S.A. No. 46 of 1995, reported in I.L.R. (2011) M.P. 3141

Held :

The provisions of Order 7 Rule 3 of the Code of Civil Procedure, prescribe that where the subject-matter of the suit is immovable property, the plaint shall contain a description of the property **sufficient to identify it** and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, the plaint shall specify such boundaries or numbers.

The provisions of Order 20 Rule 9 of the Code of Civil Procedure are ***para material*** to the provisions of Rule 3 of Order 7 of C.P.C., the only difference is that such description is required to be given under Order 7 Rule 3 of the Code of Civil Procedure in the plaint and such description is required to be given in the decree for recovery of immovable property, under Order 20 Rule 9 of the Code of Civil Procedure.

A plain and simple reading of the paras of the plaint and a perusal of the plaint map which has been marked and made a part of the plaint, it is clear that identification of the suit land can be made from the said document and the statement and pleadings made in the plaint. Thus, it cannot be said that the plaint was having no specific description of the disputed property, so as to identify the same and in accordance to Order 7 Rule 3 of the Code of Civil Procedure, the pleadings were incomplete in the plaint and, accordingly, under Order 20 Rule 9 of the Code of Civil Procedure, the decree for immovable property of which identification was not possible, could not have been passed by the learned trial Court.

Learned counsel for the appellant/defendant has placed reliance in the case of ***Chutahru Bhagat and others v. Hialal Sah and others, AIR 1950 Patna 306*** and has contended that in view of the law laid down by the said High Court of Patna, no decree could have been passed in favour of the respondents/plaintiffs.

In view of this, it is submitted by the learned counsel for the appellant/defendant that the legal aspect was not considered by the learned lower appellate Court and, as such, dismissal of the appeal in motion stage itself was not permissible. The facts of the said case relied by the learned counsel for the appellant/ defendant are some what different. However, the proposition of law and the consideration done by the High Court of Patna was to the effect that a description must be there in the plaint either by means of boundaries or by means of a map so as to identify the property in suit. As has been pointed out hereinabove, not only the boundaries were shown by the respondents/plaintiffs in the plaint, but a map of the disputed property was also prepared and filed along with the plaint, which was made part of the plaint and this fact was not denied specifically by the appellant/defendant. Therefore, in the considered opinion of this Court even the law laid down by the Patna High Court does not favour the appellant/ defendant rather it helps the respondents/plaintiffs.

The first question of law is, thus, answered that since there was sufficient description of the suit property given in the plaint, in compliance of Order 7 Rule 3 of the Code of Civil Procedure, a decree as per the provisions of Order 20 Rule 9 of the Code of Civil Procedure could be passed by the learned trial Court in favour of the respondents/plaintiffs.

The second question of law is whether the learned lower appellate Court was having jurisdiction to dismiss the first appeal without issuing notices to other side? The power of the appellate Court are enumerated under Rule 11 of Order 41 of the Code of Civil Procedure. The said provision clearly prescribes that the appellate Court, after sending for the record if it thinks fit so to do and after fixing a day for hearing the appellant or his pleader and hearing him accordingly if he appears on that day may dismiss the appeal without sending notice to the Court from whose decree the appeal is preferred and without serving notice on the respondents or his pleader. Such a provision was in force before the amendment made in the Code of Civil Procedure on 01.07.2002. Since the power was very much available with the learned lower appellate Court, to dismiss the appeal at motion stage itself without sending notices to the respondents in appeal, it cannot be said that judgment was passed by the learned lower appellate Court without authority of law.

This Court in the case of ***Mangilal v. Manakchand 2001 (3) MPHT 191***, has categorically held that the first appellate Court has power to dismiss the appeal even in motion hearing under Order 41 Rule 11 of the Code of Civil Procedure if the learned lower appellate Court reaches to the right conclusion that the trial Court has properly appreciated the evidence, has rightly taken into account the documents produced before the trial Court and has rightly taken into consideration the facts stated before the learned trial Court.

In view of this, the second question of law framed is also to be answered that first appellate Court has not committed any error in dismissing the appeal of the appellant/defendant in motion hearing.

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*79. **CIVIL PROCEDURE CODE, 1908 – Order 22**
SPECIFIC RELIEF ACT, 1963 – Section 41
Legal representatives – Original plaintiff died during pendency of civil suit and his legal heirs were brought on record – Defendant filed appeal against decree but 'A' one of the L.Rs. was not made a party – 'A' also filed appeal against part dismissal of suit – Held, as 'A' had also filed cross-appeal and other legal representatives were on record, first and second appeals filed by defendant was maintainable as they had not abated.
Injunction – No injunction can be granted against any coparcener – Each coparcener is having equal right in the property.

Gajendrarao & Ors. v. Murti Shri Ganpati Ji Maharaj & Ors.
Judgment dated 01.10.2011, passed by the High Court of M.P. in S.A. No. 367 of 1999, reported in ILR (2012) M.P. S.N. 4

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*80. **CIVIL PROCEDURE CODE, 1908 – Order 39 Rules 1 and 2**
Encashment of bank guarantee – In case of unconditional bank guarantees, interference by the Court is warranted only when there is established fraud and irretrievable damage to the promise – Bank guarantee cannot be encashed if it is conditional and for inconsistent purpose.
Bank Guarantee was for mobilization of advance with a view to secure the said amount – Bank guarantee has been encashed for non-performance of contract – Trial Court rightly restrained defendants from invocation and encashment of bank guarantee – Trial Court was also right in directing the defendants to deposit the amount as the bank guarantee was encashed after receiving the notice of the suit.

Devi ShakuntalaThakral v. Wig Brothers (India) Pvt. Ltd. & Anr.
Judgment dated 31.10.2011, passed by the High Court of M.P. in M.A. No. 299 of 2011, reported in ILR (2012) M.P. S.N. 3

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81. **CIVIL PROCEDURE CODE, 1908 – Order 39 Rules 1 and 2**
Interim injunction – An interim order, which would create irremediable difficulties for defendants in the event of dismissal of suit, cannot be issued.

Makers Development Services Private Limited v. M. Visvesvaraya Industrial Research and Development Centre
Judgment dated 14.11.2011 passed by the Supreme Court in Civil Appeal No. 9709 of 2011, reported in (2012) 1 SCC 735

Held:

It is settled law that while passing an interim order of injunction under Order

39 Rules 1 and 2 of the Code of Civil Procedure, 1908, the Court is required to consider three basic principles, namely, a) prima facie case, b) balance of convenience and inconvenience and c) irreparable loss and injury. In addition to the above mentioned three basic principles, a court, while granting injunction must also take into consideration the conduct of the parties. It is also established law that the Court should not interfere only because the property is a very valuable one. Grant or refusal of injunction has serious consequences depending upon the nature thereof and in dealing with such matters the court must make all endeavours to protect the interest of the parties.

With the above principles, let us consider the claim of both the parties.

The appellant/plaintiff, who filed Suit No. 2618 of 2007 on the file of original side of the High Court of Bombay prayed for the following interim reliefs pending hearing and final disposal of the said suit:

"(a) That pending the hearing and final disposal of the Suit, the Defendant be ordered and directed to do, sign, execute, deliver and register all such acts, deeds, matters writings, documents, authorities papers, plans, sanctions and things as may be necessary to enable the Plaintiff to continue construction on the Suit Land in terms of the Suit Contract;

(b) That pending the hearing and final disposal of the Suit, the Defendant by itself, its servants and agents or any person or persons claiming by, from, through or under them be restrained by an order and injunction of this Court from dispossessing the Plaintiff or removing the authorized representatives, employees, staff, workers and labourers of the Plaintiff and their respective family member or their belongings and articles or the construction materials, equipment and other belongings of the Plaintiff from the Suit Land;

(c) That pending the hearing and final disposal of the Suit, it be ordered and decreed that the Defendant to allow the Plaintiff to continue construction on the Suit Land and unhindered access to the Suit Land and allow ingress to and egress from the Suit Land, by the Plaintiff, its representatives, employees and contract labour as also for all construction materials and equipment without in any manner, directly or indirectly, obstructing or hindering the Plaintiff.

(d) That pending the hearing and final disposal of the Suit, the Defendant by itself, its servants and agents or any person or persons claiming by, from, though or under them be restrained by an order and injunction of this Court from in

any manner restraining, preventing impending or obstructing implementation of the Suit Contract or construction on the Suit Land or access to and ingress to and egress from the Suit Land, of the Plaintiff or its authorized representatives, employees, workers, labourers and their respective family members or preventing, impeding or obstructing construction material or equipment of the Plaintiff from being brought on to the Suit land or in any manner, directly or indirectly, by any act of omission or commission, withholding or causing to be withheld essential utilities such as power and water supply to the Suit Land for construction by the Plaintiff;

(e) That pending the hearing and final disposal of the Suit, the Defendant by itself, its servants and agents or any person or persons claiming by, from, through or under them be restrained by an order and injunction of this Court from in any manner, whether directly or indirectly, revoking or acting on any purported revocation of the Letter of Authority granted by the Defendant to the Plaintiff or in any manner, whether directly or indirectly, hindering, impeding or obstructing construction on the Suit Land in terms of the Suit Contract;

(f) That pending the hearing and final disposal of the Suit, the Defendant by itself, its servants and agents or any person or persons claiming by, from, through or under them be restrained by an order and injunction of this Court from in any manner committing unlawful trespass or from in any manner intimidating the Plaintiff, its employees, workers, labourers and other agencies appointed by the Plaintiff;

(g) That pending the hearing and final disposal of the Suit, the Defendant by itself, its servants and agents or any person or persons claiming by, from, through or under them be restrained by an order and injunction of this Court from, in any manner, selling transferring, dealing with, disposing of, alienating encumbering or creating any third party rights or interest in, or entering into any agreement or arrangement with any one else in respect of the Suit Land or any part thereof;"

Among the above prayers for interim reliefs, the learned single Judge granted relief only in respect of prayer clause (g) that too with a condition, namely, except the words "dealing with". The learned single Judge on satisfying himself and after thorough scrutiny of the materials placed rejected the relief insofar as prayer clauses (a) to (f), which resulted in filing of above two appeals

by the appellant and the defendant. It is the claim of the appellant/plaintiff that on the basis of the contract between the parties, the learned single Judge and the Division Bench should have granted an order permitting the appellant to carry on further construction especially when construction of about 80 ft. had already been raised by the appellant on the suit land. On the other hand, it is the case of the defendant that there is no existing agreement between the parties and the only point is that the parties have agreed to enter into an agreement and, therefore, the learned single Judge as well as the Division bench were not justified even in granting interim order in terms of Prayer (g).

Inasmuch as the main suit is pending, it would not be proper for this Court to delve into the matter and arrive at a categorical finding one way or other. Accordingly, we have to find out whether there is prima facie case and 'balance of convenience' in terms of principles mentioned above.

The finding of the learned single Judge about the construction of the building to the height of 80 ft. on the suit land by the appellant cannot be ignored. However, whether the defendant permitted the appellant to enter on the suit land and to carry on construction are all matters to be decided in the main suit. The limited relief granted in clause (g) by the learned single Judge is quite understandable, otherwise, it could be possible for the defendant to deal with the suit land with third parties or encumber it before the final disposal of the suit. However, as rightly observed by the learned single Judge as well as Division Bench, if other reliefs which we have already extracted above are granted, in the event of dismissal of a suit, undoubtedly, it would create enormous difficulties for the defendant using the plot or land freely and without any difficulty. In other words, if the appellant was allowed to proceed with the construction on the suit land, in the event of dismissal of suit, the defendant cannot use the land in a different manner with the structure without undertaking an enormous exercise of demolishing the same. Further, what was claimed by the plaintiff was not a mere prohibitory order but prayed for positive mandatory injunction which, as rightly observed by the Division Bench, would permit the plaintiff to alter the status quo on the suit land on the date of the suit.

The learned Single Judge as well as Division Bench on appreciation of entire materials rendered the factual finding that the balance of convenience is not in favour of granting such mandatory interim order as claimed in prayer clauses (a) to (f). It is relevant to point out that though the appellant had stated that it had started construction in the year 1996, even after the information by the defendant to the appellant in 2002 that the BEST had given their 'no objection' for the demolition of temporary receiving station and the appellant can proceed with the demolition, however, the fact remains, the height of the construction was only 80 ft. which shows that from the year 2001 to 2007, the appellant had not carried on construction and there was no obstruction from the side of the defendant. In view of all these factual aspects and in the light of the stand of the defendant disputing the existence of the agreement, as rightly observed by the

learned single Judge as well as Division Bench, further permission for construction or ancillary works cannot be granted during the pendency of the suit.

We are satisfied that the learned single Judge was fully justified in granting limited relief in respect of prayer clause (g) and declined the other reliefs in clauses (a) to (f). The Division Bench was also fully justified in confirming the said limited order. Though learned senior counsel for the respondent has prayed for certain directions such as execution of a mortgage deed etc., for the same reasons mentioned above, we are not inclined to grant such relief as claimed. As observed earlier, at this stage, it is not desirable to go into all the details and render a specific finding which would undoubtedly affect the claim of both the parties in the main suit. On the other hand, we are in entire agreement with the prima facie conclusion arrived at by the learned single Judge and the Division Bench.

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82. CIVIL PROCEDURE CODE, 1908 – Order 39 Rules 1 and 2
Power to make interim order is implicit in the power to make a final order except where it is specifically taken away by the concerned Statute – The law does not permit making of an interim order by one Authority or Court pending adjudication of the dispute by another.

Ashok Kumar Lingala v. State of Karnataka & Ors.
Judgment dated 18.10.2011 passed by the Supreme Court in Civil Appeal No. 8819 of 2011, reported in AIR 2012 SC 53

Held:

The mere pendency of a suit in a Civil Court could not be an impediment for the appellant to start or continue his mining activity, unless there was an injunction restraining him from doing so. No such injunction has been issued by the Civil Court. That does not, however, mean that the Government or the Director (Mines) for that matter could not in the event of any dispute between the appellant and M/s Sandur Manganese & Iron ore Company Ltd. (SIHORE) regarding the identity and demarcation of the area leased to both of them direct the appellant to refrain from carrying on the mining activity as an interim measure till such time the issue was sorted out. But once such an interim direction was issued, the authority doing so had to take steps to resolve the dispute. It could not let the dispute fester and result in a stalemate. So also the restraint order could not be continued by the High Court till the dispute was adjudicated upon by the Civil Court. Doing so would amount to one authority making an interim order pending a final order to be made by another. The power to make an interim order is, except where it is specifically taken away by the statute, implicit in the power to make a final order. It is exercised by the authority who has to make the final order or an authority exercising appellate or revisional jurisdiction, against an order granting or refusing an interim order. The exercise of the power implies that the authority seized of the proceedings in which such an order is made will eventually pass a final order; the interim order serving only as a step in aid of such final order. The law, in our view, does not permit the making of an interim order by

one authority or Court pending adjudication of the dispute by another except in the situation mentioned above. Counsel appearing or the State Government was, therefore, right in her submission that the order of restraining mining operation was meant to be a temporary and interim arrangement meant to remain in force only till such time the Director (Mines) examined the issue regarding the alleged overlapping of the area and passed a final order on the subject.

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83. CIVIL PROCEDURE CODE, 1908 – Order 39 Rules 1 & 2, Section 151 and Order 43 Rule 1(2)
CONSTITUTION OF INDIA – Article 226
Order passed u/s 151 CPC directing parties to maintain *status quo* – It is an order under Order 39 Rules 1 and 2 CPC and appealable under Order 43 Rule 1 (2) CPC – Writ Petition not maintainable.

Ved Prakash Mukhariya v. Balmukund Sharma & Ors.
Judgment dated 09.08.2011 passed by the High Court of M.P. in Writ Petition No. 3824 of 2011, reported in AIR 2012 MP 11

Held:

Considering the aforesaid, it is held that the petitioner has a remedy under the Code of Civil Procedure and he may avail the same. Since the Court fees for preferring appeal may be different, this petition is not converted into an appeal. Registry is directed to return the certified copy of the impugned order to enable the petitioner to file an appropriate appeal.

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84. CONSTITUTION OF INDIA – Articles 21 and 22
INDIAN PENAL CODE, 1860 – Sections 302, 364, 342, 344, 346, 201 and 120-B
EVIDENCE ACT, 1872 – Sections 106 and 133
CRIMINAL TRIAL:

(i) Police atrocities – Protection of human rights in view of Article 21 of the Constitution – Any form of torture or cruel, inhuman or degrading treatment is inhibited – Torture is not permissible whether it occurs during investigation, interrogation or otherwise – The law requires for adoption of a realistic approach rather than narrow technical one in cases of custodial crimes.

(ii) *Corpus delicti*, recovery of – In a murder case, it is not necessary that the dead body should be found and identified i.e. conviction for the offence of murder does not necessarily depend upon *corpus delicti* being found.

(iii) Facts especially in the knowledge – Burden of proving such facts – Where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn, the burden of

proving the facts would be upon the accused by virtue of his special knowledge of such facts.

(iv) **Evidence of an accomplice, appreciation of – An accomplice who has not been made an accused/put to trial, can be relied upon, however, the evidence is required to be considered with care and caution.**

(v) **Sole eye witness, appreciation of – It is open to a competent court to fully and completely rely on a solitary witness and record conviction, conversely, it may acquit the accused inspite of testimony of several witnesses, if it is not satisfied about the quality of evidence.**

Prithipal Singh and others v. State of Punjab and another

Judgment dated 04.11.2011 passed by the Supreme Court in Criminal Appeal No. 523 of 2009, reported in (2012) 1 SCC 10

Held:

Police atrocities in India had always been a subject-matter of controversy and debate. In view of the provisions of Article 21 of the Constitution, any form of torture or cruel, inhuman or degrading treatment is inhibited. Torture is not permissible whether it occurs during investigation, interrogation or otherwise. The wrong-doer is accountable and the State is responsible if a person in custody of the police is deprived of his life except in accordance with the procedure established by law. However, when the matter comes to the court, it has to balance the protection of fundamental rights of an individual and duties of the police. It cannot be gainsaid that freedom of an individual must yield to the security of the State. Latin maxim ***salus populi est suprema lex*** – the safety of the people is supreme law; and ***salus reipublicae suprema lex*** – the safety of the State is supreme law, co-exist. However, the doctrine of the welfare of an individual must yield to that of the community.

The right to life has rightly been characterised as "'supreme' and 'basic'; it includes both so-called negative and positive obligations for the State". The negative obligation means the overall prohibition on arbitrary deprivation of life. In this context, positive obligation requires that State has an overriding obligation to protect the right to life of every person within its territorial jurisdiction. The obligation requires the State to take administrative and all other measures in order to protect life and investigate all suspicious deaths.

The State must protect victims of torture, ill-treatment as well as the human rights defender fighting for the interest of the victims, giving the issue serious consideration for the reason that victims of torture suffer enormous consequences psychologically. The problems of acute stress as well as a post-traumatic stress disorder and many other psychological consequences must be understood in correct perspective. Therefore, the State must ensure prohibition of torture, cruel, inhuman and degrading treatment to any person, particularly at the hands of any State agency/police force.

In addition to the protection provided under the Constitution, the Protection of Human Rights Act, 1993, also provide for protection of all rights to every individual. It inhibits illegal detention. Torture and custodial death have always been condemned by the courts in this country. In its 113th Report, the Law Commission of India recommended the amendment to the Indian Evidence Act, 1872 (hereinafter called "Evidence Act"), to provide that in case of custodial injuries, if there is evidence, the court may presume that injury was caused by the police having the custody of that person during that period. Onus to prove contrary is on the police authorities. Law requires for adoption of a realistic approach rather than narrow technical approach in cases of custodial crimes. (***Vide: Dilip K. Basu v. State of W.B. & Ors., AIR 1997 SC 3017, N.C. Dhoundial v. Union of India, AIR 2004 SC 1272*** and ***Munshi Singh Gautam v. State of M.P., AIR 2005 SC 402***).

In ***Mani Kumar Thapa v. State of Sikkim, AIR 2002 SC 2920***, this Court held that in a trial for murder, it is neither an absolute necessity nor an essential ingredient to establish corpus delicti. The fact of the death of the deceased must be established like any other fact. Corpus delicti in some cases may not be possible to be traced or recovered. There are a number of possibilities where a dead body could be disposed of without any trace, therefore, if the recovery of the dead body is to be held to be mandatory to convict an accused, in many a case, the accused would manage to see that the dead body is destroyed to such an extent which would afford the accused complete immunity from being held guilty or from being punished. What is, therefore, required in law to base a conviction for an offence of murder is that there should be reliable and plausible evidence that the offence of murder like any other factum of death was committed and it must be proved by direct or circumstantial evidence albeit the dead body may not be traced. (See also: ***Ram Chandra v. State of Uttar Pradesh, AIR 1957 SC 381, Ashok Laxman Sohoni v. State of Maharashtra, AIR 1977 SC 1319*** and ***Rama Nand v. State of Himachal Pradesh, AIR 1981 SC 738***)

Therefore, in a murder case, it is not necessary that the dead body of the victim should be found and identified, i.e. conviction for offence of murder does not necessarily depend upon corpus delicti being found. The corpus delicti in a murder case has two components - death as result, and criminal agency of another as the means. Where there is a direct proof of one, the other may be established by circumstantial evidence.

In ***State of West Bengal v. Mir Mohammad Omar & Ors. etc. etc., AIR 2000 SC 2988***, this Court held that if fact is especially in the knowledge of any person, then burden of proving that fact is upon him. It is impossible for prosecution to prove certain facts particularly within the knowledge of accused. Section 106 is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the Section would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to

offer any explanation which might drive the Court to draw a different inference. Section 106 of the Evidence Act is designed to meet certain exceptional cases, in which, it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused. (See also: ***Shambhu Nath Mehra v. State of Ajmer, AIR 1956 SC 404, Sucha Singh v. State of Punjab, AIR 2001 SC 1436*** and ***Sahadevan alias Sagadevan v. State rep. by Inspector of Police, Chennai, AIR 2003 SC 215***)

In ***Rudrappa Ramappa Jainpur v. State of Karnataka, AIR 2004 SC 4148***, this Court considered the issue at length and held that in case the witness does not involve a particular accused in a crime at the time of recording his statement under Section 161 Cr.P.C., and names him first time in his deposition in the court, the accused becomes entitled to benefit of doubt. A similar view has been re-iterated in ***State v. Sait, (2008) 15 SCC 440***.

This Court has consistently held that as a general rule the Court can and may act on the testimony of a single witness provided he is wholly reliable. There is no legal impediment in convicting a person on the sole testimony of a single witness. That is the logic of Section 134 of the Evidence Act. But if there are doubts about the testimony, the court will insist on corroboration. In fact, it is not the number or the quantity, but the quality that is material. The time-honoured principle is that evidence has to be weighed and not counted. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise. The legal system has laid emphasis on value, weight and quality of evidence, rather than on quantity, multiplicity or plurality of witnesses. It is, therefore, open to a competent court to fully and completely rely on a solitary witness and record conviction. Conversely, it may acquit the accused in spite of testimony of several witnesses if it is not satisfied about the quality of evidence. [See: ***Vadivelu Thevar v. State of Madras, AIR 1957 SC 614; Sunil Kumar v. State (Govt. of NCT of Delhi), (2003) 11 SCC 367; Namdeo v. State of Maharashtra, (2007) 14 SCC 150*** and ***Bipin Kumar Mondal v. State of W.B., AIR 2010 SC 3638***].

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85. CONSUMER PROTECTION ACT, 1986 – Sections 2 (1) (o) and (g) Deficiency in service – Encroachment by some people from the neighbouring areas on the plot allotted by the allotter/development authority after possession thereof has been delivered to the allottee – It will not amount to deficiency of service on part of the allotter/ development authority.

Haryana Urban Development Authority v. Viresh Sangwan and another

Judgment dated 08.11.2011 passed by the Supreme Court in Civil Appeal No. 9691 of 2011, reported in (2012) 1 SCC 256

Held:

In our view, the finding recorded by the District Forum that there was deficiency

in service on the appellant's part is ***ex facie*** erroneous and the Sate Commission and the National Commission committed serious error by confirming the direction given by the District Forum for allotment of alternative plot to the respondents. Unfortunately, none of the consumer forums adverted to the fact that possession of the plot was delivered to the original allottee Shri Champat Jain on 27.02.1998 free from all encumbrances and there is no provision in the Haryana Urban Development Authority Act, 1977 and the Regulations for redelivery of possession to the transferees. One can easily visualise that after taking possession of the plot allotted to him, Shri Champat Jain did not take steps to protect the same and by taking advantage of his absence at the site, the people from the neighbouring areas may have opened their doors towards the plot or made some encroachment. However, the appellant cannot be blamed for the encroachment, if any, made after possession of the plot was delivered to the original allottee.

The respondents must have executed the sale deed after inspecting the site. If there was any encroachment or the area of the plot was less than the one specified in the allotment/re-allotment letter, they would have immediately lodged a protest with the vendor. However, the fact of the matter is that the respondents did not raise any objection in this regard and by taking shelter of a manipulative report prepared by the Junior Engineer, they filed complaint and succeeded in convincing the District Forum to ordain allotment of an alternative plot.

In our considered opinion, the appellant cannot be held responsible for the encroachment, if any, made after possession of the plot had been delivered to Shri Champat Jain and neither Devender Yadav and Narender Yadav, who purchased the plot from Shri Champat Jain nor the respondents could possibly accuse the appellant of deficiency in service in the matter of allotment of plot on the ground that some people had made encroachment on it.

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86. COURT FEES ACT, 1963 – Section 7 (v)
CIVIL PROCEDURE CODE, 1908 – Section 2 (2) and Order 8 Rule 6-D

(i) Valuation for the purpose of court fees – Suit/counter claim for recovery of possession of agricultural land – In such suits, valuation of property for the purpose of court fees will be twenty times of land revenue of the agricultural land – Valuation on market value of the agricultural land is not required.
"Discontinue", meaning and scope of – When a Court returns a plaint to the plaintiff to file it in the Court having pecuniary jurisdiction, it comes within the scope of the term "discontinue" as envisaged under Rule 6-D of Order 8 CPC.

(ii) Non-drawing up of a decree, effect of – If the claim is allowed by trial Court by decreeing the rights of parties in its judgment, it will amount to a decree even if no formal decree was drawn up.

Saida Sultan v. Jairam and another

Judgment dated 28.09.2011, passed by the High Court of M.P. in S.A. No. 2435 of 2005, reported in 2012 (1) MPLJ 398

Held:

The suit property is an agricultural land and first defendant-respondent No. 1 has filed her counter-claim for restoration of possession and valued her suit 20 times of the land revenue and accordingly paid ad valorem Court fee which is in accordance to Section 7 (v) of the Court Fees Act, 1870 prevailing in Madhya Pradesh in incorporating the State amendment.

Since, the counter-claim of first defendant is for possession of the agricultural land having assessed land revenue and therefore rightly by fixing the valuation of the counter-claim she had paid ad valorem Court fee on it and therefore the valuation which has been made by first defendant in her counter-claim does not exceed the pecuniary jurisdiction of Civil Judge, Class II even if the counter-claim for injunction and to award compensation is added to the valuation of the counter-claim to restore possession of the suit property. Hence, I am of the view that learned trial Court was having pecuniary jurisdiction to entertain the counter-claim of first defendant-appellant and rightly it was entertained and allowed on merits after recording the evidence.

The plaint has been returned to the plaintiff to file it in the appropriate Court having pecuniary jurisdiction of ₹ 1,91,400 and therefore, his suit shall be deemed to be discontinued. The term "discontinue" embodied in Rule 6-D is having great significance. This word has not been defined in the Civil Procedure Code and therefore I am obliged to examine the meaning of this word from various dictionaries. In the *'Major Law Lexicon' by P. Ramanatha Aiyar (4th Edition, 2010) at page 2034,* the meaning of word "discontinue" is given which reads as under –

"to cause to cease; to put a stop to".

The plaint of plaintiff has been returned to him to file it in the proper Court having pecuniary jurisdiction and therefore the suit has been ceased and has been stopped till plaintiff files it in the Court having pecuniary jurisdiction. Similarly the meaning of the word "discontinue" is mentioned in the same book on page 2033 which reads thus: –

> "Default; a discontinuance in practice is the interruption in proceedings occasioned by the failure of plaintiff to continue the suit from time to time as he ought, or failure to follow up his case. A break or chasm in a suit arising from the failures of the plaintiff to carry the proceedings forward in due course of law."

On bare perusal of the explanation of the term 'discontinuance' it is clear that failure on the part of plaintiff to continue the suit and to follow up his case. Applying the said meaning in the instant case, because plaintiff was required to follow up his case and yet he had failed to continue it by not filing the plaint in

the proper Court, it will amount to discontinuance. At page 2034, the term "discontinuance and non suit" has been explained which means: –

> "A discontinuance is somewhat similar to a non-suit; for when a plaintiff leaves a chasm in the proceedings of his cause, as by not continuing the process regularly from day to day and time to time, as he ought to do, the suit is discontinued, and the defendant is no longer bound to attend."

Applying the aforesaid meaning and explanation in the instant case, because the plaintiff leaves a chasm in the proceedings of his cause by not continuing the process which he ought to have done by filing the plaint in the Court having pecuniary jurisdiction, it would mean that his suit is discontinued.

In ***Black's Law Dictionary by Bryan A. Garner (9th Edition) at page 532,*** the term "discontinuance" has been explained which reads thus: –

> "The termination of a lawsuit by the plaintiff; a voluntary dismissal or non-suit."

Applying the meaning of the aforesaid term in the present case, the suit of plaintiff has been terminated by returning the plaint to the plaintiff.

The word "discontinue" has been further explained in the ***New Webster's Dictionary and Thesaurus & Medical Dictionary at page 116*** according to which : –

> "to interrupt; to break off; to stop; to cease, discontinuance, discontinuation, interruption, cessation, discontinuity, want of continuity, discontinuous, intermittent."

Applying the aforesaid meaning in the present case, the plaint has been returned to the plaintiff for filing it before proper Court having pecuniary jurisdiction and thus continuity of the suit is stopped.

The term "discontinue" is also explained in ***Collins Cobuild Advanced Learner's dictionary (new Edition) at page 400*** which reads thus: –

> "if you discontinue something that you have been doing regularly, you stop doing it."

By applying the aforesaid dictionary meaning in the present context, the plaintiff has discontinued his suit by not filing it in the proper Court which he was regularly proceeding and has stopped to proceed by not filing it in the proper Court. Hence, I am not having any scintilla of doubt in my mind that/returning the plaint to the plaintiff to file it in the Court having pecuniary jurisdiction would come within the term 'discontinue' as envisaged under Rule 6-D of Order VIII, Civil Procedure Code and therefore the legislature is very clear in its mind while enacting this rule that if a suit is discontinued, nevertheless the counter-claim will proceed and hence the finding of the learned First Appellate Court holding that the suit of plaintiff does not come within the purview of the term 'discontinue' is misinterpretation of law.

On going through the judgment passed by learned trial Court this Court finds that the counter-claim of first defendant-appellant was found to be proven and the issues which were framed in respect to counter-claim were decided in favour of first defendant-appellant and against the plaintiff and accordingly the counter-claim was allowed. Indeed, a decree ought to have been drawn up, but, merely it was not drawn, it cannot be said that counter-claim has not been decreed, because, drawing up a decree is a ministerial job and even if it was ordered by learned trial Court to prepare the memorandum of cost it would not mean that the counter-claim of first defendant-appellant has not been decreed. The term 'decree' has been defined in section 2(2) of Civil Procedure Code which reads thus: –

> "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the right of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within section 144, but shall not include –
>
> (a) any adjudication from which an appeal lies as an appeal from an order, or
>
> (b) any order of dismissal for default.
>
> ***Explanation.*** – A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final."

Needless to say, a decree is nothing but a formal expression of adjudication which, so far as regards the Court expressing it, conclusively determines the right of the parties with regard to all or any of the matters in controversy in the suit. Since the counter-claim has already been allowed by learned trial Court by decreeing the rights of first defendant and plaintiff (defendant in counter-claim) in its judgment it will amount to a decree even if no formal decree was drawn up.

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87. COURT FEES (M.P. AMENDMENT) ACT, 2008 – Schedule II, Article 11 (a) (i)

Enhancement of Court Fee – Purpose – Reason for increase in expenditure on Court is implementation of recommendation made by Justice Shetty Commission – Held, need has arisen for amendment in Court Fees Act.

Fiscal Laws – Laws relating to economic activities should be viewed with greater latitude – State has to be left with wide latitude in devising ways and means of fiscal or regulatory measures, and the Court

should not unless compelled by the Statute or by the Constitution encroach into this field or invalidate such law.

***Ad valorem* Court Fee – Discrimination – Payment of Ad valorem Court Fee on appeal for enhancement of compensation – Position of appellant seeking enhancement of compensation is different from that of Insurance Company and Owner – Insurance Company can challenge the award on limited grounds – Owner and Insurance Company are liable to pay atleast ₹ 25,000 alongwith memo of appeal – Owner and Insurance Company are saddled with liability to pay compensation whereas in case of claimant, compensation is awarded by Tribunal – Provision not discriminatory – Petition dismissed.**

Upper limit of Court Fee – Absence of – Issue regarding absence of limit of Court Fee does not arise in the present case – Issue left to be dealt with in appropriate cases.

Date of operation – Right to file appeal vests in the suit or on the date when an action is initiated – Such right is substantive right cannot be taken away by an enactment which is not retrospective unless it says so expressly – Fixed Court Fee is payable on claims filed before 02.04.2008.

Ashok Kumar v. State of M.P. & ors.

Judgment dated 18.11.2011, passed by the High Court of M.P. in W.P. No. 14740 of 2008, reported in I.L.R. (2011) M.P. 3084 (DB)

Held :

The relevant extract of the Court Fee (M.P. Amendment) Act, 2008 (hereinafter referred to as the 'Act, 2008') reads as under :

> "(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 enhancement 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 |

We have considered the submissions made on both sides. Reference to Statement of Objects and Reasons is permissible for understanding the backgrounds, the antecedent state of affairs, the surrounding circumstances in relation to the statute and the evil which the statute sought to remedy. [See : ***Bhaiji v. Sub-divisional Officer, Thandla, (2003) 1 SCC 692*** and ***A. Manjula Bhashini v. Managing Director Andhra Pradesh Women's Cooperative Finance Corporation Ltd., (2009) 8 SCC 431.*** It is well settled in law that it must be assumed that the

legislature understands and appreciates the need of the people and the laws it enact are directed to alleviate problems which are manifest by experience and that the elected representatives assembled in a legislature and enact laws which they consider to be reasonable for the purpose for which they are enacted. [See : ***Charanjit Lal Chowdhury v. Union of India, AIR 1951 SC 41***]. The Statement of Objects and Reasons of Act No. 6 of 2008 contains declaration that it has been decided to levy the court fee on the memorandum of appeal when presented to the High Court by the claimant for enhancement of the award passed by the Motor Accident Claims Tribunal by making suitable amendment in Article 11 of Schedule II to the Principal Act. Having regard to inflationary trends and the increased cost of administration of justice, the increase in court fee is necessitated. The Supreme Court in ***All India Judges' Association v. Union of India, (1992) 1 SCC 199*** and in subsequent cases namely ***All India Judges' Association and others v. Union of India and others, 2002 SCC (L&S) 508, All India Judges' Association and others v. Union of India and others, (2006) 12 SCC 178, All India Judges' Association and others v. Union of India and others, (2006) 12 SCC 183, All India Judges' Association and others v. Union of India and others, (2006) 12 SCC 187*** and in the order dated 12.07.2010 passed in Writ Petition (C) No. 2022/89, has given various directions to the Government, in the light of Justice Shetty Commission recommendations, requiring considerable amount of funds most of which will fall under the head of administration of justice. This has enormously increased the financial burden on the State towards maintaining the Judicial Establishment of the State. The burden has also been substantially increased with the implementation of the Sixth Pay Commission. There is great emphasis on increase in the Judicial infrastructure, which again requires substantial financial resources.

In ***All India Judges' Association and others v. Union of India and others, 2002 SCC (L&S) 508,*** it has been directed that entire expenditure on account of recommendations of Justice Shetty Commission be borne by respective States. It has been held that it is for the State to increase the court-fee or to approach the Finance Commission or the Union of India for more allocation of funds. In the order dated 12.07.2010 passed in W.P. (c) No. 1022/89, once again Supreme Court has reiterated that funds internally generated by way of court-fees should be deployed for infrastructure of the subordinate Judiciary and Government may consider amending the Court Fees Act.

In the return which has been filed in W.P. No. 1796/2007, it is stated on behalf of the State Government that there has been steady decline in collection of court-fee. The amount collected by way of court-fees and the amount spent by the State Government on the establishment of Civil and Session Court in the State, which has been mentioned in paragraph 7 of the return is reproduced below for the facility of reference : –

Year	Court collected Fees	Year	Amount spent
2000-01	24 crores	2000-01	72 crores
2001-02	16.5 crores	2001-02	68 crores
2002-03	29 crores	2002-03	70 crores
2003-04	20 crores	2003-04	75 crores
		2004-05	106 crores
		2005-06	102 crores

The expenditure incurred in respect of the High Court has also been mentioned in the form of chart in para 7 of the return, which shows the steady increase. The chart is reproduced below for ready reference:

2000-01	13.5 crores
2001-02	14 crores
2002-03	14.5 crores
2004-05	17 crores
2005-06	21.5 crores

It has further been averred in the return that the main reason for increase in expenditure on Court is implementation of recommendation made by Justice Shetty Commission. The aforesaid averments made in the return have not been controverted by the petitioner. In order to meet the expenditure, the Government has to raise funds through court-fee. In the aforesaid context, the need has arisen for amendment in the Court Fees Act, which is otherwise discernible from the statement of objects and reasons.

It is equally well settled legal proposition that laws relating to economic activities should be viewed with greater latitude. The Court should feel more inclined to give judicial deference to legislative judgment in the field of economic regulation, as compared to other areas where fundamental rights are involved. Since economic matters are extremely complicated, this inevitably entails special treatment for special situations. The State therefore has to be left with wide latitude in devising ways and means of fiscal or regulatory measures, and the Court should not, unless compelled by the statute or by the Constitution, encroach into this field, or invalidate such law. [See: ***Government of Andhra Pradesh and Others v. P. Laxmi Devi, (2008) 4 SCC 720***].

In the backdrop of well settled legal position, we may advert to the facts of the case. Prior to coming into force of Act No. 6 of 2008, an appeal could be filed by the claimant seeking enhancement of the amount of compensation on fixed court-fee. In other words, a claimant was exempted from payment of court-fee on ad-valorem basis. By the impugned amendment, the aforesaid exemption has been withdrawn and only those claimants, who have received compensation, have been made liable to pay ad-valorem court fee like other litigants. Article 11 (1) (i) of the Act as amended by Act No. 6 of the 2008 has been assailed on

the ground that the same is discriminatory. In order to substantiate the plea of discrimination, it has to be shown that similarly situated persons are being subjected to different treatment. In the instant case, the insurance company, owner of the vehicle and the claimant cannot be said to be similarly situated persons. Under Section 149 (2) of the Motor Vehicle Act, 1988 (in short 'the 1988 Act'), the insurance company can contest the claim on limited grounds mentioned therein, except in those few cases where the MACT grants permission to the Insurance Company to take other defences. Naturally the scope of appeal also becomes limited to such grounds of defence. Further, the Legislature will be deemed to have knowledge, experience or statistics that insurance companies have law departments in which the awards passed by the tribunals are scrutinized and thereafter a decision is taken whether to file or not to file an appeal. Whereas the appeals by the claimants seeking enhancement of compensation that are filed in large numbers and in an indiscriminate manner which gives rise to the suspicion, if not inference, that there is an increase in the tendency of litigants to gamble in litigation. Similarly, if the owner of the vehicle wants to file an appeal against the award passed by the tribunal he is required to deposit at least a sum of ₹ 25,000 along with the memorandum of appeal as required by Proviso to Section 173 (1) of the 1988 Act. The owner as well as the insurer are saddled with the liability to pay the amount of compensation whereas in case of claimant, the amount of compensation is awarded by the tribunal. For the aforementioned reasons, we have no hesitation to hold that the petitioner has not been able to substantiate the plea of discrimination. Accordingly, the plea cannot be upheld.

The next contention raised on behalf of the petitioner is that requirement of payment of ad-valorem court fee without upper limit is arbitrary and discriminatory, because in respect of plaint, written statement, set off, counter claim and memorandum of appeal presented in civil or revenue court, upper limit of ₹ 1.5 lac as court fee has been prescribed. Thus, if a claimant seeks enhancement of amount of compensation by ₹15 Lac he would have to pay ₹ 1.5 Lac as court fee. In the writ petitions under consideration, on facts, the aforesaid issue does not arise. It is well settled that Courts do not decide academic questions which do not arise on the facts of the case. [See : ***Basant Kumar v. State of Rajasthan and Others, (2001) 7 SCC 201***]. Besides that it has been urged on behalf of the State that the decision in the case of ***Adhunik Grah Nirman Sahakari Samili Ltd. and others v. State of Rajasthan, 1989 (Supp.) 1 SCC 656*** is distinguishable. It was argued that the Supreme Court in that case was faced with the proceeding for grant of probate and letters of Administration, which being contentious was to be registered as a suit. In the aforesaid context, it was held that if in respect of all other suits upper limit of ₹15,000 on the court-fee is fixed there is no logical justification for excluding the proceeding for grant of probate and letters of administration, which are registered as suits, without fixing upper limit for court-fee. It is further submitted on behalf of the respondents that an appeal filed against the award passed by the MACT cannot be equated with the regular appeals against decrees filed either under the Code of Civil

Procedure or under other enactments. Be that as it may, we leave the issue to be dealt with in an appropriate case.

Now we may deal with the submission made on behalf of the petitioner that prescription of ad-valorem court fee at the rate of 10% would amount to denial to access to justice. We are not impressed by the aforesaid submission for the simple reason that if a claimant has no means to pay the ad-valorem court fee he can always sue as an indigent person under Order 44 of the Code of Civil Procedure. Accordingly, the aforesaid contention also does not deserve acceptance.

Before parting with the case, we may restate the well settled legal principle that the right to file an appeal vests in the suitor on the day when an action is initiated. The said right is a substantive right and cannot be taken away or even curtailed by an enactment which is not retrospective unless it says so expressly or by necessary intendment. [See : ***E. V. Balakrishan v. Mahalakshmi Anmal and Another, AIR 1960 SC 980*** and ***Ramesh Singh and Another v. Cinta Devi and Others, AIR 1996 SC 1560***]. Thus in view of the aforesaid enunciation of law, the appeals which are filed in respect of the claims instituted before the Motor Accident Claims Tribunal before 02.04.2008, fixed court fee would be payable whereas in respect of the appeal against the awards in respect of claims filed on or after 02.04.2008 ad-valorem court fee as provided under the Act No. 6 of 2008 would be payable.

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***88. CRIMINAL PROCEDURE CODE, 1973 – Section 125**
EVIDENCE ACT, 1872 – Section 45
Medical examination – Applicant took a defence that wife is having character of hermaphroditism (Ubhaylingata) and prayed for her karyotype medical test – Held, person can not be insisted contrary to her wish to examine herself for any medical examination – Such direction would be violative of Article 21 of Constitution – Revision dismissed.

Pushpendra Singh Thakur v. Smt. Mamta Thakur
Judgment dated 25.11.2011, passed by the High Court of M.P. in Cri. Rev. No. 1936 of 2011, reported in ILR (2012) M.P. 292

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***89. CRIMINAL PROCEDURE CODE, 1973 – Sections 125 and 127**
Payment of maintenance amount – Petitioner was directed to pay interim maintenance – Application for alteration of interim maintenance amount on the ground of delaying tactics being adopted by wife, filed by husband is pending – Held, unless the interim order of maintenance passed earlier is amended/altered or maintained, same will be enforceable – Petitioner bound to pay interim maintenance amount – Revision dismissed with direction to dispose of the petition within two months from the date of order.

Ajay Sharma v. Smt. Archana Sharma

Judgment dated 14.10.2011, passed by the High Court of M.P. in Cri. Rev. No. 786 of 2011, reported in ILR (2012) M.P. 272

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90. CRIMINAL PROCEDURE CODE, 1973 – Sections 154, 190, 203 and 204

(i) Multiple FIRs in respect of the same incident – Permissibility of – Held, law does not prohibit registration and investigation of two FIRs in respect of the same incident, in case the versions are different.

(ii) Entertainment of second complaint/protest petition on same facts – Permissibility of – Law does not prohibit filing or entertaining of the second complaint even on the same facts – However, second complaint would not be maintainable where the earlier one has been disposed of after full consideration of the case on merit.

Shivshankar Singh v. State of Bihar and another

Judgment dated 22.11.2011 passed by the Supreme Court in Criminal Appeal No. 2160 of 2011, reported in (2012) 1 SCC 130

Held:

We do not find any force in the submission made on behalf of the respondents that as in respect of same incident i.e. dacoity and murder of Gopal Singh, the appellant himself alongwith others is facing criminal trial, proceedings cannot be initiated against the respondent No.2 at his behest as registration of two FIRs in respect of the same incident is not permissible in law, for the simple reason that law does not prohibit registration and investigation of two FIRs in respect of the same incident in case the versions are different. The test of sameness has to be applied otherwise there would not be cross cases and counter cases. Thus, filing another FIR in respect of the same incident having a different version of events is permissible. [Vide: ***Ram Lal Narang v. State (Delhi Admn.), AIR 1979 SC 1791; Sudhir, v. State of M.P., AIR 2001 SC 826, T.T. Antony v. State of Kerala, AIR 2001 SC 2637, Upkar Singh v. Ved Prakash, AIR 2004 SC 4320*** and ***Babubhai v. State of Gujarat, (2010) 12 SCC 254***].

The law does not prohibit filing or entertaining of the second complaint even on the same facts provided the earlier complaint has been decided on the basis of insufficient material or the order has been passed without understanding the nature of the complaint or the complete facts could not be placed before the court or where the complainant came to know certain facts after disposal of the first complaint which could have tilted the balance in his favour. However, second complaint would not be maintainable wherein the earlier complaint has been disposed of on full consideration of the case of the complainant on merit.

The Protest Petition can always be treated as a complaint and proceeded with in terms of Chapter XV of Cr.P.C. Therefore, in case there is no bar to entertain a second complaint on the same facts, in exceptional circumstances, the second Protest Petition can also similarly be entertained only under

exceptional circumstances. In case the first Protest Petition has been filed without furnishing the full facts/particulars necessary to decide the case, and prior to its entertainment by the court, a fresh Protest Petition is filed giving full details, we fail to understand as to why it should not be maintainable.

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91. CRIMINAL PROCEDURE CODE, 1973 – Section 173

(i) Once the investigation is completed and final report u/s 173 (2) has been filed by the investigative agency, the process of monitoring the case is over.

(ii) Before considering the closure report submitted by the investigative agency, the Magistrate must give notice to the informant and provide him an opportunity to be heard.

Jakia Nasim Ahesan & Anr. v. State of Gujarat & Ors.

Judgment dated 12.09.2011 passed by the Supreme Court in Criminal Appeal No. 1765 of 2011, reported in AIR 2012 SC 243 (3-Judge Bench)

Held:

We direct the Chairman, SIT to forward a final report, along with the entire material collected by the SIT, to the Court which had taken cognizance of Crime Report No.67 of 2002, as required under Section 173(2) of the Code. Before submission of its report, it will be open to the SIT to obtain from the Amicus Curiae copies of his reports submitted to this Court. The said Court will deal with the matter in accordance with law relating to the trial of the accused, named in the report/charge-sheet, including matters falling within the ambit and scope of Section 173(8) of the Code. However, at this juncture, we deem it necessary to emphasise that if for any stated reason the SIT opines in its report, to be submitted in terms of this order, that there is no sufficient evidence or reasonable grounds for proceeding against any person named in the complaint, dated 8th June 2006, before taking a final decision on such 'closure' report, the Court shall issue notice to the complainant and make available to her copies of the statements of the witnesses, other related documents and the investigation report strictly in accordance with law as enunciated by this Court in ***Bhagwant Singh v. Commissioner of Police & Anr., AIR 1985 SC 1285***. For the sake of ready reference, we may note that in the said decision, it has been held that in a case where the Magistrate to whom a report is forwarded under Section 173(2)(i) of the Code, decides not to take cognizance of the offence and to drop the proceedings or takes a view that there is no sufficient ground for proceeding against some of the persons mentioned in the FIR, the Magistrate must give notice to the informant and provide him an opportunity to be heard at the time of consideration of the report.

Having so directed, the next question is whether this Court should continue to monitor the case any further. The legal position on the point is made clear by this Court in ***Union of India & Ors. v. Sushil Kumar Modi & Ors., (1998) 8 SCC 661,***

wherein, relying on the decision in *Vineet Narain & Ors. v. Union of India & Anr., AIR 1996 SC 3386,* a Bench of three learned Judges had observed thus :

> "...that once a charge-sheet is filed in the competent court after completion of the investigation, the process of monitoring by this Court for the purpose of making the CBI and other investigative agencies concerned perform their function of investigating into the offences concerned comes to an end; and thereafter it is only the court in which the charge-sheet is filed which is to deal with all matters relating to the trial of the accused, including matters falling within the scope of Section 173(8) of the Code of Criminal Procedure. We make this observation only to reiterate this clear position in law so that no doubts in any quarter may survive."

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92. CRIMINAL PROCEDURE CODE, 1973 – Sections 190, 203, 204, 399, 400 and 401

Cognizance on complaint – Setting aside of order in revision – Photocopies of documents produced by accused for the first time before revisional Court – Cannot be entertained and made a basis for setting aside an order passed by the trial court – Position explained.

Helios and Matheson InformationTechnology Limited and others v. Rajeev Sawhney and another

Judgment dated 16.12.2011 passed by the Supreme Court in SLP (Crl.) No. 4606 of 2011, reported in (2012) 1 SCC 699

Held:

We have gone through the averments made in the complaint and are of the view that the complaint does contain assertions with sufficient amount of clarity on facts and events which if taken as proved can culminate in an order of conviction against the accused persons. That is, precisely the test to be applied while determining whether the Court taking cognizance and issuing process was justified in doing so. The legal position in this regard is much too well-settled to require any reiteration.

Learned counsel for the petitioners made a valiant attempt to argue that the Revisional Court was justified in receiving documents from the accused persons at the hearing of the revision and decide the legality of the order taking cognizance on that basis. Before the High Court a similar contention was raised but has been turned down for reasons that are evident from a reading of the passage extracted by us above. We see no error or perversity in the view taken by the High Court that in a revision petition photocopies of documents produced by the accused for the first time, could not be entertained and made a basis for setting aside an order passed by the trial Court and dismissing a complaint which otherwise made out the commission of an offence. The accused is

doubtless entitled to set up his defence before the trial Court at the proper stage, confront the witnesses appearing before the Court with any document relevant to the controversy and have the documents brought on record as evidence to enable the trial Court to take a proper view regarding the effect thereof. But no such document, the genuineness whereof was not admitted by the parties to the proceedings, could be introduced by the accused in the manner it was sought to be done.

We may in this regard gainfully refer to the decision of this Court in ***Minakshi Bala v. Sudhir Kumar, (1994) 4 SCC 142*** where one of the questions that fell for consideration was whether in a revision petition challenging an order framing charges against the accused, the latter could rely upon documents other than those referred to in Sections 239 and 240 of the Cr.P.C. and whether the High Court would be justified in quashing the charges under Section 482 of the Cr.P.C. on the basis of such documents. Answering the question in the negative this Court held that while an order framing charges could be challenged in revision by the accused persons before the High Court or the Sessions Judge, the revisional Court could in any such case only examine the correctness of the order framing charges by reference to the documents referred to in Sections 239 and 240 of the Cr.P.C and that the Court could not quash the charges on the basis of documents which the accused may produce except in exceptional cases where the documents are of unimpeachable character and can be legally translated into evidence. The following passage is, in this regard, apposite:

> "7. If charges are framed in accordance with Section 240 CrPC on a finding that a prima facie case has been made out – as has been done in the instant case – the person arraigned may, if he feels aggrieved, invoke the revisional jurisdiction of the High Court or the Sessions Judge to contend that the charge-sheet submitted under Section 173 CrPC and documents sent with it did not disclose any ground to presume that he had committed any offence for which he is charged and the revisional court if so satisfied can quash the charges framed against him. To put it differently, once charges are framed under Section 240 CrPC the High Court in its revisional jurisdiction would not be justified in relying upon documents other than those referred to in Sections 239 and 240 CrPC; nor would it be justified in invoking its inherent jurisdiction under Section 482 CrPC to quash the same except in those rare cases where forensic exigencies and formidable compulsions justify such a course. We hasten to add even in such exceptional cases the High Court can look into only those documents which are unimpeachable and can be legally translated into relevant evidence."

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*93. **CRIMINAL PROCEDURE CODE, 1973 – Sections 195(1)(b)(i) and 438 Anticipatory bail proceedings conducted by the Court of Sessions Judge in connection with the criminal case lodged with CAWC (Crime Against Women Cell) are judicial proceedings, therefore, offence committed u/s 211 IPC related to said proceedings comes under such proceedings under Section 195(1)(b)(i) Cr.P.C. and cognizance could be taken only at the instance of the complainant in writing of the Court in relation to whose proceedings the same was committed or who finally dealt with the case. [Cases referred:** *Kamalapati Trivedi v. State of W.B., (1980) 2 SCC 91* **and** *State of Maharashtra v. Sk. Bannu, (1980) 4 SCC 286*]

Abdul Rehman and others v. K.M. Anees-ul-Haq

Judgment dated 14.11.2011 passed by the Supreme Court in Criminal Appeal No. 2090 of 2011, reported in (2011) 10 SCC 696

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*94. **CRIMINAL PROCEDURE CODE, 1973 – Section 311**

Recall of witness – Doctor who conducted postmortem was examined at earlier stage – He was sought to be recalled in the light of subsequent evidence which has come on record – Held, accused should be extended ample opportunity to defend his case and such right should not be curtailed on account of minor technical grounds and specially in those cases in which capital punishment has been provided under the law – Applicants facing trial under Section 302 of IPC in which the maximum punishment provided is death – Doctor directed to be recalled – Revision allowed.

Deepak Raikwar & Anr. v. State of M.P.

Judgment dated 23.11.2011, passed by the High Court of M.P. in Cri. Rev. No. 2014 of 2011, reported in ILR (2012) M.P. 285

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*95. **CRIMINAL PROCEDURE CODE, 1973 – Section 320**

Compromise in non-compoundable cases may be relevant circumstance while imposing sentence – The offences which are not compoundable with or without the permission of Court u/s 320 Cr.P.C. cannot be allowed to be compounded but where the parties have settled the dispute amongst themselves, the factum of compromise may be taken as an extenuating circumstance while imposing substantive sentence. [Cases referred: *Ram Lal v. State of J& K, (1999) 2 SCC 213* **and** *Ishwar Singh v. State of M.P., (2008) 15 SCC 667*]

Shiji alias Pappu and others v. Radhika and another

Judgment dated 14.11.2011 passed by the Supreme Court in Criminal Appeal No. 2094 of 2011, reported in (2011) 10 SCC 705

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96. **CRIMINAL PROCEDURE CODE, 1973 – Sections 357 (1) & (3) and 29 (2) NEGOTIABLE INSTRUMENTS ACT, 1881 – Sections 138 and 143**

(i) **Award of compensation in case of dishonour of cheque – Scope of – Where the sentence does not impose a fine, the Court can direct the accused to pay compensation as may be specified in the order, but where the Court imposes a sentence of which fine forms a part, the compensation could be awarded only from out of the fine subject to the ceiling imposed by Section 29 (2) CrPC.**

(ii) **Compensation in case of conviction in a summary trial – Scope of – In view of the conferment of the power upon the JMFC by the Amendment Act, 2002, ceiling as to amount of fine stipulated under Section 29 (2) CrPC is removed, consequently a JMFC may impose a fine exceeding ₹10,000 and may award compensation from the amount of fine so imposed.**

(iii) **Award of compensation in cases relating to dishonour of cheque – Approach of Court – Direction to pay compensation by way of restitution in regard to the loss on account of dishonour of cheque should be practicable and realistic which would mean not only payment of the cheque amount but also interest thereon at a reasonable rate.**

R. Vijayan v. Baby and another

Judgment dated 11.10.2011 passed by the Supreme Court in Criminal Appeal No. 1902 of 2011, reported in (2012) 1 SCC 260

Held:

It is evident from Sub-Section (3) of Section 357 of the Code, that where the sentence imposed does not include a fine, that is, where the sentence relates to only imprisonment, the court, when passing judgment, can direct the accused to pay, by way of compensation, such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the Act for which the accused person has been so sentenced. The reason for this is obvious. Sub-section (1) of Section 357 provides that where the court imposes a sentence of fine or a sentence of which fine forms a part, the Court may direct the fine amount to be applied in the payment to any person of compensation for any loss or injury caused by the offence, when compensation is, in the opinion of the court, recoverable by such person in a Civil Court. Thus, if compensation could be paid from out of the fine, there is no need to award separate compensation. Only where the sentence does not include fine but only imprisonment and the court finds that the person who has suffered any loss or injury by reason of the Act of the accused person, requires to be compensated, it is permitted to award compensation under compensation under Section 357(3).

The difficulty arises in this case because of two circumstances. The fine levied is only ₹ 2000. The compensation required to cover the loss/injury on account of the dishonour of the cheque is ₹ 20,000. The learned Magistrate

having levied fine of ₹ 2,000, it is impermissible to levy any compensation having regard to Section 357(3) of the Code. The question is whether the fine can be increased to cover the sum of ₹ 20,000 which was the loss suffered by the complainant, so that the said amount could be paid as compensation under Section 357(1)(b) of the Code.

As noticed above, Section 138 of the Act authorizes the learned Magistrate to impose by way of fine, an amount which may extend to twice the amount of the cheque, with or without imprisonment. Section 29 of the Code deals with the sentences which Magistrates may pass. The Chief Judicial Magistrate is empowered to pass any sentence authorized by law (except sentence of death or imprisonment for life or imprisonment for a term exceeding seven years). On the other hand, sub-section (2) of Section 29 empowers a court of a Magistrate of First Class to pass a sentence of imprisonment for a term not exceeding three years or fine not exceeding ₹ 5,000 or of both. (Note : By Act No.25 of 2005, sub-section (2) of Section 29 was amended with effect from 23.06.2006 and the maximum fine that could be levied by the Magistrate of First Class, was increased to ₹ 10,000). At the relevant point of time, the maximum fine that the First Class Magistrate could impose was ₹ 5,000. Therefore, it is also not possible to increase the fine to ₹ 22,000 so that ₹ 20,000 could be awarded as compensation, from the amount recovered as fine.

It is of some interest to note, though may not be of any assistance in this case, that the difficulty caused by the ceiling imposed by Section 29(2) of the Code has been subsequently solved by insertion of Section 143 in the Act (by Amendment Act No.55 of 2002) with effect from 06.02.2003. Section 143 (1) provides that notwithstanding any thing contained in the Code, all offences under Chapter XVII of the Act should be tried by a Judicial Magistrate of the First Class or by a Metropolitan Magistrate and the provisions of Sections 262 to 265 of the Code (relating to summary trials) shall, as far as may be, apply to such trials. The proviso thereto provides that it shall be lawful for the Magistrate to pass a sentence of imprisonment for a term extending one year and an amount of fine exceeding ₹ 5,000, in case of conviction in a summary trial under that section. In view of conferment of such special power and jurisdiction upon the First Class Magistrate, the ceiling as to the amount of fine stipulated in Section 29(2) of the Code is removed. Consequently, in regard to any prosecution for offences punishable under Section 138 of the Act, a First Class Magistrate may impose a fine exceeding ₹ 5,000, the ceiling being twice the amount of the cheque.

We propose to address an aspect of the cases under Section 138 of the Act, which is not dealt with in ***Damodar S. Prabhu v. Sayed Babalal H., (2010) 5 SCC 663***. It is sometimes said that cases arising under section 138 of the Act are really civil cases masquerading as criminal cases. The avowed object of Chapter XVII of the Act is to "encourage the culture of use of cheques and enhance the credibility of the instrument". In effect, its object appears to be both punitive as also compensatory and restitutive, in regard to cheque dishonour

cases. Chapter XVII of the Act is an unique exercise which blurs the dividing line between civil and criminal jurisdictions. It provides a single forum and single proceeding, for enforcement of criminal liability (for dishonouring the cheque) and for enforcement of the civil liability (for realization of the cheque amount) thereby obviating the need for the creditor to move two different fora for relief.

The apparent intention is to ensure that not only the offender is punished, but also ensure that the complainant invariably receives the amount of the cheque by way of compensation under Section 357(1)(b) of the Code. Though a complaint under Section 138 of the Act is in regard to criminal liability for the offence of dishonouring the cheque and not for the recovery of the cheque amount, (which strictly speaking, has to be enforced by a civil suit), in practice once the criminal complaint is lodged under Section 138 of the Act, a civil suit is seldom filed to recover the amount of the cheque. This is because of the provision enabling the court to levy a fine linked to the cheque amount and the usual direction in such cases is for payment as compensation, the cheque amount, as loss incurred by the complainant on account of dishonour of cheque, under Section 357 (1)(b) of the Code and the provision for compounding the offences under Section 138 of the Act. Most of the cases (except those where liability is denied) get compounded at one stage or the other by payment of the cheque amount with or without interest. Even where the offence is not compounded, the courts tend to direct payment of compensation equal to the cheque amount (or even something more towards interest) by levying a fine commensurate with the cheque amount. A stage has reached when most of the complainants, in particular the financing institutions (particularly private financiers) view the proceedings under Section 138 of the Act, as a proceeding for the recovery of the cheque amount, the punishment of the drawer of the cheque for the offence of dishonour, becoming secondary.

Having reached that stage, if some Magistrates go by the traditional view that the criminal proceedings are for imposing punishment on the accused, either imprisonment or fine or both, and there is no need to compensate the complainant, particularly if the complainant is not a 'victim' in the real sense, but is a well-to-do financier or financing institution, difficulties and complications arise. In those cases where the discretion to direct payment of compensation is not exercised, it causes considerable difficulty to the complainant, as invariably, by the time the criminal case is decided, the limitation for filing civil cases would have expired. As the provisions of Chapter XVII of the Act strongly lean towards grant of reimbursement of the loss by way of compensation, the courts should, unless there are special circumstances, in all cases of conviction, uniformly exercise the power to levy fine upto twice the cheque amount (keeping in view the cheque amount and the simple interest thereon at 9% per annum as the reasonable quantum of loss) and direct payment of such amount as compensation. Direction to pay compensation by way of restitution in regard to the loss on account of dishonour of the cheque should be practical and realistic, which would mean not only the payment of the cheque amount but interest

thereon at a reasonable rate. Uniformity and consistency in deciding similar cases by different courts, not only increase the credibility of cheque as a negotiable instrument, but also the credibility of courts of justice.

We are conscious of the fact that proceedings under Section 138 of the Act cannot be treated as civil suits for recovery of the cheque amount with interest. We are also conscious of the fact that compensation awarded under Section 357(1)(b) is not intended to be an elaborate exercise taking note of interest etc. Our observations are necessitated due to the need to have uniformity and consistency in decision making. In same type of cheque dishonour cases, after convicting the accused, if some courts grant compensation and if some other courts do not grant compensation, the inconsistency, though perfectly acceptable in the eye of law, will give rise to certain amount of uncertainty in the minds of litigants about the functioning of courts. Citizens will not be able to arrange or regulate their affairs in a proper manner as they will not know whether they should simultaneously file a civil suit or not. The problem is aggravated having regard to the fact that in spite of Section 143(3) of the Act requiring the complaints in regard to cheque dishonour cases under Section 138 of the Act to be concluded within six months from the date of the filing of the complaint, such cases seldom reach finality before three or four years let alone six months. These cases give rise to complications where civil suits have not been filed within three years on account of the pendency of the criminal cases. While it is not the duty of criminal courts to ensure that successful complainants get the cheque amount also, it is their duty to have uniformity and consistency with other courts dealing with similar cases.

One other solution is a further amendment to the provision of Chapter XVII so that in all cases where there is a conviction, there should be a consequential levy of fine of an amount sufficient to cover the cheque amount and interest thereon at a fixed rate of 9% per annum interest, followed by award of such sum as compensation from the fine amount. This would lead to uniformity in decisions, avoid multiplicity of proceedings (one for enforcing civil liability and another for enforcing criminal liability) and achieve the object of Chapter XVII of the Act, which is to increase the credibility of the instrument. This is however a matter for the Law Commission of India to consider.

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97. CRIMINAL PROCEDURE CODE, 1973 – Sections 437 and 439 Bail – Relevant consideration in granting or refusing bail – Approach of the Courts – Discussed.

Sanjay Chandra v. Central Bureau of Investigation

Judgment dated 23.11.2011 passed by the Supreme Court in Criminal Appeal No. 2178 of 2011, reported in (2012) 1 SCC 40

Held:

In bail applications, generally, it has been laid down from the earliest times

that the object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty.

From the earliest times, it was appreciated that detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some un-convicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, 'necessity' is the operative test. In this country, it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances.

Apart from the question of prevention being the object of a refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any Court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an un-convicted person for the purpose of giving him a taste of imprisonment as a lesson.

The grant or refusal to grant bail lies within the discretion of the Court. The grant or denial is regulated, to a large extent, by the facts and circumstances of each particular case. But at the same time, right to bail is not to be denied merely because of the sentiments of the community against the accused. The primary purposes of bail in a criminal case are to relieve the accused of imprisonment, to relieve the State of the burden of keeping him, pending the trial, and at the same time, to keep the accused constructively in the custody of the Court, whether before or after conviction, to assure that he will submit to the jurisdiction of the Court and be in attendance thereon whenever his presence is required.

This Court in ***Gurcharan Singh v. State (Delhi Admn.), (1978) 1 SCC 118*** observed that two paramount considerations, while considering petition for grant of bail in non-bailable offence, apart from the seriousness of the offence, are the likelihood of the accused fleeing from justice and his tampering with the prosecution witnesses. Both of them relate to ensure of the fair trial of the case. Though, this aspect is dealt by the High Court in its impugned order, in our view, the same is not convincing.

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98. **ELECTRICITY ACT, 2003 – Sections 126 and 135**
Unauthorised use of electricity vis-à-vis theft of electricity – Distinction between – Both operate in different fields and have no common premise in law – Section 126 would be applicable to the case where there is no theft of electricity but the electricity is being consumed in violation of terms and conditions of supply leading to malpractices which may squarely fall within the expression "unauthorized use of electricity." – Whereas, Section 135 deals with an offence of theft of electricity and a penalty that can be imposed for such theft – This squarely falls within the dimension of criminal jurisprudence and *mens rea* is one of the relevant factors for finding a case of theft.

Executive Engineer, Southern Electricity Supply Company of Orissa Limited (SOUTHCO) and another v. Sri Seetaram Rice Mill
Judgment dated 20.10.2011 passed by the Supreme Court in Civil Appeal No. 8859 of 2011, reported in (2012) 2 SCC 108 (3-Judge Bench)

Held:

Upon their plain reading, the mark differences in the contents of Sections 126 and 135 of the 2003 Act are obvious. They are distinct and different provisions which operate in different fields and have no common premise in law. We have already noticed that Sections 126 and 127 of the 2003 Act read together constitute a complete code in themselves covering all relevant considerations for passing of an order of assessment in cases which do not fall under Section 135 of the 2003 Act.

Section 135 of the 2003 Act falls under Part XIV relating to 'offences and penalties' and title of the Section is 'theft of electricity'. The Section opens with the words 'whoever, dishonestly' does any or all of the acts specified under clauses (a) to (e) of Sub-section (1) of Section 135 of the 2003 Act so as to abstract or consume or use electricity shall be punishable for imprisonment for a term which may extend to three years or with fine or with both. Besides imposition of punishment as specified under these provisions or the proviso thereto, Sub-section (1A) of Section 135 of the 2003 Act provides that without prejudice to the provisions of the 2003 Act, the licensee or supplier, as the case may be, through officer of rank authorized in this behalf by the appropriate commission, may immediately disconnect the supply of electricity and even take other measures enumerated under Sub-sections (2) to (4) of the said Section. The fine which may be imposed under Section 135 of the 2003 Act is directly proportional to the number of convictions and is also dependent on the extent of load abstracted.

In contradistinction to these provisions, Section 126 of the 2003 Act would be applicable to the cases where there is no theft of electricity but the electricity is being consumed in violation of the terms and conditions of supply leading to

malpractices which may squarely fall within the expression 'unauthorized use of electricity'. This assessment/proceedings would commence with the inspection of the premises by an assessing officer and recording of a finding that such consumer is indulging in an 'authorized use of electricity'. Then the assessing officer shall provisionally assess, to the best of his judgment, the electricity charges payable by such consumer, as well as pass a provisional assessment order in terms of Section 126(2) of the 2003 Act.

The officer is also under obligation to serve a notice in terms of Section 126(3) of the 2003 Act upon any such consumer requiring him to file his objections, if any, against the provisional assessment before a final order of assessment is passed within thirty days from the date of service of such order of provisional assessment. Thereafter, any person served with the order of provisional assessment may accept such assessment and deposit the amount with the licensee within seven days of service of such provisional assessment order upon him or prefer an appeal against the resultant final order under Section 127 of the 2003 Act. The order of assessment under Section 126 and the period for which such order would be passed has to be in terms of Sub-sections (5) and (6) of Section 126 of the 2003 Act. The Explanation to Section 126 is of some significance, which we shall deal with shortly hereinafter. Section 126 of the 2003 Act falls under Chapter XII and relates to investigation and enforcement and empowers the assessing officer to pass an order of assessment.

Section 135 of the 2003 Act deals with an offence of theft of electricity and the penalty that can be imposed for such theft. This squarely falls within the dimensions of Criminal Jurisprudence and mens rea is one of the relevant factors for finding a case of theft. On the contrary, Section 126 of the 2003 Act does not speak of any criminal intendment and is primarily an action and remedy available under the civil law. It does not have features or elements which are traceable to the criminal concept of mens rea.

Thus, it would be clear that the expression 'unauthorized use of electricity' under Section 126 of the 2003 Act deals with cases of unauthorized use, even in absence of intention. These cases would certainly be different from cases where there is dishonest abstraction of electricity by any of the methods enlisted under Section 135 of the 2003 Act. A clear example would be, where a consumer has used excessive load as against the installed load simpliciter and there is violation of the terms and conditions of supply, then, the case would fall under Section 126 of the 2003 Act. On the other hand, where a consumer, by any of the means and methods as specified under Sections 135(a) to 135(e) of the 2003 Act, has abstracted energy with dishonest intention and without authorization, like providing for a direct connection bypassing the installed meter, the case would fall under Section 135 of the Act.

Therefore, there is a clear distinction between the cases that would fall under Section 126 of the 2003 Act on the one hand and Section 135 of the 2003 Act on the other. There is no commonality between them in law. They operate in

different and distinct fields. The assessing officer has been vested with the powers to pass provisional and final order of assessment in cases of unauthorized use of electricity and cases of consumption of electricity beyond contracted load will squarely fall under such power. The legislative intention is to cover the cases of malpractices and unauthorized use of electricity and then theft which is governed by the provisions of Section 135 of the 2003 Act.

Section 135 of the 2003 Act significantly uses the words 'whoever, dishonestly' does any of the listed actions so as to abstract or consume electricity would be punished in accordance with the provisions of the 2003 Act. 'Dishonesty' is a state of mind which has to be shown to exist before a person can be punished under the provisions of that Section.

The word 'dishonest' in normal parlance means 'wanting in honesty'. A person can be said to have 'dishonest intention' if in taking the property it is his intention to cause gain, by unlawful means, of the property to which the person so gaining is not legally entitled or to cause loss, by wrongful means, of property to which the person so losing is legally entitled. 'Dishonestly' is an expression which has been explained by the Courts in terms of Section 24 of the Indian Penal Code, 1860 as:

> "24. – Dishonesty. 'whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person is said to do that thing dishonestly'.

[***The Law Lexicon*** (2nd Edn. 1997) by P. Ramanatha Aiyar]

This Court in ***S. Dutt v. State of U.P., AIR 1966 SC 523*** stated that a person who does anything with the intention to cause wrongful gain to one person or wrongful loss to another is said to do that dishonestly.

Collins English Dictionary explains the word 'dishonest' as 'not honest or fair; deceiving or fraudulent'. ***Black's Law Dictionary*** (Eighth Edition) explains the expression 'dishonest act' as a fraudulent act, 'fraudulent act' being a conduct involving bad faith, dishonesty, a lack of integrity or moral turpitude.

All these explanations clearly show that dishonesty is a state of mind where a person does an act with an intent to deceive the other, acts fraudulently and with a deceptive mind, to cause wrongful loss to the other. The act has to be of the type stated under Sub-sections (1)(a) to (1)(e) of Section 135 of the 2003 Act. If these acts are committed and that state of mind, mens rea, exists, the person shall be liable to punishment and payment of penalty as contemplated under the provisions of the 2003 Act. In contradistinction to this, the intention is not the foundation for invoking powers of the competent authority and passing of an order of assessment under Section 126 of the 2003 Act.

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*99. **EVIDENCE ACT, 1872 – Sections 3 and 118**
CRIMINAL PROCEDURE CODE, 1973 – Section 161
Child witness – Evidence of witness aged 9-10 years is natural and there seems to be no element of tutoring about the incident – He gives a clear picture of the incident, which is supported by other prosecution evidence – His statement is also supported by medical evidence – His statement is believable.
Discrepancy in police statement and Court statement – Witness (aged 9-10 years) the son of deceased (and one accused) could not give the correct statement of the incident to the police because at that time his maternal grand mother *(Nani)* was not in his favour and threatened him that if he will tell this incident to any person, then she will send him to jail – Held, the witness cannot be disbelieved on the ground that he did not tell the truth to the Investigating Officer and stated it after a lapse of time in the Court.

Ramesh v. State of M.P.
Judgment dated 17.08.2011, passed by the High Court of M.P. in Cr.A. No. 613 of 2001, reported in I.L.R. (2011) M.P. 2565 (DB)

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100. **EVIDENCE ACT, 1872 – Sections 3 and 134**
INDIAN PENAL CODE, 1860 – Section 302
(i) **The quality of the evidence is material and not the quantity – The administration of justice has emphasied on the value, weight and quality of evidence rather than on the quantity or plurality of witnesses – Criminal Court can rely on solitary witness and record conviction.**
(ii) **Who is an interested witness? One who has some direct interest in having the accused somehow or the other, convicted for some other reason.**
(iii) **Minor contradictions, omissions, inconsistencies or improvements on trivial matters do not affect the prosecution case.**

Takdir Samsuddin Sheikh v. State of Gujarat & Anr.
Judgment dated 21.10.2011 passed by the Supreme Court in Criminal Appeal No. 831 of 2010, reported in AIR 2012 SC 37

Held:

It is settled legal proposition that while appreciating the evidence, the court has to take into consideration whether the contradictions/omissions/ improvements/embellishments etc. had been of such magnitude that they may materially affect the trial. Minor contradictions, inconsistencies, omissions or improvements on trivial matters without affecting the case of the prosecution should not be made the court to reject the evidence in its entirety. The court after going through the entire evidence must form an opinion about the credibility

of the witnesses and the appellate court in natural course would not be justified in reviewing the same again without justifiable reasons.

[Vide: ***Sunil Kumar Sambhudayal Gupta (Dr.) & Ors. v. State of Maharashtra, (2010) 13 SCC 657***].

While appreciating the evidence of witness considering him as the interested witness, the court must bear in mind that the term 'interested' postulates that the witness must have some direct interest in having the accused somehow or the other convicted for some other reason. (Vide: ***Kartik Malhar v. State of Bihar, (1996) 1 SCC 614*** and ***Rakesh & Anr. v. State of Madhya Pradesh, JT 2011 (10) SC 525***).

This Court has consistently held that as a general rule the Court can and may act on the testimony of a single witness provided he is wholly reliable. There is no legal impediment in convicting a person on the sole testimony of a single witness. That is the logic of Section 134 of the Evidence Act, 1872. But if there are doubts about the testimony, the court will insist on corroboration. In fact, it is not the number, the quantity, but the quality that is material. The time-honoured principle is that evidence has to be weighed and not counted. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise. The legal system has laid emphasis on value, weight and quality of evidence rather than on quantity, multiplicity or plurality of witnesses. It is, therefore, open to a competent court to fully and completely rely on a solitary witness and record conviction. Conversely, it may acquit the accused inspite of testimony of several witnesses if it is not satisfied about the quality of evidence. [See: ***Vadivelu Thevar v. The State of Madras, AIR 1957 SC 614, Sunil Kumar v. State Govt. of NCT of Delhi, AIR 2004 SC 552, Namdeo v. State of Maharashtra, (2007) 14 SCC 150*** and ***Bipin Kumar Mondal v. State of West Bengal, AIR 2010 SC 3638***]

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101. EVIDENCE ACT, 1872 – Section 6

Relevancy of facts – Hearsay evidence – Section 6 is exception to the general rule where hearsay evidence becomes admissible – It should be contemporaneous with act and there should not be an interval to allow fabrication.

Barjiya v. State of M.P.

Judgment dated 16.08.2011, passed by the High Court of M.P. in Cri. A. No. 988 of 2001, reported in ILR (2012) M.P. (DB) 182

Held :

Section 6 of the Evidence Act is an exception to the general rule where under the hearsay evidence becomes admissible. But for bringing such hearsay evidence within the provisions of this section, what is required to be established is that it must be almost contemporaneous with the acts and there should not be an interval which would allow fabrication. The statement sought to be admitted, therefore, as forming part of res gestate, must have been made contemporaneously with the acts or immediately thereafter.

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102. EVIDENCE ACT, 1872 – Section 45
CIVIL PROCEDURE CODE, 1908 – Section 151
CONSTITUTION OF INDIA – Article 20 (3)
Medical examination of defendant – Respondent filed application for divorce under Section 12 of the Hindu Marriage Act, on the ground of impotency – Held, Family Court can issue direction for medical examination of a party regarding alleged impotency – Such direction does not violate the fundamental right flowing from Article 21 of the Constitution.
Direction given by Family Court for medical examination of defendant regarding alleged impotency – Article 20 (3) has no application as said Article gives protection to accused in criminal case and deals with criminal matters – In divorce case, husband cannot be equated with an accused.

Amol Chavhan v. Smt. Jyoti Chavhan

Judgment dated 11.11.2011, passed by the High Court of M.P. in W.P. No. 7182 of 2011, reported in I.L.R. (2011) M.P. 3076

Held :

Admittedly, wife filed an application under Section 12 of the Hindu Marriage Act, 1955 against the husband mainly on the ground of alleged impotency of the husband. Thus, the basic question before the Court below is regarding the correctness of these allegations. The Court below exercised its discretionary and inherent powers and allowed the application under Section 151 of the C.P.C./45 of Evidence Act. The subsequent judgment in ***G. Venkatanarayanan v. Kurupati Laxmi Devi AIR 1985 AP 1*** shows that such a direction can be given by the Court below to ascertain the real position. In ***G. Venkatanarayanan*** (supra) the Court directed that in matrimonial proceedings the Court can appoint Commissioner doctor to examine a party and it is not excluded under Section 14 of the Evidence Act nor it deprives any personal liberty of a person under Section 21 of the Constitution. Relevant portion of this judgment in paras 6, 8 and 9 are reproduced sherein under:-

> "6. The human body is the most ancient apparatus and defied probe and vulnerability to diagnosis and treatment of ailments for long time. The human intellect generated by the human body unraveled the mysteries and complications in the human body and the process of experimentation for several years, dissection of anatomy scientific analysis and modern scientific approach contributed to discovery of diverse methods of diagnosis of deficiencies and ailments and treatment of the same. There is a gradual change over from oral diagnosis and treatment to discovery of deficiencies precisely by scientific data and effective and expeditious treatment by prescription of medicines and surgery. The transplantation of heart and other parts of

the body, scanning the body to detect deficiencies and malfunctioning, invasive diagnosis and treatment yielded dividends of minimizing wear and tear of the body and thereby improving the longevity and quality of life though the avoidance of final exit is not in sight. The close affinity between law and medicine is demonstrated by medical jurisprudence. The physician as an expert witness has become a common and welcome feature in Court ranging from opinions on nature and degree of injuries to the proximate cause of death in criminal cases assessment of insanity and several other situations. When there is a dispute between the wife and husband about the potency of either of them their evidence reflected by truth constitutes the cream of evidence and the marshalling of adventitious or extraneous circumstances afford a poor substitute. In the event of diametrically opposite and rival versions of the parties the recourse to medical test resolves the riddle and the medical opinion assumes the acceptable piece of evidence. In the present atmosphere of looking forward to progeny of artificial insemination, scientific probe by virginity tests and the knowledge of predelivery sex the depreciation of the importance of determination of potency by medical test does not bear the impress of realistic approach.

8. The examination of mental or bodily state is not excluded by Section 14 of the Evidence Act. The exposure to medical examination aided by scientific data cannot be construed as deprivation of personal liberty and breach of Article 21 of the Constitution.

9. The Order of the Court below is confirmed. C.R.P. Dismissed. No costs."

This question is no more res-integra in view of the judgment of Supreme Court in ***Lalit Kishore v. Meeru Sharma and another (2009) 9 SCC 433***. The Apex Court held by invoking Section 151 that medical examination of a party in Hindu Marriage Act proceedings is permissible. Para 2 to 7 of this judgment is reproduced as under:-

"2. In our view, the High Court as well as the Family Court was not justified in rejecting the application for medical examination of the respondent wife. It is difficult to conceive that the Family Court cannot be conferred with the jurisdiction to pass an order for medical examination in an appropriate case because when such report is received, that would facilitate the court in giving a positive conclusion on the mental condition of the respondent wife.

3. It is true that the Hindu Marriage Act, 1955 or any other law governing the field does not contain any express provision empowering the court to issue direction upon a party in a matrimonial proceeding to compel him to submit herself/himself to a medical examination. But, in our view, it does not preclude the court from passing such an order. The court is always empowered to satisfy itself as to whether a party before it suffers from mental illness or not, either for the purpose of taking evidence on the ground for which the matrimonial proceeding was started. (sic).

4. It is well settled that the primary duty of the court is to see that the truth comes out. Therefore, although the medical examination of a party is not provided in the Act, even then, the court has complete inherent power in an appropriate case under Section 151 of the Code of Civil Procedure to pass all orders for doing complete justice to the parties to the suit.

5. In ***Sharda v. Dharmpal, (2003) 4 SCC 493*** a three-Judge Bench decision of this Court has taken into consideration the power of the court to allow such an application for medical examination of a party in a matrimonial proceeding and observed as under: (SCC p. 509, para 34).

> "34. In certain cases medical examination by the experts in the field may not only be found to be leading to the truth of the matter but may also lead to removal of misunderstanding between the parties. It may bring the parties to terms."

6. In view of the aforesaid decision of this Court in ***Sharda*** (supra) and considering the fact that the report of the medical expert would only be an evidence in the proceeding, we do not find any reason why such an application for appointment of a medical expert to examine the respondent wife cannot be granted.

7. For the reasons aforesaid the impugned order as well as the order of the Family Court are set aside. The application for appointment of a medical expert for medical examination of the respondent wife filed at the instance of the appellant husband is thus allowed. The appeal is thus allowed. There will be no order as to costs."

Thus, in view of the judgment in ***Lalit Kishore*** (supra), I have no hesitation to hold that since there is an inherent power under Section 151 C.P.C. with the Family Court to direct medical examination, the Court below has not committed any error of law in passing the impugned order.

So far the issue regarding infringement of petitioner's personal or fundamental rights flowing from Article 21 is concerned, in the opinion of this Court, there is no such infringement in a proceeding of this nature, where a question raised regarding impotency of petitioner by the wife, the Court has inherent power to direct the petitioner to undergo medical test.

So far the issue regarding direction for wife's medical examination is concerned, the petitioner's contention is misconceived. A divorce petition under Section 12 is filed by the wife making specific allegations against the petitioner. There is no allegation adultery etc. against the wife and, therefore, the Court was under no obligation to allow the application of petitioner for medical examination of wife. Needless to mention that whenever Courts are required to appoint expert or require medical examination of somebody, it is always on the basis of allegations and averments made by the party to ascertain the truth of the matter. In absence of any factual foundation and pleadings by the petitioner, there was no occasion for the Court to direct such a medical examination of the wife.

Apart from this, analogy or assistance from Article 20(3) also cannot be taken. A plain reading of the language of the said article shows that it dealt with a protection with regard to criminal matters. In ***Makbool Husain v. Bombay High Court, AIR 1953 SC 325*** the Apex Court held that the article contemplates proceedings of the nature of criminal proceeding before a court of law (para 12). Thus, the analogy from Article 20 (3) is also of no help to the petitioner.

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103. EVIDENCE ACT, 1872 – Sections 61, 62, 65 and 90

Photocopy of a document – It is neither a primary evidence nor a secondary evidence – If a party wants to prove a photocopy as secondary evidence, it is required to satisfy the ingredients of Section 65 of the Evidence Act – Furthermore, it is also required to examine the person who took out the photocopy of the original – In the matter, only photocopy of document was filed, hence it is not proved.

Presumption as to thirty years old documents – The presumption is not applicable to the photocopy of a document.

Ratanlal v. Kishanlal and others

Judgment dated 21.09.2011, passed by the High Court of M.P. in S.A. No. 144 of 1998, reported in 2012 (1) MPLJ 120

Held:

The contention of the learned counsel for the appellant is that because a copy of the document of Will Ex. P/1 dated 19.03.1961 was tendered in evidence of plaintiff on 04.01.1995, therefore, 30 years were completed and hence from the date when the copy of the document Ex. P/1 was tendered in evidence the period of limitation of 30 years should be computed. The arguments so advanced by learned counsel for the appellant at the first blush appears to be quite attractive, however, on being scrutinized at length the same is found to be devoid

of any substance. Indeed, the presumption envisaged under Section 90 of the Evidence Act would be applicable to the document itself and not for its copy. Since the document itself was not tendered in the evidence, there cannot be any presumption for a copy of the document.

According to me the photocopy is neither primary nor secondary evidence and in this regard decision of this Court in ***Ramesh Verma and others etc. v. Smt. Lajesh Saxena and others etc., AIR 1998 M.P. 46*** may be seen. Apart from this even if it is stretched to the extent to bring the photocopy of Will Ex. P/1 within the sphere of secondary evidence, the plaintiff was required to satisfy the ingredients to Section 65 of the Evidence Act which speaks about secondary evidence. The plaintiff was further required to examine the person who took out the photocopy of the original. This is very much essential because, it is a matter of common knowledge that by putting another writing written on a separate paper if that paper is kept upon the original document and photocopy is taken out, the said photocopy cannot be said to be a true photocopy of the original document. Further it cannot be said that Ex. P/1 is the photocopy of the original Will because it is very easy to take out a photocopy from a document which itself was a photocopy. Therefore, if the person who took out the photocopy Ex. P/1 would have been examined, it could have been ascertained whether he took out the photocopy Ex. P/1 from the original document, or Ex. P/1 is the photocopy of the document which itself was a photocopy and further whether the document of which the photocopy Ex/ P/1 was taken was not at all tampered. Hence, I am of the view that in absence of tendering in the evidence a document of Will itself, a photocopy Ex. P/1 cannot take the place of original document and, therefore, Section 90 is not applicable.

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***104. EVIDENCE ACT, 1872 – Section 73**

Comparison of signature, handwriting etc. – Applicant filed application for sending the *Dehati Nalishi*, F.I.R. and other documents to handwriting expert as according to him, they were written by same person – These documents are very much available before the Trial Court – There is no rule of law that Court is precluded from coming to its own conclusion in such cases where it is fully familiar with language and script of document which is under scrutiny – Where the Court considers that opinion of a handwriting expert would be of assistance to it in coming to a decision, it may call for the evidence of an expert – Trial Court is not bound to refer the matter to the handwriting expert when by itself it can note dissimilarity in the handwritings – Revision allowed with direction to Trial Court to either compare the handwriting by itself and if it considers that opinion of handwriting expert is necessary, then it shall call for the evidence of an expert.

Rinku @ Yatendra v. State of M.P.

Judgment dated 04.08.2011, passed by the High Court of M.P. in Cr.Rev. No. 536 of 2011, reported in I.L.R. (2011) M.P. 3200

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105. EVIDENCE ACT, 1872 – Sections 74, 76, 77 and 79

Compromise placed on file – Admissibility of its certified copy – Judgment and decree were passed as per the terms and conditions of compromise placed on file – Compromise has merged into decree and has become part and parcel to it – Hence, it is a public document in terms of Section 73 and certified copy thereof is admissible in evidence without being proved by calling witnesses.

Jaswant Singh v. Gurdev Singh and others

Judgment dated 21.10.2011 passed by the Supreme Court in Civil Appeal No. 8879 of 2011, reported in (2012) 1 SCC 425

Held:

Question which requires to be decided is whether the compromise Ex. D3 is admissible in evidence or not? The compromise dated 27.11.1972 has become the basis of the decree dated 08.12.1972 passed by the Sub-Judge, Hoshiarpur. The perusal of Ex. D4 i.e., judgment and decree were passed as per the terms and conditions of compromise placed on file. As rightly observed by the courts below, the compromise has merged into a decree and has become part and parcel of it. To put it clear, the compromise had become a part of the decree which was passed by the court of Sub-Judge Ist Class, Hoshiarpur. Hence, it is a public document in terms of Section 74 of the Indian Evidence Act, 1872 (in short 'the Act') and certified copy of the public document prepared under Section 76 of the Act is admissible in evidence under Section 77 of the said Act. A certified copy of a public document is admissible in evidence without being proved by calling witness. Inasmuch as the decree was passed and drafted in the light of the compromise entered into between the parties, viz., the plaintiff and the defendants, the certified copy of such document which was produced before the Court, there is presumption as to the genuineness of such certified copy under Section 78 of the Act.

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106. EVIDENCE ACT, 1872 – Section 90

TRANSFER OF PROPERTY ACT, 1882 – Sections 3 and 123

Presumption – Period of 30 years has to be calculated from the date on which the document is tendered in evidence and not from the date of filing of suit.

Registration of gift – For a valid gift of immovable property, transfer must be affected by a registered instrument signed by or on behalf of donor and attested by atleast two witnesses.

Presumption – Rebuttable – Presumption under Section 90 is rebuttable – Once, the execution of the gift deed was denied by the defendants, then it was obligatory on the part of the plaintiff to prove the gift deed in accordance with the provisions of Section 68/69 of Evidence Act.

Gift – Receiver should also prove that donor was the absolute owner of the property – Donor died prior to coming into force of Hindu Succession Act, 1956, therefore she was having limited interest in the suit property and was not competent to give the suit property to plaintiffs in gift even though registered gift deed has been executed by her in their favour.

Custom – Custom is not only required to be pleaded but also to be proved by leading evidence – Where a caste is admittedly governed by Hindu law but is asserted that there exists a special custom in derogation of that law, the onus rests upon those who assert the custom to make it out.

Ramu Singh & Ors. v. Smt. Bandibai & Ors.

Judgment dated 13.09.2011, passed by the High Court of M.P. in S.A. No. 583 of 1994, reported in ILR (2012) M.P. 121

Held :

The contention of learned counsel for respondents that where a document purporting or proved to be 30 years old is produced from any custody, the Court may presume that the signature and every other part of the document which purports to be hand-writing of any particular person is that person's hand-writing and in case the document executed or attested that it was duly executed or attested by the person by whom it purports to be executed and attested. Thus, it is proved that gift deed (Ex.P/1) dated 18.02.1953 which is a 30 years old document, therefore section 90 of the Evidence Act is attracted. The suit was filed on 18.11.1980 and therefore on the date of filing of the suit 30 years were not completed. But, according to me, the date of filing of the suit is not the determining date to compute period of 30 years and indeed this period should be computed when the document was tendered in the evidence. On bare perusal of the gift deed Ex. P/1 date 18.2.1953 this Court finds that same was tendered in the evidence of plaintiff Bandibai on 18.02.1983 when she was examined as PW1 and therefore on the date when this document was tendered 30 years were already completed. In this regard Law of Evidence by Sarkar 17th Edition Page 1653 may be seen. But, section 90 of the Evidence Act speaks about presumptive value of 30 years old document and nothing more. This presumption is a rebuttal presumption and once the execution of the document of give is denied by the defendants specifically in their written statement by taking a firm stand that it was never executed. The revenue record which has been filed by defendants it raises a doubt about the execution of this document. Hence it was incumbent upon the plaintiffs not only to prove the execution of the document of gift but the attestation was also required to be proved.

Under Section 123 of Transfer of Property Act, 1882 (in short "T.P. Act") which is in respect to the gift, it is clear that for a valid gift of immovable property, the transfer must be affected by a registered instrument signed by or on behalf of donor and attested by at-least two witnesses. The term "attested" is also interpreted in Section 3 of the T.P. Act.

Thus according to me, the attestation of the gift deed was required to be proved according to the definition of the word 'Attested' in Section 3 of the T.P. Act. At this juncture, Section 68 of the Evidence Act is required to be taken into account which speaks about the proof of execution of a document required by law to be attested and as per this section if a document is required by law to be attested, it shall not be used as evidence until one attesting witness atleast has been called for the purpose of proving its execution. Needless to say that a gift deed is required to be attested atleast by two witnesses and therefore attestation is required to be proved by examining atleast one attesting witness. It is not the case of the plaintiffs that attesting witnesses are not alive. Even if they are not alive, the legislature has taken note of this situation and has enacted Section 69 in the Evidence act which pertains to proof where not attesting witness is found. Thus, I am of the view that since plaintiffs are basing there case and title on the basis of the registered gift deed (Ex. P/1) dated 18.02.1953, they were duty bound to examine at-least one attesting witness in order to prove the attestation of the gift deed and the plaintiffs cannot take aid of Section 90 of the Evidence Act.

Even if the presumption under Section 90 of the Evidence Act is drawn in favour of the plaintiffs, until and unless it is proved by the plaintiffs that Chamelibai who gifted the suit property to them on 18.02.1953 (Ex.P/1) was the absolute owner of the suit property on that date it cannot be said that plaintiffs acquired a valid title in them by the said gift deed. Hence, it is to be seen whether Chamelibai after the death of her husband would become the absolute owner of the suit property or not. Admittedly the property was of her husband Ramlal who died somewhere in the year 1952 and after his death Chamelibai was having only limited interest of maintenance in the suit property under the Act of 1937. Had she been alive on coming into force of the Act of 1956, certainly she would have become absolute owner of the suit property under Section 14(1) of the Act of 1956. But, since she died much prior to coming into force of the Act of 1956 and was having only limited interest in the suit property, she was not competent to give the suit property to plaintiffs in gift even though registered gift deed has been executed by her in their favour.

The substantial question of law is thus answered that attestation and validity of gift deed (Ex. P/1) is not proved because the attesting witnesses have not been examined and Section 90 of he Evidence Act is having only presumptive value and nothing more.

On going through the judgment of learned two Courts below and particularly the impugned judgment passed by learned First Appellate Court para 6 this Court finds that a finding has been arrived at by the said Court that

on account of the death of Ramlal who was of Gond community, this entire right in the suit property devolved upon his widow Chamelibai and this is a valid custom in the Gond community and therefore Chameliabi has rightly gifted the suit property to plaintiffs by registered gift deed (Ex.P/1). However, on bare perusal of the plaint nowhere it is gathered that any such custom has been pleaded by the plaintiffs and it has also not been proved by plaintiff (PW1) in her testimony. The plain and simple case of the plaintiffs is that by virtue of gift deed dated 18.02.1953 executed by their mother Chamelibai, they became the owner of he suit property. According to me, if a particular valid custom is prevailing in Gond community, it should have not only been pleaded but it was also required to be proved. In absence of any such pleading no conclusion can be arrived at that a particular custom is prevailing in that community.

In the present case, the factual position which has been carved out from the evidence of plaintiff No. 1 herself is that somewhere in the year 1952 the husband of Chamelibai namely Ramlal had died and three years thereafter i.e. in the year 1955, Chamelibai also died. Thus, admittedly Ramlal and his widow died prior to coming into force of Act of 1956. I do not find any merits in the contention of learned counsel for respondents that the burden of proof was on the defendants to prove that a particular custom is prevailing in Gond community that on account of death of a husband the entire property would not devolve in his widow. According to me, if a particular party is pleading a particular custom in that situation that party is required to prove that custom. In the present case neither any such custom has been pleaded by the plaintiffs not has it been proved by them. According to me, in absence of proving any custom to the contrary that provisions of Hindu law are not applicable in the God community, it would be deemed that Hindu law is applicable even on Gond community. The Division Bench of this Court in ***Samlal Shrikisan Mahesari v. Mt. Jiyabai w/o. Shrikisan and others, AIR (31) 1944 Nagpur 62*** has laid down the law that where a caste is admittedly governed by Hindu law but it is asserted that there exists a special custom in derogation of that law the onus rests upon those who assert the custom to make it out. The same view was taken by learned Single Bench of this Court in ***Sukhsen and another v. Shravan Kumar, 1972 MPLJ 95***, wherein, it has been held that although Gond community is not Hindu, but presumption is that they are governed by Hindu law unless the contrary is shown. The Single Bench of this Court in S.A. No. 464/1979 (***Rupatiya Bai v. Sona Bai and another decided on 08.02.1985***) has also laid down the same principle of law and I apt to quote para 4 of the said judgment:-

> "4. It cannot be counted, in view of the decision of this Court in ***Sukhsen v. Shravan Kumar, 1972 M.P.L.J. 95,*** that there is a presumption that Gonds are governed by Hindu law, unless the contrary is shown. Accordingly, it was for the defendant to prove the contrary, which has not been done and the presumption of applicability of Hindu law to the parties is clearly available. The contrary conclusion reached by the first appellate Court was, therefore, clearly erroneous."

In another decision of learned Single Bench in ***Kailash Singh v. Mewalal Singh Gond, AIR 2002 Madhya Pradesh 112*** it has been held that there should be a proper pleading and proof of such custom and because there is no pleading in that regard, therefore, this Court held that the provision of Hindu law would be applicable. Above all, the Supreme Court also in ***Harihar Prasad Singhand others v. Balmiki Prasad Singh and others, AIR 1975 SC 733*** has held that in the first instance it is for the plaintiffs to prove the existence of a particular custom and if they failed to prove, it, they cannot succeed. Thus, in the present case it was for the plaintiffs to plead and proved the custom. Even it the custom which the defendant have pleaded by amending their written statement, has not been proved by them, it would not strengthen the case of the plaintiffs because first of all it was for the plaintiffs to prove the custom and then only the burden would shift on the defendants to plead the custom which they pleaded. Since plaintiffs have failed to prove the custom prevailing in Gond community, the provision of Hindu Law would be applicable.

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***107. EVIDENCE ACT, 1872 – Section 119**
CRIMINAL PROCEDURE CODE, 1973 – Section 282
Recording of evidence of deaf and dumb witness, mode of – If the evidence is recorded with the help of interpreter, an oath has to be administered to him and the sign and gesture used by the witness for his statement have to be taken on record – In this case neither oath was administered to the interpreter of deaf and dumb witness nor the sign and gesture used by the witness for his statement were taken on record – Hence the evidence is not admissible in the eye of law [*Vinod v. State of M.P. 2010 (1) JLJ 346* relied on]

Ramkumar v. State of M.P.
Judgment dated 01.12.2011, passed by the High Court of M.P. in Criminal Appeal No. 153 of 2004, reported in 2012 (1) MPHT 244

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***108. EXCISE ACT, 1915 (M.P.) – Section 34 (2)**
Possession of illicit liquor – Prosecution has to prove that accused was in possession of illegal liquor exceeding 50 bulk liters – Seized liquor was not measured either on the spot or during investigation – containers in which illicit liquor was kept were not produced before Court – Prosecution failed to prove that seized liquor was exceeding the prohibited limit – Revision allowed.

Mukesh v. State of M.P.
Judgment dated 09.10.2011, passed by the High Court of M.P. in Cri. Rev. No. 850 of 2006, reported in ILR (2012) M.P. 264

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109. GUARDIANS AND WARDS ACT, 1890 – Section 9 (i)
CIVIL PROCEDURE CODE, 1908 – Order 7 Rule 11
Expession "Where the minor ordinarily resides", scope of – The question vested in the expression is a mixed question of fact and law and cannot be answered without holding enquiry into the factual aspects of controversy – As the applicability of provision of Order 7 Rule 11 of CPC is confined only to the averments made in petition, the mixed question regarding jurisdiction cannot be decided by way of an application under this provision.

Adesh Gupta and others v. Sadhna Gupta

Judgment dated 05.01.2012, passed by the High Court of M.P. in W.P. No. 12742 of 2011, reported in 2012 (1) MPLJ 406

Held:

Section 9 (1) of the Act provides that application with regard to guardianship of the person of the minor shall be made to the District Court having jurisdiction in the place where the minor "ordinarily resides". The residence is a mere physical fact. It means no more than personal presence in a locality, regarded apart from any of the circumstances attending it. When this physical fact is accompanied by the required state of mind, neither its character nor its duration is in any way material See : ***Kedar Pandey v. Narain Bikram Sah, AIR 1966 SC 160.*** In ***Yogesh Bhardwaj v. State of U.P. and others, (1990) 3 SCC 355,*** it has been held that residence is a physical fact and no volition is needed to establish it. Any period of physical presence, however short, may constitute residence provided it is not transitory, fleeting or casual. It has further been held that residence must be voluntary.

It is well settled in law that while dealing with the application under Order 7, Rule 11 of the Civil Procedure Code, only the averments made in the plaint alone are to be seen See : ***Saleem Bhai and others v. State of Maharashtra and others, 2003 (2) MPLJ (S.C.) 320 = (2003) 1 SCC 557.*** In the case of ***Ruchi Majoo v. Sanjee Majoo, 2011 (3) MPLJ (SC) 642 = (2011) 6 SCC 479,*** the Supreme Court while considering section 9(1) of the Act has held that solitary test for determining the jurisdiction of the Court under section 9 is ordinary residence of the minor. The expression used in section 9(1) of the Act is "where the minor ordinarily resides". Whether the minor is ordinarily residing at a given place is primarily a question of intention which in turn is a question of fact. It may at best be mixed question of law and fact. It has further been held that unless jurisdictional facts are admitted, it can never be pure question of law capable of being answered without an enquiry into the factual aspects of the controversy.

Thus, from the aforesaid enunciation of law by the Supreme Court, it is apparent that the question whether the minor is ordinarily residing at a given place is primarily a question of fact which cannot be decided without an enquiry into the factual aspects. Besides that it is relevant to mention here that residence by volition or by compulsion within territorial jurisdiction of the Court cannot be

treated as place of ordinary residence. Similarly, the words "ordinarily resides" are not identical and cannot have the same meaning as residence at the time of filing of the application for grant of custody. The purpose of using the expressions "where the minor ordinarily resides" is probably to avoid the mischief that minor may be forcibly removed to a distant place, but still the application for minor's custody could be filed within the jurisdiction of the Court from whose jurisdiction he had been removed or in other words where the minor would have continued to remain but for his removal. Similar view has been taken in ***Konduparthi Venkateshwarlu and others v. Ramavarapu Viroja Nandan and others, AIR 1989 Orissa 151.*** If the averments made by the respondent in paragraphs 4, 11, 15 and 16 of the petition filed by her are seen, it is apparent, that the children have been removed from Chhattarpur without her consent. The jurisdictional facts are not admitted and the petition, contains the averment that the Court at Chhattarpur has the territorial jurisdiction to try the petition. The question whether the Court at Chhattarpur has territorial jurisdiction to try the petition is a mixed question of law and fact, as the same is dependent on the question whether the minors are residing within the territorial jurisdiction of the Court. The aforesaid question cannot be determined without holding enquiry into the factual aspects of the controversy. The scope of scrutiny at the stage of consideration of an application under Order 7, Rule 11 of Civil Procedure Code is confined only to the averments made in the petition. Thus, the question whether the Court has territorial jurisdiction being mixed question of law and fact cannot be decided by way of an application under Order 7, Rule 11 of Civil Procedure Code.

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110. INDIAN PENAL CODE, 1860 – Section 84 Chapter IV and Section 302

(i) Act of a person of unsound mind – The onus would be on the accused to prove by expert evidence that he is suffering from such mental disorder or mental condition that he could not be expected to be aware of the consequence of his act.

(ii) Epileptic psychosis – Accused killing deceased while in a state of insanity induced by epileptic fit – Accused was entitled to acquittal under Section 84 IPC, though to be detained in safe custody till he was cured.

State of Rajasthan v. Shera Ram alias Vishnu Dutta

Judgment dated 01.12.2011 passed by the Supreme Court in Criminal Appeal No. 1502 of 2005, reported in (2012) 1 SCC 602

Held:

Section 84 states that:

> *"84. Act of a person of unsound mind.* – Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that what he is doing is either wrong or contrary to law."

It is obvious from a bare reading of this provision that what may be generally an offence would not be so if the ingredients of Section 84 IPC are satisfied. It is an exception to the general rule. Thus, a person who is proved to have committed an offence, would not be deemed guilty, if he falls in any of the general exceptions stated under this Chapter.

To commit a criminal offence, mens rea is generally taken to be an essential element of crime. It is said ***furiosus nulla voluntus est.*** In other words, a person who is suffering from a mental disorder cannot be said to have committed a crime as he does not know what he is doing. For committing a crime, the intention and act both are taken to be the constituents of the crime, ***actus non facit reum nisi mens sit rea.*** Every normal and sane human being is expected to possess some degree of reason to be responsible for his/her conduct and acts unless contrary is proved. But a person of unsound mind or a person suffering from mental disorder cannot be said to possess this basic norm of human behavior.

From the above-stated principles, it is clear that a person alleged to be suffering from any mental disorder cannot be exempted from criminal liability ipso facto. The onus would be on the accused to prove by expert evidence that he is suffering from such a mental disorder or mental condition that he could not be expected to be aware of the consequences of his act. Once, a person is found to be suffering from mental disorder or mental deficiency, which takes within its ambit hallucinations, dementia, loss of memory and self-control, at all relevant times by way of appropriate documentary and oral evidence, the person concerned would be entitled to seek resort to the general exceptions from criminal liability.

Epileptic Psychosis is a progressing disease and its effects have appropriately been described in the text book of ***Medical Jurisprudence and Toxicology by Modi,*** 24th Ed. 2011 where it states as follows:

> "***Epileptic Psychosis.*** – Epilepsy usually occurs from early infancy, though it may occur at any period of life. Individuals, who have had epileptic fits for years, do not necessarily show any mental aberration, but quite a few of them suffer from mental deterioration. Religiousity is a marked feature in the commencement, but the feeling is only superficial. Such patients are peevish, impulsive and suspicious, and are easily provoked to anger on the slightest cause.
>
> The disease is generally characterized by short transitory fits of uncontrollable mania followed by complete recovery. The attacks, however, become more frequent. There is a general impairment of the mental faculties, with loss of memory and self - control. At the same time, hallucinations of sight and hearing occur and are followed by delusions of a persecuting nature. They are deprived of all moral sensibility, are given to the lowest forms of vice and sexual

excesses, and are sometimes dangerous to themselves as well as to others. In many long standing cases, there is a progressive dementia or mental deficiency.

True epileptic psychosis is that which is associated with epileptic fits. This may occur before or after the fits, or may replace them, and is known as pre- epileptic, post-epileptic and masked or psychic phases (psychomotor epilepsy).

Post-Epileptic Mental Ill-health.– In this condition, stupor following the epileptic fits is replaced by automatic acts of which the patient has no recollections. The patient is confused, fails to recognize his own relatives, and wanders aimlessly.

He is terrified by visual and auditory hallucinations of a religious character and delusions of persecution, and consequently, may commit crimes of a horrible nature, such as thefts, incendiarism, sexual assaults and brutal murders. The patient never attempts to conceal them at the time of perpetration but on regaining consciousness may try to conceal them out of fear."

Similar features of Epilepsy have been recorded in the ***HWV Cox's Medical Jurisprudence and Toxicology*** (7th Edn) by PC Dikshit.

Reverting to the facts of the present case, it may be noted that no witness of the prosecution including the Investigating Officer stated anything with regard to the mental condition of the respondent. However, the respondent not only in his statement under Section 313 Cr.P.C. took up the defence of mental disorder seeking benefit of Section 84 IPC but even led evidence, both documentary as well as oral, in support of his claim.

The respondent examined Dr. Vimal Kumar Razdan, DW-2, who deposed that he had examined the respondent and had given him treatment. He, also, produced the examination report in regard to the treatment of the respondent, Ext.D-5, which was prepared in his clinic. According to the statement of this doctor and the prescription, the respondent was suffering from Epilepsy and while describing post epileptic insanity, this witness stated that after the epileptic attack, a patient behaves like an insane person and he is unable to recognise even the known persons and relatives. During this time; there is a memory loss and the patient can commit any offence.

In the prescription, Ext. D-3; issued by Dr. Ashok Pangadiya, it was stated that the patient was suffering from the fits disease and symptoms of behavioral abnormality. Two types of medication on the basis of diagnosis of epileptic disease and other one for insanity were prescribed to the respondent who continued to take these medicines, post epileptic insanity. Another witness who was produced by the defence was DW-1, Bhanwar Lal, the brother of the respondent. According to this witness, the respondent was suffering from mental

disorder since 1993. He stated that when he gets the fits of insanity, he can fight with anybody, hit anybody and even throw articles lying around him. At the initial stage, Dr. Devraj Purohit had treated him. Then Dr. V.K. Razdan treated him and thereafter, in Jaipur, Dr. Ashok Pagadiya/Pandharia also treated him. Even when he was in jail, he was under treatment. He produced the prescription slips i.e. Exts. D3 and D4. This witness has also stated that on the date of occurrence at about 6.00 – 6.30 a.m., Shera Ram/respondent was not feeling well and, in fact, his condition was not good. Even at home he had broken the electricity meter and the bulbs. When the people at home including the witness tried to stop him, he had beaten DW-1 on his arm and after hitting him on the face he had run away.

This oral and documentary evidence clearly shows that the respondent was suffering from epileptic attacks just prior to the incident. Immediately prior to the occurrence, he had behaved violently and had caused injuries to his own family members. After committing the crime, he was arrested by the Police and even thereafter, he was treated for insanity, while in jail.

Thus, there is evidence to show continuous mental sickness of the respondent. He not only caused death of the deceased but also on the very same day injured and caused hurt to his family members including DW-1. His statement made under Section 313 Cr.PC is fully corroborated by oral and documentary evidence of DW-2 and Ext. D-3 and D-4. Though, the High Court has not discussed this evidence in great detail, but this being an admissible piece of evidence, can always be relied upon to substantiate the conclusion and findings recorded by the High Court.

In other words, the High Court on the basis of the documentary and oral evidence has taken a view which was a possible and cannot be termed as perverse or being supported by no evidence. The finding of the High Court, being in consonance with the well settled principles of criminal jurisprudence, does not call for any interference. More so, the learned counsel appearing for the State has not brought to our notice any evidence, documentary or otherwise, which could persuade us to take a contrary view i.e. other than the view taken by the High Court.

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111. INDIAN PENAL CODE, 1860 – Sections 96 to 106, 300 Exception 4 and Section 304 Part II

(i) Right of private defence – Exercise of – Even in absence of physical injury, such right may be upheld provided there is a reasonable apprehension to life or a grievous hurt to a person – Position reiterated.

(ii) Right of private defence – Proof of – Onus of proof on the accused as to exercise of right of private defence is not as heavy as on the prosecution to prove guilt of the accused and it is sufficient for him to prove the defence on the touchstone of preponderance of probabilities.

(iii) Culpable homicide not amounting to murder – Accused had inflicted one stab wound on the deceased with a penknife after an altercation between two sides – The blow landed on the chest, a vital part of the body of the deceased – The circumstances clearly indicated the accused stabbed the deceased without premeditation on a sudden fight in the heat of passion, though the accused knew that the act by which the death was caused was likely to cause death, but he had no intention to cause death – His case falls under Exception 4 to Section 300 IPC

Ranjitham v. Basavraj and others

Judgment dated 28.11.2011 passed by the Supreme Court in Criminal Appeal No. 1453 of 2005, reported in (2012) 1 SCC 414

Held:

In several decisions, this court has considered the nature of this right. Right of private defence cannot be weighed in a golden scale and even in absence of physical injury, in a given case, such a right may be upheld by the court provided there is reasonable apprehension to life or reasonable apprehension of a grievous hurt to a person. It is well settled that the onus of proof on the accused as to exercise of right of private defence is not as heavy as on the prosecution to prove guilt of the accused and it is sufficient for him to prove the defence on the touchstone of preponderance of probabilities (See *Sat Narain v. State of Haryana, (2009) 17 SCC 141*).

In *V. Subramani v. State of T.N., (2005) 10 SCC 358,* this Court examined the nature of this right. This court held that whether a person legitimately acted in exercise of his right of private defence is a question of fact to be determined on the facts and circumstances of each case. In a given case it is open to the Court to consider such a plea even if the accused has not taken it, but the surrounding circumstances establish that it was available to him. The burden is on the accused to establish his plea. The burden is discharged by showing preponderance of probabilities in favour of that plea. The injuries received by the accused, the imminence of threat to his safety, the injuries caused by the accused and whether the accused had time to have recourse to public authorities are all relevant factors to be considered.

What needs to be decided now is what offence has A2 committed. A2 has inflicted one stab wound on the deceased with a penknife after an altercation between the two sides. The blow landed on the chest, a vital part of the body of the deceased. The question is whether A2 is guilty of murder or culpable homicide not amounting to murder.

In *Hari Ram v. State of Haryana, (1983) 1 SCC 193,* there was an altercation between the appellant and the deceased. The appellant had remarked that the deceased must be beaten to make him behave. He thereafter ran inside the house, brought out a jelly and thrust it into the chest of the deceased. This Court observed that in the heat of altercation between the deceased on the one

hand, and the appellant and his comrades on the other, the appellant seized a jelly and thrust it into the chest of the deceased. This was preceded by his remark that the deceased must be beaten to make him behave. Therefore, it does not appear that there was any intention to kill the deceased. This Court, therefore, set aside the conviction of the appellant under Section 302 of the IPC and instead convicted him under Section 304 Part II of the IPC and sentenced him to suffer rigorous imprisonment for five years.

In ***Jagtar Singh v. State of Punjab, (1983) 2 SCC 342,*** in a trivial quarrel the appellant wielded a weapon like a knife and landed a blow on the chest of the deceased. This Court observed that the quarrel had taken place on the spur of the moment. There was exchange of abuses. At that time, the appellant gave a blow with a knife which landed on the chest of the deceased and therefore, it was permissible to draw an inference that the appellant could be imputed with a knowledge that he was likely to cause an injury which was likely to cause death but since there was no premeditation, no intention could be imputed to him to cause death. This Court, therefore, convicted the appellant under Section 304 Part II of the IPC instead of Section 302 of the IPC and sentenced him to suffer rigorous imprisonment for five years.

In ***Hem Raj v. State (Delhi Admn.), 1990 Supp SCC 291,*** the appellant and the deceased had suddenly grappled with each other and the entire occurrence was over within a minute. During the course of the sudden quarrel, the appellant dealt a single stab which unfortunately landed on the chest of the deceased resulting in his death. This Court observed that as the totality of the established facts and circumstances show that the occurrence had happened most unexpectedly, in a sudden quarrel and without premeditation during the course of which the appellant caused a solitary injury to the deceased, he could not be imputed with the intention to cause death of the deceased, though knowledge that he was likely to cause an injury which is likely to cause death could be imputed to him. This Court, therefore, set aside the conviction under Section 302 of the IPC and convicted the appellant under Section 304 Part II of the IPC and sentenced him to undergo rigorous imprisonment for seven years.

In *V. Subramani* (supra) there was some dispute over grazing of buffaloes. Thereafter, there was altercation between the accused and the deceased. The accused dealt a single blow with a wooden yoke on the deceased. Altering the conviction from Section 302 of the IPC to Section 304 Part II of the IPC, this Court clarified that it cannot be laid down as a rule of universal application that whenever death occurs on account of a single blow, Section 302 of the IPC is ruled out. The fact situation has to be considered in each case. Thus, the part of the body on which the blow was dealt, the nature of the injury and the type of the weapon used will not always be determinative as to whether an accused is guilty of murder or culpable homicide not amounting to murder. The events which precede the incident will also have a bearing on the issue whether the act by which death was caused was done with an intention of causing death or

knowledge that it is likely to cause death but without intention to cause death. It is the totality of circumstances which will decide the nature of the offence.

The deceased received a single stab injury. PW-15 Dr. Subramani, who did the postmortem has described the said injury as a stab injury seen at the left chest, that is, junction of second rib bone and chest bone. On internal examination, he found that the injury had gone inside the left chest through the lungs into the heart. Undoubtedly, the injury was serious and on a vital part of the body, but it was caused by a penknife, which was in key bunch of the accused. A key bunch is carried by a person in routine course and a penknife is used for odd jobs, which a person may be required to do during the course of the day. It is not possible for us to say, in the facts of this case, that A2 had carried the penknife which was in his key bunch to stab the deceased.

The background of this case also needs to be kept in mind. This case appears to have political overtones. The accused and the deceased belonged to different political parties. Admittedly, there was enmity between the two sides. There had been an altercation between the deceased and PW-1 on the one hand and the accused on the other hand. PW-1 had, at the instance of the deceased, asked for donation from A2 and A2 is stated to have made some disparaging remarks. The situation in the village was tense. The accused had then gone to the rice mill of the deceased. There again, there was an altercation between the two sides. The circumstances on record clearly indicate that A2 stabbed the deceased without premeditation, in a sudden fight in the heat of passion. His case falls in Explanation 4 to Section 300 of the IPC. A2 knew that the act by which the death was caused was likely to cause death but it appears to us that he had no intention to cause death.

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112. INDIAN PENAL CODE, 1860 – Sections 279, 337 and 304-A PROBATION OF OFFENDERS ACT, 1958 – Section 4

(i) Offence relating to motor accident – Quantum of sentence – Consideration therefor – Held, while considering the quantum of sentence to be imposed for the offence of causing death or injury by rash and negligent driving of automobiles, one of the prime considerations should be deterrence – The person driving motor vehicles cannot and should not take a chance thinking that even if he is convicted, he would be dealt with leniently by the Court.

(ii) Offence relating to motor accident – Extension of probation – Court cannot treat the nature of the offence under Section 304-A as attracting benevolent provisions of Section 4 of the Probation of Offenders Act – The Apex Court endorsed the view expressed in *Dalbir Singh v. State of Haryana, (2000) 5 SCC 82.*

State of Punjab v. Balwinder Singh and others

Judgment dated 06.01.2012 passed by the Supreme Court in Criminal Appeal No. 47 of 2012, reported in (2012) 2 SCC 182

Held:

Section 304-A was inserted in the Penal Code by Penal Code (Amendment) Act 27 of 1870 to cover those cases wherein a person causes the death of another by such acts as are rash or negligent but thee is no intention to cause death and no knowledge that the act will cause death. The case should not be covered by Sections 299 and 300 only then it will come under this section. The section provides punishment of either description for a term which may extend to two years or fine or both in case of homicide by rash or negligent act. To bring a case of homicide under Section 304-A IPC, the following conditions must exist, namely,

(1) there must be death of the person in question;
(2) the accused must have caused such death; and
(3) that such act of the accused was rash or negligent and that it did not amount to culpable homicide.

Even a decade ago, considering the galloping trend in road accidents in India ad its devastating consequences, this Court in ***Dalbir Singh v. State of Haryana, (2000) 5 SCC 82*** held that, while considering the quantum of sentence to be imposed for the offence of causing death by rash or negligent driving of automobiles, one of the prime considerations should be deterrence. A professional driver should not take a chance thinking that even if he is convicted, he would be dealt with leniently by the Court.

It is settled law that sentencing must have a policy of correction. If anyone has to become a good driver, must have a better training in traffic laws and moral responsibility with special reference to the potential injury to human life and limb. Considering the increased number of road accidents, this Court, on several occasions, has reminded the criminal courts dealing with the offences relatigto motor accidents that they cannot treat the nature of the offence under Section 304-A IPC as attracting the benevolent provisions of Section 4 of the Probation of Offenders Act, 1958. We fully endorse the view expressed by this Court in ***Dalbir Singh*** (supra).

While considering the quantum of sentence to be imposed for the offence of causing death or injury by rash and negligent driving of automobiles, one of the prime considerations should be deterrence. The persons driving motor vehicles cannot and should not take a chance thinking that even if he is convicted he would be dealt with leniently by the Court.

For lessening the high rate of motor accidents due to careless and callous driving of vehicles, the Courts are expected to consider all the relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence if the prosecution is able to establish the guilt beyond reasonable doubt.

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113. INDIAN PENAL CODE, 1860 – Section 302

Death sentence – Rarest of rare case, consideration of – Appellant accused, a jobless person aged about 28 years caused death of three persons without any preplan after quarrel relating to land dispute – No weapon much dangerous was used for commission of the offence – It cannot be said that appellant accused would be a menace to the society – Held, the case does not fall under the category of the rarest of rare case where extreme penalty of death is called for.

Sham alias Kishor Bhaskarrao Matkari v. the State of Maharashtra Judgment dated 30.09.2011 passed by the Supreme Court in Criminal Appeal No. 868 of 2006, reported in AIR 2012 SC 301

Held:

Since this Court, in series of decisions starting from ***Bachan Singh v. State of Punjab, AIR 1980 SC 898*** indicated various aggravating and mitigating circumstances, there is no need to refer to all those decisions. Though the appellant caused death of three persons, he had no pre-plan to done away with the family of his brother and the quarrel started due to the land dispute and, in fact, on the fateful night, he was sleeping with the other victims in the same house. In those circumstances and other materials placed clearly show that he has no pre-plan or pre-determination to eliminate the family of his brother. At the time of the incident, i.e., in the year 2001, the accused was 28 years old and was jobless. He is in jail since 30.06.2001 and in the death cell since the date of the judgment of the High Court that is on 03.05.2006. It is clear that he remained in jail for more than 10 years and more than five years in death cell. The materials placed on record show that the antecedents of the accused-appellant are unblemished as nothing is shown by the prosecution that prior to this incident, he was indulged in criminal activities. The appellant had no bad antecedents. We have already concluded that the murders were not pre-planned or pre-meditated. No weapon much less dangerous was used in commission of offence. As pointed out earlier, only on account of property dispute, the appellant went to the extent of committing murders. This is clear from the prosecution evidence and the conclusion of the trial Court. As rightly pointed out by the counsel for the appellant, there is no reason to disbelieve that the appellant cannot be reformed or rehabilitated and that he is likely to continue criminal acts of violence as would constitute a continued threat to the society. Considering the facts and circumstances, it cannot be said that the appellant-accused would be a menace to the society. We are satisfied that the reasonings assigned by the High Court for awarding extreme penalty of death sentence are not acceptable. It is relevant to point out that the trial Court which had the opportunity of noting demeanour of all the witnesses and the accused thought it fit that life sentence would be appropriate. However, the High Court while enhancing the same from life to death, in our view, has not assigned adequate and acceptable reasons. In our

opinion, it is not a rarest of rare case where extreme penalty of death is called for instead sentence of imprisonment for life as ordered by the trial Court would be appropriate.

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114. INDIAN PENAL CODE, 1860 – Sections 364-A and 363

(i) To bring home offence under Section 364-A IPC, following ingredients are required to be proved:

(a) that the accused kidnapped or abducted the person;

(b) kept him under detention after such kidnapping or abduction; and

(c) that the kidnapping or abduction is for ransom.

(ii) For offence u/s 364-A IPC, no leniency should be shown in awarding sentence – On the other hand, it should be dealt with in the harshest possible manner irrespective of the fact that kidnapping had not resulted in the death of the victim.

Akram Khan v. State of West Bengal

Judgment dated 05.12.2011 passed by the Supreme Court in Criminal Appeal No. 2248 of 2011, reported in AIR 2012 SC 308

Held:

In *Malleshi v. State of Karnataka, AIR 2004 SC 4865,* while considering the ingredients of Section 364A IPC, this Court held as under:

> "12. To attract the provisions of Section 364-A what is required to be proved is: (1) that the accused kidnapped or abducted the person; (2) kept him under detention after such kidnapping and abduction; and (3) that the kidnapping or abduction was for ransom....."

To pay a ransom, as stated in the above referred Section, in the ordinary sense means to pay the price or demand for ransom. This would show that the demand has to be communicated.

It is relevant to point out that Section 364A had been introduced in the IPC by virtue of Amendment Act 42 of 1993.

The statement of objects and reasons are as follows: –

> "*Statement of Objects and Reasons*.– Kidnappings by terrorists for ransom, for creating panic amongst the people and for securing release of arrested associates and cadres have assumed serious dimensions. The existing provisions of law have proved to be inadequate as deterrence. The Law Commission in its 42nd Report has also recommended a specific provision to deal with this menace. It [was] necessary to amend the Indian Penal Code to provide for

deterrent punishment to persons committing such acts and to make consequential amendments to the Code of Criminal Procedure, 1973."

It is clear from the above the concern of Parliament in dealing with cases relating to kidnapping for ransom, a crime which called for a deterrent punishment, irrespective of the fact that kidnapping had not resulted in death of the victim. Considering the alarming rise in kidnapping young children for ransom, the legislature in its wisdom provided for stringent sentence. Therefore, we are of the view that in those cases whoever kidnaps or abducts young children for ransom, no leniency be shown in awarding sentence, on the other hand, it must be dealt with in the harshest possible manner and an obligation rests on the courts as well.

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115. INDIAN PENAL CODE, 1860 – Section 497

Offence of adultery – A woman cannot be prosecuted for adultery under Section 497 of IPC.

W. Kalyani v. State through Inspector of Police and another

Judgment dated 01.12.2011 passed by the Supreme Court in Criminal Appeal No. 2232 of 2011, reported in (2012) 1 SCC 358

Held:

Section 497 deals with the offence of adultery and provides as follows:

> "Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor."

The provision is currently under criticism from certain quarters for showing a strong gender bias for it makes the position of a married woman almost as a property of her husband. But in terms of the law as it stands, it is evident from a plain reading of the Section that only a man can be proceeded against and punished for the offence of adultery. Indeed, the Section provides expressly that the wife cannot be punished even as an abettor. Thus, the mere fact that the appellant is a woman makes her completely immune to the charge of adultery and she cannot be proceeded against for that offence.

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116. INTERPRETATION OF STATUTES

Princible "Statute must be read as a whole" – Applicability of – The principle is equally applicable to the different parts of the same section – The section must be construed 'as a whole' whether or not one of the parts is a saving clause or a proviso – The sub-section must be read as part of an integral whole as being inter-dependent, an attempt should be made in construing them to reconcile them if it is reasonably possible to do so and to avoid repugnancy.

State of M.P and another v. Puranlal Nahir

Judgment dated 24.1.2012 passed by the High Court of M.P in Writ Appeal No. 311 of 2011, reported in 2012 (1) MPHT 375 (FB)

Held:

It is an elementary rule which has been referred by ***Viscount Simonds in AG v. HRH Prince Ernest Augustus, (1957) 1 All ER 49,*** "as compelling rule" that intention of Legislature must be found by reading the statute as a whole. In ***K.S. Paripooran V. State of Kerala, AIR 1955 SC 1012,*** it has been that "no rule of construction can require that when the words of one part of a statute convey a clear meaning it shall be necessary to introduce another part of a statute for the purpose of controlling or diminishing the efficacy of the first part". Moreover, these observations have no application in the interpretation of related provisions. (See: "***Principles of Statutory Interpretation***, Justice G.P. Singh, 13th Edition, pages 35 as 37). The principle that the statute must be read as a whole equally applicable to different part of the same section. The section must be construed as a whole whether or not one of the parts is a saving clause or a proviso. Subbarao, J. calls it "an elementary rule that construction of a section is to be made of all the parts together" and that "it is not permissible to omit any part of it; the whole section should be read together". Sub-section in a section must be read as parts of an integral whole and as being interdependent. "each portion throwing light, if need be, on the rest". (See : ***Principles of Statutory Interpretation***, Justice G. P. Singh, 13th Edition, Pages 42 and 43).

It is equally settled rule of Statutory interpretation that where language of a statute in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be to open it, which modifies the meaning of the words, and the structure of the sentence. See : ***Tirath Singh v. Bachittar Singh, AIR 1955 SC 830, Molarmal v. Kay Iron Works (P) Ltd., AIR 2000 SC 1261*** and ***Modern Singh v. Union of India, AIR 2004 SC 2236.*** The Sub-section must be read as parts of an integral whole as being inter-dependent, an attempt should be made in construing them to reconcile them if it is reasonably possible to do so and to avoid repugnancy. See : "***Principles of Statutory Interpretation***", Justice G. P. Singh, 13th Edition, Page 145.

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*117. LAND ACQUISITION ACT, 1894 – Sections 18, 23 and 54
EVIDENCE ACT, 1872 – Section 45

(i) Genuine and *bona fide* sale transactions in respect of the land under acquisition or in its absence the *bona fide* sale transactions proximate to the point of acquisition of the lands situated in the neighbourhood of the acquired lands possessing similar value or utility taken place between a willing vendee and the willing vendor which could be expected to reflect the true value, as agreed between reasonable prudent persons acting in the normal market conditions are the real basis to determine the market value.

(ii) Averaging of the prices of two sale deeds not justified – After all when the land is being compulsorily taken away from a person, he is entitled to say that he should be given the highest value which similar land in the locality is shown to have fetched in a *bona fide* transaction entered into between a willing purchaser and a willing seller near about the time of the acquisition. The mere fact that average sale price of transactions relied upon by respondent State was substantially less could not be made a ground for discarding the sale deed.

(iii) Reference Court on the issue of existence of trees on the acquired land and their valuation may consider the value of a consultant (expert) in Agriculture and Horticulture, who personally visited the acquired land and gave the details of the trees standing on different parts of the land, their present and future age, condition, height, width, spread and annual fruit production capacity – The valuation made by him was amply supported by the market rates of fruits fixed by the Agriculture and Horticulture Department of the Government of Maharashtra.

Chindha Fakira Patil (Dead) Through LRs. v. Special Land Acquisition Officer, Jalgaon

Judgment dated 01.11.2011 passed by the Supreme Court in Civil Appeal No. 5475 of 2007, reported in (2011) 10 SCC 787

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118. LAND ACQUISITION ACT, 1894 – Section 23

Determination of market value of agricultural land – When land is not acquired subject to the tenancy, the market value of acquired land has to be assessed at the same rate as granted to adjoining agricultural land, moreso, where apportionment of compensation between land owner and tenant is not disputed.

Rajendra Vasudev Deshprabhu (Dead) through L.Rs. & Ors. v. Deputy Collector (Retd.) & Land Acquisition Officer, Panaji

Judgment dated 11.10.2011 passed by the Supreme Court in Civil Appeal No. 8539 of 2011, reported in AIR 2012 SC 228

Held:

The High Court committed an error in holding that the compensation for the land in question should be lesser than the compensation for a land which is not subject to tenancy. It relied upon the decision of this Court in ***M.B. Gopala Krishna & Ors. v. Special Deputy Collector, Land Acquisition, AIR 1996 SC 3149*** wherein this Court observed:

> "A freehold land and one burdened with encumbrances do make a big difference in attracting willing buyers. A free hold land normally commands higher compensation while the land burdened with encumbrances secures lesser price. The fact of a tenant in occupation would be an encumbrance and no willing purchaser would willingly offer the same price as would be offered for a freehold land."

The said principle will apply only where a property subject to encumbrances is to be sold to a private purchaser or is acquired subject to the tenancy. The decision of this Court made those observations when upholding the compensation that was payable to the landlord, without reference to the tenant's rights, where the tenant did not claim any compensation. But in this case, the landlords have been awarded only 50% of the compensation amount and remaining 50% has been awarded to the tenants. The High Court has mixed up a sale subject to encumbrances with an acquisition free from encumbrances under the Land Acquisition Act, 1894. The two are conceptually different. If a property subject to a lease and in the possession of a lessee is offered for sale by the owner to a prospective private purchaser, the purchaser being aware that on purchase he will get only title, but not possession and that the sale in his favour will be subject to an encumbrance, namely the lease, will offer a price taking note of the encumbrances. Naturally such a price would be less than the price of a property without any encumbrances. But when a land is acquired free from encumbrances, what is acquired is not only the landlord's right, but also the lessee's rights. In such a case compensation awarded is for the property free from encumbrances, which includes the lessee's rights also. We may illustrate by the following example:

Let us assume the value of a property which is not subject to any lease is Rs.Ten lakhs. If that property was subject to a lease and if the possession was with the lessee, a purchaser will offer only ₹ Five lakhs as he will be purchasing a property with an encumbrance and will not be getting physical possession. But when the property subject to a lease is acquired, under the Land Acquisition Act, 1894, what is acquired is not only the landlord's right, title and interest, but also the lessee's right and interest. In other words the property with all rights, free from encumbrances is acquired and the compensation is determined and paid for the property as one free from encumbrances. The rights of lessor as well as lessee are extinguished. Therefore, compensation payable will be the entire market value that is Ten lakhs which may be shared by the lessors and

lessee at the rate of Five lakhs each or such other ratio as may be determined with reference to the extent of their respective rights. The Land Acquisition Officer issue notice to all persons interested and hears them before making the apportionment of the compensation among the persons interested. The 'market value' of the property free from encumbrances acquired by the State will not, therefore, be the same as the price a purchaser may pay to buy the property subject to a lease (encumbrances).

As the High Court has already determined ₹ 78 per sq.m. as the compensation in regard to the adjoining lands acquired under the same notification vide its judgment dated 14.10.2008 (Dy.Collector (Development) and ***Land Acquisition Officer, Panaji v. Smt. Sitadevi & Ors. in FA No.123/2003)*** and the said judgment has attained finality, there is no reason why the same compensation should not be awarded for this land also. The appellants have no grievance in regard to the apportionment made by the Land Acquisition Officer at the rate of 50% for the landlords and 50% for the tenants. The tenants apparently have not raised any dispute in regard to the apportionment. It is made clear that if any dispute regarding apportionment is pending, this decision shall not be construed as determining the percentage of entitlement of appellants or other co-owners (not before us) or the tenants (not before us).

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119. LAND ACQUISITION ACT, 1894 – Section 23

Determination of market value on the basis of exemplar sale transaction – Appropriate deductions from such value – Deductions for keeping aside area/space for providing developmental infrastructure and deduction for developmental expenditure/expenses are considerable components – Position reiterated.

Chandrashekar (dead) by LRs. and others v. Land Acquisition Officer and another

Judgment dated 22.11.2011 passed by the Supreme Court in Civil Appeal No. 1743 of 2006, reported in (2012) 1 SCC 390

Held:

The present controversy calls for our determination on the quantum of the deductions to be applied, to the market value assessed on the basis of the exemplar sale transaction, so as to ascertain the fair compensation payable to the land loser. The only factual parameters to be kept in mind are, the factual inferences drawn in the foregoing paragraph. On the issue in hand, we shall endeavor to draw our conclusions from past precedent.

In the process of consideration hereinafter, we have referred to all the judgments relied upon by the learned counsel for the appellants, as well as, some recent judgments on the issue concerned:

(i) In ***Brig. Sahib Singh Kalha v. Amritsar Improvement Trust, (1982) 1 SCC 419,*** this Court opined, that where a large area of undeveloped land is acquired, provision has to be made for providing minimum amenities of town-life. Accordingly it was held, that a deduction of 20 percent of the total acquired land should be made for land over which infrastructure has to be raised (space for roads etc.). Apart from the aforesaid, it was also held, that the cost of raising infrastructure itself (like roads, electricity, water, underground drainage, etc.) need also to be taken into consideration. To cover the cost component, for raising infrastructure, the Court held, that the deduction to be applied would range between 20 percent to 33 percent. Commutatively viewed, it was held, that deductions would range between 40 and 53 percent.

(ii) Noticing the determination rendered by this Court in ***Brig. Sahib Singh Kalha's case*** (supra), this Court in ***Administrator General of W.B. v. Collector, (1988) 2 SCC 150,*** upheld deduction of 40 percent (from the acquired land) as had been applied by the High Court.

(iii) In ***Chimanlal Hargovinddas v. Land Acquisition Officer, (1988) 3 SCC 751,*** while referring to the factors which ought to be taken into consideration while determining the market value of acquired land, it was observed, that a smaller plot was within the reach of many, whereas for a larger block of land there was implicit disadvantages. As a matter of illustration it was mentioned, that a large block of land would first have to be developed by preparing its lay out plan. Thereafter, it would require carving out roads, leaving open spaces, plotting out smaller plots, waiting for purchasers (during which the invested money would remain blocked). Likewise, it was pointed out, that there would be other known hazards of an entrepreneur. Based on the aforesaid likely disadvantages it was held, that these factors could be discounted by making deductions by way of allowance at an appropriate rate, ranging from 20 percent to 50 percent. These deductions, according to the Court, would account for land required to be set apart for developmental activities. It was also sought to be clarified, that the applied deduction would depend on, whether the acquired land was rural or urban, whether building activity was picking up or was stagnant, whether the waiting period during which the capital would remain locked would be short or long; and other like entrepreneurial hazards.

(iv) In ***Land Acquisition Officer v. L. Kamalamma (Smt.), (1998) 2 SCC 385,*** this Court arrived at the conclusion, that a deduction of 40 percent as developmental cost from the market value determined by the Reference Court would be just and proper for ascertaining the compensation payable to the landowner.

(v) In ***Kasturi v. State of Haryana, (2003) 1 SCC 354,*** this Court opined, that in respect of agricultural land or undeveloped land which has potential value for housing or commercial purposes, normally 1/3rd amount of compensation should be deducted, depending upon the location, extent of

expenditure involved for development, the area required for roads and other civic amenities etc. It was also opined, that appropriate deductions could be made for making plots for residential and commercial purposes. It was sought to be explained, that the acquired land may be plain or uneven, the soil of the acquired land may be soft and hard, the acquired land may have a hillock or may be low lying or may have deep ditches. Accordingly, it was pointed out, that expenses involved for development would vary keeping in mind the facts and circumstances of each case. In ***Kasturi's case*** (supra) it was held, that normal deductions on account of development would be 1/3rd of the amount of compensation. It was however clarified that in some cases the deduction could be more than 1/3rd and in other cases even less than 1/3rd.

(vi) Following the decision rendered by this Court in ***Brig. Sahib Singh Kalha's case,*** this Court in ***Land Acquisition Officer v. Nookala Rajamallu, (2003) 12 SCC 334,*** applied a deduction of 53 percent, to determine the compensation payable to the landowners.

(vii) In ***V. Hanumantha Reddy v. Land Acquisition Officer, (2003) 12 SCC 642,*** this Court examined the propriety of compensation determined as payable to the land loser by the High Court. The Reference Court had determined the market value of developed land at Rs.78 per sq. yard. The Reference Court then applied a deduction of 1/4th to arrive at Rs.58 per sq. yard as the compensation payable. The High Court however concluded, that compensation at Rs.30 per sq. yard would be appropriate (this would mean a deduction of approximately 37 percent, as against market value of developed land at Rs.78 per sq. yard). This Court having made a reference to ***Kasturi's case*** (supra) did not find any infirmity in the order passed by the High Court. In other words, deduction of 37 percent was approved by this Court.

(viii) In para 21 of the judgment in ***Viluben Jhalejar Contractor v. State of Gujarat, (2005) 4 SCC 789,*** it was held that for development, i.e., preparation of lay out plans, carving out roads, leaving open spaces, plotting out smaller plots, waiting for purchasers, and on account of other hazards of an entrepreneur, the deduction could range between 20 percent and 50 percent of the total market price of the exemplar land.

(ix) In ***Atma Singh v. State of Haryana, (2008) 2 SCC 568,*** this Court after making a reference to a number of decisions on the point, and after taking into consideration the fact that the exemplar sale transaction was of a smaller piece of land concluded, that deductions of 20 percent onwards, depending on the facts and circumstances of each case could be made.

(x) In ***Lal Chand v. Union of India, (2009) 15 SCC 769,*** it was held that to determine the market value of a large tract of undeveloped agricultural land (with potential for development), with reference to sale price of small developed plot(s), deductions varying between 20 percent to 75 percent of the price of such developed plot(s) could be made.

(xi) In ***Subh Ram v. State of Haryana, (2010) 1 SCC 444,*** this Court opined, that in cases where the valuation of a large area of agricultural or undeveloped land was to be determined on the basis of the sale price of a small developed plot, standard deductions ought to be 1/3rd towards infrastructure space (areas to be left out for roads etc.) and 1/3rd towards infrastructural developmental costs (costs for raising infrastructure), i.e., in all 2/3rd (or 67 percent).

(xii) In ***A.P. Housing Board v. K. Manohar Reddy, (2010) 12 SCC 707,*** having examined the existing case law on the point it was concluded, that deductions on account of development could vary between 20 percent to 75 percent. In the peculiar facts of the case a deduction of 1/3rd towards development charges was made from the awarded amount to determine the compensation payable.

(xiii) In ***Land Acquisition Officer v. M.K. Rafiq Sahib, (2011) 7 SCC 714,*** this Court after having concluded, that the land which was subject matter of acquisition was not agricultural land for all practical purposes and no agricultural activities could be carried out on it, concluded that in order to determine fair compensation, based on a sale transaction of a small piece of developed land (though the acquired land was a large chunk), the deduction made by the High Court at 50 percent, ought to be increased to 60 percent.

Based on the precedents on the issue referred to above it is seen, that as the legal proposition on the point crystallized, this Court divided the quantum of deductions (to be made from the market value determined on the basis of the developed exemplar transaction) on account of development into two components.

Firstly, space/area which would have to be left out, for providing indispensable amenities like formation of roads and adjoining pavements, laying of sewers and rain/flood water drains, overhead water tanks and water lines, water and effluent treatment plants, electricity sub-stations, electricity lines and street lights, telecommunication towers etc. Besides the aforesaid, land has also to be kept apart for parks, gardens and playgrounds. Additionally, development includes provision of civic amenities like educational institutions, dispensaries and hospitals, police stations, petrol pumps etc. This "first component", may conveniently be referred to as deductions for keeping aside area/space for providing developmental infrastructure.

Secondly, deduction has to be made for the expenditure/expense which is likely to be incurred in providing and raising the infrastructure and civic amenities referred to above, including costs for levelling hillocks and filling up low lying lands and ditches, plotting out smaller plots and the like. This "second component" may conveniently be referred to as deductions for developmental expenditure/expense.

It is essential to earmark appropriate deductions, out of the market value of an exemplar land, for each of the two components referred to above. This would be the first step towards balancing the differential factors. This would pave the way for determining the market value of the undeveloped acquired land on the basis of market value of the developed exemplar land.

120. LAND REVENUE CODE, 1959 (M.P.) – Section 158
VINDHYA PRADESH LAND REVENUE AND TENANCY ACT, 1953 – Section 2 (1)(xvi)(b)
Declaration as to Bhumiswami Rights u/s 158(i)(d) of the Code – Suit property was given to the father of plaintiff as 'Pattedar tenant' by the order of Tehsildar on 29.4.1959 when the Act of 1953 was in force – Held, plaintiff became 'Bhumiswami' of the suit property after death of his father under Section 158(i)(d) of the Code after coming into force of the Code w.e.f. 2.10.1959 – He cannot be said to be a trespasser.

Santosh Sharma v. State of M.P. and another

Judgment dated 18.8.2011 passed by the High Court of M.P in S.A. No. 3 of 1995, reported in 2012 (1) MPHT 22

Held:

The foundation stone of the case is the patta dated 1-6-1959 (Exh. P-7), which has been granted to one Kashi Prasad who was the father of plaintiff. On going through patta (Exh. P-7), this Court finds that disputed property was given to Kashi Prasad as Pattedar Because in the column of Nauiyat Kasht, Pattedar is mentioned. In this Patta, it has been mentioned that by order of Tehsildar in file No. 349, dated 29-4-1959 to open a dairy over land which was given to him. Thus, the plaintiff's father was the Pattedar when the Code came into force.

On bare perusal of clause (d)(i) of sub-section (1) of Section 158 this Court finds that every person holding a land in Vindhya Pradesh region as pattedar tenant as defined in the Vindhya Pradesh Land Revenue and Tenancy Act, 1953 shall become Bhumiswami on coming into force of Code on 2-10-1959. The suit land is situated in Satna District which was the part of erstwhile Vindhya Pradesh. Thus, in order to hold whether the plaintiff's father was a Pattedar or not this Court is required to go through the definition clause of 'pattedar tenant' as defined in Vindhya Pradesh Land Revenue and Tenancy Act, 1953, Section 2 (1)(xvi)(b). According to this provision, a tenant other than pachpan-paintalis tenant to whom the rights of a Pattedar tenant are granted by a lawful authority after the commencement of this Act shall be Pattedar tenant. It would be apt to quote the relevant clause, which reads thus :-

"(xvi) "Pattedar tenant"means –

(a) *** *** ***, or

(b) a tenant other than a pachpan-paintalis tenant to whom the rights of a Pattedar tenant are granted by a lawful authority after the commencement of this Act, or

(c) *** *** ***"

Admittedly, the Vindhya Pradesh Land Revenue and Tenancy Act, 1953 was in force when the impugned patta (Exh. P-7) dated 1-6-1959 was given. On bare perusal of patta (Exh. P-7) this Court finds that under a lawful authority, i.e., Tehsildar Raghuraj Nagar, Satna, the pattawas given and this has also been

embodied in the document that by order of Tehsildar in file No. 349, dated 29-4-1959 the disputed property has been given on patta to Kashi Prasad (father of plaintiff). Hence, according to me, the plaintiff became Bhumiswami by operation of law on coming into force of the Code on 2-10-1959 and therefore, he cannot be said to be trespasser.

The substantial question of law is thus answered that learned two Court below erred in not holding that appellant's father was a Pettedar tenant and became Bhumiswami on coming into the force of the Code and after his death plaintiff has become Bhumiswami. This question is decided in favour of the appellant and against the respondents.

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121. LAND REVENUE CODE, 1959 (M.P.) – Sections 158, 57 (2) & (3) CIVIL PROCEDURE CODE, 1908 – Section 9

(i) Bhumiswami – Land given to plaintiffs' forefather in Inam by the then Holkar State and not to the deity – Firstly, the plaintiffs' forefather and after his death, the plaintiffs became the Bhumiswami on coming into force of the Code.

(ii) Dispute with the State Government – Plaintiffs' suit for declaration of Bhumiswami right and injunction against the Government – Held, civil suit is maintainable.

State of M.P. v. Vijayabai & Ors.

Judgment dated 08.08.2011, passed by the High Court of M.P. in S.A. No. 212 of 1995, reported in I.L.R. (2011) M.P. 3093

Held :

The plaintiffs have pleaded that lands in question were given to plaintiff's forefather in Inam as they were offering Pooja of temple Shri Ramji in order to prove these issues the foundation stone (the basic documents) Inam of the lands have been filed by the plaintiffs and they are Ex.P/6, Ex.P/7 and Ex.P/8.

These three documents are identically verbatim to each other except the name of the village. Needless to say that Ex.P/6 is of village Dhulna, while Ex. P/7 is of village Iklera and Ex.P/8 pertains to Village Nemawar. On bare perusal of column No. 1 which is the column of Inamdar, to whom the land is given, the name of Gangadhar S/o. Mukunda has been mentioned and this position finds place in Ex.P/7 and Ex.P/8 also. Except in Ex.P/8 word Pujari has not been mentioned. In column No. 2 the khasra number of the field has been given, column No. 3 pertains to its area while column No. 4 is in respect of which kind of Inam is and in this column Devisthan has been endorsed. Column No. 5 and 6 are very important. In Column No. 5, which is in respect of conditions, if any, it has been mentioned to offer Pooja of Shri Ramji Mandir. In column No. 6 it has been mentioned that Inam land has been given in terms of Rule No. 30 and payment of revenue is exempted. On the rear side of this document, it has been mentioned that the land is given to Inamdar i.e. plaintiffs' forefather by the order

of Settlement Officer. The signature of Settlement Officer is also there on each document of Ex.P/6, P/7 and P/8.

It would be relevant to mention here that if the land would have been given to deity Shri Ramji then certainly name of deity should have been mentioned in column No. 1 but in column No. 1 the name of Gangadhar, who was the forefather of the plaintiffs, has been mentioned and therefore I am of the view that the land was given to plaintiffs' forefather in Inam by the-then Holkar State to offer Pooja of Shri Ramji Mandir. Thus, it cannot be said that land was given to deity Shri Ramji. The plaintiff Vishwanath examined himself as PW 1 and he proved these documents. No document in rebuttal has been filed by defendant nor any witness has been examined by it. Hence, it has been proved that land was given to plaintiffs' forefather in Inam to offer Pooja and therefore learned Courts below did not commit any error in decreeing the suit of plaintiffs.

So far as the contention of learned Government Advocate that suit is not maintainable in view of Section 57(2) and 57(3) of the Code because without approaching the SDO, straightway suit has been filed is not maintainable, is concerned, suffice it to say that Full Bench of this Court in ***State of M.P. v. Balveer Singh, 2001 RN 343*** has already held that Civil suit is maintainable without approaching the SDO. Moreover, the Supreme Court in ***Hukam Singh (Dead) by LRs and others v. State of M.P., (2005) 10 SCC 124*** has held that Civil Court is having jurisdiction and judgment of this Court was reversed holding that there is bar under Section 57(2) of the Code to file Civil Suit. The present case is for declaration of bhumiswami right and injunction which, according to me, is maintainable in Civil Court only and in this regard Section 9 of the CPC may be seen. The Supreme Court in ***Hukam Singh's case*** (supra) has approved the earlier Full Bench decision of this Court in ***Ramgopal v. Chetu, 1976 JLJ 278.*** The Supreme Court also relied its other earlier decision ***Rohini Prasad v. Kasturchand (2000) 3 SCC 668*** in which it was held by the Supreme Court that Full Bench decision of ***Ramgopal*** (supra) has laid down the correct proposition of law and therefore I am of the view that Civil Suit is maintainable and Civil Court was having jurisdiction to decide the Civil Suit in the form in which it has been brought. In this context, I am also relying Full Bench decision of this Court ***Ramgopal*** (supra).

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122. LEGAL SERVICES AUTHORITIES ACT, 1987 – Sections 20 and 21
CONSTITUTION OF INDIA – Article 227
WORDS & PHRASES :
Validity of award passed by Lok Adalat – Award passed by the Lok Adalat is akin to a compromise decree, its validity can be challenged by a party in a writ petition on the ground that the same has been obtained by playing fraud.

Award passed by Lok Adalat – On the basis of compromise arrived at between the parties, an award was passed by Lok Adalat – Petitioner later on learnt that land allotted to petitioner under the award belong to

other persons who are not parties to the proceedings and the lands allotted to the petitioner under the award have already been sold by respondents vide registered sale-deeds – Held, consent to settlement, was obtained from the petitioner by playing fraud or even otherwise, parties to the agreement were mistaken as to the matter of fact essential for the agreement, which renders the agreement void – Award passed by Lok Adalat cannot be sustained in the eye of law – Award quashed.

"Fraud" means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract : (1) the suggestion, as a fact, of that which is not true by one who does not believe it to be true (2) the active concealment of a fact by one having knowledge or belief of the fact (3) a promise made without intention of performing it (4) any other act fitted to deceive (5) any such act or omission as the law specially declares to be fraudulent.

Jagdish Prasad v. Sangamlal & Ors.

Judgment dated 18.10.2011, passed by the High Court of M.P. in W.P. No. 9079 of 2005, reported in I.L.R. (2011) M.P. 3071

Held :

It is well settled in law that Lok Adalats have no adjudicatory or judicial functions. Their functions relate purely to conciliation. A Lok Adalat determines the reference on the basis of a compromise or settlement between the parties and puts its seal of confirmation by making the award in terms of compromise. It is equally well settled legal proposition that if any party wants to challenge the award based on settlement, the same can be examined in a writ petition under Article 226 and/or 227 on very limited grounds. [See : ***State of Panjab and another v. Jalour Singh and others, (2008) 2 SCC 660***]. In ***Kiran Singh and others v. Chaman Paswan and others, AIR 1954 SC 340*** it has been held that a judgment or decree obtained by playing fraud on the Court is a nullity and ***non est*** in the eye of law and its invalidity can be challenged even in collateral proceedings. Similar view has been taken in ***S.P. Chengalvaraya Naidu (dead) by L.Rs. v. Jagannath (dead) by L.Rs. and others, AIR 1994 SC 853*** and in ***K.D. Sharma v. Steel Authority of India Ltd. & Ors., 2008 AIR SCW 6654.*** Though the award of a Lok Adalat is not a result of a contest on merits, just as a regular suit by a Court in a regular trial is, however it is as equal and on par with a decree on compromise and will have same binding effect and be conclusive [See : ***P.T. Thomas v. Thomas Job, (2005) 6 SCC 4781.***] It is trite law that validity of a compromise decree can be challenged on the ground that it was obtained by playing fraud. [See : ***A. A. Gopalkrishnan v. Cochin Devaswom Board & ors., (2007) 7 SCC 482.***] Since the award passed by the Lok Adalat is akin to a compromise decree, its validity can be challenged by a party in a writ petition on the ground that the same has been obtained by playing fraud. "Fraud" means and includes any of the following acts committed

by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:- (1) the suggestion, as a fact, of that which is not true by one who does not believe it to be true; (2) the active concealment of a fact by one having knowledge or belief of the fact; (3) a promise made without intention of performing it; (4) any other act fitted to deceive; (5) any such act or omission as the law specially declares to be fraudulent. [See : ***Advanced Law Lexicon*** by P. Ramanatha Aiyar, Third Edition Reprint 2007].;

It is graphically clear that it was not brought to the notice of the petitioner at the time of settlement that lands which are being allotted to him under the award have already been sold and third parties are in possession, though this fact was well within the knowledge of respondents. The consent of the petitioner for compromise was obtained by active concealment of aforesaid fact by the respondents. Thus, the consent to settlement, on the basis of which impugned award has been passed, was obtained from the petitioner by playing fraud. Even if, for the sake of argument it is accepted that no fraud was played upon the petitioner, yet it is a case where both the parties to the agreement were mistaken as to the matter of fact essential for the agreement, which renders the agreement void. Thus, for aforementioned reasons the award passed by Lok Adalat cannot be sustained in the eye of law.

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123. LEGAL SERVICES AUTHORITIES ACT, 1987 – Section 21
COURT FEES ACT, 1870 – Sections 16 and 35
CIVIL PROCEDURE CODE, 1908 – Section 89
Refund of court fees in matters decided by the Lok Adalat – If a matter is decided by Lok Adalat, the petitioner shall be entitled to a certificate from Court authorizing him to receive back from the Collector the entire amount of court fees already paid in the matter without any deduction – State is directed to refund full amount of court fee in respect of the matters which are settled in the Lok Adalat.

Ramesh Chandra v. State of M.P. & Others

Judgment dated 01.11.2011, passed by the High Court of M.P. in W.P. No. 7282 of 2010 reported in ILR (2012) MP 320 (DB)

Held :

Relevant Notification of the State Government dated 24.03.2003 reads thus :-

NOTIFICATION

F. No. 17(E)4/2003/234/21-B (II) - In Exercise of the powers conferred by section 35 of the Court Fees Act, 1870 (No. 7 of 1870), the State Government hereby makes the following amendment in this Department's notification No. 9-1-86-B-XXI dated 10th April, 1987, namely:-

AMENDMENT

In the said Notification, in sub-para (3) of para (1) for the wards "the party shall be entitled to refund of the court-fees already paid by him", the words "the party shall be entitled to refund of an amount after deduction of 10 percent of the court-fee already paid by him."

BY ORDER AND IN THE NAME OF THE GOVERNOR

Sd/- G. S. Solanki, Addl. Secretary,
Law and legislative Affairs

Aforesaid notification has been issued by the State under Section 35 of the Court Fees Act, 1870.

This provision specifically provides that the State Government may subject to such condition or restriction, as it may think to impose, by notification in the Official Gazette, ***reduce or remit*** in the whole or in any part of the State under its administration all or any of the fees mentioned in the first and second schedules to this Act annexed, and may in like manner cancel or very such order, Aforesaid provision specifically provides that the State Government may reduce or remit the court-fee payable in respect of the items mentioned in the first and second schedules of the Act, but it does not give any power to the State Government to deduct any amount which is to be refunded to the petitioner in view of Section 16 of the Court Fees Act. Section 16 of the Court fees Act, 1870 and Section 21 of Legal Services Authorities Act, 1987 specifically provides that in a case where the matter is settled under Section 89 of the Code of Civil Procedure, the Petitioner/appellant shall be entitled for the full refund of the court-fee paid in respect of such plaint or appeal. Section 21 of the Legal Services Authorities Act, 1987 also provides that where a compromise or settlement has been arrived at, by a Lok Adalat in a case referred to it under sub-section (1) of section 20, the court-fee paid in such case shall be refunded in the manner provided under the Court fees Act, 1870.

Section 16 of the Court Fees Act, 1870 has been inserted by the Code of Civil Procedure (Amendment) Act, 1999 (Act No. 46 of 1999) which has been made effective from 1.7.2002. Aforesaid provision has been inserted by the Parliament by the aforesaid Act which provides that after settlement of the dispute referred to the Lok Adalat under Section 89 of the Code of Civil Procedure, 1908, petitioner/appellant shall be entitled to a certificate from the Court authorizing him to receive back from the Collector the full amount of the fee paid in respect of memo of appeal. In view of the specific provision as contained in Section 16 of the Court Fees Act, 1870, the petitioner/appellant is entitled for full refund of the fee paid on appeal.

In the light of aforesaid discussion, no deduction could have been made by the authorities even on the strength of the Notification dated 24.3.2003 issued by the State under section 35 of the Court Fees Act, 1870. As stated hereinabove, there is no provision in Section 35 of the Court Fees Act, 1870

empowering the State to deduct any amount which is refundable under Section 16 of the said act, but inspite of this, aforesaid amount has been directed to be deducted by the State Government.

The aforesaid enactment has been made by the Parliament with the assent of the President and if the State was of the view that any amount is to be deducted from such court-fees, then after due amendment in the provision, assent of the President was necessary. In this case, no averment has been made by the State that any such amendment was made by the State Legislature in Section 16 and the assent of the President was obtained. In view of the aforesaid, notification dated 24.3.2003 is contrary to Section 16 of the Court Fees Act, not sustainable under law and is hereby quashed.

State in directed to refund full amount of the court-fee in respect of the matters which are settled in Lok Adalat in view of the specific provision as contained in Section 16 of the Court Fees Act, 1870 and Section 21 of the Legal Services Authorities Act, 1987.

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124. LIMITATION ACT, 1963 – Sections 2 (j) and 15 (2)
Exclusion of period of notice of suit – In computing the period of limitation, the period of notice, provided, notice is given within the limitation period, would be mandatorily excluded.

Disha Constructions and others v. State of Goa and another

Judgment dated 09.12.2011 passed by the Supreme Court in Civil Appeal No. 10763 of 2011, reported in (2012) 1 SCC 690

Held:

We are of the view that in the facts and circumstances of this case, the notice under Section 80 was admittedly given on 19.02.2009 which is within the period of limitation and the same was received on 27.02.2009 and two months from the date of receipt expired on 27.04.2009.

The High Court has held, in our view erroneously, that since the suit was filed on 24.10.2009, which is beyond 20.09.2009, the plaintiffs appellants are not entitled to the benefit of exclusion statutorily provided under Section 15(2) of the Act and the suit is barred by limitation.

The said interpretation of the High Court is erroneous in view of the fact that if the notice under Section 80 had been given, say, on 29.09.2009, in that case the appellants according to High Court's interpretation, would have been given the benefit of exclusion of time after 30.09.2009. Just because the appellants gave the notice before the expiry of the period of limitation, the benefit which is given under Section 15(2) of the Act cannot be taken away. We are of the view that the said period of two months must be computed and benefit of exclusion of the said two months must be given to the appellants even if they had given the said notice within the period of limitation. If the appellants had given the notice after the expiry of period of limitation, say, after 30.09.2009, then possibly they could not have

been given the benefit. In this connection, we may refer to the decision of this Court in ***Union of India v. West Coast Paper Mills Ltd., (2004) 3 SCC 458,*** where in a somewhat similar situation, this Court has held as follows:

> "Any circumstance, legal or factual, which inhibits entertainment or consideration by the Court of the dispute on the merits comes within the scope of the Section and a liberal touch must inform the interpretation of the Limitation Act which deprives the remedy of one who has a right".

We are in respectful agreement with the aforesaid principles laid down by this Court though in the context of considering Section 14 of the Limitation Act. We are of the view that the same principles should be applied while considering the provision of Section 15(2) of the Limitation Act. The statutory provision in this connection is very clear and in the definition clause also it has been made clear in Section 2(j) of the Act. Under Section 2(j) of the Act, the "period of limitation" means the period prescribed for any suit, or other proceeding by the Schedule and the "prescribed period" means the period of limitation computed in accordance with the provisions of the Act. If we follow the aforesaid principles, as we must, we find that the erroneous interpretation which has been given by the High Court will have the effect of denying the appellants the benefit of Section 15(2) which is not permissible in the eye of law.

In our view, proper interpretation of Section 15(2) of the Act would be that in computing the period of limitation, the period of notice, provided notice is given within the limitation period, would be mandatorily excluded. That would mean a suit, for which period of limitation is three years, would be within limitation even if it is filed within two months after three years, provided notice has been given within the limitation period. In such a case, the period of notice cannot be counted concurrently with the period of limitation. If it is done, then period of notice is not excluded. Any other interpretation would be contrary to the express mandate of Section 15(2) of the Act.

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***125. LIMITATION ACT, 1963 – Section 5**

Condonation of delay – Procedure regarding time barred appeal – If appeal is barred by time, the Court concerned should either return the memorandum of appeal to the appellant to submit it alongwith the application under Section 5 of the Limitation Act, 1963 (In this regard, specific provision under Order 41 Rule 3 CPC should also be kept for consideration) or provide a chance to file application to condone the delay. [*State of M.P. v. Pradeep Kumar and another, (2000) 7 SCC 372* relied on].

Premchand Soni since deceased LRs. Janki Bai and others v. Harish Chand

Judgment dated 07.09.2011, passed by the High Court of M.P. in S.A. No. 246 of 2002, reported in 2012 (1) MPLJ 65

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*126. N.D.P.S. ACT, 1985 – Sections 42 and 20 (b) (i)

If a police officer does not record the information at all and does not inform the official superior, it will be a clear violation of Section 42 of the Act.

Offence under Section 20 (b) (i) of the Act – Proof – Investigation Officer not complying with the provision of Section 42 of the Act – He did not weigh the seized *ganja* before seizure – The seized material was also not produced in the Court – No independent witness from adjoining shop was taken for search of contraband – No other witnesses supported the evidence of Investigation Officer – Held, the prosecution failed to prove beyond reasonable doubt that ganja/ contraband was seized from the shop or possession of the appellant – Conviction set aside.

Ramnarayan Raikwar v. State of M.P.

Judgment dated 19.10.2011, passed by the High Court of M.P. in Cr.A. No. 1133 of 1996, reported in I.L.R. (2011) M.P. 3167

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*127. NEGOTIABLE INSTUMENTS ACT, 1881 – Section 138

Whether amendment can be made in a complaint u/s 138 of N.I. Act ? Held, Yes – To provide full and effective opportunity to the parties, application requesting amendment in the complaint should be allowed.

Chandra Pal Singh v. Ashok Leyland Ltd.

Judgment dated 05.07.2011, passed by the High Court of M.P. in M.Cr.C. No. 2113 of 2010, reported in ILR (2012) M.P. 302

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128. NEGOTIABLE INSTRUMENTS ACT, 1881 – Sections 138 and 141
EVIDENCE ACT, 1872 – Section 74 (2)
COMPANIES ACT, 1956 – Sections 159, 163 and 610

(i) Dishonour of cheque issued by a Company – Liability of Director – The complainant should specifically spell out how and in what manner the Director was incharge of or was responsible to the Company for conduct of its business and mere bald statement in this regard is not sufficient.

(ii) Criminal liability of Director – A person who resigned from the Directorship of the Company in the year 1998, cannot be held responsible for the dishonour of the cheque issued in the year 2004.

(iii) Annual return filed under Section 159 of the Companies Act with the Registrar of Companies – Nature and admissibility in evidence – Such return is a public document being public record kept in State of private documents, therefore, a certified copy of such annual report is a public document and the same would be admissible in evidence.

Anita Malhotra v. Apparel Export Promotion Council and another
Judgment dated 08.11.2011 passed by the Supreme Court in Criminal Appeal No. 2033 of 2011, reported in (2012) 1 SCC 520

Held:

This Court has repeatedly held that in case of a Director, complaint should specifically spell out how and in what manner the Director was in charge of or was responsible to the accused Company for conduct of its business and mere bald statement that he or she was in charge of and was responsible to the company for conduct of its business is not sufficient. [Vide ***National Small Industries Corporation Limited v. Harmeet Singh Paintal, (2010) 3 SCC 330***].

Inasmuch as the certified copy of the annual return dated 30.09.1999 is a public document, more particularly, in view of the provisions of the Companies Act, 1956 read with Section 74 (2) of the Indian Evidence Act, 1872, we hold that the appellant has validly resigned from the Directorship of the Company even in the year 1998 and she cannot be held responsible for the dishonour of the cheques issued in the year 2004.

A reading of the provisions of the Companies Act, 1956 particularly Sections 159, 163 and 610 (3) makes it clear that that there is a statutory requirement under Section 159 of the Companies Act that every Company having a share capital shall have to file with the Registrar of Companies an annual return which include details of the existing Directors. The provisions of the Companies Act require annual return to be made available by a company for inspection (S. 163) as well as Section 610 which entitles any person to inspect documents kept by the Registrar of Companies. The High Court committed an error in ignoring Section 74 of the Indian Evidence Act, 1872. Sub-section (1) of Section 74 refers to public documents and sub-section (2) provides that public documents include "public records kept in any State of private documents". A conjoint reading of Sections 159, 163 and 610(3) of the Companies Act, 1956 read with sub-section (2) of Section 74 of the Indian Evidence Act, 1872 make it clear that a certified copy of annual return is a public document and the contrary conclusion arrived at by the High Court cannot be sustained.

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129. NEGOTIABLE INSTRUMENTS ACT, 1881 – Sections 138 and 147
LEGAL SERVICES AUTHORITIES ACT, 1987 – Section 21

(i) Whether in a criminal case under Section 138 of the Negotiable Instruments Act referred by the Magistrate's Court to the Lok Adalat, the award passed by the Lok Adalat can be considered as a decree of a Civil Court and thus, executable by that Court? Held, Yes.

(ii) Award passed by the Lok Adalat – Nature of – Every award of Lok Adalat shall be deemed to be a decree of a Civil Court and as such is executable by that Court.

K.N. Govindan Kutty Menon v. C.D. Shaji

Judgment dated 28.11.2011 passed by the Supreme Court in Civil Appeal No. 10209 of 2011, reported in (2012) 2 SCC 51

Held:

Section 21 of the Legal Services Authorities Act reads as under:

> "*21. Award of Lok Adalat.* – (1) Every award of Lok Adalat shall be deemed to be a decree of a Civil Court or, as the case may be, an order of any other Court and where a compromise or settlement has been arrived at, by a Lok Adalat in a case referred to it under sub-section (1) of Section 20, the Court-fee paid in such case shall be refunded in the manner provided under the Court-Fee Act, 1870 (7 of 1870).
>
> (2) Every award made by a Lok Adalat shall be final and binding on all the parties to the dispute, and no appeal shall lie to any Court against the award."

Free legal aid to the poor and marginalized members of the society is now viewed as a tool to empower them to use the power of the law to advance their rights and interests as citizens and as economic actors. Parliament enacted the Legal Services Authorities Act, 1987 in order to give effect to Article 39-A of the Constitution to extend free legal aid, to ensure that the legal system promotes justice on the basis of equal opportunity. Those entitled to free legal services are members of the Scheduled Castes and the Scheduled Tribes, women, children, persons with disability, victims of ethnic violence, industrial workmen, persons in custody, and those whose income does not exceed a level set by the Government (currently it is ₹ 1 lakh a year in most States). the Act empowers Legal Services Authorities at the District, State and National levels, and the different committees to organize Lok Adalats to resolve pending and pre-litigation disputes. It provides for permanent Lok Adalats to settle disputes involving public utility services. Under the Act, 'legal services' have a meaning that includes rendering of service in the conduct of any court-annexed proceedings or proceedings before any authority, tribunal and so on, and giving advice on legal matters. Promoting legal literacy and conducing legal awareness programmes are the functions of legal services institutions. the Act provides for a machinery to ensure access to justice to all through the institutions of legal services authorities and committees. These institutions are manned by Judges and judicial officers. Parliament entrusted the judiciary with the task of implementing the provisions of the Act.

Section 21 of the Act, which we have extracted above, contemplates a deeming provision, hence, it is a legal fiction that the "award" of the Lok Adalat is a decree of a civil court. In the case on hand, the question posed for consideration before the High Court was that "when a criminal case referred to

by the Magistrate to a Lok Adalat is settled by the parties and award is passed recording the settlement, can it be considered as a decree of civil court and thus executable by that court?" After highlighting the relevant provisions, namely, Section 21 of the Act, it was contended before the High Court that every award passed by the Lok Adalat has to be deemed to be a decree of a civil court and as such executable by that court. Unfortunately, the said argument was not acceptable by the High Court. On the other hand, the High Court has concluded that when a criminal case is referred to the Lok Adalat and it is settled at the Lok Adalat, the award passed has to be treated only as an order of that criminal court and it cannot be executed as a decree of the civil court. After saying so, the High Court finally concluded "an award passed by the Lok Adalat on reference of a criminal case by the criminal court as already concluded can only be construed as an order by the criminal court and it is not a decree passed by a civil court" and confirmed the order of the Principal Munsiff who declined the request of the petitioner therein to execute the award passed by the Lok Adalat on reference of a complaint by the criminal court. On going through the Statement of Objects and Reasons, definition of 'Court', 'legal service' as well as Section 21 of the Act, in addition to the reasons given hereunder, we are of the view that the interpretation adopted by the Kerala High Court in the impugned order is erroneous.

A statutory support as evidenced in the Statement of Objects and Reasons of the Act would not only reduce the burden of arrears of work in regular courts, but would also take justice to the door steps of the poor and the needy and make justice quicker and less expensive. In the case on hand, the Courts below erred in holding that only if the matter was one which was referred by a civil court it could be a decree and if the matter was referred by a criminal court it will only be an order of the criminal court and not a decree under Section 21 of the Act. the Act does not make out any such distinction between the reference made by a civil court and criminal court. There is no restriction on the power of Lok Adalat to pass an award based on the compromise arrived at between the parties in a case referred by a criminal court under Section 138 of the N.I. Act, and by virtue of the deeming provision it has to be treated as a decree capable of execution by a civil court. In this regard, the view taken in ***Subhash Narasappa Mangrule (M/S) v. Sidramappa Jagdevappa Unnad, 2009 (3) Mh.L.J. 857*** and ***M/s Valarmathi Oil Industries v. M/s Saradhi Ginning Factory, AIR 2009 Madras 180*** supports this contention and we fully accept the same.

It is useful to refer the judgment of this Court in ***State of Punjab v. Jalour Singh, (2008) 2 SCC 660.*** The ratio that decision was that the "award" of the Lok Adalat does not mean any independent verdict or opinion arrived at by any decision making process. The making of the award is merely an administrative act of incorporating the terms of settlement or compromise agreed by the parties in the presence of the Lok Adalat, in the form of an executable order under the signature and seal of the Lok Adalat. This judgment was followed in ***B.P. Moideen Sevamandir v. A.M. Kutty Hassan, (2009) 2 SCC 198.***

In *P.T. Thomas vs. Thomas Job, (2005) 6 SCC 478,* Lok Adalat, its benefits, Award and its finality has been extensively discussed.

From the above discussion, the following propositions emerge:

1. In view of the unambiguous language of Section 21 of the Act, every award of the Lok Adalat shall be deemed to be a decree of a civil court and as such it is executable by that Court.
2. The Act does not make out any such distinction between the reference made by a civil court and criminal court.
3. There is no restriction on the power of the Lok Adalat to pass an award based on the compromise arrived at between the parties in respect of cases referred to by various Courts (both civil and criminal), Tribunals, Family Court, Rent Control Court, Consumer Redressal Forum, Motor Accidents Claims Tribunal and other Forums of similar nature.
4. Even if a matter is referred by a criminal Court under Section 138 of the Negotiable Instruments Act, 1881 and by virtue of the deeming provisions, the award passed by the Lok Adalat based on a compromise has to be treated as a decree capable of execution by a civil Court.

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***130. NEGOTIABLE INSTRUMENTS ACT, 1881 – Sections 141 and 147**
CRIMINAL PROCEDURE CODE, 1973 – Section 320
Offences by Company – Appellant No. 2 is the signatory of the cheque and appellant No. 3 is the Managing Director of the Company – Both the persons by virtue of their position are vicariously liable for the offence committed by appellant No. 1/Company.
Application for compromise – Application for compromise filed after the pronouncement of judgment – Application is not maintainable as the Court is no more seisin over the case.

O.T.G. Global Finance Ltd. Company & Ors. v. Mohan Mandelia & Anr.

Judgment dated 26.09.2011, passed by the High Court of M.P. in Cr. Rev. No. 613 of 2006, reported in I.L.R. (2011) M.P. S.N.152

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131. PARTNERSHIP ACT, 1932 – Section 69
Suit by unregistered partnership firm – Maintainability of – Suit is not maintainable where it does not cover any of the exceptions provided u/s 69 of the Partnership Act – Legal position explained.

Held:

On due consideration of the material available on record, this Court is of the considered view that the application under Order 7 Rule 11 of CPC deserves

to be allowed in the light of plaint averments and Section 69 of the Indian Partnership Act.

Learned counsel for respondent placed reliance on decision reported in *Jagat Mittar Saigal v. Kailash Chander Saigal, AIR 1983 Delhi 134, Prakash Rajmalji Jain and others v. Vijay Saxena and another, 2001 (1) MPLJ 148* and *Krishna Motor Services by its Partners v. H.B. Vittala Kamath, (1996) 10 SCC 88 = AIR 1996 SC 2209.*

From perusal of the plaint averments and reliefs claimed therein, it is clear that the suit for share in the business of partnership firm has arisen from a contract of partnership. Plaintiff has claimed money from the defendant/revisionist as his share in the partnership business. Further, in view of the status of the plaintiff as partner, he has claimed right to participate in the said partnership business. Thus, obviously, the suit of the plaintiff is for enforcement of a right arising out of the contract of partnership and not independent of it. Plaintiff has nowhere pleaded that the firm is already dissolved. Thus, the suit of the plaintiff is not covered by any of the exceptions provided in Section 69 of the Act. In the case of *Krishna Motor Service's by its Partners* (supra) the partnership between the parties was already dissolved. In the case of *Prakash Rajmalji Jain and others* (supra), suit was against unregistered firm for rendition of accounts of dissolved firm. In the case in hand, the partnership firm between the plaintiff and defendant is still running even as per plaint averments.

The question of law raised in the case of *Jagat Mittar Saigal* (supra) under Section 8 (b) read with Section 20 (4) of the Arbitration Act, 1940 was as to whether such a petition is barred at the instance of a partner of an unregistered partnership firm. This being not a situation in the present case, the respondent does not get any assistance from the Delhi High Court's decision.

This Court in the case of *Madanlal and others v. Smt. Badambai. ILR (2008) MP 3249,* has clearly held that the suit for rendition of accounts is not maintainable in the absence of registration of the firm by virtue of Section 69 (supra).

Thus, the learned trial Judge has committed an illegality in treating the suit to have not arisen from the partnership agreement. The plaintiff thus does not get assistance from any of the rulings cited by him.

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***132. PREVENTION OF CORRUPTION ACT, 1988 – Sections 3 and 5 (2) CRIMINAL PROCEDURE CODE, 1973 – Sections 306, 307 and 308 Power of Special Court to grant pardon – Held, as a Court of original criminal jurisdiction, Special Court has power to grant pardon to approver both, under Sections 306 and 307 CrPC – Also held, since Special Judge is clothed with Magisterial power to remand which is a very wide power as compared to power of grant of pardon, then in absence of any contrary provisions, power to grant pardon at investigation stage cannot be denied to Special Court.**

Bangaru Laxman v. State (through CBI) and another
Judgment dated 22.11.2011 passed by the Supreme Court in Criminal Appeal No. 2164 of 2011, reported in (2012) 1 SCC 500

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133. PREVENTION OF CORRUPTION ACT, 1988 – Section 13 (2) r/w/s 13 (1) (a) & (d) and Section 19

(i) Sanction for prosecution – Significance of – It is not an empty formality but a solemn and sacrosanct act which affords protection to Government servants against frivolous and vexatious prosecution – It is a safeguard for the innocent but not a shield for the guilty.

(ii) Distinction between absence of sanction and invalidity of sanction – The question of absence of sanction can be raised at the inception and threshold by an aggrieved person – However, where sanction order exists, question of its legality and validity has to be raised in the course of trial – Position reiterated.

Dinesh Kumar v. Chairman, Airport Authority of India and another
Judgment dated 22.11.2011 passed by the Supreme Court in Criminal Appeal No. 2170 of 2011, reported in (2012) 1 SCC 532

Held:

This Court has in ***Mansukhlal Vithaldas Chauhan v. State of Gujarat, (1997) 7 SCC 622*** considered the significance and importance of sanction under the P.C. Act. It has been observed therein that the sanction is not intended to be, nor is an empty formality but a solemn and sacrosanct act which affords protection to government servants against frivolous prosecutions and it is a weapon to ensure discouragement of frivolous and vexatious prosecution and is a safeguard for the innocent but not a shield for the guilty. This Court highlighted that validity of a sanction order would depend upon the material placed before the sanctioning authority and the consideration of the material implies application of mind.

The provisions contained in Section 19(1),(2),(3) and (4) of the P.C. Act came up for consideration before this Court in ***Parkash Singh Badal v. State of Punjab, (2007) 1 SCC 1.*** In paras 47 and 48 of the judgment, the Court held as follows:

> "47: The sanctioning authority is not required to separately specify each of the offences against the accused public servant. This is required to be done at the stage of framing of charge. Law requires that before the sanctioning authority materials must be placed so that the sanctioning authority can apply his mind and take a decision. Whether there is an application of mind or not would depend on the facts and circumstances of each case and there cannot be any generalised guidelines in that regard.

> 48: The sanction in the instant case related to the offences relatable to the Act. There is a distinction between the absence of sanction and the alleged invalidity on account of non-application of mind. The former question can be agitated at the threshold but the latter is a question which has to be raised during trial."

While drawing a distinction between the absence of sanction and invalidity of the sanction, this Court in ***Parkash Singh Badal*** (supra) expressed in no uncertain terms that the absence of sanction could be raised at the inception and threshold by an aggrieved person. However, where sanction order exists, but its legality and validity is put in question, such issue has to be raised in the course of trial. Of course, in ***Parkash Singh Badal*** (supra) this Court referred to invalidity of sanction on account of non- application of mind. In our view, invalidity of sanction where sanction order exists, can be raised on diverse grounds like non-availability of material before the sanctioning authority or bias of the sanctioning authority or the order of sanction having been passed by an authority not authorised or competent to grant such sanction. The above grounds are only illustrative and not exhaustive. All such grounds of invalidity or illegality of sanction would fall in the same category like the ground of invalidity of sanction on account of non-application of mind - a category carved out by this Court in ***Parkash Singh Badal*** (supra), the challenge to which can always be raised in the course of trial.

In a later decision, in the case of ***State of Karnataka v. Ameerjan, (2007) 11 SCC 273,*** this Court had an occasion to consider the earlier decisions of this Court including the decision in the case of ***Parkash Singh Badal*** (supra). ***Ameerjan*** (supra) was a case where the Trial Judge, on consideration of the entire evidence including the evidence of sanctioning authority, held that the accused Ameerjan was guilty of commission of offences punishable under Sections 7, 13(1)(d) read with Section 13(2) of the P.C. Act. However, the High Court overturned the judgment of the Trial Court and held that the order of sanction was illegal and the judgment of conviction could not be sustained. Dealing with the situation of the case wherein the High Court reversed the judgment of the conviction of the accused on the ground of invalidity of sanction order, with reference to the case of ***Parkash Singh Badal*** (supra), this Court stated in ***Ameerjan*** (supra) in para 17 of the Report as follows:

> "17. Parkash Singh Badal, therefore, is not an authority for the proposition that even when an order of sanction is held to be wholly invalid inter alia on the premise that the order is a nullity having been suffering from the vice of total non-application of mind. We, therefore, are of the opinion that the said decision cannot be said to have any application in the instant case."

In our view, having regard to the facts of the present case, now since cognizance has already been taken against the appellant by the Trial Judge, the

High Court cannot be said to have erred in leaving the question of validity of sanction open for consideration by the Trial Court and giving liberty to the appellant to raise the issue concerning validity of sanction order in the course of trial. Such course is in accord with the decision of this Court in ***Parkash Singh Badal*** (supra) and not unjustified.

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134. PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005 – Section 2 (q)

Interpretation of the expression 'Respondent' – Whether a female member of the husband's family could be made a party to the proceedings under the Domestic Violence Act, 2005? The trial Court observed that female members cannot be made parties in proceedings under the Domestic Violence Act, 2005, as "females" are not included in the definition of "respondent" in Section 2(q) of the said Act – Learned Single Judge confirmed the said order relating to deletion of the names of the 'other members' – In appeal the Supreme Court held that if the Legislature intended to exclude females from the ambit of the complaint, which can be filed by an aggrieved wife, females would have been specifically excluded, instead it provided in the proviso that a complaint could also be filed against a relative of the husband or the male partner – No restrictive meaning has been given to the expression "relative", nor has the said expression been specifically defined in the Domestic Violence Act, 2005 to make it specific to males only – Impugned orders of the lower Courts set aside – Trial Court directed to proceed against the said Respondent Nos. 2 and 3 on the complaint filed by the appellant – Appeal allowed.

Sandhya Manoj Wankhade v. Bhimrao Wankhade & Ors.

Judgment dated 31.01.2011 passed by the Supreme Court in Criminal Appeal No. 271 of 2011, reported in (2011) 3 SCC 650

Held:

Questioning the said judgment and order of the Nagpur Bench of the Bombay High Court, learned Advocate appearing for the appellant, submitted that the High Court had erred in confirming the order of the learned Sessions Judge in regard to deletion of names of the Respondent Nos. 2 and 3 from the proceedings, upon confirmation of the finding of the Sessions Judge that no female could be made a party to a petition under the Domestic Violence Act, 2005, since the expression "female" had not been included in the definition of "respondent" in the said Act. learned Advocate appearing for the appellant submitted that it would be evident from a plain reading of the proviso to Section 2(q) of the Domestic Violence Act, 2005, that a wife or a female living in a relationship in the nature of marriage can, not only file a complaint against her husband or male partner but also against relatives of the husband or male

partner. The term "relative" not having been defined in the Act, it could not be said that it excluded females from its operation.

Learned Advocate appearing for the Respondents, on the other hand, defended the orders passed by the Sessions Judge and the High Court and urged that the term "relative" must be deemed to include within its ambit only male members of the husband's family or the family of the male partner. Learned counsel submitted that when the expression "female" had not been specifically included within the definition of "respondent" in Section 2(q) of the Domestic Violence Act, 2005, it has to be held that it was the intention of the legislature to exclude female members from the ambit thereof.

Having carefully considered the submissions made on behalf of the respective parties, we are unable to sustain the decisions, both of the learned Sessions Judge as also the High Court, in relation to the interpretation of the expression "respondent" in Section 2(q) of the Domestic Violence Act, 2005. For the sake of reference, Section 2(q) of the above-said Act is extracted hereinbelow :-

> "2(q). "respondent" means any adult male person who is, or has been, in a domestic relationship with the aggrieved person and against whom the aggrieved person has sought any relief under this Act:
>
> Provided that an aggrieved wife or female living in a relationship in the nature of a marriage may also file a complaint against a relative of the husband or the male partner."

From the above definition it would be apparent that although Section 2(q) defines a respondent to mean any adult male person, who is or has been in a domestic relationship with the aggrieved person, the proviso widens the scope of the said definition by including a relative of the husband or male partner within the scope of a complaint, which may be filed by an aggrieved wife or a female living in a relationship in the nature of a marriage.

It is true that the expression "female" has not been used in the proviso to Section 2(q) also, but, on the other hand, if the Legislature intended to exclude females from the ambit of the complaint, which can be filed by an aggrieved wife, females would have been specifically excluded, instead of it being provided in the proviso that a complaint could also be filed against a relative of the husband or the male partner. No restrictive meaning has been given to the expression "relative", nor has the said expression been specifically defined in the Domestic Violence Act, 2005, to make it specific to males only.

In such circumstances, it is clear that the legislature never intended to exclude female relatives of the husband or male partner from the ambit of a complaint that can be made under the provisions of the Domestic Violence Act, 2005.

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135. PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005 ACT, 2005 – Sections 3, 12, 18 and 19

(i) Whether a woman is entitled to protection provided by the Act even if the cause of action arose prior to the coming into force of the Act? Held, Yes – Looking into a complaint u/s 12 of the Act, the conduct of the parties even prior to the enforcement of the Act could be taken into consideration while passing an order under Sections 18, 19 and 20 thereof – Hence, a wife who had a shared household in the past but had left it prior to the enforcement of the Act, would still be entitled to protection under the Act.

(ii) Under Section 19 of the Act, a woman is entitled for a suitable portion of the shared household for her residence alongwith all necessary amenities to make such residential premises properly habitable for her – It should also be properly furnished according to the choice of the woman entitled, to enable her to live in dignity in the shared household.

V. D. Bhanot v. Savita Bhanot

Judgment dated 07.02.2012 passed by the Supreme Court in SLP (Criminal) No. 3916 of 2010, reported in (2012) 3 SCC 183

Held:

Before the Delhi High Court, the only question which came up for determination was whether the petition under the provisions of the PWD Act, 2005, was maintainable by a woman, who was no longer residing with her husband or who was allegedly subjected to any act of domestic violence prior to the coming into force of the PWD Act on 26th October, 2006. After considering the constitutional safeguards under Article 21 of the Constitution, vis-à-vis, the provisions of Sections 31 and 33 of the PWD Act, 2005, and after examining the statement of objects and reasons for the enactment of the PWD Act, 2005, the learned judge held that it was with the view of protecting the rights of women under Articles 14, 15 and 21 of the Constitution that the Parliament enacted the PWD Act, 2005, in order to provide for some effective protection of rights guaranteed under the Constitution to women, who are victims of any kind of violence occurring within the family and matters connected therewith and incidental thereto, and to provide an efficient and expeditious civil remedy to them. The learned Judge accordingly held that a petition under the provisions of the PWD Act, 2005, is maintainable even if the acts of domestic violence had been committed prior to the coming into force of the said Act, notwithstanding the fact that in the past she had lived together with her husband in a shared household, but was no more living with him, at the time when the Act came into force.

We agree with the view expressed by the High Court that in looking into a complaint under Section12 of PWD Act, 2005, the conduct of the parties even prior to the coming into force of the PWD Act, could be taken into consideration

while passing an order under Sections 18, 19 and 20 thereof. In our view, the Delhi High Court has also rightly held that even if a wife, who had shared a household in the past, but was no longer doing so when the Act came into force, would still be entitled to the protection of the PWD Act, 2005.

On facts it may be noticed that the couple has no children. Incidentally, the Respondent wife is at present residing with her old parents, after she had to yacate the matrimonial home, which she had shared with the Petitioner at Mathura, being his official residence, while in service. After more than 31 years of marriage, the Respondent wife having no children, is faced with the prospect of living alone at the advanced age of 63 years, without any proper shelter or protection and without any means of sustenance except for a sum of ₹ 6,000 which the Petitioner was directed by the Magistrate by order dated 8th December, 2006, to give to the Respondent each month. By a subsequent order dated 17th February, 2007, the Magistrate also passed a protection-cum-residence order under Sections 18 and 19 of the PWD Act, protecting the rights of the Respondent wife to reside in her matrimonial home in Mathura. Thereafter, on the Petitioner's retirement from service, the Respondent was compelled to vacate the accommodation in Mathura and a direction was given by Magistrate to the Petitioner to let the Respondent live on the 1st Floor of House No. D-279, Nirman Vihar, New Delhi, and if that was not possible, to provide a sum of ₹ 10,000 per month to the Respondent towards rental charges for acquiring an accommodation of her choice.

In our view, the situation comes squarely within the ambit of Section 3 of the PWD Act, 2005, which defines "domestic violence" in wide terms, and, accordingly, no interference is called for with the impugned order of the High Court. However, considering the fact that the couple is childless and the Respondent has herself expressed apprehension of her safety if she were to live alone in a rented accommodation, we are of the view that keeping in mind the object of the Act to provide effective protection of the rights of women guaranteed under the Constitution, who are victims of violence of any kind occurring within the family, the order of the High Court requires to be modified. We, therefore, modify the order passed by the High Court and direct that the Respondent be provided with a right of residence where the Petitioner is residing, by way of relief under Section 19 of the PWD Act, and we also pass protection orders under Section 18 thereof. As far as any monetary relief is concerned, the same has already been provided by the learned Magistrate and in terms of the said order, the Respondent in receiving a sum of ₹ 6,000 per month towards her expenses.

Accordingly, in terms of Section 19 of the PWD Act, 2005, we direct the Petitioner to provide a suitable portion of his residence to the Respondent for her residence, together with all necessary amenities to make such residential premises properly habitable for the Respondent, within 29th February, 2012. The said portion of the premises will be properly furnished according to the choice of the Respondent to enable her to live in dignity in the shared household. Consequently, the sum of ₹ 10,000 directed to be paid to the Respondent for

obtaining alternative accommodation in the event the Petitioner was reluctant to live in the same house with the Respondent, shall stand reduced from ₹ 10,000 to ₹ 4,000, which will be paid to the Respondent in addition to the sum of ₹ 6,000 directed to be paid to her towards her maintenance. In other words, in addition to providing the residential accommodation to the Respondent, the Petitioner shall also pay a total sum of ₹ 10,000 per month to the Respondent towards her maintenance and day-to-day expenses.

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136. REGISTRATION ACT, 1908 – Section 17 (1) (d)
TRANSFER OF PROPERTY ACT, 1882 – Section 107
Whether a rent note executed by tenant unilaterally in favour of landlord is compulsorily registrable as per Section 17 (1) (d) of the Registration Act, 1908 ? Held, No – As the document does not come within the meaning of lease as per Transfer of Property Act, it need not be registered compulsorily.

Shri Dadawadi Upasara Baba Sahab Ka Mandir v. Sureshchand
Judgment dated 24.08.2011, passed by the High Court of M.P. in W.P. No. 10597 of 2010, reported in 2012 (1) MPHT 250

Held :

In the matter of ***Sitaram v. Shankarlal, 1986 I MPWN, Note 163,*** this Court had an occasion to consider the impact of document which has been executed by the tenant and observed that it is explicitly contemplated in Section 107 that a lease of an immovable property shall be executed "by both lessor and lessee" and unless the instrument is of such a nature, evidently, according to me it cannot be called a 'lease' to fulfill the requirement of Section 17 (1) (d) of the Registration Act. In the instant case, the admitted position is that the instrument in question was a "Rent Note", which was executed only by the tenant or the lessee. It was not executed by both lessor and the lessee to fit in the requirement of "lease" contemplated under Section 107 of the Transfer of Property Act. Unfortunately, still the Court below took the view that the instrument in question namely, the rent note aforesaid could not be admitted in evidence. It was further held that the decision is palpably and patently wrong.

Keeping in view the fact that the document was tendered by the petitioner in evidence was executed by the respondent and not by both the parties, this Court is of the view that the learned Court below committed error in holding that the document is inadmissible in evidence as it was unregistered. In view of this, petition filed by the petitioner is allowed and the impugned order passed by the learned Court below is set aside. Learned Court below is directed to proceed with the case by allowing the petitioner to exhibit the document in evidence.

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137. SCHEDULED CASTES AND SCHEDULED TRIBES (PREVENTION OF ATROCITIES) ACT, 1989 – Section 3 (1) (xi)
CRIMINAL PROCEDURE CODE, 1973 – Section 313
Assault to a woman – Where the accused being a stranger knows and has reason to believe that the victim of the offence is a member of such a caste or tribe, the offence would squarely fall under Section 3 (1) (xi) of the Act and it would not be necessary to establish further that the offence was committed on the ground that she belongs to such a caste or tribe.

Baja alias Bajasingh v. State of M.P.

Judgment dated 18.11.2011, passed by the High Court of M.P. in Cr. A. No. 239 of 1996, reported in ILR (2012) M.P. 224

Held :

Legality and propriety of the conviction have been challenged on the under-mentioned grounds -

(a) .....

(b) No evidence was adduced by the prosecution to prove that the prosecutrix belongs to a Scheduled Caste.

(c) No offence under Section 3(1)(xi) would be made out as the act in question was not committed on the ground that the prosecutrix was a member of Scheduled Caste.

To buttress the contentions (b) and (c) [above], learned counsel for the appellant has cited decision of a co-ordinate Bench of this Court in ***Shankarlal v. State of M.P. (2005 (1) MPLJ 449)***.

Learned counsel for the appellant has placed implicit reliance on the following bservations made in ***Shankarlal's*** case -

> "6. In the testimony of prosecutrix (PW1), it is said that she is Chamar by caste and the appellant has admitted this fact. She has not said that she is a member of SC or ST or whether her caste is included in the list of SC caste. Her husband (PW2) has deposed that he is "Suryavanshi Chamar" by caste. The prosecution has not led any evidence to the effect that "Suryavanshi Chamar" is the caste which has been included in the list of SC or ST. In the absence of any such evidence, this fact cannot be taken for granted that prosecutrix belongs to the SC or ST community. As being one of the essential ingredients, this fact was required to be proved beyond any reasonable doubt by the prosecution.

> 7. Assuming that it is established that the prosecutrix belongs to SC or ST, still it is difficult to hold that the offence under Section 3(1)(xi) of the Act is established. There is no evidence to show that the appellant used criminal force to the prosecutrix to outrage her modesty only because she belonged to a particular caste or community. There is no such circumstance to suggest that her modesty was intended or tried to be outraged, simply because she belonged to a particular community. It is thus clear that the ingredient of section 3(1)(xi) of the Act is not proved and conviction of the appellant under section 3(1)(xi) of the Act deserves to be set aside"

The Constitution (Scheduled Castes) Order must be read as it is. It is not even permissible to say that a caste, sub-caste, part or group of any caste or community is synonymous to the one mentioned in the Order if they are not so specifically mentioned in it. The aforesaid observations are to be understood in the context of Shankarlal's case wherein the prosecutrix claimed to be a member of Suryavanshi chamar caste. Hence, the decision in Shankarlal's case cannot be treated as an authority for the proposition that non-production of caste certificate issued by the Competent Authority would always be fatal to the prosecution.

The assertion made by the prosecutrix (PW1) that she belongs to Balai caste was not subjected to challenge in her crossexamination. Moreover, it was candidly admitted by the appellant in his examination, under Section 313 of the Code of Criminal Procedure. In such a situation, judicial notice could be taken of the fact that Balai caste has been included in the list of Scheduled Castes in the State of M.P. In other words, no further proof in the form of caste certificate/ notification or otherwise to show that the prosecutrix is a member of Scheduled Caste was required.

This apart, the Supreme Court in ***Vidyadharan v. State of Kerala (2004) 1 SCC 215***) has pointed out the distinction between the offences punishable under Section 354 of the IPC and Section 3(1)(xi) of the Act in the following terms-

> "Section 3(1)(xi) of the Act deals with assaults or use of force to any woman belonging to a scheduled caste or scheduled tribe with the intent to dishonour or outrage her modesty is an aggravated form of the offence under Section 354 IPC. The only difference between section 3(1)(xi) and section 354 is essentially the caste or the tribe to which the victim belongs. If she belongs to a scheduled caste or scheduled tribe, section 3(1)(xi) applies. The other difference is that in section 3(1)(xi) dishonour of such victim is also made an offence."

However, neither the offence under Section 354 nor the one under Section 509 of the IPC is punishable with imprisonment for a term of 10 years. As such, the ingredient that it is committed on the ground that the victim belongs to a Scheduled Caste or a Scheduled Tribe, which is ***sine quo non*** for applying the provision of Section 3(2)(v) of the Act, is not attracted (See. ***Dinesh v. State of Rajasthan (2006) 3 SCC 771***)

It is true that there may be cases where the accused, being a stranger, may not be aware of the fact that the complainant belongs to a Scheduled Caste or a Scheduled Tribe but if he knows and has reason to believe that the victim of the offence is a member of such a caste or tribe, the offence would squarely fall under Section 3(1)(xi) of the Act and it would not be necessary to establish further that the offence was committed on the ground that she belongs to such a Caste or Tribe.

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138. SECURITISATION AND RECONSTRUCTION OF FINANCIAL ASSETS AND ENFORCEMENT OF SECURITY INTEREST ACT, 2002 – Section 32 CIVIL PROCEDURE CODE, 1908 – Order 21 Rule 11

(i) Where remedy under Civil Procedure is selected, is it open for the bank to switch over to a remedy under SARFAESI Act in midway? Held, Yes – The doctrine of election has no application in the facts and circumstances of the act.

(ii) There is no repugnancy or inconsistency between two remedies available in the Civil Procedure Code and under the SARFAESI Act – Therefore, the doctrine of election has no application in the matter.

(iii) Plea of limitation can always be raised in appeal u/s 17 of SARFAESI Act before Debt Recovery Tribunal.

Smt. Kasturi Devi Jain v. Union Bank of India & Ors.

Judgment dated 27.07.2011 passed by the High Court of M.P. in Writ Petition No. 1494 of 2011, reported in AIR 2012 MP 4

Held:

In the present case there is no repugnancy or inconsistency between two remedies available in the Code of Civil Procedure and under the SARFAESI Act and, therefore, the doctrine of election has no application in the matter.

The contention of the petitioner is liable to be rejected for yet another reason. The claim even assuming for sake of argument is barred by time, can always be raised in an appeal under Section 17 of the SARFAESI Act before the Debts Recovery Tribunal. This point is dealt with in extenso by Madras High Court in ***Misons Leather Ltd. v. Canara Bank, AIR 2007 Mad 268***. The relevant portion is reproduced as under:-

"10. We are afraid that the contention is totally misconceived. The provisions of Section 17(1) of the Act provides remedy for the borrower guarantor/mortgagor to challenge the action of the Bank under Section 13(4) of the Act before the Debts Recovery Tribunal. The Debts Recovery Tribunal is required to decide whether the action of the Bank/Financial Institutions, under Section 13(4) is in accordance with the provisions of the Act and the rules framed thereunder. It is open to the borrower/guarantor/mortgagor to demonstrate before the Debts Recovery Tribunal that resort to Section 13 of the Act is not permissible by law. In a given case, the claim of the Bank/Financial Institutions may be barred by limitation or there may be cases, where the adjustment of the amount paid is not reflected in the notice or the calculation of interest may not be in accordance with the contract between the parties. Needless to say that all such grounds, which render the action of the Bank/Financial Institutions illegal can be raised in the proceedings under Section 17 of the Act before the Debts Recovery Tribunal."

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***139. SPECIFIC RELIEF ACT, 1963 – Section 34 Proviso**

Relief of declaration simpliciter, grant of – Plaintiffs filed suit for declaration simpliciter without claiming relief of possession – Plaintiffs were not possessing the suit property on the date of filing of the suit as per their admissions in depositions – Held, the suit was not maintainable as per Proviso to Section 34 of the Act (*Ramsaran v. Smt. Ganga Devi, AIR 1972 SC 2685* relied on).

Gangadhar and others v. Bhanwaribai and others

Judgment dated 20.09.2011, passed by the High Court of M.P. in S.A. No. 173 of 1998, reported in 2012 (1) MPLJ 114

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***140. SPECIFIC RELIEF ACT, 1963 – Section 38**

EVIDENCE ACT, 1872 – Section 114 (g)

Permanent Injunction – State Government admitting the possession of plaintiff for 12 years prior to the date of filing of suit – From the record it is proved that from 1956-57 to 1963-64 the suit property has been recorded in the name of 'T' – Defendant State Government has not filed any document in order to show when the suit property came in the ownership of State or when the Bhumiswami rights of 'T' were extinguished – Held, Appellate Court rightly granted the decree of permanent injunction in favour of respondent/plaintiff, holding him not to be a trespasser on the Government land.

Adverse inference – Party in possession of best evidence, which would throw sufficient light on the issue in controversy withholding it – Court should draw an adverse inference against him notwithstanding that onus of proof does not lie on him.

State of M.P. v. Mangilal

Judgment dated 12.08.2011, passed by the High Court of M.P. in S.A. No. 406 of 1998, reported in I.L.R. (2011) M.P. 3106

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141. SUCCESSION ACT, 1925 – Sections 61, 63 and 71

(i) Execution of unprivileged Will – Inter-lineation, alteration etc. made in an unprivileged Will – Any alteration/correction made in any unprivileged Will after its execution has no effect unless such alteration/correction has been executed in the same manner in which the Will is executed or has been made in the manner laid down in proviso to Section 71.

(ii) Proof of execution of a second Will as a voluntary act of the testator – At the time of execution of second Will, testator was seriously ill due to acute stomach cancer and he was not in a position to eat and walk – It was also on record that just 14 days after the execution of the second Will, the testator died – Moreso, if the testator had consciously decided to disinherit respondent No. 1 in the first Will by making correction/alteration, there was no reason for him to execute the second Will for disinheriting respondent No. 1 – Execution of second Will was highly suspicious and was not a voluntary act of the testator.

Dayanandi v. Rukma D. Suvarna and others

Judgment dated 31.10.2011 passed by the Supreme Court in Civil Appeal No. 2164 of 2011, reported in (2012) 1 SCC 510

Held:

Sections 63 and 71 of the Act which have bearing on the decision of the first question read as under:

> "*63. Execution of unprivileged Wills.* – Every testator, not being a soldier employed in an expedition or engaged in actual warfare, or an airman so employed or engaged, or a mariner at sea, shall execute his Will according to the following rules: –
>
> (a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.

(c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

71. Effect of obliteration, interlineation or alteration in unprivileged Will. – No obliteration, interlineation or other alteration made in any unprivileged Will after the execution thereof shall have any effect, except so far as the words or meaning of the Will have been thereby rendered illegible or undiscernible, unless such alteration has been executed in like manner as hereinbefore is required for the execution of the Will:

Provided that the Will, as so altered, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses is made in the margin or on some other part of the Will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the Will."

An analysis of Section 63 shows that the testator must sign or affix his mark on the Will or the same shall be signed by some other person as per his direction and in his presence. The signature or mark of the testator or the signature of the person signing for him shall be placed in a manner which may convey the intention of the testator to give effect to the writing as a Will, which is also required to be attested by two or more persons, each of whom must have seen the testator sign or affix his mark on the Will or some other person sign the Will in the presence or as per the direction of the testator. If the witness has received a personal acknowledgment from the testator of his signature or mark or the signature of other person signing on his behalf, then it is not necessary that both the witnesses shall simultaneously remain present. The section also lays down that no particular form of attestation is necessary.

The plain language of Section 71 makes it clear that any alteration made in an unprivileged Will after its execution has no effect unless such alteration has been executed in the same manner in which the Will is executed. The proviso to this section carves out an exception and lays down that such alterations shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses is made in the margin or on some other part of the Will opposite or near to such alterations or at the foot or end or opposite to a memorandum referring to such alterations and written at the end or some part of the Will.

We have gone through Exhibit P-1, which was got produced by respondent No.1 from the appellant. Four corrections have been made on pages 1 and 2 of this document. The figures written in letters (four) were substituted with numbers (3) and the name of respondent No.1 was scored out (page 2). At the end of the Will, the testator appended his left thumb mark. On the right side of thumb mark a line has been written with the ink pen/ball pen suggesting that the corrections/ alterations were made prior to putting of left thumb mark by the testator. However, the space between the last line of the typed Will (in Kannada) and what was written with the ink pen/ball pen leaves no manner of doubt that the writing on the right side of the thumb mark was made after execution of the Will. If the corrections/alterations had been made before the testator had appended his left thumb mark, there was no reason why the line showing deletion of the name of respondent No.1 and corrections in the figures were not reflected in the typed Will and why the line was inserted in the little space left between the concluding portion of the Will and the space where the left thumb mark was put by the testator. Therefore, we approve the view taken by the High Court that the corrections/alterations made in Exhibit P1 cannot be said to have been duly attested by the testator as per the requirement of Section 71 of the Act and respondent No.1 is entitled to share in the property specified in Schedule B appended to the plaint.

The next question which merits consideration is whether Exhibit D.1 was duly executed by Singa Gujaran and, therefore, the first Will will be deemed to have become redundant. Admittedly, Ext. D1 was propounded by the appellant and respondent No.2 and was contested by respondent No.1, who specifically pleaded that by taking advantage of the ill health of the father, the appellant and respondent No.2 conspired and manipulated execution of the second Will purporting to disinherit her. According to respondent No.1, at the time of execution of the second Will, Singa Gujaran was seriously ill and was not in a sound state of mind so as to understand the implications and consequences of his actions. In support of this assertion, respondent No.1 examined Dr. B.R. Kamath (PW-2), Dr. Prabhakar Rao (PW-3) and Dr. C.R. Ballal (PW-4) apart from PW-5 Dr. J. Subba Rao. All of them categorically stated that Singa Gujaran was suffering from acute stomach cancer and he was not in a position to eat. The statement

of PW-6 is also significant on the issue of health of the executant. This witness gave out that the executant was taken to the car by three persons and they brought him back to the house in an unconscious state of mind and he was not taking any food. PW-6 also gave out that the executant was not in a position to walk.

The appellant and respondent No.2 relied upon the testimony of PW-5, who had been examined by respondent No.1 to prove the execution of the Will Exhibit P.1. In his cross examination PW-5 disclosed that as per his knowledge, Singa Gujaran had made two Wills and he was a witness to the second Will as well which, according to him, was also scribed by Narsappayya. According to PW-5, the testator had affixed left thumb mark on Exhibit D.1 and he had signed the Will as a witness in the clinic. What is significant to be noted is that PW-5 did not say that Singa Gujaran had affixed left thumb mark in his presence and that he had put his signatures as witness in the presence of the testator. As to the state of health of the executant, PW-5 categorically stated that he was suffering from acute stomach cancer and was not in a position to eat or walk.

It has come in the evidence of the parties that the executant was admitted in Tara Clinic on 11.08.1987 and when the doctor attending him found that cancer was at an advanced stage, they advised the parties to take him home. It has also come on record that just 14 days after the execution of the second Will, the executant died. Therefore, it is not possible to find any fault with the finding recorded by the High Court that the execution of Exhibit D.1 was highly suspicious.

It is also apposite to observe that if Singa Gujaran had consciously decided to disinherit respondent No.1 in the first Will by appending his left thumb mark after corrections/alterations were made and the name of respondent No.1 was deleted, there was no reason for him to execute the second Will. In her evidence, the appellant and respondent No.2 could not offer any tangible explanation as to why it became necessary for her father to execute the second Will after he had already disinherited respondent No.1. This also supports the conclusion that execution of Exhibit D.1 was not a voluntary act of the testator.

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***142. SUCCESSION ACT, 1925 – Section 63**
EVIDENCE ACT, 1872 – Section 68
Will – Will is to be duly proved in accordance with Section 63 of the Act of 1925 and Section 68 of Act of 1872 – All the attending circumstances creating doubt must be made clear so as to satisfy conscience of the Court that the Will was duly executed by testator.

Devkaran v. Rameshwar & Ors.

Judgment dated 06.09.2011, passed by the High Court of M.P. in S.A. No. 393 of 1997, reported in I.L.R. (2011) M.P. 3135

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143. TRANSFER OF PROPERTY ACT, 1882 – Sections 5 and 54
SUCCESSION ACT, 1925 – Section 63
REGISTRATION ACT, 1908 – Section 17

(i) Transactions of the nature of Sale Agreement, General Power of Attorney Sales or Will are not valid mode of transfer of immovable property – Immovable property can be legally transferred by registered deed only,

(ii) Will comes into effect only after the death of the testator and is also revocable at any time during the life time of the testator.

Suraj Lamp & Industries Pvt. Ltd. v. State of Haryana & Anr.
Judgment dated 11.10.2011 passed by the Supreme Court in Special Leave Petition (C) No. 13917 of 2009, reported in AIR 2012 SC 206 (3 Judge Bench)

Held:

A will is the testament of the testator. It is a posthumous disposition of the estate of the testator directing distribution of his estate upon his death. It is not a transfer inter vivos. The two essential characteristics of a will are that it is intended to come into effect only after the death of the testator and is revocable at any time during the life time of the testator. It is said that so long as the testator is alive, a will is not be worth the paper on which it is written, as the testator can at any time revoke it. If the testator, who is not married, marries after making the will, by operation of law, the will stands revoked. (See Sections 69 and 70 of Indian Succession Act, 1925). Registration of a will does not make it any more effective.

We therefore reiterate that immovable property can be legally and lawfully transferred/conveyed only by a registered deed of conveyance. Transactions of the nature of ('GPA sales') or Sale Agreement/General Power General Power of Attorney Sales of Attorney/Will transfers ('SA/GPA/WILL transfers') do not convey title and do not amount to transfer, nor can they be recognized or valid mode of transfer of immoveable property. The courts will not treat such transactions as completed or concluded transfers or as conveyances as they neither convey title nor create any interest in an immovable property. They cannot be recognized as deeds of title, except to the limited extent of Section 53A of the TP Act. Such transactions cannot be relied upon or made the basis for mutations in Municipal or Revenue Records. What is stated above will apply not only to deeds of conveyance in regard to freehold property but also to transfer of leasehold property. A lease can be validly transferred only under a registered Assignment of Lease. It is time that an end is put to the pernicious practice of SA/GPA/WILL transactions known as GPA sales.

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***144. TRANSFER OF PROPERTY ACT, 1882 – Section 54**

Sale – Plea of want of consideration – Recital contained in the registered sale deed dated 02.03.1987 shows the receipt of consideration as well as delivery of possession –The sale deed shows that the sale is complete – Merely because the sale price is not paid, the sale deed cannot be held to be invalid – At the most, if the seller who has sold the property and has not received the sale consideration, may sue for recovery of the sale consideration.

Registered sale deed – Presumption as to – Registered sale deed has been executed by defendant No. 2 in favour of defendant No. 1, which is *prima facie valid* and, therefore, a presumption arises with regard to its genuineness – Even assuming that the sale deed was executed without payment of any consideration and the defendant No. 2 was not in a fit physical and mental condition at the time of execution of the sale deed, the same would be binding on defendant No. 2 and would be a voidable document – Since defendant No. 2 has not challenged the same, it would bind her and it would be invalid only to the extent of the share of the plaintiff.

Shakuntala Tiwari (Smt.) v. Mohammad Ramjan

Judgment dated 07.12.2011, passed by the High Court of M.P. in S.A. No. 829 of 1996, reported in ILR (2012) M.P. 160

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145. TRANSFER OF PROPERTY ACT, 1882 – Sections 106 and 111

Splitting up of tenancy –The suit shop was earlier given to defendants on tenancy and later on, after lapse of considerably long period, another adjoining shop was also given to them – Tenants removed partition wall situated between the two shops and single rent was being paid for the two shops and began to give single receipt – Held, still the tenancy of the two shops will be separate – There is no splitting up of tenancy and therefore, plaintiff is entitled to file eviction suit for single shop. (*Habibunnisa Begum v. G. Doraikannu Chettiar, AIR 2000 SC 152* distinguished wherein it was held that there cannot be partial ejectment of tenanted premises)

M/s Kanhaiya Ready-made Stores, Partnership Firm and others v. Rameshchand

Judgment dated 18.11.2011 passed by the High Court of M.P in S.A. No. 204 of 2000, reported in 2012 (1) MPHT 412

Held :

There is no quarrel over the proposition that the tenancy cannot be split. The Supreme Court in ***Habibunnisa Begum and others v. G. Doraikannu Chettiar (deceased by LRs.) and others, AIR 2000 SC 152*** has also held that ther cannot be

a partial ejectment of the tenanted premises. Hence, it is to be seen whether the present suit filed by the plaintiff Rameshchand has been filed in respect of partial ejectment of entire tenanted premises (two shops). If it is held that by the instant suit a decree of partial ejectment of tenanted premises has been sought, plaintiff would stand nowhere and his suit is liable to be dismissed. However, if it is held that tenancy of two shops is quite distinct to each other, certainly the submission of learned Senior Counsel for appellants in respect of first substantial question of law cannot be accepted.

On behalf of defendants, Bhojraj (Second defendant) was examined as D.W. 1. In Para 8 of his cross-examination specifically it has been admitted by him that he is tenant of Dagdulal (father of plaintiff) since 1968. In very specific words he has further admitted that at that juncture he was having only one shop on tenancy basis in which he was carrying on business in the name and style "Asha Cut-piece" (suit shop) later on its name has been changed to "Kanhaiya Ready-made Stores". Thus, it is clear that initially the suit shop was obtained by the tenant and lateron he also took adjoining shop. In the same para, further it has been admitted by defendant Bhojraj that when he obtained the suit shop in which he was carrying on business of "Asha Cut-piece" there was a wall between the two shops. Further, he has admitted that when after lapse of some period, second shop was given to him by father of plaintiff, he removed the wall existing between the two shops. Hence, according to me merely because lateron the second shop adjoining to suit shop was given by Dagdulal to defendants and second defendat Bhojraj removed the wall existing between two shops it would not mean that there was a single tenancy of two shops. Merely because one time rent of two shops or we may say single rent of two shops was being obtained it whould not mean that the tenancy of two shops was joint. Since the landlord (Dagdulal) was same, therefore, if he was receiving rent of two shops at one point of time singly it would not mean that tenancy of the two shops became a single tenancy.

Looking to the admission made by the defendant Bhojraj in his testimony Para 8 that earlier the suit shop was given to him on tenancy basis and later on after lapse of considerable long period another adjoining shop was given and to carry on business smoothly if the had removed the wall existing between two shops still the tenancy of the two shops will be separate.

Learned two Courts below have categorically held that in the present case thee is splitting of tenancy this has not been proved rather pure fining of fact has been arrived at that defendants are the tenant in the suit shop and their tenancy of suit shop is quite distinct and separate from another shop. Although a pure finding of fact has been arrived at by learned two Courts below that defendant Bhojaraj himself removed the wall existing between two shops so as to convert two shops into one shop and much has been argued by learned Senior Counsel for appellants in this regard but this Court is not entering into

those niceties because it has been proved that tenancy of defendants of suit shop is quite distinct and separate from another shop. It is well settled in law that finding of fact, how so far erroneous it may be, cannot be interfered in second appeal. Hence, I am of the view that in the present case there is no splitting of tenancy and, therefore, respondent is entitled to evict the appellants from the suit property.

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146. URBAN LAND (CEILING AND REGULATION) ACT, 1976 – Sections 6 and 10 (1)

Transfer of land – Transfer of excess land through sale deed after draft statement and notification is void *ab initio* and does not create any right – Any such transfer shall be deemed to be null and void.

M.P. Samdariya v. State of M.P. & Ors.

Judgment dated 24.10.2011, passed by the High Court of M.P. in W.P. No. 18045 of 2011, reported in ILR (2012) M.P. 70

Held :

In the case at hand the said transfer of excess land by virtue of sale deed dated 26.3.90 being after the draft statement filed under Section 6 and the notification under Section 10 (1) of 1976 Act, is ***void ab initio***, and does not create any right in favour of the petitioner, In ***Ritesh Tewari and another v. State of Uttar Pradesh and others, (2010) 10 SCC 677*** it is observed –

> "32- It is settled legal proposition that if an order is bad in its inception, it does not get sanctified at a leter stage. A subsequent action/development cannot validate and action which was not lawful at its inception, for the reason that the illegality strikes at the root of the order. It would be beyond the competence of any authority to validate such an order. It would be ironical to permit a person to rely upon a law, in violation of which he has obtained the benefits.
>
> 35- In the instant case, as we have observed that the alleged sale deed dated 20.4.82 in favour of Mayur Sahkari Awas Samiti has been a void transaction, all subsequent transactions have merely to be ignored."

In view of above the impugned order negativing the claim of the petitioner for recording him owner of the property in question cannot be faulted with.

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NOTE: (*) Asterisk denotes short notes

PART - III

CIRCULARS/NOTIFICATIONS

13वें वित्त आयोग से प्राप्त धनराशि से संस्थान द्वारा जिला प्रशिक्षण केन्द्र के ग्रंथालय एवं न्यायिक अधिकारियों के उपयोग हेतु न्यायालय ग्रंथालय हेतु क्रय एवं प्रदत्त की गई पुस्तकों के संधारण हेतु दिशा निर्देश

1. यह दिशा निर्देश न्यायिक अधिकारी प्रशिक्षण एवं अनुसंधान संस्थान, जबलपुर द्वारा प्रदत्त पुस्तकों के संधारण हेतु मान्य होंगे।

2. (i) पुस्तकों से तात्पर्य 13वें वित आयोग से प्राप्त धन राशि से संस्थान द्वारा क्रय एवं प्रदत्त की गई पुस्तकों से है।

   (ii) संस्थान से तात्पर्य न्यायिक अधिकारी प्रशिक्षण एवं अनुसंधान संस्थान, उच्च न्यायालय म. प्र., जबलपुर है।

   (iii) "जिला प्रशिक्षण केंद्र" से तात्पर्य प्रत्येक जिला न्यायालय परिसर में न्यायाधीशों के प्रशिक्षण हेतु स्थापित केन्द्र से है।

   (iv) "जिला प्रशिक्षण केन्द्र के ग्रंथालय" से तात्पर्य जिला प्रशिक्षण केन्द्र के उपयोग हेतु संस्थान द्वारा प्रदत्त पुस्तकों द्वारा निर्मित ग्रन्थालय से है।

   (v) "न्यायालय ग्रन्थालय" से तात्पर्य संस्थान द्वारा प्रत्येक न्यायालय को प्रदत्त पुस्तकों द्वारा निर्मित ग्रन्थालय से है।

   (vi) भपुस्तकों के वितरण की पंजी" से तात्पर्य संस्थान में संधारित पुस्तकों के वितरण की सूची से है।

   (vii) परिग्रहण पंजिका (Accession Register) से तात्पर्य प्रत्येक जिला न्यायालय में न्यायालय अधीक्षक द्वारा अथवा उसके निर्देशन में जिला न्यायालय कार्यालय में संधारित संस्थान द्वारा जिला स्थापना को प्रदत्त सभी न्यायालय पुस्तकालयों की पुस्तकों की विस्तृत पंजी से है।

   (viii) "न्यायालय ग्रन्थालय पंजी" से तात्पर्य प्रत्येक जिला स्थापना में स्थित प्रत्येक न्यायालय द्वारा संधारित उस पंजी से है जिसमें उस न्यायालय को प्राप्त पुस्तकों की प्रविष्टि की जायेगी।

   (ix) "जिला प्रशिक्षण केन्द्र ग्रन्थालय पंजी" से तात्पर्य प्रत्येक जिला न्यायालय द्वारा संधारित उस पंजी से हैं जिसमें जिला प्रशिक्षण केन्द्र को प्राप्त पुस्तकों की प्रविष्टि की जायेगी।

3. (i) परिग्रहण पंजी के संधारण का उत्तरदायित्व न्यायालय अधीक्षक का होगा।

   (ii) न्यायालय ग्रंथालय पंजी के संधारण का उत्तरदायित्व संबंधित न्यायालय के साक्ष्य लेखक का होगा।

(iii) जिला प्रशिक्षण केन्द्र ग्रंथालय पंजी के संधारण का उत्तरदायित्व जिला न्यायाधीश के सिविल निष्पादन लिपिक का होगा।

(iv) पुस्तकों की वितरण पंजी के संधारण का दायित्व संस्थान का होगा।

4. (i) न्यायालय ग्रंथालय को प्रदत्त पुस्तके संबंधित न्यायालय में पृथक से प्रदत्त बुक शेल्फ में इस प्रकार सुरक्षित रखी जाएगी जिससे कि उनकी पहचान पृथक एवं सुनिश्चित बनी रहे।

(ii) पुस्तकों के प्राप्त होने पर उनकी प्रविष्टि यथाशीघ्र परिग्रहण पंजिका (Accession Register) में एवं संबंधित न्यायालय द्वारा "न्यायालय ग्रन्थालय पंजी" में कराई जाएगी। Accession Register जिसमें पुस्तकों की प्रविष्टि संलग्न प्रोफार्म में की जाना अनिवार्य हैं।

(ii-A) जिला स्थापना में संस्थान द्वारा प्रदत्त सभी पुस्तकों की प्रविष्टि परिग्रहण पंजिका (Accession Register) में की जाएगी एवं प्रत्येक पुस्तक को विशिष्ट (Unique) क्रमांक दिया जाएगा जिसे परिग्रहण क्रमांक (Accession No.) कहा जाएगा।

(ii-B) प्रत्येक पुस्तक में शीर्षक पृष्ठ (Title Page), अंतिम पृष्ठ एवं 21 नंबर पृष्ठ पर परिग्रहण क्रमांक (ACC. No.) निम्न सील लगाते हुए डाला जाएगा – परिग्रहण क्रमांक (ACC. No.) ....., दिनांक .....। किसी भी परिस्थिति में कोई भी दो पुस्तकों के परिग्रहण क्रमांक (ACC. No.) एक जैसे नहीं होंगे।

(ii-C) कार्यालयीन प्रक्रिया में यदि किसी पुस्तक का उल्लेख किया जाना हो तो उसके साथ उसके परिग्रहण क्रमांक (ACC. No.) आवश्यक रूप से उल्लेख किया जाएगा।

(iii) पुस्तकों की प्रविष्टि न्यायालय ग्रंथालय पंजी में साक्ष्य लेखक द्वारा की जाएगी तथा इसके अतिरिक्त साक्ष्य लेखक पुस्तकों की एक सूची तीन प्रतियों में निर्मित एवं हस्ताक्षरित कर उस न्यायालय के पीठासीन अधिकारी के समक्ष सत्यापन हेतु प्रस्तुत करेगा।

(iv) पीठासीन अधिकारी यथाशीघ्र उक्त सूची की सभी प्रतियों को पंजी की प्रविष्टियों एवं पुस्तकों से मिलान कर सत्यापित करेगा एवं सूची की प्रविष्टियों के सही होने के टीप के साथ दो प्रतियाँ जिला न्यायाधीश को प्रेषित करेगा।

(v) सत्यापित सूची जिला न्यायाधीश को प्राप्त होने पर सूची में प्रविष्ट पुस्तकों का मिलान न्यायालय अधीक्षक द्वारा या उसके निर्देशन में जिला न्यायालय कार्यालय में संधारित परिग्रहण पंजिका (Accession Register) की प्रविष्टियों से किया जाएगा तथा सत्यापन के संबंध में टीप अंकित कर जिला न्यायाधीश के हस्ताक्षर द्वारा एक प्रति संस्थान को प्रेषित की जाएगी।

(vi) संस्थान किसी जिले की सभी सूचियाँ प्राप्त होने पर उनका मिलान जिले से पुस्तकों की प्राप्ति अभिस्वीकृतियों से कराएगा तथा पुस्तकों की प्रविष्टि पुस्तकों की वितरण पंजी में की जाएगी।

5. (i) जिला प्रशिक्षण केन्द्र को प्रदत्त पुस्तके पृथक से प्रदत्त बुक शेल्फ में सुरक्षित रूप से जिला न्यायाधीश के विश्राम कक्ष में इस प्रकार सुरक्षित रखी जाएगी जिससे कि उनकी पहचान पृथक एवं सुनिश्चित बनी रहे।

(ii) उक्त पुस्तकों के प्राप्त होने पर उनकी प्रविष्टि यथा शीघ्र जिला प्रशिक्षण केन्द्र ग्रंथालय पंजी में जिला न्यायाधीश के सिविल निष्पादन लिपिक द्वारा की जाएगी एवं इस पंजी को संधारित करने का उत्तरदायित्व संबंधित निष्पादन लिपिक का होगा।

(iii) पुस्तकों की प्रविष्टि के अतिरिक्त संबंधित निष्पादक लिपिक पुस्तकों की एक सूची तीन प्रतियों में निर्मित एवं हस्ताक्षरित कर जिला न्यायाधीश के समक्ष सत्यापन हेतु प्रस्तुत करेगा।

(iv) जिला रजिस्ट्रार यथाशीघ्र स्वयं या स्वयं द्वारा इस निमित्त अधिकृत कर्मचारी द्वारा सूची में प्रविष्ट पुस्तकों का मिलान करेगा/करवाएगा तथा प्रविष्टियों के सही होने की टीप के साथ संस्थान को प्रेषित करेगा।

(अ) संस्थान को सत्यापित सूची प्राप्त होने पर उसका मिलान संबंधित जिले के जिला प्रशिक्षण केन्द्र हेतु प्राप्त पुस्तकों की प्राप्ति अभिस्वीकृति से किया जाएगा तथा पुस्तकों की प्रविष्टि पुस्तकों की वितरण सूची में की जाएगी।

6. (i) न्यायालय ग्रंथालय की पुस्तकों का प्रभार साक्ष्य लेखक द्वारा न्यायालय के पीठासीन अधिकारी को प्रदान किया जाएगा एवं पीठासीन अधिकारी का स्थानांतरण होने पर पीठासीन अधिकारी द्वारा पुस्तकों का प्रभार साक्ष्य लेखक को दिया जाएगा।

(ii) पुस्तकों का प्रभार देते अथवा लेते समय पीठासीन अधिकारी/साक्ष्य लेखक द्वारा पुस्तकों का सत्यापन न्यायालय ग्रंथालय पंजी से किया जाएगा एवं इस आशय की टीप प्रभार लेने/देने के पत्र पर अंकित की जाएगी।

(iii) प्रभार लेने/देने के पत्र की एक प्रति जिला न्यायाधीश को प्रेषित की जाएगी जो ऐसे प्रभार लेने/देने के पत्र को मुख्य पंजी के साथ संधारित कराऐंगे।

(iv) पीठासीन अधिकारी का स्थानांतरण होने पर उनका अंतिम वेतन प्रमाण पत्र तब तक जारी नहीं किया जाएगा जब तक कि ऐसी पुस्तकों का प्रभार साक्ष्य लेखक को दिए जाने का प्रमाण पत्र पीठासीन अधिकारी द्वारा जिला न्यायाधीश को प्रेषित नहीं कर दिया जाता तथा उसका सत्यापन जिला न्यायालय कार्यालय द्वारा परिग्रहण पंजी से नहीं कर लिया जाता।

7. पुस्तकों पर न्यायालय के नाम/जिला प्रशिक्षण केन्द्र ग्रंथालय, जैसी भी स्थिति हो, की सील अंकित की जाएगी।

8. न्यायालय ग्रंथालय की पुस्तके बुक शेल्फ सहित उसी न्यायालय में, जिसे प्रदान की गई है, रखी जाएगी, जिन्हें जिला न्यायाधीश के आदेशानुसार संबंधित न्यायाधीश द्वारा अपने आवास पर भी रखा जा सकेगा। ऐसा आदेश जिला न्यायाधीश द्वारा इस संतुष्टि के उपरांत ही दिया जाएगा कि संबंधित न्यायाधीश इन पुस्तकों को सुरक्षित रूप से रखेंगे। ऐसे आदेश की एक प्रति संस्थान को प्रेषित की जाएगी तथा एक प्रति मुख्य पंजी के साथ संधारित की जाएगी।

9. (i) यदि कोई न्यायालय रिक्त है तो उसके ग्रंथालय का प्रभार जिला न्यायाधीश ऐसे न्यायालय को अंतरिम रूप से दे सकता है जिसके पास ऐसा ग्रंथालय नहीं हैं। संबंधित न्यायालय में नवीन पदस्थापना होते ही उस न्यायालय का ग्रंथालय बुक शेल्फ सहित संबंधित न्यायालय को वापस कर दिया जाएगा।

(ii) यदि जिला न्यायाधीश के मत में ऐसा कोई न्यायालय विद्यमान नहीं है जिसे रिक्त न्यायालय के ग्रंथालय का अंतरिम प्रभार दिया जा सकता हो और ऐसे ग्रंथालय का उस न्यायालय कक्ष से स्थानांतरण अपेक्षित है तो जिला न्यायाधीश ऐसे ग्रंथालय को बुक शेल्फ सहित पृथक पहचान के साथ जिला न्यायालय के पुस्तकालय कक्ष में तब तक रखे जाने का आदेश कर सकेंगे जब तक कि उस न्यायालय में नवीन पदस्थापना नहीं होती। उस न्यायालय के नवीन पदस्थापना होते ही उस न्यायालय का ग्रंथालय बुक शेल्फ सहित उस न्यायालय को वापस कर दिया जाएगा।

(iii) उपर्युक्त दोनों ही स्थितियों में जिला न्यायाधीश के आदेश की एक प्रति संस्थान को प्रेषित की जाएगी तथा एक प्रति परिग्रहण पंजिका के साथ संधारित की जाएगी।

(iv) यह स्पष्ट किया जाता है कि वह न्यायालय जिसे अंतरिम प्रभार दिया गया है अथवा जिला न्यायालय पुस्तकालय के द्वारा पुस्तकों के प्रभार लेने व देने के संबंध में पूर्व वर्णित नियमों का अनुपालन किया जाना अपेक्षित होगा।

10. (i) पुस्तकों का भौतिक सत्यापन प्रतिवर्ष ग्रीष्म अवकाश के मध्य आवश्यक रूप से किया जाएगा तथा प्रत्येक न्यायाधीश प्रस्तकों की सूची के साथ प्रतिवेदन जिला न्यायाधीश को दो प्रतियों में प्रेषित करेगा।

(ii) न्यायालय अधीक्षक स्वयं अथवा अपने निर्देशन में परिग्रहण पंजिका (Accession Register) से प्रतिवेदन एवं सूची की प्रविष्टियों की जांच करेगा/कराएगा तथा अपने प्रतिवेदन सहित जिला को प्रस्तुत करेगा।

(iii) जिला न्यायाधीश अपने हस्ताक्षर सहित एक सूची संस्थान को आवश्यक रूप से प्रतिवर्ष 15 जून तक संस्थान को प्रेषित करेंगे।

11. दिशा निर्देशों निर्वाचन के संबंध में संस्थान का निर्णय अंतिम होगा।

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