29th Year

Pursuit of Excellence

JOTI JOURNAL

(BI-MONTHLY)

AUGUST 2023

MADHYA PRADESH STATE JUDICIAL ACADEMY
JABALPUR

JOTI JOURNAL
AUGUST 2023

JOTI JOURNAL AUGUST - 2023

SUBJECT – INDEX

HINDU SUCCESSION ACT, 1956
हिन्दू उत्तराधिकार अधिनियम, 1956

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INDIAN PENAL CODE, 1860
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Sections 201 and 302 – Circumstantial evidence – Complete chain must be established meticulously with forensic clarity.

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143 201

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धाराएं 201 एवं 302 – हत्या – परिस्थितिजन्य साक्ष्य – पीड़ित का शव कब्र से कई माह बाद निकाला गया – मानव वध का कोई चिकित्सीय प्रमाण नहीं – पोस्टमॉर्टम में मृत्यु के कारण का पता नहीं चल सका परन्तु परिस्थितियों की श्रृंखला पूरी तरह से स्थापित – दोषसिद्धि उचित। **144 202**

Section 302 – (i) Identification parade – Value – If the accused are previously known to the witness, holding of identification parade has no value.

(ii) Judgment – Basis of – To avoid miscarriage of justice, it should consist of reasons and appreciation of evidence but should not be based on the principle of preponderance of probability.

धारा 302 – (i) शिनाख्त परेड – महत्व – यदि साक्षी अभियुक्त को पहले से जानता है तब शिनाख्त परेड किया जाना अनुपयोगी है।

(ii) निर्णय – आधार – न्याय के दुरूपयोग से बचने के लिये निर्णय में कारणों और साक्ष्य के मूल्यांकन को शामिल किया जाना चाहिए न कि अधिसंभावना की प्रबलता के सिद्धांत पर आधारित होना चाहिए । **145 203**

Sections 302, 363, 365 and 376 (2)(f) – (i) Death sentence – Rape and murder of 7-8 year old physically and mentally challenged minor victim – Punishment based on "crime test", "criminal test" and "rarest of the rare test"– Possibility of reformation ruled out – Conviction and sentence held proper.

(ii) Life imprisonment – Imposition – Minimum or non–remittable term of imprisonment – Condition when can be imposed ? Explained.

धाराएं 302, 363, 365 एवं 376 (2)(च) – (i) मृत्युदंड – शारीरिक और मानसिक रूप से निःशक्त 7–8 वर्ष की अव्यस्क पीड़िता के साथ बलात्कार और हत्या – ''अपराध परीक्षण'', ''अपराधी परीक्षण'' और ''दुर्लभ से भी दुर्लभतम परीक्षण'' के आधार पर सजा– सुधार की संभावना नहीं – दोषसिद्धि एवं दण्डादेश उचित अभिनिर्धारित।

(ii) आजीवन कारावास – आरोपण – कारावास की न्यूनतम या गैर परिहार योग्य अवधि – शर्त कब लगाई जा सकती है ? व्याख्या की गई।

146 204

Sections 302 and 364-A – (i) Sentencing – Right to be heard – A meaningful, real and effective hearing should be offered to the accused, even if the Court is to be adjourned for a separate hearing.

(ii) Capital punishment – What are mitigating circumstances ?

धाराएं 302 एवं 364-क – (i) दण्डादेश – सुनने का अधिकार – अभियुक्त को एक सार्थक, वास्तविक और प्रभावी सुनवाई की पेशकश की जानी चाहिए, भले ही न्यायालय को अलग सुनवाई हेतु स्थगन करना पड़े।

(ii) मृत्युदण्ड – कौन सी परिस्थितियां लघुतरकारी होंगी ?

147 206

Sections 324, 366 and 376-AB – (i) Sentencing – Death sentence – Even if one circumstance favours accused including his young age, imposition of capital punishment is not proper.

(ii) DNA report – Chain of custody – Blood samples were collected and sent to FSL promptly – Seal of hospital was intact – No procedural impropriety found – DNA report cannot be doubted – Conviction can solely be based on DNA report.

(iii) Recovery from open place – Recovery was made from bushes and open place but was not accessible to public; it can be relied upon – No straight jacket formula that every recovery from open space is vitiated.

धाराएं 324, 366 एवं 376–कख – (i) दण्डादेश – मृत्युदण्ड – यदि अभियुक्त के हित में केवल एक परिस्थिति हो जिसमें उसका अल्प आयु का होना हो, तब भी मृत्युदण्ड उचित नही है।

(ii) डी.एन.ए. प्रतिवेदन – परिस्थितियों की श्रृंखला – रक्त का नमूना एकत्रित कर एफ.एस.एल. जॉच हेतु शीघ्रता से भेजा गया – अस्पताल की मुद्रा अखंडित – कोई प्रक्रियात्मक त्रुटि नही पाई गई – डी.एन.ए. प्रतिवेदन पर अविश्वास नहीं

किया जा सकता – दोषसिद्धि केवल डी.एन.ए. प्रतिवेदन के आधार पर की जा सकती है।

(iii) खुले स्थान से वस्तु की बरामदगी – बरामदगी खुले स्थान से की गई जहाँ घांस थी, पर आम जन की पहुँच नहीं थी; इस पर विश्वास किया जा सकता है – ऐसा कोई निश्चित सूत्र नही है कि खुले स्थान से की गई हर बरामदगी दूषित होती है। **148 208**

Section 326 – Criminal practice – Testimony of injured witness – Injury to a witness is an inbuilt guarantee of his presence at the scene of crime – Unless there are strong grounds for its rejection based on major contradictions and discrepancies, it should be relied upon.

धारा 326 – आपराधिक प्रथा – आहत साक्षी की अभिसाक्ष्य– साक्षी को आई हुई चोट स्वतः प्रमाण है कि वह घटना स्थल पर मौजूद था – जब तक तात्विक श्रेणी के विरोधाभास एवं विसंगतियों जैसे ठोस आधार उसे खारिज करने के न हो, विश्वास किया जाना चाहिये। ***149 212**

Sections 405 and 406 – (i) Issuance of process – Facts to be considered.

(ii) Accused resides outside the jurisdiction of court – It is obligatory upon the Magistrate to inquire into the case himself or direct investigation be made by a police officer for finding out whether or not there is sufficient ground for proceeding against the accused.

धाराएं 405 एवं 406 – (i) आदेशिका जारी किया जाना – विचार में लिये जाने वाले तथ्य।

(ii) अभियुक्त का न्यायालय के क्षेत्राधिकार के बाहर निवास – मजिस्ट्रेट के लिए बाध्यकारी है कि वह प्रकरण की जांच स्वयं करे या पुलिस अधिकारी को अन्वेषण के लिए निर्देशित करें कि क्या अभियुक्त के विरूद्ध कार्यवाही किये जाने के लिए पर्याप्त आधार दर्शित होते है। **150 212**

INTERPRETATION OF STATUTES:
संविधियों का निर्वचन :

– See Order 14 Rule 5 of the Civil Procedure Code, 1908.

– देखें सिविल प्रक्रिया संहिता, 1908 का आदेश 14 नियम 5।

129 182

LIMITATION ACT, 1963
परिसीमा अधिनियम, 1963

Article 58 – (i) Suit for Partition – Limitation – Right to sue for partition is a recurring right and its cause of action arises on a day-to-day basis, which will be governed by Article 58 of the Act.

(ii) Suit for partition – Requirement of separate relief – Suit inherently includes relief of delivery of separate possession – Not necessary for plaintiff to independently seek such relief.

अनुच्छेद 58 – (i) विभाजन के लिए वाद – परिसीमा – विभाजन के लिये वाद का अधिकार एक निरंतर अधिकार है और इसके लिये वाद कारण दिन प्रतिदिन के आधार पर उत्पन्न होता है जो अधिनियम के अनुच्छेद 58 से शासित होगा।
(ii) विभाजन के लिए वाद – पृथक अनुतोष की आवश्यकता – वाद में पृथक से आधिपत्य प्रदान किये जाने का अनुतोष अन्तर्निहित है – वादी के लिये ऐसा अनुतोष स्वतंत्र रूप से प्रार्थित किया जाना आवश्यक नहीं है। **151 213**

MOTOR VEHICLES ACT, 1988
मोटर यान अधिनियम, 1988

Section 147 (1) – Pay and Recover – Goods Vehicle – Liability of insurance company – "Owner of goods" means the person who travels in the cabin of the vehicle – Deceased was not sitting in the cabin – Insurance Company not liable – However, Tribunal can order for pay and recover.

धारा 147 (1) – भुगतान करें और वसूलें – मालवाहक वाहन –बीमा कंपनी का दायित्व –'' माल का स्वामी'' के अंतर्गत केवल वही व्यक्ति आएगा जो वाहन के केबिन में बैठकर यात्रा करे – मृतक केबिन में नहीं बैठा था – बीमा कंपनी उत्तरादायित्व से मुक्त – परंतु अधिकरण भुगतान करो और वसूलो का आदेश कर सकती है। **152 214**

Section 147 (1) – Liabilities of Insurance Company – Tractor trolley insured for agricultural purpose – No premium was paid for carrying the passenger – Use of tractor for other business activities – Insurance Company cannot be held liable.

धारा 147 (1) – बीमा कम्पनी का दायित्व – ट्रेक्टर ट्राली कृषि प्रयोजन के लिये बीमित – यात्री के संबंध में कोई प्रीमियम का भुगतान नहीं किया गया – ट्रेक्टर का उपयोग अन्य व्यापारिक गतिविधियों हेतु किया गया – बीमा कंपनी उत्तरदायी नहीं मानी जा सकती। **153 216**

Sections 149 and 166 – Theft of vehicle – Insurance Company failed to lead any evidence to prove the violation of any specific terms and condition of policy – Held, insurance company liable to pay compensation.

धाराएं 149 एवं 166 – वाहन की चोरी – बीमा कंपनी पालिसी के किसी विशिष्ट नियम और शर्त के उल्लंघन को साबित करने वाला प्रमाण प्रस्तुत करने में विफल रही – अभिनिर्धारित, बीमा कम्पनी उत्तरदायी है। **154 216**

PART- III
(CIRCULARS/NOTIFICAIONS)

Editorial

Esteemed Readers,

I proudly extend my greetings to everyone on the occasion of 77th Independence Day. This independence day, the Academy was in full swing, as at the behest of Hon'ble Chief Justice Shri Ravi Malimath, High Court of Madhya Pradesh, the name and motto of the Academy 'Pursuit of Excellence' adorned the frontage of old building. This issue carries the photograph of this new addition made to the building on the cover page. Hon'ble Chief Justice hoisted the National Flag at the Academy. Glimpses of this event can be taken from the photograph section of this edition.

At this juncture, I would like to make a mention of the Independence Day speech delivered by Hon'ble Chief Justice which focused on introspecting whether we have truly achieved 'independence'? In order to move forward on the path of progress, it is extremely crucial that one should continuously introspect one's self-growth. Hon'ble Chief Justice has emphasized that as citizens of this nation we should return something to the society in lieu of the independence that we got. In furtherance of this noble thought, I would like to highlight the initiative *'Boond'*, wherein Hon'ble Chief Justice and Hon'ble sitting Judges of High Court has pledged to contribute a monthly sum for the welfare of the needy. Another step in this direction is conduction of online classes for Capacity Building of Advocates pro bono inaugrated on August 24, 2023 so as to increase their representation in the judicial service.

In these two months, the Academy conducted Conference of Family Court Judges, Refresher Courses for Civil Judges on completion of 5 years of service, Refresher Course for District Judges (Entry Level) on completion of one year of service, Workshop on Land Acquisition Laws & Motor Accident Claim Cases and Identified Legal Issues on Attributes of a Judge. The Academy also commenced Foundation and Advance Training Course for District Judges (Entry Level) recruited from Bar and on promotion.

It is noteworthy that Academy conducted an online workshop of Negotiable Instruments Act, 1881 on August 19, 2023 with a hope to address the issues relating to docket explosion of these cases. The pendency of these matters is a growing concern and directions were issued by Hon'ble Supreme Court

In Re: Expeditious Trial of Negotiable Instrument Act, 1881 **2021 SCC Online SC 325** to expedite trial of these cases. Following this judgment, a pilot study has also been initiated in five Hon'ble High Courts with a view point to address the grave issue of curtailing the pendency of cases arising from this arena. This step is indicative that it is imperative on our part to expedite trial of these matters and attempt to conclude the trial in the given time frame in the Act.

I would like to make a mention of one of the highlight events of this year, '*Vimarsh*', which was conducted in collaboration with Juvenile Justice Committee Madhya Pradesh State Legal Services Authority and UNICEF, Madhya Pradesh. This was a two day State Level Consultation on Child Protection which was inaugurated by Hon'ble Chief Justice on August 26, 2023. His Lordship was kind enough to grace the event and emphasized on importance of mental health and ensuring the overall well-being of affected children. This two day event witnessed deliberations pertaining to various issues concerning children in conflict with law. A separate session was devoted towards highlighting the impact and achievements of '*Manthan*' conducted in the previous year. I hope that the deliberations made over these two days have a bearing on the participants and we, as a society, safeguard the rights of our younger generation and nurture them with the love and care they deserve.

As our country celebrates the feat of becoming the first nation to land on the South Pole of the Moon with the successful soft landing of *Chandrayaan-3,* I conclude by quoting legendary poet Shri Rabindranath Tagore:

"Everything will come to us that belong to us if we
build the capacity to receive it."

I salute the dedication of ISRO scientists who addressed each and every possible issues that *Chandrayaan-2* may have experienced. They worked on that and created history. This episode as is etched in the history of mankind now, is an invaluable learning lesson for all of us to set aside our egos and arrogance and to constantly work on our weaknesses. This is what develops strength and paves way for a successful life. Let us all strive to imbibe this quality in our lives.

Krishnamurty Mishra
Director

GLIMPSES OF INDEPENDENCE DAY CELEBRATION

Hon'ble Chief Justice Shri Ravi Malimath hoisting National Flag on Independence Day at MPSJA (15.08.2023)

MADHYA PRADESH STATE JUDICIAL ACADEMY, JABALPUR

Hon'ble Chief Justice inaugrating *'Vimarsh'* – State Consultation on Child Protection organized by the Juvenile Justice Committee of High Court of Madhya Pradesh in collaboration with MPSJA, MPSLSA and UNICEF Madhya Pradesh on 25.08.2023 by lighting the lamp.

Hon'ble Chief Justice addressing the gathering during inaugural Session

MADHYA PRADESH STATE JUDICIAL ACADEMY, JABALPUR

Refresher Course for Civil Judges (2014-2017 Batch)
(on completion of 5 years service) (Group-II) (26.06.2023 to 01.07.2023)

Refresher Course for the District Judges (Entry Level & Selection Grade)
(on completion of 5 years service) (Group - I) (03.07.2023 to 08.07.2023)

Refresher Course for District Judges (Entry Level)
(on completion of one year service) (10.07.2023 to 14.07.2023)

MADHYA PRADESH STATE JUDICIAL ACADEMY, JABALPUR

Hon'ble Shri Justice Sujoy Paul, Chairman, Governing Counsel, MPSJA addressing the participants of the Awareness Programme on Attributes of a Judge: An Interaction (15.07.2023)

Conference of Family Court Judges
(21.07.2023 & 22.07.2023)

MADHYA PRADESH STATE JUDICIAL ACADEMY, JABALPUR

Workshop on – Key issues relating to Motor Accident Claim Cases &
Land Acquisition Laws (28.07.2023 & 29.07.2023)

Workshop on – Commercial Courts Act, 2015
(05.08.2023 & 06.08.2023)

HON'BLE SHRI JUSTICE ARUN KUMAR SHARMA DEMITS OFFICE

Hon'ble Shri Justice Arun Kumar Sharma demitted office on His Lordship attaining superannuation.

Hon'ble Shri Justice Arun Kumar Sharma was born on 29th July,1961 at Vidisha (M.P). After obtaining the degrees B.Sc. and LL.B., His Lordship joined Madhya Pradesh Judicial Services as Civil Judge Class II on 27th August, 1987 at Sagar. His Lordship was promoted as officiating District Judge in Higher Judicial Services on 2nd June,1999. His Lordship was granted Selection Grade Scale w.e.f. 10th October, 2007 and Super Time Scale w.e.f. 11th April, 2016.

In the course of service as Judicial Officer, His Lordship served in different capacities at various places like Sagar, Nasrullaganj (Rajgarh) , Sehore, Bagli (Dewas), Ujjain, Indore, Sabalgarh (Morena), Agar Malwa (Shajapur), Bhopal, Tikamgarh and Indore. His Lordship also held the posts of Principal Judge, Family Court, Chhatarpur and Deputy Welfare Commissioner, Bhopal Gas Victims, Bhopal. His Lordship also served as District & Sessions Judge (nomenclature now used as the Principal District Judge) Tikamgarh. His Lordship was Principal District Judge Chhatarpur from 28th March, 2019 till elevation.

His Lordship was administered oath of the office of Judge, High Court of Madhya Pradesh on 25th June 2021.

During His Lordship's tenure in the High Court of Madhya Pradesh, rendered invaluable services as Judge and Member of various Administrative Committees of the High Court.

We on behalf of JOTI Journal wish His Lordship a very happy, heathy and prosperous life.

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PART I

ADDRESS OF HON'BLE CHIEF JUSTICE SHRI RAVI MALIMATH ON INDEPENDENCE DAY

My esteemed Sister & Brother Judges,

Shri Prashant Singh, Advocate General, State of Madhya Pradesh,

Shri Pushpendra Yadav, Deputy Solicitor General, Union of India,

Shri Prem Singh Bhadouria, Chairman, State Bar Council of Madhya Pradesh,

Shri Sanjay Verma, President, High Court Bar Association, Jabalpur,

Shri Anil Khare, Senior Advocate & President, High Court Advocates' Bar Association, Jabalpur,

Shri R. P. Agarwal, Senior Advocate & President, Senior Advocates' Council, Jabalpur,

Member Secretary and other officers of M.P. State Legal Services Authority,

Shri Krishnamurty Mishra, Director and other officers of M.P. State Judicial Academy,

The Registrar General and other Officers of the Registry,

Shri Alok Awasthi, Principal District and Sessions Judge, Jabalpur and other Judicial Officers,

Office bearers of Bar Council,

Senior Advocates and other members of the Bar,

Staff and Employees of High Court of Madhya Pradesh,

Ladies and Gentlemen,

I wish you all a very happy 77th Independence Day. We humbly bow our heads in reverence to the brave men and women who valiantly fought without regard for their own lives for an independent India. We are indeed indebted to each one of them. To be born in a free country is itself gratifying. The sacrifices undertaken to make our country independent can never be forgotten. The men and women who fought for the independence

of the country were men and women of principles. They fought for the principles they believed in, irrespective of any loss or damage caused to them. They fought with the sole hope and desire to obtain freedom for the country. They were brave souls who were dedicated to the cause of the country.

Today, we, the citizens of free India need to remember and recognize the fact that all those who fought for independence, fought for values, fought for principles, fought for an independent India.

We have formed our country into a sovereign, socialist, secular, democratic republic, governed by the Constitution of India. The three organs of the country, the executive, the judiciary and the legislature are critical divisions in its administration. The strength of these institutions determines the strength of the country. Therefore, each institution has to be strong by itself. Insofar as we, the men and women of law, are concerned, our interest is naturally the judiciary. Protecting the judiciary and maintaining its independence is of paramount importance to us. To have a strong and robust judiciary, is the requirement of the day. Today is not just a day to celebrate the independence that we have achieved but also to introspect on whether we are wholly and truly independent. Are we independent of corruption, independent of prejudice, independent of greed. Are we independent of the apathy that prevents us from putting the needs of the institution before our own? We need to ask ourselves whether we have contributed to the development and growth of the institution. Have we done anything to improve the system to make it more independent and robust or have we only helped ourselves individually. It is essential for all of us to contemplate these issues especially on a day like this.

Certain prominent freedom fighters who had been at the forefront in the freedom struggle were advocates. I want the advocates to be at the forefront in building this institution as well. The Bar and the Bench have always been considered as two sides of the same coin. Both work to the best of their abilities to ensure that justice prevails. However, when either falters, justice fails. Any act committed by the Bar which undermines the faith and mutual respect between the Bar and the Bench is fatal to the institution. Any act of commission or omission attacks the very fabric of the institution. An act of protest weakens the system. An act of protest damages the trust and dignity of the relationship between the Bar and the

Bench. We must stand together, work together, fight together, so that when we achieve results, we can celebrate together.

The only goal that our forefathers had, was to achieve freedom. They maintained the highest degree of integrity and honesty in their cause. Many of the freedom fighters lost their lives, family, property and other assets but they did not yield. They only wanted to gain independence. They stood firmly by their values and principles. They always put the interests of the nation first. What have we learnt from them? Have we followed even a modicum of the high ideals and values that were propagated by all our countrymen who fought for independence, or have we fallen into the narrow path of seeking only personal gains. It is high time that we carefully mull over this.

The country has produced great men. The country needs to produce great men. Great men aren't great by birth, they become so by virtue of the values they hold, for the principles they cherish and the noble causes that they espouse. The priority that our freedom fighters had was only one. We should also carve out our own priorities and in doing so, the interest of the institution has to be pre-eminent. We must give up our chase for personal comforts and instead use every ounce of our energy for the development of the institution and the country. It is high time we change our attitude from 'who cares' to 'yes, I do care'.

A country cannot be developed nor does it grow into strength by itself. It does so because of its citizens and their efforts. The potential that each one of you has, appears to be under-utilized. You are all intelligent and talented people with the capacity to contribute immensely. If your abilities are properly channelized and focused towards strengthening of the institution, I do not think anything can hold us back.

It is only in adversity that a man is tested. Occasions occur in life where one needs to make a choice between the right and the wrong. It is at that juncture that your values and principles are put to test. The decision to be taken by you should follow your own values and principles and should not succumb to any other enticements or threats. The right decision will take you forward. The wrong decision will pull you down. There can be no excuse for taking a wrong decision.

Having given us independence, we owe it to our forefathers to make this country great and strong. With every passing year of independence, the

country should become stronger than what it was in the previous years. It is only then that the efforts of our forefathers in achieving freedom for us will not go wasted. It is only then that our forefathers will really feel that we are have paid gratitude to them. A popular saying goes, "ask not what your country can do for you but ask what you can do for your country". Such beautiful words and sentiments are not just to be appreciated and to be drowned in contemplation. They should be put into effect, they should be put into action.

The judiciary contributes to nation building through ensuring the rule of law and dispensation of justice. We also strive to do our best through administrative actions. Notwithstanding this, the amount that we do can never be enough until a single person remains in suffering. Mahatma Gandhi once said "The true measure of any society can be found in how it treats its most vulnerable members." Being in a position to do so, the contributions of the judiciary must necessarily extend beyond the judicial sphere. We must make a positive impact in the lives of these vulnerable members of society. There are countless who are less fortunate than us. There are people who lack the fundamental requirements of food, clothing, a roof over their heads, clean water to drink, etc.

The judiciary has always stepped up when there have been natural calamities and other issues. We are also connected with various causes on an individual basis. However, we feel that this is not sufficient. God has been kind to us and it is our duty to give back to society, not just when disaster strikes but on a periodic and regular basis and on an institutional level.

On this Independence Day, in this spirit of contributing to society beyond judicial and allied methods, I am happy to announce an initiative by the chief justice and judges of the High Court of Madhya Pradesh for those less fortunate in Madhya Pradesh.

At a Full Court Meeting held on the 12th of August, 2023, it has been unanimously resolved that the chief justice and each sitting judge of the High Court of Madhya Pradesh would contribute a minimum sum of Rs. 5,000 per month towards upliftment of the poorest of the poor in Madhya Pradesh. This amount will be utilised in such a way that it directly benefits those in need of assistance. For instance, through the purchase and supply of essential commodities such as food, water, clothing, assistance in cases of exigencies, etc.

We do not view this as charity but as inching towards fulfillment of our moral obligation to give back to society. The enthusiasm of the judges when I proposed this initiative, was heartening to see. At the meeting itself, there were multiple ideas suggested for utilisation of the amount. To ensure optimum usage of the amount, a committee will be constituted. With time, we may also consider including retired judges and the district judiciary, purely on a voluntary basis. No amount or donations will be accepted from any outside sources.

Similarly, the amount will not be provided to any governmental or non- governmental organisations either. This is solely a contribution from the chief justice and sitting judges of the Madhya Pradesh High Court. This is intended to directly reach those in need.

Currently, we have a strength of 33 judges. This means, we would collect at least Rs. 1,65,000 per month and Rs. 19,80,000 per annum. Not just collect, but every single naya paisa of this will go to the poorest of the poor across Madhya Pradesh.

This amount may be viewed as large by some and small by others. For us, as an institution, it is a start.

As said by Mother Teresa, "We know only too well that what we are doing is nothing more than just a drop in the ocean. But if that drop were not there, the ocean would be less because of that missing drop." Our initiative is called "Boond". As all of you know, in Hindi, this means, "a drop". It signifies our humble initiative which is akin to a drop. It also alludes to the fact that a drop, though humble, makes a difference to the ocean. We sincerely hope that our modest contributions will make a positive difference to someone's lives.

This Independence Day, let us all join hands to give rather than to take, to build rather than to brood and to put our institution before ourselves.

Wish you all a Happy Independence Day once again.

Thank you.

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OUR LEGENDS

HON'BLE SHRI JUSTICE BISHAMBHAR DAYAL
4th CHIEF JUSTICE OF HIGH COURT OF MADHYA PRADESH

This edition comes to you with yet another encouraging story of our legal stalwart, Hon'ble Shri Justice Bishambar Dayal. To begin with the narration of His Lordship's awe inspiring life journey he was born on September 14, 1910. He was the eldest son of his father. His father passed away when he was only 12 years of age. In 1926, he passed his matriculation from C.A.B. School, Allahabad, thereafter, he passed his intermediate examination in 1928 from St. Jones College, Agra and took his B.A. degree from the same college. His passion for law led him to acquire his law degree from Law College, Agra in 1932. After a commendable academic career and being a part-time lecturer, His Lordship was enrolled as a Pleader in Agra in 1933 before eventually relocating to Nainital. He joined the chambers of the esteemed lawyer Rai Bahadur Kanhaiyalal in U.P. After gaining invaluable experience in the district courts, His Lordship joined the Allahabad Bar in 1946. As a member of Bar, His Lordship attracted large practice because of his hard work, genial temperament, quick grasp and legal acumen. Recognizing his expertise and dedication to the legal profession, he was appointed as Judge of the Allahabad High Court on May 6, 1957. His remarkable journey in the field of law and his unwavering commitment to justice have left an indelible mark on the legal fraternity.

On March 19, 1969, Justice Bishambhar Dayal was sworn in as the 4th Chief Justice of the High Court of Madhya Pradesh. The prestigious swearing in ceremony took place in the main hall of the Raj Bhawan, Bhopal (M.P.), with the Governor, Shri K. C. Reddy, administering the oath of office. The legal fraternity, including the Bar and Bench of the State, extended a warm welcome to the new Chief Justice, wishing him resounding success in his new role.

On work front, His Lordship believed to not to devote the time of judicial work in discharging administrative work and ensured team-work among Judges. Recognizing the value of time, Justice Dayal urged lawyers to consider the court's schedule as public time and minimize its wastage. He shared examples of stalwart advocates at the Allahabad High Court who would wait in the Bar room to promptly present their cases when the court session commenced. Additionally, he advised young lawyers not to idle away their time if they had no immediate work. Instead, he encouraged them to attend court proceedings and attentively listen to the arguments of their seniors, fostering a learning environment that could be utilized when they eventually received cases.

Justice Bishambhar Dayal's tenure as Chief Justice was marked by his commitment to upholding standards and maintaining discipline in the court. His simplicity, straightforwardness, calm disposition and extensive legal knowledge endeared him to the legal fraternity. His punctuality and dedication to full court hours instilled a sense of alertness and discipline among the advocates. Above all, his unwavering loyalty, love for justice and steadfast adherence to truth left a lasting impression on those who knew him.

As far as his relationship with the Bar is concerned, His Lordship felt more at home with the members of the Bar and strongly propounded for a dedicated and an independent Bar. To highlight his bond with the Bar, the relevant extract from the Lordship's ovation is reproduced below:-

> *"Administration of justice is impossible without an efficient Bar and without the full co-operation of the Bar. Mr. Advocate-General has suggested that the guidance has to come from me. But we are guided by the Bar. Judgments of any Court cannot be of any good standard unless the members of the Bar study the case properly, study the law properly, and place the whole case clearly. We cannot get time enough at the spur of the moment to know all the facts of the case, unless they are brought to our notice. It may be different if we take the files home and study them, we may consider some points here and there sometimes. But usually, in 99 percent of cases, it is the guidance which has been given by the Bar that leads us to give our judgments, and, therefore, it is the Bar which lays down the standards of a Court. For this purpose, I have always thought that an independent Bar and a Bar exclusively devoted to High Court work can only lay down proper standards"*

In his address, His Lordship laid great emphasis on importance of maintaining objectivity and professionalism in the legal field. He advised lawyers to approach cases without emotional bias and instead focus on ensuring that justice should be served. He shared anecdotes of senior lawyers giving him disapproving looks when he suggested holding back cases from the court. His firm belief was that a lawyer's responsibility lies in upholding justice rather than solely concentrating on winning or losing a case. It is noteworthy that His Lordship allotted the land in the precincts of the High Court for construction of Bar Council building on November 28, 1971.

Justice Dayal firmly believed that every aspect of the justice system should function harmoniously to uphold the standards of justice and enhance legal knowledge through the study of diverse cases. With unwavering dedication, he served in this esteemed position until his retirement on September 14, 1972. Such was the impact of his legal acumen and integrity that even after his retirement, his expertise was sought and he was appointed as the Lokayukta in Uttar Pradesh on September 14, 1977. This additional responsibility allowed him to continue his commitment to upholding justice and fighting against corruption, ensuring that his invaluable contributions continued to benefit society. His Lordship believed in "Radhaswami Faith" and devoted his life to the welfare of humanity. After laying down his office as Lokayukta he started living almost permanently at Hazuri Bhawan, Pipalmandi, Agra, the Ashram of his spiritual Guru. And no one was surprised at this because he was leading a saintly life even while he was holding various high offices. In the last few years of his life, he was completely devote towards spiritualism. His Lordship passed away on February 20, 1987.

His Lordship was a staunch supporter and believer of the maxim 'work is worship' and strictly followed it throughout his career. He always disfavoured unnecessary show and ceremonies and appreciated simplicity in every walk of life. It is noteworthy that on the day of His Lordship's retirement, he worked till last minute of the court and after spending some time with the members of the Bar, straightaway went to the railway station for boarding the train for his hometown Allahabad.

Justice Bishambhar Dayal, an exemplar of justice and integrity, dedicated his life to serving humanity. His remarkable legal career, his humble nature and his unyielding commitment to upholding justice continues to inspire the legal fraternity and the citizens he served. Although he has left this world, he will forever be cherished and his legacy will serve as an eternal source of inspiration.

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CRIMINAL APPEAL *VIS-À-VIS* RIGHT TO BE HEARD

Institutional Article

Rules of natural justice imply fairness, reasonableness, equity and equality. These are part of higher procedural principles of common law developed through adjudication to guide, while taking any decision adversely affecting the rights of an individual. These principles are in consonance with the Constitution of India to provide legal immunity and protection to safeguard the misuse of law. After a court has convicted and sentenced an accused, the accused may file an appeal to a higher court, asking it to review the trial court's decision for correction of legal errors that may have affected the outcome of the case *vice versa* if the Court acquitted the accused or in case of insufficiency of sentence or compensation, the prosecution may file an appeal. If the Appellate Court allows the appeal, it may reverse the trial court's decision wholly or partly. If the Appellate Court rejects the appeal, the trial court's decision stands upheld. An appeal is not a retrial, but a review of the record of the trial court. The Appellate Court reviews the record of the lower court's proceedings to determine whether there are adequate grounds to allow the appeal. Sections 374, 379 and 380 of the Criminal Procedure Code, 1973 (herein after referred as "CrPC") provide for appeal against conviction and under sections 372, 377 and 378, provide provision for appeal against acquittal, inadequacy of punishment/compensation.

This article aims at considering the right of an accused to be heard as an appellant or respondent in criminal appeal prescribed under CrPC. Right of hearing is related with the Latin maxim *audi alteram partem* which is part of the principles of natural justice. In fact, there are two main principles in which the rules of natural justice are manifested, namely; *nemo judex in causa sua (*no one shall be a judge in his own cause) and *audi alteram partem (*no decision shall be given against a party without affording him a reasonable hearing). In ***Maneka Gandhi v. Union of India, (1978) 1 SCC 248***, the Apex Court held that the procedure for depriving a person of his life or liberty should be fair, reasonable and just. Looking to the finding of the Constitutional Bench in the above case, it is clear that giving an opportunity for hearing in criminal appeal is a constitutional right. The main object of the article is to clear the cloud about the notice of appeal to accused person and consequence of non-appearance of accused in criminal appeal as an appellant or respondent because number of criminal appeals are pending due to non-appearance of parties.

Chapter XXIX of CrPC prescribes procedure for criminal appeal. Section 372 of the CrPC reiterates the general principle of law that an appeal is not a right unless it is granted by the statute. Section 384 of the CrPC prescribes the procedure about summary disposal of criminal appeals while section 385 provides procedure for those criminal appeals which are not summarily decided. Sections 385(1) and 386 of the CrPC read as under:

> **"385. Procedure for hearing appeals not dismissed summarily**.–
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> (1) If the Appellate Court does not dismiss the appeal summarily, it shall cause notice of the time and place at which such appeal will be heard to be given-
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> (i) to the appellant or his pleader;
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> (ii) to such officer as the State Government may appoint in this behalf;
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> (iii) if the appeal is from a judgment of conviction in a case instituted upon complaint, to the complainant;
>
> (iv) if the appeal is under section 377 or section 378, to the accused, and shall also furnish such officer, complainant and accused with a copy of the grounds of appeal.
>
> **386. Power of the Appellate Court. –**
>
> After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor if he appears, and in case of an appeal under section 377 or section 378, the accused, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may-
> ……**"**

It is clear from section 385(1) of CrPC that in both situations i.e. whether accused is appellant or respondent, it is the duty of the Court to give him notice about the time and place at which such appeal will be heard while section 386 of CrPC provides that Appellate court is duty bound to hear the parties of the appeal before it allows or dismisses the appeal. It is manifested from the above two provisions that it is mandatory for the appellate court to hear the parties who will be affected by the disposal of the criminal appeal which is in consonance with the Latin maxim *audi alteram partem*. Section 385 (1) of the CrPC mandates about

the issuance of notice. It is pertinent to mention here that like section 385 of CrPC, there was equivalent provision in Criminal Procedure Code, 1898 (herein after referred as "CrPC, 1898") as section 422.

Now, let us consider first the situation of criminal appeal filed against the judgment of acquittal and thereafter, we will consider the said position in case where criminal appeal filed against the order of conviction by accused. In the first case, as per section 385(1) (iv) CrPC, a notice must be issued to accused about the time and place at which such appeal will be heard but there is no format prescribed in the appendix II in CrPC for the appearance of accused in criminal appeal and for that reason, the Courts are using general notice/summons. For serving summons, Chapter VI of CrPC is applicable and section 62 of the CrPC provides that every summons shall be served personally by delivering or tendering to him while section 64 provides that if such person cannot be found, the summons may be served to some adult member of his family. In section 65 of the CrPC, if serving of summons is not possible as provided under sections 62, 63 and 64 then such summons shall be affixed to some conspicuous part of the house or homestead in which the person summoned ordinarily resides. In case of ***State v. Gopala Pillai Sadasivan Pillai, 1968 SCC Online Ker 88*****,** the Kerala High Court found it right to use the provision of Chapter VI of the CrPC for serving the summons to the respondent in case of criminal appeal.

In criminal appeal against acquittal, the following situation may arise after issuance of notice/summons to the accused:-

1. After receiving the summons, the accused remained present before the court but on the next date, despite the knowledge, he did not appear before the court.
2. After lawful service of the summons, he remained absent.
3. It was not possible to serve notice/summons on the accused.

In the case of ***Dwarka Prasad v. State*** (Criminal Appeal No. 1 of 1950) (unreported) decided on 06.10.1950, with reference to section 422 CrPC, 1898, the Apex Court observed that the provision of section 422 (now section 385) is mandatory and compliance of it is essential prior to the hearing of case. In this case, a lawyer appeared for accused Dwarka Prasad, as instructed by his father and no material was on record which showed that Dwarka Prased instructed the lawyer through his father. The Court further observed that there has been a material defect in the procedure relating to hearing of the appeal by reason of non-compliance with a mandatory provision of the CrPC and this has led to miscarriage of justice.

Another case related to the appearance of the accused in criminal appeal is ***State Government, Madhya Pradesh v. Vishwanath Nidhanji, AIR 1954 Nag 231***. In this case, the facts were that an appeal was presented against judgment of acquittal against several accused and one accused was not found and no notice was served upon him. A proclamation was issued and published for the appearance of the absentee accused. In such a situation, the court held that though the accused might be absconding or concealing himself, that would be no ground for hearing the appeal in his absence. The Court had no option but to adjourn the case till such time as the respondent was served or he appeared before the Court and the court held that in such situation, an appeal cannot be heard against such accused and it should be adjourned *"sine die"* so far as the absentee accused is concerned.

Another interesting case regarding serving of notice under section 422 of CrPC, 1898 (now section 385 CrPC 1973) is of ***Mohd. Dastgir v. State of Madras, AIR 1960 SC 756***. In this case, it was argued that the provision of section 422 of CrPC, 1898 had not been complied with. The Apex Court held that the High Court was intimated in the clearest terms that appearance had been entered on behalf of the appellant and two advocates of the High Court were representing him and the High Court was requested not to issue any summons to the appellant because appearance had already been entered on his behalf. Inspite of that the High Court issued notice under section 422 to the accused person. Even then, the High Court took the precaution to intimate the Special Judge of Tiruchirappalli to inform the accused about the appeal filed against him. In these circumstances, the Apex Court held that it can hardly be said that notice of the appeal had not been served on the appellant.

In ***State v. Ramgopal, ILR (2006) 1 Del*****,** the presence of accused could not be ensured despite repeated service of bailable and non-bailable warrants on the accused. Accused Ramgopal was declared as "proclaimed offender" and the question before the High Court was whether appeal can be heard when summons to respondent/accused has remained unserved? The High Court answered this question in negative and held that such appeal cannot be heard in the absence of the accused. Series of above cases makes it clear that serving of notice under section 385 of the CrPC is mandatory, failing which appeal cannot be decided on merits.

There may also be a situation in criminal appeal when the accused remains absent during the proceedings of criminal appeal or chooses to not appear before the Court after summons have been duly served on him. This situation may also

arise when criminal appeal is presented by the accused or he appears in the appeal as a respondent defending himself. The criminal justice delivery system is being held to ransom by convicts who have developed the devious and dishonest practice of escaping punishment or sentence by filing appeals, obtaining bail or suspension of sentence and thereafter, disappearing beyond the reach of the arms of the law. The opinion in ***Ram Naresh Yadav v. State of Bihar, AIR 1987 SC 1500*** as well as in ***Bani Singh v. State of U.P., (1996) 9 SCC 372*** is available to us to ensure that preventive action is devised to combat the abuse of court process so that facilitative steps are taken to secure the ends of justice. In ***Ram Naresh*** case (supra) the Apex Court held that if in criminal appeal, the accused remains absent, the proper course is to appoint a Counsel at State's cost to argue on behalf of the accused. A three-Judge Bench of the Apex Court in ***Bani Singh*** case (supra) held that there is nothing in the law to preclude the court to appoint a lawyer at State's expense to assist him, if deems it appropriate. In case of ***Mangat Singh v. State of Punjab, (2005) 11 SCC 185,*** the Apex Court held that where the advocate for the accused is absent on the date of hearing, the court shall either appoint an *amicus curiae* and then decide the appeal or adjourn the case. In the case of ***Shankar v. State of Maharashtra,*** Criminal Appeal No. 1106/2019, decided on 23.07.2019, it was held that a counsel can be nominated through Legal Services Authority to proceed further in a case. In ***K.S. Panduranga v. State of Karnataka, (2013) 3 SCC 721*****,** after a comprehensive analysis of previous decisions, the Apex Court had distilled the legal position into six propositions:

> "1. that the High Court cannot dismiss an appeal for non-prosecution simpliciter without examining the merits;
> 2. that the Court is not bound to adjourn the matter if both the appellant or his counsel/lawyer are absent;
> 3. that the court may, as a matter of prudence or indulgence, adjourn the matter but it is not bound to do so;
> 4. that it can dispose of the appeal after perusing the record and judgment of the trial court.
> 5. that if the accused is in jail and cannot, on his own, come to court, it would be advisable to adjourn the case and fix another date to facilitate the appearance of the appellant-accused if his lawyer is not present, and if the lawyer is absent and the court deems it appropriate to appoint a lawyer at the State expense to assist it, nothing in law would preclude the court from doing so; and

6. that if the case is decided on merits in the absence of the appellant, the higher court can remedy the situation.

It is evident from the catena of above referred judgments that if the accused, whether as appellant or respondent after summons being duly served, remains absent from the proceeding, the proper remedy is that the Court can request Legal Services Authority to appoint an advocate or request State to appoint an *amicus curiae*. The Court can also request eminent lawyers to render their services *pro bono* in such cases but the Court cannot decide such appeal without giving an opportunity of hearing to the accused.

Conclusion

It is clear from the above discussion and in the light of the judgments pronounced by the Apex Court and the High Courts that it is mandatory to serve summons on accused and appeal cannot be decided if such summons are not duly served and the only remedy in such case is to adjourn the case i.e. *sine die* and if summons is duly served but the accused remains absent from the proceeding then the court has to appoint an advocate through legal services authority or an *amicus curiae* through State. The legal position in this regard can be summarized as follows:

1. Where a criminal appeal has not been dismissed summarily and has been admitted for final hearing, such appeal will have to be disposed of on merits only.
2. In the appeal made by the State/complainant/victim, service of summons to the respondent/accused can be done in the manner of service of summons given in sections 62, 64 and 65 of CrPC. Service done in such a manner along with a copy of the memorandum of appeal shall be deemed to be lawful service of the summons.
3. Where there is compliance or non-compliance of summons of the State and accused appeared personally or through his pleader on the date of hearing and remains absent on the next date of hearing, the Court of Appeal, after hearing the party who remained present and on behalf of the absentee respondent/ accused, with the aid of Legal Services Authority, can dispose of the appeal on merit, by appointing an advocate or an *amicus curiae* appointed by the State.
4. Where in the appeal made by the State / complainant / victim, if it is not possible to serve the summons on respondent about the time and place of hearing, the hearing of the appeal will be adjourned (*sine die*) till then.

5. In the situation narrated at point No. 4, if the court is satisfied, it can ensure the presence of such respondent/accused by issuing bailable warrant, arrest warrant and in suitable cases, take resort to sections 82 and 83 of the CrPC. It can also forfeit the bail bond produced under section 437-A CrPC before the trial court.

6. Where there are more than one respondents/accused and some of them have been lawfully served and serving on some are not possible, the court will hear the appeal and may proceed to dispose of in respect of only those respondents/accused on whom summons have been served. In relation to those respondents / accused on whom summons could not be served, the hearing of the appeal, in respect of such respondents/accused, will be adjourned till his/her lawful appearance is secured.

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It is very simple to be happy but very difficult to be simple.

- Rabindranath Tagore

INHERITANCE IN MUSLIM LAW RELATING TO SHIA LAW

Abdul Kadeer Mansoori,
District Judge, Rajgarh

INTRODUCTION:

Inheritance is the non-testamentary devolution of property of the deceased upon the heirs. Muslim inheritance is governed according to the Muslim Personal Law (Shariat) Application Act, 1937. Section 2 of the Act states that: **"**notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law marriage, dissolution of marriage, including *talaq, ila, zihar, lian, khula* and *mubaraat,* maintenance, dower, guardianship, gifts, trusts and trust properties and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat)".

The Muslim Personal Law has its sources in the Holy Quran, Hadith, Ijma and Qiyas. Jurists text books like Mulla's Principles of Mohammedan Law, A A Fyzee/Taiyabji provides one place codification of Muslim law. This article has been prepared with the help of these Text Books. On judicial notice of such Text/Reference Books, Section 57 of the Evidence Act provides as under:

The Court shall take judicial notice of the following facts:

(1) All laws in force in the territory of India;

(2) All public Acts passed or hereafter to be passed by Parliament [of the United Kingdom], and all local and personal Acts directed by Parliament [of the United Kingdom] to be judicially noticed;

(3) .....

In all these cases, and also on all matters of public history, literature, science or art, the Court may resort for its aid to appropriate books or documents ofreference. The Hon'ble Supreme Court in the case of ***Shayara Bano v Union of India & ors., (2017) 9 SCC 1*** and in several other cases, cited Muslim Personal Law Text Book with Edition & Page No.

Schools in Muslim Law:

The Islamic law of inheritance is a combination of the pre-Islamic customs and the rules introduced by the Prophet. The Quran gives specific shares to

certain individuals on humane considerations while the pre-Islamic customary law deals withthe residue left and distributes among the agnatic (Male line) heir and failing them to the cognatic (Female line) heirs. There are two Schools of Muslims; (i) Sunnis & (ii) Shias. The laws of inheritance in both the Schools are different in their foundational structure as well as detailed implications, though both are inspired from the Quranic verses of inheritance. The greater part of Mohammedan Law of Inheritance is founded upon the Quran. It did not sweep away the existing laws of succession, but made a great number of amendments based on few common principles. These amendments have been differently interpreted by the Sunnis and Shias. The Sunni to some extent allows the principles of the pre-Islamic custom to stand and they add or alter those rules in specific manner mentioned in the Quran and by the Prophet. The Shias deduce certain principles which they consider to underlie the amendments mentioned in the Quran and fuse these principles with the principles of the pre-existing customary law, thus bringingup a completely altered set of rules.

Presumption of Hanafi Sect of Sunni School and Athna-Asharias Sect of Shia School:

Since majority of Mohammedans in India are Sunnis, hence, it is presumed that the parties to a suit are Sunnis unless it is shown that the parties belong to the Shia. Amongst Sunnis, the majority is of Hanafi sect, so the presumption can be drawn that the Indian Muslims are Sunni of Hanafi sect unless it is pleaded and proved otherwise. Same presumption applies in case of Shia about its sub-sect Athna-Asharias. (***Akbarally v. Mahommadally, (1932) 34 Bom. L.R. 655***)

Shia Law - Classification of Heirs:

Shia law divides the heirs in two grounds:-

1. Heirs by consanguinity (Nasab) that is blood relationship:- Heirs by consanguinity are divided into three classes and each Class is sub-divided into two sections:-

(i) **Class I** - (a) Parents (b) Children and other lineal descendants how low so ever.

(ii) **Class II** - (a) Grandparents (true or false) how high so ever; (b) Brothers and sisters and their descendants how low so ever.

(iii) **Class III** - (a) Paternal and (b) Maternal uncles and aunts of the deceased and of his parents and grandparents how high so ever, and their descendants how low so ever.

2. Heir by special cause (Sabab) - The heirs by special cause may be divided into two kinds:

(i) Heir by marriage *(Zoujiyat)*, that is husband and wife;

(ii) Heir by special relationship *(Wala)* that is by virtue of spiritual headship. The heirs by special (legal) relationship are not recognized in India.

Order of Succession:

The heirs will inherit the heritable property of a person in the following order:-

(1) The husband or wife is never excluded from the inheritance, but inherit together with the nearest heir by consanguinity.

(2) Among the heirs by consanguinity, the first group excludes the second and the second excludes the third. That is to say in the presence of an heir of the first group, the heirs of the second or third group will not be entitled to share and so on.

(3) As we have noticed each of the group is divided into two sections, amongst these two sections of the heirs of each group, the claimants succeed together, i.e. if there are heirs of both the sections, they will succeed together.

(4) In each section there can be various heirs, e.g. in section (ii) of Group I, there can be a son and son's son. The rule in this regard is that the nearer in degree in each section will exclude the more remote in that section.

(5) The decision as per stripes i.e. in each of these three groups of heirs by consanguinity, the descendants get per stripes or according to the branch.

After determining the people who are entitled to succeed to the property of the deceased, the next problem that comes up is allotment of shares, i.e. which heir will receive what amount of shares. For the purpose of determining the shares,the heirs are divided into two classes, viz. Sharers and Residuaries. There is no class of distant kindred under Shia Law.

Sharers & Residuaries:

There are 9 Sharers in Shia Law similar Sunni Law except grand father, grand mother and son's daughter. Of these sharers, four inherit sometimes as Sharers and sometimes as Residuaries. These are:

1) Father

2) Daughter

3) Full Sister

4) Consanguine Sister

The heirs who are not Sharers, are Residuaries who are mentioned in three classes of heirs by consanguinity *(Nasab)* and they are not entitled to any fixed share inthe property. They get the residue (what is left).

How the distribution of property is affected:

If a Muslim at the time of his death, leaves only heir, the whole property would go to that heir except to wife. The rationale behind this exception is that a wife is not entitled to the surplus by return, even if there be no other heir. If she is the sole heir, she takes ¼ and the surplus passes to the *Imam*, now the Government of India. If there are two or more heirs, left by the deceased, the first step is to give the share to the husband or wife. The second step is to see which of the surviving relations are entitled to succeed. The property, after giving the share of the husband or wife, is divided among the other claimants, according to the rules of distribution applicable to the three classes of heirs by consanguinity.

Rule of Representation:

This rule requires interpretation because it has more than one meaning which is mentioned below:-

1) Determination of heirs, which persons are entitled to inherit from the deceased (First meaning).

2) Determination of the quantum of share, what he is entitled to inherit. (Second meaning).

So far as the determination of heirs is concerned, the Rule of Exclusion applies,i.e. the nearer in degree excludes the more remote. For example if ‘A’, a Muslim dies leaving behind surviving son ‘C’ and grandson by a pre-deceased son ‘B’, the grandson is excluded from inheritance by his uncle ‘C’. The grandson does not take in his father’s place though he ‘B’ would have been an heir, had he survived his father ‘A’. If in the above example, both sons ‘B’ and ‘C’ are pre-deceased and the deceased ‘A’ died leaving three grandsons ‘D’, ‘E’ and ‘F’ by ‘B’ and two grandsons ‘G’ and ‘H’ by ‘C’, then all the grandsons are heirs.

The principle of representation is to be applied for deciding the quantum of share that is for ascertaining the share of each grandson. According to the principle of representation, the sons of B will get ½ (1/6 to each grandson) and the sons of C will get ½ (1/4 to each grandson).

Under the Sunni Law, the rule of representation is not applied in calculating thegrandson's share. In the above example, each grandson would take the same share, i.e. 1/5, because the division of shares among grandsons would be per capita and not per stripes.

The Shia Law accepts the principles of representation for the limited purpose of deciding the quantity of the share of each heir as different from the purpose of deciding the heirs. According to the rule of representation, the children of a deceased son, if they are heirs, take the portion which he (deceased son) if living would have taken and in that sense, represent the daughter, if they are heirs, they take the portion which would have taken and in that sense, represents the son. In the same way, the children of a deceased daughter represent the daughter, if they are heirs; they take theportion which the daughter, if living would have taken. This principle in the same limited sense is applicable to the children of a deceased brother, sister or aunt. Similar is the principle applicable to great grandparents who take the portion which the grandparents, if living, would have taken.

Succession among the Heirs of the Same Class:

Succession among descendants in each of the three classes of heirs by consanguinity is per stripes and not per capita. Example: 'A' Shia Muslim dies having two grandsons D and E by a predeceased son B and a grandson F by another predeceased son C. The succession inthis example is per stripes among the descendants of two sons, B and C of A. Each son notionally takes ½. B's share ½ will go to his two sons, D and E and they will get1/4 and C's share ½ passes to his son F. This division in other words, is according to the stocks and not according to the claimants.

The Rule of Succession among Descendants:

The rule is that the descendants of a person, who if living, would have taken as Sharer, succeed as Sharers. In the same way, the descendants of a person, who if living, would have taken as a Residuary, succeed as Residuaries. Example: A Shia Muslim dies leaving a full brother's daughter and uterine brother's son. Uterine brother, had he survived, would have taken as a Sharer, his Quranic share 1/6. In the same way, the full brother, had he survived would have taken 5/6 as a

residuary. Here the uterine brother's sons, being the descendant of a sharer, will succeed as sharer and representing his father takes his father's share 1/6. The full brother's daughter, being the descendants of a Residuary, will succeed also as a Residuary and representing her father, takes her father's share 5/6. Under the Sunni Law, both a full brother's daughter and uterine brother's son are distant kindred of the third class.

Distribution among heirs of the First Class:

The heirs of the first class are entitled to succeed to the property of a deceased Shia Muslim along with the husband or wife, if any. First the share is allotted to the spouse (husband or wife as the case may be) and then to the rest of the heirs.

Example:-

1) When no lineal descendant is present:-
   a) Husband will inherit 1/2 as sharer;
   b) Mother will inherit 1/3 as sharer;
   c) Father will inherit 1/6 as residuary.
2) When lineal descendant is present:-
   a) Father will inherit 1/6 as sharer;
   b) Mother will inherit 1/6 as sharer;
   c) Son will inherit 2/3 as residuary;

Distribution among heirs of the Second Class:

Heirs in the line of paternal side get double share with maternal relations. If there is only one grandparent in the paternal line, he or she would get 2/3. Similarly, if there is only grandparent in the maternal line, he or she would get 1/3.

a) Father's father would get 2/3 as sharer;

b) Mother's mother would get 1/3 as sharer.

Distribution among heirs of the Third Class:

First of all the surviving spouse is allotted his share and then the residue is divided among the following order:

i. Paternal and maternal uncles and aunts of the deceased;

ii. Their descendants h.l.s., the nearer excluding the remoter;

iii. Paternal and maternal uncles and aunts of the parents on the descendants; and

iv. Their descendants, h.l.s; the nearer excluding the remoter;

v. Paternal and maternal uncles and aunts of the grandparents;

vi. Their descendants how low so ever; the nearer excluding the remoter;

vii. Remot uncles and aunts and their descendants in like order.

Of the above groups, each in turn must be exhausted before any member of the next group can succeed.

Difference between Sunni & Shia Law:

The Shia law does not recognize the Doctrine of Increase in this manner. Under Shia Law if the total share of sharers exceeds the heritable property i.e., exceeds unity, the share of all the sharers is not proportionally reduced but it is always deducted from the sharers of the following two heirs:-

a) Daughter

b) Full or consanguine sister

Example: A, a Shia Mohammedan wife dies leaving behind (i) Husband and (ii) two full sisters. According to Shia Law (i) The husband will get 1/2 as sharer as there is no lineal descendant of the deceased. (ii) Full sisters will get 2/3 as sharer when there is no lineal descendant, father or full brother. Since there are two sisters each will get 2/3 which will turn out to be as 4/6 share of two full sisters and thus, husband will receive 3/6 share. Total share (without reduction) = 7/6 i.e. more than unity. In the above case, in order to make total sharer equal to unity, the share of the sisters will be reduced to 1/2 and the share of the husband will not be touched. Thus, each sister will take 1/4 of the share.

In case of Radd, under Sunni Law, if there is a residue and there are no residuaries, the residue returns to the sharers. But such is not the case in Shia Law of Return. Under Shia Law, the total absence of the residuaries as a class is not required, only if the residuaries in the class to which the sharers belong is absent, it will sufficient for application of the Doctrine of Return.

Exception:- There are certain exceptions to the Doctrine of Return which are as follows:-

i. **Husband -** The husband is not entitled to the 'Return' as long as there is any other heir of the deceased. If there is no other heir, the husband will take the whole estate by Return.

ii. **Wife -** Like the husband, the wife too is not entitled to a 'Return' of share as long as any other heir of the deceased exist. The old view was that if there was no other heir, the wife would not take the whole estate; she would take only her share 1/4 and the surplus would escheat to the

Government. But in ***Abdul Hamid Khan v. Peare Mirza, (1935) 10 Luck 550***, the Oudh Court held that the rule now enforced is that the widow is entitled to take by return.

iii. **Mother -** The mother is not entitled to share the 'Return' if the deceased dies leaving behind a father and a daughter and also any of the following;

a. Two or more full or consanguine brothers

b. One full consanguine brother and two full consanguine sisters

c. Four full or consanguine sister,

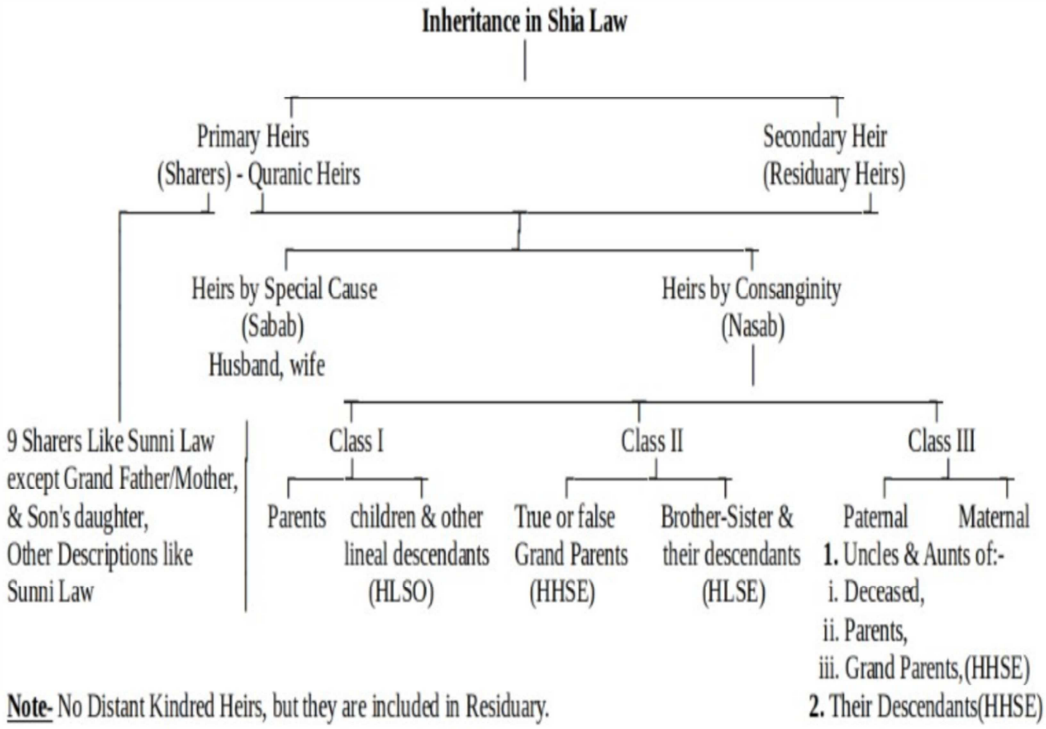
the brother and sisters are heirs of the second class. Though they are excluded from inheritance, prevent the mother from taking by Return and the surplus reverts to the father and the daughter in proportion of their respective share. This is the only case in which the mother is excluded from the Return.

iv. **Uterine brothers and sisters** - Uterine brothers and sisters are not entitled to the 'Return' if they co-exist with full sisters and sisters divide the return in proportion of their sharers. The 'Return' in such cases goes to the full sister. This rule does not apply to consanguine sisters.

Conclusion:

The Article has explained the basic features of inheritance in Muslim Law in context of Shia law of inheritance and also compared Shia and Sunni Laws with the corresponding principles of both laws. As highlighted in the article are differences between both the laws. For instance, Shia law adopts the principle of consanguinity whereas Sunni law prefers agnates to cognates. Illegitimate child is not entitled to inherit property under Shia law whereas under Sunni Law illegitimate child is entitled to inherit property from mother. There is another noteworthy distinction that Shia law does not recognize distant kindred as another category of legal heirs as they are identified in Sunni law. Most of those who are classed as distant kindred in Sunni law, they are absorbed in the three basic classes of Shia. Though there appears some difference between them, but in letter and spirit, both have adopted fixed Quranic Shares of Sharers and residue is distributed among Residuaries in order of preference in class and nearer in degree.

For brevity, the flow chart is annexed herewith to further elaborate the concept of inheritance in Shia Law.



Rules of Inheritance Among Residuaries:-

1. Husband/ wife always get their share as per Sharer. Then the Heirs of First Group excludes the Second Group & so on.
2. Among the Heirs of Two Sections of one Group, the claimants succeed together but nearer in degree in each Section, excludes more Remoter.
3. Descendants get per stripes or according to Branch they belong.
4. Descendants of Sharers or Residuary succeed as Sharer or Residuary.
5. Paternal Heirs get double than Maternal Heirs.

Note: *Readers are requested to go through the Article published in 2017 JOTI JOURNAL August issue- Part I "Principles of Inheritance in Muslim Law" for better understanding to law related to inheritance in Sunni Law.)*

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कार्यपालक मजिस्ट्रेट के आदेश के विरूद्ध पुनरीक्षणः क्षेत्र एवं विस्तार

डॉ0 धर्मेन्द्र टाडा
जिला न्यायाधीश, भोपाल

आपराधिक न्याय प्रणाली में दाण्डिक न्यायालयों की स्थापना *प्रथमतः* अपराध कारित होने के उपरांत दोषसिद्धि व दण्डादेश एवं *द्वितीयतः* अपराध के कारित होने के पूर्व अपराध का निरोध करने के लिए की गयी है, अपराध निरोध की दृष्टि से दण्ड प्रक्रिया संहिता 1973 (जिसे आगे संहिता से संबोधित किया जाएगा) के अध्याय 8, 10 एवं 11 में विशेष प्रावधान किए गए हैं। संहिता के अध्याय 8 के तहत परिशांति कायम रखने और सदाचार के लिए प्रतिभूति प्रस्तुत करने के आदेश देने एवं ऐसे आदेशों के निष्पादन एवं कारागार में निरूद्ध करने के आदेश की शक्ति कार्यपालक मजिस्ट्रेट एवं विशेष कार्यपालक मजिस्ट्रेट को प्रदत्त की गयी है।

पुलिस कमिश्नर प्रणाली एवं कार्यपालक मजिस्ट्रेट :–

मध्यप्रदेश राजपत्र दिनांक 09.12.2021 के द्वारा संहिता की धारा 8 (1) के तहत राज्य शासन द्वारा अधिसूचना द्वारा अधिसूचना क्र. एफ–73 व 74 (II)/2021/बी–2/2 दिनांक 09 दिसम्बर, 2021, क्रमशः इंदौर एवं भोपाल को मेट्रोपोलिटन क्षेत्र घोषित किया गया तथा मेट्रोपोलिटन क्षेत्र में पुलिस आयुक्त को, कार्यपालक मजिस्ट्रेट तथा पुलिस उपायुक्तों एवं पुलिस सहायक आयुक्तों को विशेष कार्यपालक मजिस्ट्रेट की शक्ति प्रदत्त की गई है।

संहिता की धारा 117 के आदेश एवं उपचारः–

संहिता की धारा 107 से 110 तक की परिस्थितियों में कार्यपालक मजिस्ट्रेट को धारा 111 से 116 में दी गई प्रक्रिया के अनुसार जांच में यह साबित हो जाने पर कि यथास्थिति परिशांति कायम रखने के लिए या सदाचार बनाये रखने के लिए यह आवश्यक है तो संहिता की धारा 117 के तहत प्रतिभुओं सहित या रहित बंधपत्र निष्पादित कराने का आदेश दे सकता है।

संहिता की धारा 373 में यह प्रावधान किया गया है कि कोई व्यक्ति– (i) जिसे परिशांति कायम रखने या सदाचार के लिए प्रतिभूति देने के लिए धारा 117 के अधीन आदेश दिया गया है, अथवा (ii) जो धारा 121 के अधीन प्रतिभू स्वीकार करने से इंकार करने या उसे अस्वीकार करने वाले किसी आदेश से व्यथित है, सत्र न्यायालय में ऐसे आदेश के विरूद्ध अपील कर सकता है।

संहिता की धारा 117 के आदेश का निष्पादन एवं प्रभावः–

संहिता की धारा 117 के तहत प्रतिभूति देने के आदेश के निष्पादन में (I) जब प्रतिभूति नहीं दी जाती है तो उसके बारे में प्रावधान संहिता की धारा 122 (1)(क), 122 की उपधारा (2) से उपधारा (8) तथा 123 व 124 में प्रावधान दिए गए हैं एवं उस दशा में (II) जबकि संहिता की धारा 117 के तहत आदेश के अनुपालन में बंधपत्र का निष्पादन कर

दिया जाता है और उसके उपरांत बंधपत्र की शर्तों का उल्लंघन किया जाता है तो परिशांति के बंधपत्र की दशा में संहिता की धारा 122 (1) (ख) के तहत कारावास तथा सदाचार कायम रखने के संबंध में निष्पादित बंधपत्र की दशा में विविध आपराधिक प्रकरण पंजीबद्ध कर संहिता की धारा 446 के तहत कार्यवाही की जा सकती है। इस संबंध में न्यायदृष्टांत ***पी.सतीश उर्फ सतीश कुमार विरूद्ध राज्य, क्रिमिनल रिवीजन* नं. 137/2018, 78/2020 निर्णय दिनांक 13.03.2023 (खण्डपीठ)** अवलोकनीय है।

संहिता की धारा 122 (1) (ख) के तहत कारावासः

संहिता की धारा 122 (1) (ख) यह उपबंधित करती है कि ''यदि किसी व्यक्ति द्वारा धारा 117 के अधीन मजिस्ट्रेट के आदेश के अनुसरण में *परिशांति बनाये रखने के लिये (प्रतिभुओं सहित या रहित बंधपत्र)* निष्पादित कर दिये जाने के पश्चात् बंधपत्र का भंग किया जाता हे, तब उस दशा में उसे बंधपत्र की शेष कालावधि के लिए कारावास में भेज दिया जाएगा। ऐसे आदेश के विरूद्ध संहिता की धारा 397 के तहत पुनरीक्षण सत्र न्यायालय में प्रचलनशील होगी।

संहिता की धारा 122 (1) (ख) के आदेश के विरूद्ध पुनरीक्षण :–

(अ) जमानतः–

सत्र न्यायालय के समक्ष जब कार्यपालक मजिस्ट्रेट के आदेश के विरूद्ध पुनरीक्षण याचिका प्रस्तुत की जाती है तो जमानत आवेदन साथ में प्रस्तुत किया जाता है। ऐसा जमानत आवेदन तथा स्थगन आवेदन अंतर्गत धारा 389 संहिता प्रचलनशील है, क्योंकि धारा 397 उपधारा (1) में यह प्रावधान किया गया है कि न्यायालय यह निर्देश दे सकता है कि पुनरीक्षण लंबित रहने तक दण्डादेश का निष्पादन निलंबित किया जाये और यदि अभियुक्त परिरोध में है तो उसे जमानत पर या अपने बंधपत्र पर छोड़ दिया जाये।

(ब) बंधपत्र की प्रकृति एवं प्रभावः–

संहिता की धारा 117 के तहत आदेश में धारा 107 की दशा में परिशांति कायम रखने के लिए बंधपत्र (द्वितीय अनुसूची के प्रारूप संख्या 12) तथा धारा 108, 109 और 110 की दशा में सदाचार के लिए बंधपत्र (द्वितीय अनुसूची के प्रारूप संख्या 13) निष्पादित करने का आदेश दिया जाता है और संहिता की धारा 117 के तहत आदेश के पालन में व्यक्ति बंधपत्र का निष्पादन कर देता है और उसके उल्लंघन में कोई कार्य करता है तो क्षेत्राधिकार रखने वाले पुलिस थाने के थाना प्रभारी द्वारा एक परिवाद संहिता की धारा 122 (1) (ख) के तहत प्रस्तुत किया जाता है, जिस पर कार्यपालक मजिस्ट्रेट बंधपत्र भंग के संबंध में प्रस्तुत साक्ष्य के आधार को लेखबद्ध कर बंधपत्र की शेष कालावधि के लिए कारागार में निरूद्ध करने का आदेश पारित करता है। ऐसे आदेश संहिता की धारा 117 के तहत सदाचार बनाये रखने के लिए निष्पादित बंधपत्र की दशा में भी पारित किए जाते हैं, जिनके विरूद्ध पुनरीक्षण प्रस्तुत की जाती है।

संहिता की धारा 122 (1) (ख) के तहत कार्यपालक मजिस्ट्रेट परिशांति बनाये रखने

के लिए बंधपत्र निष्पादित कर दिए जाने के पश्चात् भंग की दशा में बंधपत्र के शेष कालावधि के लिए कारागार में निरूद्ध करने का आदेश दे सकता है। ऐसा आदेश सदाचार बनाये रखने के लिए निष्पादित बंधपत्र की दशा में प्रदान नहीं किया जा सकता है। इस संबंध में माननीय म.प्र. उच्च न्यायालय द्वारा संहिता की धारा 122 (1) (ख) के संबंध में न्यायदृष्टांत ***मीनू उर्फ सचिन जैन विरूद्ध म.प्र. राज्य व अन्य,*** **एमसीआरसी नं. 5182/16 क्रि.आर.सी. नंबर 505/2017 आदेश दिनांक 27.09.2017** के चरण क्रमांक 13 में यह प्रतिपादित किया है किः–

> "13. A bare perusal of section 122 (1) (b) reveals that it refers specifically of a bond executed with or without the surety for keeping peace in pursuance of the order of the Magistrate under section 117. It does not refer to a bond furnished for maintaing good behaviour at all, making it abundantly clear that it would not be applicable where a bond has been furnished for maintaining good behaviour as required under section 110 of the Cr.P.C."

माननीय म.प्र. उच्च न्यायालय के उपरोक्त न्यायदृष्टांत के अतिरिक्त माननीय मद्रास उच्च न्यायालय द्वारा न्यायदृष्टांत ***पी.सतीश (पूर्वोक्त),*** **देवी वि. एक्जीक्यूटिव मजिस्ट्रेट तथा अन्य, सीआरएल. आर.सी. 78/2020 एवं सीआरएल एम.पी. 468/2020 आदेश दिनांक 25.09.2020** एवं माननीय पंजाब एवं हरियाणा उच्च न्यायालय द्वारा **अनूप सिंह उर्फ महना वि. पंजाब राज्य, सी.डब्ल्यू.पी. 7832/15 निर्णय दिनांक 29.05.2015** में भी यह अभिनिर्धारित किया है कि परिशांति कायम रखने के लिए बंधपत्र के उल्लंघन की दशा में संहिता की धारा 122 (1) (ख) के तहत् कार्यवाही की जा सकती है, जबकि धारा 108 से 110 संहिता के तहत् परिवाद प्रस्तुत किए जाने की दशा में जब 117 के तहत् आदेश दिया जाता है तो उल्लंघन की दशा में धारा 122 (1) (ख) के प्रावधान आकृष्ट नहीं होंगे।

(स) कार्यपालक मजिस्ट्रेट द्वारा अपनाई जाने वाली प्रक्रिया :–

संहिता की धारा 117 के तहत् पारित आदेश में कार्यपालक मजिस्ट्रेट द्वारा जो जांच की जाती है उसके संबंध में यह प्रावधान किया गया है कि वह समन मामलों के विचारण की प्रक्रिया का अनुसरण करेगा किन्तु संहिता की धारा 122 (1) (बी) के मामले में कोई प्रक्रिया निर्धारित नहीं की गई है। इस धारा के तहत् परिवादी द्वारा मजिस्ट्रेट को समाधानप्रद रूप में यह साबित *(Proved to the satisfaction of such Magistrate)* करना होता है कि परिशांति कायम रखने के निष्पादित बंधपत्र का भंग कारित किया गया है।

न्यायदृष्टांत **पी.सतीश उर्फ सतीश कुमार विरूद्ध राज्य, द्वारा पुलिस इंस्पेक्टर, लॉ एण्ड ऑर्डर एवं अन्य निर्णीत दिनांक 13 फरवरी 2019** में माननीय मद्रास उच्च न्यायालय द्वारा क्रि.आर.सी. नंबर 137/2018 निराकृत करते हुये संहिता की धारा 122 (1) (ख) के संदर्भ में की जाने वाली कार्यवाही हेतु निम्नलिखित दिशा–निर्देशों का पालन किया जाना अपेक्षित होना अभिनिर्धारित किया गया है किः–

1. Notice to be sent to the person by the Executive Magistrate to show cause as to why action under Section 122 (1) (b) of Cr. P. C. should not be taken of breach of the bond executed under Section 117 CrPC on a date fixed.
2. At the enquiry, the Executive Magistrate should furnish the person the material sought to be relied upon including statement of witnesses, if any, in the vernacular (if the person is not knowing the language other than his mother tongue).
3. If the person wishes to engage an Advocate to represent him at the enquiry, an apportunity to have a counsel of his choice should be provided to him.
4. The Executive Magistrate shall inform the person about his right to have the assistance of a lawyer for defending him in the enquiry.
5. The enquiry shall be conducted by the Executive Magistrate on the notified date or such other date as may be fixed and the person should be allowed to participate in the same.
6. At the enquiry an opportunity should be given to the person to: (i) Cross-examine the official witnesses, if any and (ii) produce documents and witnesses, if any, in support of his case.
7. Such Executive Magistrate or his successor in office, should then, apply his mind on the materials available on record, in the enquiry, and pass speaking order.
8. An order u/s 122 (1) (b) of CrPC should contain the grounds upon which the Executive Magistrate is satisfied that the person has breached the bond.
9. A copy of the order should be furnished to the person along with the material produced at the enquiry.
10. The enquiry, as far as possible shall be completed within 30 days and at no circumstance, the enquiry shall be adjourned unnecessarily. The Advocates, who appear on behalf of the persons concerned are expected to co-operate.

(द) कार्यपालक मजिस्ट्रेट द्वारा पारित आदेश की अपेक्षाएं :–

संहिता की धारा 122 (1) (ख) के तहत् जांच करने वाले कार्यपालक मजिस्ट्रेट से पारित आदेश में कार्यपालक मजिस्ट्रेट को साक्ष्य के आधारों को लेखबद्ध (Recording the grounds of such proof) करना आवश्यक है। कार्यपालक मजिस्ट्रेट को उपरोक्त प्रक्रिया का पालन करते हुए जांच में सबूतों का आधार लेखबद्ध करते हुए यह निर्धारित करना है कि क्या संहिता की धारा 117 के तहत् परिशांति कायम रखने के लिए निष्पादित बंधपत्र

का भंग किया जाना समाधानप्रद रूप में यह साबित कर दिया गया है और यदि ऐसा साबित कर दिया गया है तो कार्यपालक मजिस्ट्रेट यह आदेश दे सकता है कि उस व्यक्ति को गिरफ्तार किया जाये और बंध पत्र की अवधि की समाप्ति तक कारागार में निरूद्ध रखा जाये।

माननीय मद्रास उच्च न्यायालय द्वारा संहिता धारा 122(1) (ख) में पारित आदेश के अपेक्षाओं के संबंध में न्यायदृष्टांत ***मुरली उर्फ पन्नूचमय विरूद्ध सबडिविजन एक्सीक्यूटिव मजिस्ट्रेट एवं अन्य, Crl. R.C. (MD), No.161/2016, dated 09.6.2016*** में ये सिद्धांत प्रतिपादित किए हैं किः–

> "As per the said provision, the Executive Magistrate, before ordering a person to be jailed, he shall be satisfied that the person has breached the bond conditions, the Executive Magistrate must also record the grounds for such proof. That means he must apply his mind and pass orders. He cannot pass orders mechanically. But, he need not write an elaborate Judgment like us. His Orders must show atleast briefly the grounds upon which, he has satisfied that the person has breached the bond executed by him."

माननीय म.प्र. उच्च न्यायालय द्वारा संहिता की धारा 122 (1) (ख) के संबंध में न्यायदृष्टांत ***मीनू उर्फ सचिन जैन विरूद्ध म.प्र. राज्य व अन्य,*** **एम.सी.आर.सी. नं. 5182/16 क्रि.आर.सी. नंबर 505/2017, आदेश दिनांक 27.09.2017** में यह प्रतिपादित किया है किः–

> "Therein is subjective satisfaction of the Executive Magistrate that a breach of bond has occurred. If an offence is said to have been committed, framing of charge or trial or conviction is not a *sine qua non* for recording a subjective satisfaction that a breach of terms and conditions of the bond has occurred. If by filing of final report in a criminal case against the person furnishing bond, in the facts and circumstances of that particular case, satisfies the Magistrate that the breach has occurred, he need not wait for either framing of charge or trial or conviction of that person in that offence."

उपरोक्त न्यायदृष्टांतों में संहिता की धारा 122 (1) (ख) के तहत् किसी व्यक्ति को कारागार में भेजने का आदेश कार्यपालक मजिस्ट्रेट या विशेष कार्यपालक मजिस्ट्रेट द्वारा दिया जाता है तो ऐसे मजिस्ट्रेट को सबूतों के आधारों को लेखबद्ध करते हुए मस्तिष्क का प्रयोग कर आदेश पारित करना चाहिए, यांत्रिक तरीके से आदेश पारित नहीं करना चाहिए। मजिस्ट्रेट को संतुष्टि के आधारों को लेखबद्ध करना आवश्यक है। इस संबंध में न्यायदृष्टांत ***स्टैनली विरूद्ध केरल राज्य,*** **क्रि.एम.सी. नंबर 3113/12 (केरल उच्च न्यायालय) आदेश दिनांक 29.10.2012** एवं ***सेलवम विरूद्ध एक्जीक्यूटिव मजिस्ट्रेट,*** **क्रि.आर.सी. नंबर**

505/2017 (मद्रास उच्च न्यायालय) आदेश दिनांक 05.07.2017 अवलोकनीय है।

प्रावधानों की संवैधानिकता एवं प्रकृति –

न्यायदृष्टांत **पी.सतीश (पूर्वोक्त)** में माननीय मद्रास उच्च न्यायालय द्वारा यह निर्णय के पैरा 84 (*e*) में अभिनिर्धारित किया है–

> "In the light of the law laid down in paragraph 24 of the Three Judge Bench decision of the Supreme Court in ***Gulam Abbas v. State of Uttar Pradesh, (1982) 1 SCC 71***, an Executive Magistrate cannot authorize imprisonment under section 122(1)(b) for violated of a bond under section 107 CrPC. A person who has violation the bond executed before the Executive Magistrate under the said provision will have to be challenged or prosecuted before the Judicial Magistrate for inquiry and punishment under section 122 (1)(b) CrPC."

उपरोक्त न्यायदृष्टांत **पी.सतीश (पूर्वोक्त)** में अभिनिर्धारित किया गया है कि संहिता की धारा 122 (1) (ख) की शक्ति के प्रयोग का अधिकार न्यायिक मजिस्ट्रेट को होगा किंतु माननीय उच्चतम न्यायालय के द्वारा धारा 122 (1)(ख) के प्रावधानों को संवैधानिक घोषित किया है, इस संबंध में माननीय उच्चतम न्यायालय द्वारा न्यायदृष्टांत ***इस्तकार विरूद्ध उत्तर प्रदेश राज्य, 2022 एस.सी.सी. ऑनलाईन एस.सी. 1801*** में अभिनिर्धारित किया है कि–

> "As noticed, the scope and nature of section 107 CrPC is preventive and not punitive. It aims at ensuring that there be no breach of peace and that the public tranquillity be not disturbed by any wrongful or illegal act. The action being preventive in nature is not based on any overt act but is intended to forestall the potential danger to serve the interests of public at large. In other words, this provision is in aid of orderly society and seeks to avert any conduct subversive of the peace and public tranquillity. The provision authorises the Magistrate to initiate proceedings against a person if upon information, he is satisfied that such person is either likely to commit breach of peace or disturb public tranquillity or is likely to commit any wrongful act that might probably produce the same result. Simply stated, the provisions of Chapter VIII of the Code are merely preventive in nature and are not to be used as a vehicle for punishment."

उपरोक्त न्यायदृष्टांत के अतिरिक्त संहिता के अध्याय 8 की संवैधानिकता, क्षेत्र एवं उद्देश्य के संबंध में न्यायदृष्टांत ***मधु लिमये व अन्य वि. सब डिवीजनल मजिस्ट्रेट, मोंघयर***

व अन्य, 1970(3) एस.सी.सी. 746, देवदासन विरूद्ध दि सेकण्ड क्लास एक्जीक्यूटिव मजिस्ट्रेट रामनाथापुरम एवं अन्य, क्रिमिनल अपील नं. 388/22 **निर्णय दिनांक 09.03.2022** *(माननीय उच्चतम न्यायालय) एवं* न्यायदृष्टांत ***मेघा पाटकर विरूद्ध मध्यप्रदेश राज्य एवं अन्य, (2007) 4 एमएसटी 219, 2007, एसीसी ऑनलाइन एमपी 591*** अवलोकनीय है।

निष्कर्षतः संहिता की धारा 122 (1) (ख) के तहत् कार्यपालक मजिस्ट्रेट परिशांति बनाए रखने के निष्पादित बंधपत्र के भंग की दशा में बंधपत्र की शेष अवधि की समाप्ति तक कारागार में निरूद्ध रखने का आदेश देने की अधिकारिता रखता है एवं जब ऐसे आदेश के विरूद्ध सत्र न्यायालय के समक्ष पुनरीक्षण प्रस्तुत होती है तो सत्र न्यायालय को इस बात की संतुष्टि करना आवश्यक है कि प्रथमः क्या बंधपत्र धारा 107 संहिता के तहत् परिशांति कायम रखने के संबंध में निष्पादित किया गया था। द्वितीयः क्या कार्यपालक मजिस्ट्रेट द्वारा उपरोक्त उल्लेखित न्यायनिर्णयन द्वारा स्थापित प्रकिया तथा नैसर्गिक न्याय के सिद्धांत का पालन करते हुए जांच की गई है। तृतीयः क्या कार्यपालक मजिस्ट्रेट द्वारा उपरोक्त उल्लेखित न्यायनिर्णयन द्वारा स्थापित सिद्धांतों के अनुरूप मस्तिष्क का प्रयोग करते हुए बंधपत्र भंग के समाधान के आधारों को लेखबद्ध करते हुए कारावास में भेजने का आदेश पारित किया गया है। यदि उपरोक्त तीनों प्रश्नों में से किसी भी प्रश्न का जवाब नकारात्मक है तो पुनरीक्षण याचिका स्वीकार होगी और कार्यपालक मजिस्ट्रेट का आदेश सत्र न्यायालय अपास्त कर सकता है।

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मानवता की महानता मानव होने में नहीं है, बल्कि मानवीय होने में है।

— महात्मा गाँधी

विधिक समस्यायें एव समाधान

(इस स्तम्भ के अन्तर्गत मध्यप्रदेश के अधीनस्थ न्यायालयों के न्यायाधीशों द्वारा अकादमी के संज्ञान में लाई गई विधिक समस्याओं का उपयुक्त हल प्रस्तुत करने का प्रयास किया जाता है। इस स्तम्भ के लिये न्यायाधीशगण अपनी विधिक समस्याएं अकादमी को भेज सकते हैं। चयनित समस्याओं के समाधान आगामी अंको में प्रकाशित किये जाएंगे।)

1. क्या विनिर्दिष्ट अनुतोष अधिनियम में, वर्ष 2018 में किये गये संशोधन के परिणामस्वरूप संशोधन पूर्व लंबित मामलों के संबंध में संविदा के विनिर्दिष्ट पालन की डिक्री पारित किया जाना आदेशात्मक है ?

उत्तर– विनिर्दिष्ट अनुतोष (संशोधन) अधिनियम, 2018 के द्वारा धारा 10 में किये गये संशोधन के परिणामस्वरूप संविदा का विनिर्दिष्ट पालन आदेशित किया जाना आज्ञापक है।

1 अक्टूबर, 2018 अर्थात् संशोधन की तिथि से पूर्व न्यायालय में लंबित मामलों पर संशोधन अधिनियम का क्या प्रभाव होगा इस संबंध में उच्चतम न्यायालय की तीन सदस्यीय पीठ ने ***कट्टा सुजाथा रेड्डी विरूद्ध मेसर्स सिद्धमाशेट्टी इंफ्रा प्रोजेक्ट्स (प्राईवेट) लिमिटेड (2023) 1 एससीसी 355*** में ये मार्गदर्शित किया है कि सामान्यतः संशोधन के प्रभाव से पूर्व के प्रावधान निरसित होकर उनके स्थान पर संशोधित प्रावधान संशोधन–तिथि से प्रवृत्त हो जाते है, परंतु यदि ऐसे कोई तात्विक उपबंध संशोधन के माध्यम से समाविष्ट किये गये है जो नये अधिकार, उत्तरदायित्व सृजित करते है अथवा निहित अधिकारों को वापस लेते है तब ऐसे संशोधित प्रावधान भूतलक्षी प्रभाव रखते है, ऐसा स्वतः नहीं माना जा सकता जब तक कि ऐसे मामलों में विधायिका अभिव्यक्त रूप से यह स्पष्ट न कर दे कि क्या ऐसे संशोधित प्रावधान भूतलक्षी प्रभाव रखते है या नहीं। विनिर्दिष्ट अनुतोष (संशोधन) अधिनियम, 2018 के माध्यम से यह उपबंधित किया गया है कि ऐसे संशोधित प्रावधान उस तिथि से प्रवृत्त होंगे जैसा की केन्द्रीय सरकार शासकीय राजपत्र में अधिसूचना द्वारा नियत करे अथवा भिन्न तिथियां जैसा वो आवश्यक समझें। संशोधित प्रावधानों को दिनांक 01.10.2018 से प्रवृत्त किया गया है।

माननीय उच्चतम न्यायालय की तीन सदस्यीय पीठ ने ***कट्टा सुजाथा रेड्डी (पूर्वोक्त)*** में अधिनियम के भूतलक्षी अथवा भविष्यलक्षी होने के संबंध में पूर्व में पारित विधियों का विश्लेषण कर ये मार्गदर्शित किया है कि विनिर्दिष्ट अनुतोष (संशोधन) अधिनियम, 2018 के प्रावधान भविष्यलक्षी होंगे।

अर्थात् संशोधन अधिनियम का प्रभाव संविदा के विनिर्दिष्ट पालन के लंबित उन मामलों पर नहीं होगा जिनमें संव्यवहार 01.10.2018 से पूर्व का है। तब संविदा

के विनिर्दिष्ट पालन की आज्ञप्ति पारित करना आज्ञापक न होकर न्यायिक विवेक से शासित होगा।

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2. जब दण्डादेश के निष्पादन के संबंध में अपीलीय न्यायालय द्वारा सशर्त स्थगन दिया गया है तब शर्त के अपालन की स्थिति में क्या प्रक्रिया अपनायी जाएगी ?

उत्तर– धारा 389 दण्ड प्रक्रिया संहिता, 1973 की उपधारा 1 के अधीन अपीलीय न्यायालय द्वारा दण्डादेश का स्थगन किया जाता है तब विचारण न्यायालय अपीलीय न्यायालय से स्थगन लाने का समय व्यतीत हो जाने के बाद भी कभी भी ऐसा आदेश प्रस्तुत होने पर विचारण न्यायालय दोषसिद्ध को तत्काल जमानत पर मुक्त करेगी । यदि ऐसा स्थगन सशर्त है अर्थात् उसमें जुर्माना राशि जमा करने पर ही स्थगन का आदेश दिया गया है तब जुर्माना राशि जमा होने पर ही विचारण न्यायालय दोषसिद्ध को जमानत पर छोड़ सकेगी । परंतु जहां पर अपीलीय न्यायालय ने दण्डादेश को स्थगित करते हुए शर्त के पालन के संबंध में समय सीमा दी हो, जैसा कि धारा 138 परक्राम्य लिखत अधिनियम, 1881 के अपराध में दोषसिद्ध होने पर की गई अपील में प्रतिकर की बीस प्रतिशत राशि निश्चित समयावधि के भीतर जमा करने पर दण्डादेश को स्थगित कर जमानत पर छोड़ दिये जाने का आदेश दिया जाता है और यदि दोषसिद्ध द्वारा मात्र जमानत प्रस्तुत की जाती है और बाद में निश्चित समय सीमा के अंदर प्रतिकर राशि का बीस प्रतिशत भाग जमा नहीं किया जाता है तब विचारण न्यायालय शर्त के अपालन की सूचना अपीलीय न्यायालय को देगा जो इस संबंध में उचित निर्णय लेगा कि शर्त के अपालन के कारण दण्डादेश के स्थगन के संबंध में क्या कार्यवाही की जानी है । इस संबध में माननीय सर्वोच्च न्यायालय के न्याय दृष्टांत ***सुरेन्द्र सिंह देशवाल विरूद्ध वीरेन्द्र गांधी (2020) 2 एस.सी.सी. 514*** की कंडिका 20 अवलोकनीय है ।

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3. किसी अनुज्ञप्ति, अनुज्ञा पत्र या पास की शर्तों के उल्लंघन में जब्तशुदा मदिरा के संबंध में मजिस्ट्रेट द्वारा कब संज्ञान लिया जा सकता है?

उत्तरः साधारणतः अवैध मदिरा की जब्ती से संबंधित प्रकरणों में मजिस्ट्रेट पुलिस अथवा आबकारी विभाग द्वारा प्रस्तुत अंतिम प्रतिवेदन पर संज्ञान लेने की अधिकारिता रखता है। (इस संबंध में जोति जर्नल के अक्टूबर 2021 में प्रकाशित विधिक समस्या अवलोकनीय है)। परंतु यदि मदिरा किसी अनुज्ञप्ति, अनुज्ञा पत्र या पास

की किसी शर्त के उल्लंघन में जब्त की जाती है तब ऐसे प्रकरणों में मजिस्ट्रेट की संज्ञान लेने की अधिकारिता धारा 61 के प्रावधानों के अंतर्गत होती है जिसके अनुसार कोई भी न्यायालय मध्यप्रदेश आबकारी अधिनियम, 1915 के अधीन दी गई किसी अनुज्ञप्ति, अनुज्ञा पत्र या पास की किसी शर्त के उल्लंघन के लिये धारा 34, धारा 37, धारा 38 एवं धारा 39 के अधीन दण्डनीय किसी अपराध का संज्ञान कलेक्टर या जिला आबकारी अधिकारी से अनिम्न पद श्रेणी के किसी ऐसे आबकारी अधिकारी के जिसे कलेक्टर द्वारा इस निमित्त प्राधिकृत किया जाये, के परिवाद या रिपोर्ट पर ही संज्ञान ले सकेगा । धारा 61 में धारा 34 का समावेश संशोधन द्वारा जोड़ा गया है जो दिनांक 22.08.2014 से प्रभावशील है ।

इस संबंध में न्यायदृष्टांत ***गिरीश भट्नागर विरूद्ध स्टेट ऑफ मध्यप्रदेश, एमसीआरसी न. 4639/2017 निर्णय दिनांक 28.04.2017*** में माननीय उच्च न्यायालय द्वारा यह प्रतिपादित किया गया है कि न्यायालय द्वारा ऐसे प्रकरणों में पुलिस रिपोर्ट के आधार पर संज्ञान लिया जाना उचित नहीं है, ऐसे मामलों में केवल कलेक्टर या जिला आबकारी अधिकारी या उससे अनिम्न पद श्रेणी के किसी ऐसे आबकारी अधिकारी जिसे कलेक्टर द्वारा इस निमित्त प्राधिकृत किया जाये, की ओर से प्रस्तुत परिवाद पर ही मजिस्ट्रेट द्वारा संज्ञान लिया जा सकता है ।

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बुद्धि का विकास मानव के अस्तित्व का अंतिम लक्ष्य होना चाहिए।

– बी. आर. अम्बेडकर

PART- II

NOTES ON IMPORTANT JUDGMENTS

123. ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Section 12 (1)(a),(f) and (g)

CIVIL PROCEDURE CODE, 1908 – Section 100

Eviction suit – *Bona fide* requirement – Non-disclosure of availability of alternate accommodation – Effect – Will not adversely affect the case of plaintiff as it was not sufficient to satisfy his requirement.

स्थान नियंत्रण अधिनियम, 1961 (म.प्र.) – धारा 12(1)(क), (च) एवं (छ) सिविल प्रक्रिया संहिता, 1908 – धारा 100

निष्कासन हेतु वाद – सद्भाविक आवश्यकता – वैकल्पिक आवास की उपलब्धता का अप्रकटीकरण – प्रभाव – वादी के मामले पर प्रतिकूल प्रभाव नहीं पड़ेगा क्योंकि यह उसकी आवश्यकता की संतुष्टि के लिए अपर्याप्त था।

Dheeraj Rohra v. Shyam Bihari Pandey

Judgment dated 13.01.2023 passed by the High Court of Madhya Pradesh in Second Appeal No. 848 of 2022, reported in 2023 (2) MPLJ 104

Relevant extracts from the judgment:

Undisputedly, the plaintiff has more shops in the same building and it is his case that after demolishing the shop, he wants to reconstruct a shop for the non-residential purposes for his sons and nephew. The plaintiff cannot be compelled to squeeze himself in a small premises specifically when the said small premises is not sufficient for the appellant himself to run his business in a decent manner. Thus, even if one shop had fallen vacant during the pendency of the suit, still the appellant has failed to prove that the said alternative accommodation is suitable for meeting out the requirement of the sons of the plaintiff for non-residential purposes**.**

Under these circumstances, this court is of the considered opinion that the respondent cannot be non-suited only on the ground of non-disclosure of an alternative but unsuitable accommodation, which fell vacant during the pendency of the suit.

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124. ARBITRATION AND CONCILIATION ACT, 1996 – Section 9
CIVIL PROCEDURE CODE, 1908 – Section 16 (d)

Commercial Court – Territorial jurisdiction in claim regarding rendition of accounts – Suit filed at Bhopal whereas immovable property was situated at Indore – Suit for accounts cannot be treated as a suit for immovable property – Jurisdictional aspect shall not be governed by section 16 (d) of the Code – Account book maintained at the registered office at Bhopal – Order dismissing the application for want of jurisdiction of Commercial Court, Bhopal was set aside.

माध्यस्थम और सुलह अधिनियम, 1996 – धारा 9
सिविल प्रक्रिया संहिता, 1908 – धारा 16 (घ)

वाणिज्यिक न्यायालय – लेखा प्रस्तुति के दावे में प्रादेशिक क्षेत्राधिकार – वाद भोपाल में प्रस्तुत जब कि अचल संपत्ति इन्दौर में स्थित थी – लेखा के वाद को अचल संपत्ति के वाद के समतुल्य नहीं माना जा सकता – क्षेत्राधिकार का बिन्दु संहिता की धारा 16(घ) से शासित नहीं – लेखा पुस्तिका भोपाल के पंजीकृत कार्यालय में अनुरक्षित – वाणिज्यिक न्यायालय, भोपाल द्वारा आवेदन को क्षेत्राधिकार से बाधित होने के आधार पर निरस्त करने वाले आदेश को अपास्त किया गया।

Ratan Lalchandani v. Gopaldas Kukreja
Judgment dated 07.02.2023 passed by the High Court of Madhya Pradesh in Arbitration Appeal No. 15 of 2023, reported in 2023 (2) MPLJ 376 (DB)

Relevant extracts from the judgment:

The place of residence of respondent, location of property became the reason for the Court below to reach to the conclusion that cause of action has arisen at Indore. This aspect requires serious consideration. A careful perusal of impugned order shows that Court below has not examined the question of territorial jurisdiction by taking into account the fact that claim of appellant is relating to rendition of account. Appellant is not aggrieved by dissolution of the firm. He is also not claiming any right or interest in immovable property situated at Indore. This material aspect has escaped notice of learned Commercial Court while deciding the question of territorial jurisdiction.

Admittedly, the registered office of the dissolved firm is situated at Bhopal. Its accounts are maintained at Bhopal. Thus, as per judgment of Privy Council in ***Luckmee Chund and ors. v. Zorawur Mull and ors. 1860 0 Supreme(SC) 18, Tilokram Ghosh and ors v. Smt. Gita Rani Sadhukan and ors., AIR 1989 Cal***

254 and ***Jayakrushna Sahu v. Harinarayan Ram, 1988 SCC OnLine Ori 252*** the part of cause of action in a case relating to rendition of accounts has certainly arisen within the territory of Commercial Court, Bhopal. The Court below has certainly erred in dismissing the application filed under Section 9 of the Arbitration Act for want of jurisdiction.

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125. ARBITRATION AND CONCILIATION ACT, 1996 – Sections 16, 34 and 35

Arbitral award – Issue of jurisdiction raised before executing court for the first time – Once the party submits to the jurisdiction of the Tribunal, it cannot raise the plea at subsequent stage. [*MSP Infrastructure Ltd. v. Madhya Pradesh Road Development Corporation Ltd., (2015) 13 SCC 713* relied upon].

माध्यस्थम और सुलह अधिनियम, 1996 – धाराएं 16, 34 एवं 35

माध्यस्थम अधिनिर्णय – क्षेत्राधिकार का प्रश्न निष्पादन न्यायालय के समक्ष प्रथम बार उठाया गया – एक बार पक्षकार अधिकरण के क्षेत्राधिकार को मान लेता है तो पश्चात्वर्ती प्रक्रम पर वह यह विषय उठाने से निवारित रहेगा। [*एम.एस.पी. इन्फ्राट्रेक्चर लिमिटेड विरूद्ध मध्यप्रदेश रोड डेव्हलपमेन्ट कॉर्पोरेशन लिमिटेड (2015) 13 एस.सी.सी. 713* पर विश्वास किया गया]

State of M.P. v. Rajdeep Buildcon Pvt. Ltd., Ahmadnagar
Order dated 17.11.2022 passed by the High Court of Madhya Pradesh in Civil Revision No. 352 of 2019, reported in 2023 (2) MPLJ 439

Relevant extracts from the order:

On perusal of the record, it is seen that it is not in dispute that the respondent/judgment debtor did not raise the issue of jurisdiction before the Arbitral Tribunal. Later on, in the proceedings under Section 34 of the Act of 1966, the objection was not raised and similarly, in Arbitration Appeal also no such objection was raised which was permitted to be withdrawn subsequently. It would be appropriate to mention that the applicant has suppressed the said fact that they never challenged/raised the objection before Arbitral Tribunal.

Section 35 of the Act of 1996 gives finality to the arbitration award and provides that it shall be binding on the parties and persons claiming the reliefs. Section 36 of the Act provides that the award shall be executed in the same manner as if it were a decree of the Court. Section 16(2) of the Act provides

C.R.No. 352/2019 that the plea regarding lack of jurisdiction of the Arbitral Tribunal can be raised on or before the submission of statement of defence.

In the case in hand, the challenge has been made to the award at the stages available to them under the law, but at no point of time the issue of jurisdiction was raised.

In the case of ***MSP Infrastructure Ltd. v. Madhya Pradesh Road Development Corporation Ltd., (2015) 13 SCC 713,*** the Apex Court has categorically laid down that the question of jurisdiction cannot be raised later on, once the party to the award have submitted to the jurisdiction of the Tribunal, filed the statement of defence, led evidence, advanced arguments and ultimately challenged the award under Section 34 of the Act of 1996.

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126. CIVIL PROCEDURE CODE, 1908 – Section 11

***Res Judicata* – Applicability – Issue not arising for consideration in previous suit cannot operate as *res judicata* in subsequent suit – Issue involved in previous suit was with respect to plaintiff's right to construct a toilet in passage and in subsequent suit, exclusive possession of the said passage – Held, *res judicata* would not be applicable in the present case.**

सिविल प्रक्रिया संहिता, 1908 – धारा 11

पूर्व न्याय – प्रयोज्यता – पूर्ववर्ती वाद में विचार के लिए उत्पन्न नहीं होने वाला विवाद्यक पश्चात्वर्ती वाद में पूर्व न्याय के रूप में प्रभाव नहीं रखेगा – पूर्व के वाद में उद्भूत विवाद्यक वादी के मार्ग में शौचालय बनाने के अधिकार के संबंध में था एवं पश्चात्वर्ती वाद में उक्त मार्ग के अनन्य आधिपत्य के संबंध में था – अभिनिर्धारित, वर्तमान मामले में पूर्व न्याय लागू नहीं होगा।

Anil Kumar Modi and ors. v. Tarsem Kumar Gupta
Judgment dated 14.09.2022 passed by the Supreme Court in Civil Appeal No. 4736 of 2011, reported in (2023) 2 SCC 201

Relevant extracts from the judgment:

In the first round, the only question that fell for consideration before the High Court was as to whether the respondent-plaintiff was entitled to construct the latrine in the passage. The finding of the trial court was that, though the respondent-plaintiff was entitled to possession thereof, he could not construct latrine inasmuch as it adversely affected the easement rights of the appellants-defendants.

The issue in the first suit was limited only as to whether the respondent-plaintiff has a right to construct the latrine in the passage. The issue as to whether the respondent-plaintiff was exclusively entitled to possession thereof did not fall for consideration in the earlier round, whereas in the third round, the said issue directly fell for consideration.

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127. CIVIL PROCEDURE CODE, 1908 – Section 11 and Order 7 Rule 11

(i) *Res Judicata – Lis* between parties decided by the Writ Court on merits – Order would operate as *res judicata* on subsequent proceeding – Party precluded from filing civil suit seeking the same relief.

(ii) Doctrine of merger – Writ Court decided the matter on merits – In writ appeal, liberty to file civil suit was allowed – Order passed by Writ Court on merits shall survive – Doctrine of merger not applicable.

सिविल प्रक्रिया संहिता, 1908 – धारा 11 एवं आदेश 7 नियम 11

(i) पूर्व न्याय – रिट न्यायालय द्वारा पक्षकारों के मध्य का विवाद गुण–दोष पर निराकृत किया गया – आदेश पश्चात्वर्ती कार्यवाही पर पूर्वन्याय के रूप में प्रभावी – पक्षकार समान अनुतोष हेतु सिविल वाद दायर करने से बाधित।

(ii) विलयन का सिद्धांत – रिट न्यायालय द्वारा विषय गुण–दोष पर निराकृत – रिट अपील में सिविल वाद प्रस्तुत करने की स्वतंत्रता को अनुज्ञा दी गई – रिट न्यायालय का गुण–दोष पर पारित आदेश जीवित रहेगा – विलय का सिद्धांत लागू नहीं।

Wonder Cement Ltd., Indore v. Rameshwar Pratap Singh (dead) thr. LRs. and ors.

Order dated 25.01.2023 passed by the High Court of Madhya Pradesh (Indore Bench) in Civil Revision No. 596 of 2022, reported in 2023 (2) MPLJ 363

Relevant extracts from the order:

This Court is of the considered opinion that a party's right under Order VII Rule 11 of the CPC or under any other provision of CPC or any other law to which it is amenable, cannot be curtailed in any manner as this court is of the view that it is one thing to say that a party is not entitled to any particular relief

under any particular law and it is another thing to say that the party shall not claim any particular relief under any particular law. In the present case, what has been argued before this Court is that the order passed in the review petition that the Civil Court shall decide the matter after evidence is led by the parties would mean that the application under Order VII Rule 11 of CPC would not be maintainable, but this court does not find any force in this submission, as a perusal of the order passed by this Court in R.P. No.554/2019 also reveals that this Court has simply stated that the Civil Suit will be decided on merits on the basis of the evidence adduced by the parties, in accordance with law, and it was observed thus: "The present review petition is disposed off with consent of the parties as there is already a direction given by this Court that the Civil Suit will be decided in accordance with law. No further clarification is required. The Civil Suit will be decided on merits on the basis of the evidence adduced by the parties in accordance with law."

A perusal of the aforesaid order also reveals that this Court has clearly stated that no further clarification is required and the matter shall be decided in accordance with law, and when a matter is to be decided in accordance with law, it means that all the provisions of law would be applicable in the said proceedings, and it cannot be said that any particular provision of law would not be applicable in the light of the order passed by this Court and in such circumstances, when the order passed by the writ court has not been reversed on merits, and the Writ Appeal against the same has been withdrawn, and the Review Petition has also been disposed of holding that no clarification is required in the writ appellate court's order, the doctrine of merger would not be applicable and the order passed by the writ court on merits would still survive and mere liberty sought in the writ appeal would not have the effect of undoing of the order passed by the writ court on merits.

This Court is also of the considered opinion that the impugned order cannot be sustained in the eyes of law as it curtails the right of the defendant No.4 to raise a ground under Order VII Rule 11 of the CPC on the basis of the orders passed by this Court in writ appeal and review petition, which can never be the intention of this court.

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128. CIVIL PROCEDURE CODE, 1908 – Section 100

(i) Admission of title – Effect – In absence of a deed of conveyance, duly stamped and registered as required by law, no right, title or interest in immovable property can be transferred by mere admission of the parties.

(ii) Rights of possession-holder – Plaintiff can on strength of his possession, resist interference from persons who have no better title than himself to the suit property.

सिविल प्रक्रिया संहिता, 1908 – धारा 100

(i) स्वत्व की स्वीकृति – प्रभाव – विधि अनुसार स्टांपित एवं पंजीकृत, विक्रय पत्र के अभाव में, केवल पक्षकारों की स्वीकृति के आधार पर अचल संपत्ति में हित, स्वत्व या अधिकार अंतरित नहीं हो सकते।

(ii) आधिपत्यधारी के अधिकार – वादी आधिपत्य के बल पर ऐसे अन्य व्यक्तियों द्वारा विवादित संपत्ति पर किये जा रहे हस्तक्षेप को रोक सकता है जिनके पास उससे अच्छा स्वत्व नही है।

Sow. Pushpa Goyal & ors. v. Daya Ram (Dead) Through LRs. & ors.

Judgment dated 02.09.2022 passed by the High Court of Madhya Pradesh in Second Appeal No. 385 of 1995, reported in ILR 2023 MP 254

Relevant extracts from the judgment:

As such there is no documentary evidence available on record to prove title of the defendant 2-Dayaram but there is only an admission of defendant 1-Seth Champalal in favour of the defendant 2-Dayaram. In the case of ***Ambika Prasad Thakur v. Ram Ekbal Rai, AIR 1966 SC 605,*** Supreme Court has considered *inter alia* the effect of admission by a party in respect of title and it has been held that title cannot pass by a mere admission. Hence, on the basis of admissions of defendant 1-Seth Champalal, it cannot be presumed that Seth Heeralal-Madholal or thereafter the defendant 2-Dayaram became owner of the suit property.

In view of the aforesaid discussion there is no cavil of doubt that in view of auction sale, the defendant 1-Seth Champalal became owner of the suit house. As nothing is there on record to assume ownership of Seth Heeralal-Madholal and thereafter of defendant 2-Dayaram, therefore, it is held that neither Seth Heeralal-Madholal acquired ownership rights on the basis of alleged benami purchase nor the defendant 2-Dayaram acquired any right on the basis of sale deed dtd.17.3.1962.

At the same time it is pertinent to mention here that the defendant 1-Seth Champalal never came in possession of the house and never tried to recover possession from the plaintiff or his father Tularam. But in the present case the plaintiff has not sought any relief against the defendant 1-Seth Champalal, and the present suit was filed only on the basis of cause of action accrued to the plaintiff due to filing of suit for eviction by defendant 2-Dayaram, therefore, the plaintiff is not entitled for any relief including the relief of acquisition of title by adverse possession against the defendant 1-Seth Champalal. Similarly the defendants 2-4 having not acquired any right in the suit property on the basis of benami purchase or on the basis of sale deed dt. 17.3.1962, there is no question of acquiring title by plaintiff against the defendants 2-4 on the basis of adverse possession.

In view of the aforesaid discussion it is clear that the defendant 1- Seth Champalal acquired ownership on the basis of auction sale and the defendants 2-4 have not acquired any right in the suit house, therefore, they have no right to dispossess the plaintiffs from the suit house either forcibly or by way of filing any suit. In the case of ***K. Kallappa Setty v. M.V. Lakshminarayana, AIR 1972 SC 2299*** their Lordships held that "the plaintiff can on the strength of his possession resist interference from persons who have no better title than himself to the suit property. Once it is accepted, as the trial court and the first appellate Court have done that the plaintiff was in possession of the property ever since 1947 then his possession has to be protected as against interference by someone who is not proved to have a better title than himself to the suit property." As such in the light of law laid down by Supreme Court in the case of ***K. Kallappa Setty*** (supra) the plaintiff is entitled to decree of permanent against the defendant's 2-4/respondents.

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129. CIVIL PROCEDURE CODE, 1908 – Order 14 Rule 5 INTERPRETATION OF STATUTES:

(i) Additional issue – Suit for declaration of title on the basis of Will – Plea of ouster sought to be raised as an alternative by way of an amendment – Parties can plead inconsistent or alternative pleas but not to the extent of being mutually destructive to each other – Plea of ouster is alternative and not mutually destructive.

(ii) Meaning of the expressions 'alternative' and 'inconsistent' explained.

सिविल प्रक्रिया संहिता, 1908 – आदेश 14 नियम 5
संविधियों का निर्वचनः

(i) अतिरिक्त वाद प्रश्न – वसीयत के आधार पर स्वत्व की घोषणा हेतु वाद – संशोधन के द्वारा अपसारण के अभिवाक् को वैकल्पिक रूप से उठाया गया – पक्षकार असंगत अथवा वैकल्पिक अभिवाक् इस सीमा तक ले सकते हैं कि वह परस्पर विरोधाभासी न हों – अपसारण का अभिवाक् वैकल्पिक है न कि परस्पर विरोधाभासी।

(ii) 'वैकल्पिक' एवं 'असंगत' शब्दों का अर्थ समझाया गया।

Akhilesh Kumar alias Hansu and anr. v. Saradchandra Bhate and anr.
Order dated 19.12.2022 passed by the High Court of Madhya Pradesh in Miscellaneous Petition No. 6181 of 2022, reported in 2023 (2) MPLJ 401

Relevant extracts from the order:

The expression 'Alternative' means the one or the other of two things. A party to litigation may include in his pleadings two or more set of facts and claim relief in the alternative. "Inconsistent" on the other hand means mutually repugnant, contradictory or irreconcilable establishment of one necessarily implies abrogation or abandonment of other. The plaintiff may rely upon several different reliefs in the alternative. Similarly, the defendant can also raise several defences in the alternative. In instance for a suit for possession is maintainable on the basis of title or in the alternative on the basis of lease.

In case of ***Praful Manohar Rele Vs. Krishanabai Narayan Ghosalkar and others [(2014) 11 SCC 316]***, Apex Court held that:

> "Super added to all these factors is the fact that the appellate Court had granted relief to the appellant not in relation to the alternative plea raised by him, but on the principal case set up by the plaintiff. If plaintiff succeeded on the principal case set up by him whether or not the alternative plea was contradictory or inconsistent or even destructive of the original plea paled into insignificant."

Thus, it is evident that trial Court erred in not allowing framing of an issue on the basis of alternative plea of ouster overlooking the fact that parties can plead inconsistent or alternative plea, but not to the extent of mutual destructive to each other

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***130.CIVIL PROCEDURE CODE, 1908 – Order 22 Rules 3, 4 & 11 and Order 43 Rule 1 (r)**

Legal representative – Substitution of legal representatives in miscellaneous appeal and not in original suit – Effect – Failure to implead the legal representatives in the original suit itself would not be fatal to the continued prosecution of the suit – Original suit will not be abated.

सिविल प्रक्रिया संहिता, 1908 – आदेश 22 नियम 3, 4 और 11 एवं आदेश 43 नियम 1 (द)

विधिक प्रतिनिधि – विधिक प्रतिनिधि केवल विविध अपील में जोड़े गये एवं मूल वाद मे नहीं – प्रभाव – विधिक प्रतिनिधियों का मूल वाद में न जोड़े जाने में विफलता स्वमेव दावे की कार्यवाही जारी रखने हेतु घातक नहीं – मुख्य वाद उपशमित नहीं होगा।

Maringmei Acham v. M. Maringmei Khuripou
Judgment dated 03.11.2022 passed by the Supreme Court in Civil Appeal No. 8104 of 2022, reported in (2023) 2 SCC 473

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131. CIVIL PROCEDURE CODE, 1908 – Order 39 Rules 1 and 2

Temporary injunction – *Prima facie* case – How to determine? Trial court has to consider whether there is likelihood of the suit being decreed and implies probabilities of plaintiff obtaining a relief on the material placed before the court at this stage.

सिविल प्रक्रिया संहिता, 1908 – आदेश 39 नियम 1 एवं 2

अस्थायी निषेधाज्ञा – प्रथम दृष्टया मामला – निर्धारण कैसे करें ? विचारण न्यायालय को विचार में लेना होगा कि क्या वाद के डिक्री होने की संभावना है और इस स्तर पर न्यायालय के समक्ष प्रस्तुत सामग्री के आधार पर वादी को ऐसा अनुतोष प्राप्त करने की संभावना परिलक्षित होती है।

Tarun v. Goma and ors.
Order dated 28.09.2022 passed by the High Court of Madhya Pradesh in Miscellaneous Petition No. 937 of 2022, reported in ILR 2023 MP 135

Relevant extracts from the order:

It is clear that this Court is of the opinion that prima facie, no case is made out in favour of the plaintiff and therefore granting temporary injunction in his

favour is not proper. The Court below has failed to consider the fact that injunction is granted only when *prima facie* case is made out in favour of plaintiff and for determining prima facie case the trial court has to consider the following ingredient:-

(i) whether there is likelihood of the suit being decreed;

(ii) implies probabilities of plaintiff obtaining a relief on the material placed before the Court at that stage.

In view of aforesaid when chances of passing decree in favour of the plaintiff is very rare then granting injunction and depriving the true owner from getting possession by virtue of sale deed executed in their favour is a material irregularity.

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132. CIVIL PROCEDURE CODE, 1908 – Order 41 Rules 25 to 29

(i) Additional documents taken on record – Appellate Court can take additional evidence or direct the trial court to record evidence and send it back – Wholesale remand of the matter after setting aside judgment and decree wholly unwarranted.

(ii) Resettlement of issues – After framing of new issues, matter is to be referred to the trial court with direction to take additional evidence on newly framed issues and return the evidence to it together with findings – Thereafter, to proceed under Rule 26 and determine appeal finally – Remand merely because of framing of new issues, not justified.

सिविल प्रक्रिया संहिता, 1908 – आदेश 41 नियम 25 से 29

(i) अतिरिक्त दस्तावेज अभिलेख पर लिए गये – अपील न्यायालय अतिरिक्त साक्ष्य ले सकती है या विचारण न्यायालय को साक्ष्य लेने और वापस भेजने के लिये निर्देशित कर सकती है – निर्णय तथा डिक्री को अपास्त कर संपूर्ण मामले का प्रतिप्रेषण, पूर्ण रूप से अनुचित।

(ii) विवाद्यकों की पुनर्स्थापना – नए विवाद्यक विरचित करने के बाद मामला विचारण न्यायालय को इस निर्देश के साथ भेजा जाना चाहिये था कि नए विरचित विवाद्यकों पर अतिरिक्त साक्ष्य लेकर निष्कर्षो के साथ वापस भेजे – तत्पश्चात् नियम 26 के अनुसार कार्यवाही कर अपील का अंतिम रूप से निराकरण करना चाहिये – मात्र नए विवाद्यकों की विरचना के आधार पर प्रतिप्रेषित किया जाना न्यायोचित नहीं।

Omprakash v. Ashok & ors.
Judgment dated 31.10.2022 passed by the High Court of Madhya Pradesh (Indore Bench) in Miscellaneous Appeal No. 2152 of 2021, reported in ILR 2023 MP 267

Relevant extracts from the judgment:

In the present case Rule 24 would not be applicable since it is not a case of mere resettling of the issues and a case where the appellate Court has felt it necessary to proceed on some ground other than the ground on which the trial Court had proceeded. The appellate Court has not felt that the evidence on record is sufficient to enable it to pronounce the judgment. Rather the matter is governed by Rule 25 as the appellate Court has recorded a finding that the trial Court has omitted to frame and try issues which were essential to the right decision of the suit upon merits. It is for that reason the appellate Court has framed fresh issues and has deleted issues which it felt had wrongly been framed by the trial Court and which did not arise for determination from pleadings of the parties.

However, the appellate Court has not complied with the procedure prescribed under Rule 25. It ought to have referred the matter to the trial Court with a direction for it to take additional evidence on the issues newly framed and to try such issues and return the evidence to it together with findings thereon and the reasons therefore. It should have thereafter proceeded in terms of Rule 26 and determined the appeal finally. The appellate Court merely for the reason for reframing of new issues was not justified in setting aside the judgment and decree passed by the trial Court and remanding the matter back to it.

So far as the procedure adopted by the appellate Court in receiving additional evidence is concerned the same would be governed by Rule 28 and 29 of Order 41 of the CPC which are as under:-

> ***28. Mode of taking additional evidence.*** – Wherever additional evidence is allowed to be produced, the Appellate Court may either take such evidence, or direct the Court from whose decree the appeal is preferred, or any other subordinate court, to take such evidence and to send it when taken to the Appellate Court.
>
> ***29. Points to be defined and recorded.*** – Where additional evidence is directed or allowed to be taken, the Appellate Court shall specify the points to which the evidence is to be confined, and record on its proceedings the points so specified.

As per Rule 28 the appellate Court could have taken the additional evidence on record or directed the Trial Court to take such evidence and to send it when taken to it. It could have specified the points to which the additional evidence was to be confined. Only for the reason that additional documents had been taken on record, it did not necessitate setting aside the judgment and decree passed by the trial Court and remanding the matter back to it with liberty to both the parties to adduce additional evidence and also to lead oral evidence in that regard. The provisions of Rule 28 and 29 have wholly been omitted to be taken into consideration by the appellate Court. Merely because additional documents had been taken on record, wholesale remand to the trial Court after setting aside its judgment and decree was wholly unwarranted.

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133. COURT FEES ACT, 1870 – Section 16
CIVIL PROCEDURE CODE, 1908 – Section 89

Refund of court fees – Even if the matter is settled outside the Court by the parties without invoking provisions of Section 89 of the Code, they are entitled to the refund of full court fees u/s 16 of the Act.

न्यायालय फीस अधिनियम, 1870 – धारा 16
सिविल प्रक्रिया संहिता, 1908 – धारा 89

न्यायालय शुल्क की वापसी – यदि पक्षकारों द्वारा संहिता की धारा 89 के प्रावधान का अवलंब लिये बिना न्यायालय के बाहर मामला सुलझा लिया है, तो भी वे अधिनियम की धारा 16 के अंतर्गत सम्पूर्ण न्यायालय शुल्क वापस प्राप्त करने के अधिकारी हैं।

Dayaram v. Smt. Laxmi Agrawal
Order dated 20.09.2022 passed by the High Court of Madhya Pradesh in First Appeal No. 222 of 2015, reported in ILR 2023 MP 263

Relevant extracts from the order:

In ***Kamalamma v. Honnali Taluk Agricultural Produce Co-operative Marketing Society Ltd., AIR 2010 KarR 279*** where, again referring to provisions of Section 89 of CPC and Section 16 of the Act, it was observed as under:

> "7. Whether the parties to a suit or appeal or any other proceeding get their dispute settled amicably through Arbitration or meditation or conciliation or in the Lok Adalat, by invoking provisions of Section 89, C.P.C, or they get the same settled between themselves

without the intervention of any Arbitrator/ Mediator/ Conciliators or in Lok Adalat etc., and without invoking the provisions of S. 89, Civil Procedure Code, the fact remains that they get their dispute settled without the intervention of the court. If they get their dispute settled by invoking S. 89, C.P.C, in that event the State may have to incur some expenditure but, if they get their dispute settled between themselves without the intervention of the Court or anyone else, such as arbitrator/mediator etc., the State would not be incurring any expenditure. This being so, I am of the considered opinion that whether the parties to a litigation get their dispute settled by invoking Section 89, C.P.C or they get the same settled between themselves without invoking S. 89, Civil Procedure Code, the party paying Court Fees in respect thereof should be entitled to the refund of full Court Fees as provided under Section 16 of the Court Fees Act, 1870. Therefore, the contention of the learned Government Pleader that the principles laid down by the Division Bench of this Court in the said case cannot be made applicable to the facts of the present case does not deserve acceptance."

In the case of ***Pradeep Sonawat v. Satish Prakash @ Satish Chandra, 2015(2) Civil Court Cases 52*** the Punjab and Haryana High Court held as under :-

"Going a step further, it is felt that whether the compromise is with the persuasion of the Court or amongst the parties by themselves in terms of Section 89 CPC or otherwise, invocation of provision of Section 16 of the Act should be made in all cases so that settlements by way of alternative dispute resolution mechanism are encouraged.

Keeping in view the totality of the facts, merely because the matter has not been settled in Lok Adalat, as has been observed by the lower Court while dismissing the application of the plaintiff-petitioner, invocation to Section 16 of the Act should not have been refused."

In view of the aforesaid, I am of the considered opinion that even if the matter is settled by the parties outside the Court without invoking the provisions of section 89 CPC, the appellant while withdrawing his first appeal, is entitled to the refund of full court fees as provided under section 16 of the Court Fees Act, 1870.

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134. CRIMINAL PROCEDURE CODE, 1973 – Sections 110, 111 and 116 (3)

Order to execute an interim Bond for maintaining peace and good behaviour – When can be ordered? Bare allegations cannot form the basis of the order – Allegations have got to be inquired and tested – Can be passed only between commencement and completion of inquiry.

दण्ड प्रक्रिया संहिता, 1973 – धाराएं 110, 111 एवं 116 (3)

शांति और अच्छा आचरण बनाये रखने हेतु अंतरिम बंधपत्र निष्पादित करने का आदेश – कब पारित किया जा सकता है ? मात्र आक्षेप आदेश का आधार नहीं हो सकता है – आक्षेपों की जांच एवं परीक्षा की जाना चाहिए – केवल जांच प्रारम्भ होने के पश्चात् तथा पूर्ण होने के मध्य पारित किया जा सकता है।

Bugdad v. State of M.P.
Order dated 14.11.2022 passed by the High Court of Madhya Pradesh (Indore Bench) in Miscellaneous Criminal Case No. 39668 of 2022, reported in ILR 2023 MP 580

Relevant extracts from the order:

From the provisions of Sub-section (3) of Section 116 of Cr. P.C., it is apparent that the order to execute an interim bond with or without sureties, for keeping the peace or maintaining good behaviour can only be passed after the commencement and before the completion of the inquiry under Sub-section (1) of Section 116 of CrPC. In the case of ***Madhu Limaye v. Ved Murti, (1970) 3 SCC 739***, it was clearly observed that the petitioners being brought under the process of Chapter VIII of CrPC, an order was read over u/s 112 (111 of the new code) and if interim bonds were required from them the Magistrate ought to have entered upon the inquiry and satisfied himself, at least *prima facie* about the truth of the information in relation to the alleged facts. It was also observed therein, that the inquiry does not commence as soon as the delinquent appears and the order u/s 111 of the Code is read over to him. The bare allegations cannot form the foundation of the order for a bond and failing furnishing of it detention of the person. The allegations have got to be inquired and tested.

There is no indication of any inquiry having been made or evidence having been taken to ascertain the truth or otherwise of the allegations alleged against him.

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135. CRIMINAL PROCEDURE CODE, 1973 – Section 164
EVIDENCE ACT, 1872 – Sections 27 and 30

(i) Disclosure statement of accused – Scope – Statement recorded on DVD and presented before Court which is in the nature of confession and completely hit by the principles of Evidence Act – Such DVD cannot be exhibited.

(ii) Confession – Investigating officer could facilitate recording of confession only by producing the accused before Magistrate – Deviation from that procedure, not acceptable.

दण्ड प्रक्रिया संहिता, 1973 – धारा 164
साक्ष्य अधिनियम, 1872 – धाराएं 27 एवं 30

(i) अभियुक्त का प्रगटन कथन – विस्तार – डीव्हीडी पर रिकार्ड किये गये कथन जो संस्वीकृति की प्रकृति के हैं एवं साक्ष्य अधिनियम के सिद्धांतों के विरूद्ध है – ऐसी डीव्हीडी प्रदर्शित नहीं की जा सकती।

(ii) संस्वीकृति – अनुसंधान अधिकारी केवल अभियुक्त को मजिस्ट्रेट के समक्ष प्रस्तुत कर संस्वीकृति कथन करा सकता है – प्रक्रिया से विचलन स्वीकार योग्य नहीं।

Venkatesh @ Chandra & anr. Etc. v. State of Karnataka
Judgment dated 19.04.2022 passed by the Supreme Court in Criminal Appeal No. 1476 of 2018, reported in 2023 (1) Crimes 214 (SC)

Relevant extracts from the judgment:

We must observe that we have repeatedly found a tendency on part of the Prosecuting Agency in getting the entire statement recorded rather than only that part of the statement which leads to the discovery of facts. In the process, a confession of an accused which is otherwise hit by the principles of Evidence Act finds its place on record. Such kind of statements may have a direct tendency to influence and prejudice the mind of the Court. This practice must immediately be stopped. In the present case, the Trial Court not only extracted the entire statements but also relied upon them.

The other disturbing feature that we have noticed is that voluntary statements of the appellants were recorded on a DVD which was played in Court and formed the basis of the judgment of the Trial Court as is noticeable from paragraph Nos.34 and 35 of its judgment. Such a statement is again in the nature of a confession to a Police Officer and is completely hit by the principles of Evidence Act. If at all the accused were desirous of making confessions, the Investigating Machinery could have facilitated recording of confession by

producing them before a Magistrate for appropriate action in terms of Section 164 of the Code. Any departure from that course is not acceptable and cannot be recognized and taken on record as evidence. The Trial Court erred in exhibiting those DVD statement Exh.P-25 to 28. As a matter of fact, it went further in relying upon them while concluding the matter on the issue of conviction.

What has further aggravated the situation is the fact that said statements on DVD recorded by the Investigating Agency were played and published in a program named "Putta Mutta" by Udaya TV. Allowing said DVD to go into the hands of a private TV channel so that it could be played and published in a program is nothing but dereliction of duty and direct interference in the administration of Justice. All matters relating to the crime and whether a particular thing happens to be a conclusive piece of evidence must be dealt with by a Court of Law and not through a TV channel. If at all there was a voluntary statement, the matter would be dealt with by the Court of Law. The public platform is not a place for such debate or proof of what otherwise is the exclusive domain and function of Courts of law. Any such debate or discussion touching upon matters which are in the domain of Courts would amount to direct interference in administration of Criminal Justice.

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136. CRIMINAL PROCEDURE CODE, 1973 – Section 319

Summoning of additional accused – Test – If available material, more or less, carries the same weightage and value as has been testified against those accused facing trial, power u/s 319 CrPC can be invoked. [*Hardeep Singh v. State of Punjab, (2014) 3 SCC 92* and *Sukhpal Singh Khaira v. State of Punjab, (2023) 1 SCC 289* followed].

दण्ड प्रक्रिया संहिता, 1973 – धारा 319

अतिरिक्त अभियुक्त को आहूत करना – कसौटी – यदि उपलब्ध तथ्य, उनकी गुणवत्ता एवं मूल्य करीब-करीब अन्य विचारण का सामना कर रहे अभियुक्तों के समान ही है – धारा 319 दं.प्र.सं. की शक्तियों का उपयोग किया जा सकता है। [*हरदीप सिंह विरूद्ध स्टेट ऑफ पंजाब, (2014) 3 एस.सी.सी. 92 एवं सुखपाल सिंह खैरा विरूद्ध स्टेट ऑफ पंजाब, (2023) 1 एस.सी.सी. 289 पर विश्वास किया गया*]

Juhru & ors. v. Karim & anr.

Judgment dated 21.02.2023 passed by the Supreme Court in Criminal Appeal No. 549 of 2023, reported in 2023 (1) Crimes 237 (SC)

Relevant extracts from the judgment:

It is manifested from a conjoint reading of the decisions of ***Hardeep Singh v. State of Punjab, (2014) 3 SCC 92*** and ***Sukhpal Singh Khaira v. State of Punjab, (2023) 1 SCC 289*** that power of summoning under Section 319 Cr.P.C. is not to be exercised routinely and the existence of more than a prima facie case is sine quo non to summon an additional accused. We may hasten to add that with a view to prevent the frequent misuse of power to summon additional accused under Section 319 Cr.P.C., and in conformity with the binding judicial dictums referred to above, the procedural safeguard can be that ordinarily the summoning of a person at the very threshold of the trial may be discouraged and the trial court must evaluate the evidence against the persons sought to be summoned and then adjudge whether such material is, more or less, carry the same weightage and value as has been testified against those who are already facing trial. In the absence of any credible evidence, the power under Section 319 Cr.P.C. ought not to be invoked.

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137. CRIMINAL PROCEDURE CODE, 1973 – Sections 408 and 439 (2)

(i) Transfer of case – Only because of an unfavourable order passed by the court, case cannot be transferred to the other court.

(ii) Cancellation of bail – Jurisdiction – When liberty has been misused by accused, application for cancellation of bail would lie before the same court – However, when bail has been granted erroneously without considering material on record, application would lie to the superior court.

दण्ड प्रक्रिया संहिता, 1973 – धाराएं 408 एवं 439 (2)

(i) प्रकरण का अंतरण – केवल इसलिये कि न्यायालय द्वारा प्रतिकूल आदेश पारित किया गया है – प्रकरण अन्य न्यायालय में अंतरित नही किया जा सकता।

(ii) जमानत रदद् करना – क्षेत्राधिकार – जब अभियुक्त द्वारा स्वतंत्रता का दुरूपयोग किया गया तब जमानत रदद् करने हेतु कार्यवाही उसी न्यायालय में होगी – परंतु जब जमानत अभिलेख पर उपलब्ध तथ्यों पर विचार किये बिना त्रुटिपूर्ण रूप से दी गई तब आवेदन वरिष्ठ न्यायालय के समक्ष प्रस्तुत होगा।

Jagdish Singh Kaurav v. State of M.P. & ors.
Order dated 19.09.2022 passed by the High Court of Madhya Pradesh (Gwalior Bench) in Criminal Revision No. 3364 of 2022, reported in ILR 2023 MP 326

Relevant extracts from the order:

Where cancellation of bail is sought on the ground that the liberty has been misused by the co-accused, then the application would lie before the same Court and if the cancellation is sought on the ground that the bail has been granted erroneously without considering the material available on record, then the application would lie before the superior Court and in absence of any application before the High Court it is very difficult for this Court to adjudicate as to whether the bail to some of the co-accused persons was granted by the Trial Court erroneously or it was in accordance with law. Furthermore, merely because an unfavourable order has been passed, it cannot be a ground to transfer the case.

Since the applicant has not challenged the order of bail granted to the co-accused persons, therefore, his apprehension cannot be said to be real and passing of an unfavourable order cannot be a ground to transfer the case.

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138. CRIMINAL PROCEDURE CODE, 1973 – Sections 451 and 457 GOVANSH VADH PRATISHEDH ADHINIYAM, 2004 (M.P.) – Sections 4, 6, 9 and 11 (5)

Interim custody of vehicle – Confiscation by Collector – Even after passing an order of confiscation by Collector, there is no bar of jurisdiction of Criminal Court to grant interim custody u/s 451 of the Code – Vehicle directed to be released on interim custody with conditions.

दण्ड प्रक्रिया संहिता, 1973 – धाराएं 451 एवं 457
गौवंश वध प्रतिषेध अधिनियम, 2004 (म.प्र.) – धाराएं 4, 6, 9 एवं 11 (5)

वाहन की अंतरिम सुपुर्दगी – कलेक्टर द्वारा अधिहरण – कलेक्टर द्वारा अधिहरण किये जाने के आदेश के पश्चात् भी संहिता की धारा 451 के अंतर्गत अंतरिम सुपुर्दगी पर छोड़े जाने में दांड़िक न्यायालय का क्षेत्राधिकार वर्जित नहीं – वाहन शर्तों के साथ अंतरिम सुपुर्दगी पर प्रदान किये जाने के निर्देश दिये गये।

Milind v. State of M.P.

Order dated 02.09.2022 passed by the High Court of Madhya Pradesh in Miscellaneous Criminal Case No. 41986 of 2020, reported in ILR 2023 MP 407

Relevant extracts from the order:

Learned counsel for the applicant has contended that in this case although confiscation order has already been passed by the Collector under Rule 5 of the 2012 Rule but same is not sustainable because vehicle cannot be confiscated by

the Collector so long as criminal case is pending. Thus, learned Collector was not justified in passing the order of confiscation before the conclusion of the trial. For this purpose reliance has been placed on the judgment of ***Sheikh Kalim v. State of MP, 2015 (II) MPWN 157*** and ***Moin v. State of MP, 2016 (III) MPWN 119***. Undisputedly the Collector has passed the order of confiscation on 23.04.2020 i.e. before the conclusion of the trial by the Criminal Court. The criminal case is still pending for the adjudication. As per the provision of Section 11(5) of the Adhiniyam, the Collector can confiscate the vehicle only when a competent Court has found proved any violation of the Sections 4, 5, 6, 6-A and 6-B of the Act 2004. Where trial is pending and charges have yet to be proved by prosecution. The Collector should have refrained from passing any order of confiscation of vehicle during pendency of the criminal case.

Thus, in the light of pronouncement by Apex Court in the case of ***Abdul Vaha v. State of Madhya Pradesh, 2022 SCC Online SC 262*** and discussion made herein above, it would not be out of place to mention here that in the provisions of the Act even after passing an order of confiscation by Collector statutory bar to entertain the application for interim custody by the criminal Court has not been specified in the rules. In such circumstances, Collectors are required to refrain from passing any confiscation order before the conclusion of trial by the Criminal Court because as per the provision of the Act, Collector can confiscate the vehicle only when a competent Court has found proved the violation of Sections 4, 5, 6, 6-A and 6-B of the Act 2004. As in the case on hand, trial is still pending and guilt of the accused have not been proved so far. Therefore, in such circumstances, vehicle may be released on interim custody.

This Court, in the case of ***Sheikh Kalim*** (supra) and ***Moin*** (supra) had directed to release the vehicle, which were seized under Section 11(5) of the Act, 2004. In case of ***Abdul Vaha*** (supra), Hon'ble Supreme Court has made it clear that the the objective of 2004 Act is punitive and deterrent in nature. Section 11 of the 2004 Act and Rule 5 of M.P Govansh Vadh Pratishedh Rules, 2012 allows for seizure and confiscation of vehicle, in case of violation of Sections 4, 5, 6, 6-A and 6-B of the Act. As in case on hand, the trial is still pending and applicant and others have not been held guilty for commission of offences under Sections 4,5, 6, 6-A and 6-B of the Act. Hence, passing of confiscation order is not proper. Therefore, I am of the view that even after passing of the confiscation order by the Collector vehicle in question can be released on Supurdagi as there is no statutory bar to release the same.

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***139.EVIDENCE ACT, 1872 – Section 74**

Public document – Documents filed in Court and are part of record – As per Section 74 (1)(iii) there is a distinction between record of the Court and record of the acts of the Court – Merely because documents are filed in Court, they cannot be treated as public documents.

साक्ष्य अधिनियम, 1872 – धारा 74

लोक दस्तावेज – दस्तावेज न्यायालय में प्रस्तुत एवं अभिलेख का भाग – धारा 74 (1) (iii) के अनुसार न्यायालय के अभिलेख एवं न्यायालय द्वारा किये गये कार्य के अभिलेख में अंतर है – कोई दस्तावेज केवल इस आधार पर कि वह न्यायालय में प्रस्तुत किया गया, उसे लोक दस्तावेज नहीं माना जा सकता।

Praveen Malpani v. M/s Vijay Electricals & ors.
Order dated 02.11.2022 passed by the High Court of Madhya Pradesh in Miscellaneous Petition No. 4185 of 2021, reported in ILR 2023 MP 247

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140. HINDU SUCCESSION ACT, 1956 – Section 8 (a)
EVIDENCE ACT, 1872 – Section 115
TRANSFER OF PROPERTY ACT, 1882 – Section 6 (a)

(i) Suit for Partition – Claim for share in property of grandfather who died intestate – Self-acquired property of grandfather – Pre-deceased father of the claimant did not have any right by birth – Father relinquished his right for some consideration – Claimants not entitled for share in grandfather's property.

(ii) Doctrine of estoppel – Applicability of – Applies without distinction on the basis of religion – When pre-deceased father relinquished his share in lieu of valuable consideration, claimants being the heirs of the deceased, are bound to the same extent.

हिन्दू उत्तराधिकार अधिनियम, 1956 – धारा 8 (क)
साक्ष्य अधिनियम, 1872 – धारा 115
संपत्ति अंतरण अधिनियम, 1882 – धारा 6 (क)

(i) विभाजन के लिए वाद – दादा की निर्वसीयत मृत्यु के बाद संपत्ति में हिस्सेदारी के लिए दावा – दादा की स्वअर्जित संपत्ति – दावेदार के पूर्व-मृत पिता के पास जन्म से अधिकार नहीं – पिता ने कुछ प्रतिफल के लिए अपने अधिकारों का अधित्याग किया – दावेदार दादा की संपत्ति में हिस्से का हकदार नहीं ।

(ii) **विबंध का सिद्धांत – प्रयोज्यता – धर्म के आधार पर बिना किसी भेद के लागू होता है – जब पूर्व मृत पिता ने मूल्यवान प्रतिफल के एवज में अपना हिस्सा छोड़ दिया – दावेदार मृतक के उत्तराधिकारी होने के नाते उसी सीमा तक बाध्य होंगे।**

Elumalai @ Venkatesan and anr. v. M. Kamala and ors. and etc.

Judgment dated 25.01.2023 passed by the Supreme Court in Civil Appeal No. 521 of 2023, reported in 2023 (2) MPLJ 1 (SC)

Relevant extracts from the judgment:

As far as the argument of the appellants that the appellants would have an independent right, when succession open to the estate of Shri Sengalani Chettair, when he died in 1988, in view of the fact that the appellants are the children of the predeceased son, viz., Shri Chandran, who died on 09.12.1978, we are of the view that there is no merit in the said contention. It is true that under Section 8(a) of the Hindu Succession Act, 1956, property of a male Hindu, dying intestate, will devolve, firstly, upon the heirs, being the relatives specified in Class I of the Schedule. The son of a predeceased son, it is true, is a Class I heir. Therefore, it could be argued that since Shri Sengalani Chettair died intestate, a right was created in the property in favour of the appellants, being the children of the predeceased son. What estoppel brings about, however, is preventing a party from setting up the right, which, but for the estoppel, he would have in the property. In this regard, we may notice the following discussion under the caption 'Death or disability of the representor' in the work Estoppel by Representation by Spencer Bower and Turner:

> "Death or disability of the representor
>
> In case of the death, or the total or partial disability (whether by reason of insolvency, infancy, lunacy, coverture, or otherwise), of the representor at the time of the proceedings in which the question of estoppel is raised, the liability to the estoppel, speaking generally, devolves upon, or is transmitted to, the same persons, in accordance with the same rules, and subject to the same conditions, as the liability of such a representor to proceedings for the avoidance of a contract procured by the representation.
>
> Where the representor has died between the date of the representation and the date of the raising of the estoppel, the executor or administrator, or (in case of title to, and estates in, land) the heir or devise, of the deceased representor is bound by the

representation to the same extent as the representor would have been, and succeeds to all the burdens of estoppel in respect thereof to which, at the date of his decease, such representor was subject…"

It will be noticed that the father of the appellants, by his conduct, being estopped, as found by us, is the fountainhead or the source of the title declared in Section 8 (a) of the Hindu Succession Act. It is, in other words, only based on the relationship between Shri Chandran and the appellants, that the right under Section 8 (a) of the Hindus Succession Act, purports to vest the right in the appellants. We would think, therefore, that appellants would also not be in a position to claim immunity from the operation of the Principle of Estoppel on the basis of Section 8(a) of the Hindu Succession Act. If the principle in ***Gulam Abbas v. Hajikayyab Ali & ors., AIR 1973 SC 554*** applies, then, despite the fact that what was purported to be released by Shri Chandran, was a mere spec successions or expectation his conduct in transferring/releasing his rights for valuable consideration, would give rise to an estoppel. The effect of the estoppel cannot be warded off by persons claiming through the person whose conduct has generated the estoppel. We also find no merit at all in the attempt at drawing a distinction based on religion. The principle of estoppel applies without such distinction.

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141. INDIAN PENAL CODE, 1860 – Sections 107 and 306
PROTECTION OF DEBTORS ACT, 1937 (M.P.) – Sections 3 and 4
CRIMINAL PROCEDURE CODE, 1973 – Sections 227 and 228

Framing of charge – Abetment to suicide – Deceased was having legal remedy against harassment for repayment of loan, but instead of choosing legal remedy, ended his life thereby implicating the accused – No case is made out – Order regarding framing of charge quashed.

भारतीय दण्ड संहिता, 1860 – धाराएं 107 एवं 306
ऋणियों का संरक्षण अधिनियम, 1937 (म.प्र.) – धाराएं 3 एवं 4
दण्ड प्रक्रिया संहिता, 1973 – धाराएं 227 एवं 228

आरोप विरचित किया जाना – आत्महत्या के लिये दुष्प्रेरण – मृतक के पास उधार की राशि अदा न करने से होने वाले उत्पीड़न से बचने का विधिक उपचार उपलब्ध था परन्तु उसके द्वारा विधिक उपचारों का चयन न करके अपने जीवन को समाप्त किया और अभियुक्त को आलिप्त किया – कोई मामला नहीं बनता – आरोप विरचित करने का आदेश अपास्त।

Govind v. State of M.P.

Order dated 14.11.2022 passed by the High Court of Madhya Pradesh (Indore Bench) in Criminal Revision No. 1381 of 2021, reported in ILR 2023 MP 342

Relevant extracts from the order:

In the case of ***M. Arjunan v. State, Represented by its Inspector of Police (2019) 3 SCC 315,*** Hon'ble the Apex Court held as follows:

> The essential ingredients of the offence under Section 306 I.P.C. are: (i) the abetment; (ii) the intention of the accused to aid or instigate or abet the deceased to commit suicide. The act of the accused, however, insulting the deceased by using abusive language will not, by itself, constitute the abetment of suicide. There should be evidence capable of suggesting that the accused intended by such act to instigate the deceased to commit suicide. Unless the ingredients of instigation/abetment to commit suicide are satisfied, accused cannot be convicted under Section 306 I.P.C.
>
> In our considered view, in the case at hand, M.O.1-letter and the oral evidence of PW-1 to PW-5, would not be sufficient to establish that the suicide by the deceased was directly linked to the instigation or abetment by the appellant- deceased. Having advanced the money to the deceased, the appellant-accused might have uttered some abusive words; but that by itself is not sufficient to constitute the offence under Section 306 I.P.C. From the evidence brought on record and in the facts and circumstances of the case, in our view the ingredients of Section 306 I.P.C. are not established and the conviction of the appellant-accused under Section 306 I.P.C. cannot be sustained.

In the instant case, allegations alleged against the petitioner are based on suicide note recovered from the pocket of deceased's shirt, which is said to be written by the deceased and also a blank cheque bearing deceased's signatures, said to be seized on the instance of the petitioner from his possession. As the cheque bearing deceased's signature is said to be seized from the possession of petitioner and evidence with regard to the seizure of the same cannot be appreciated at this stage, therefore keeping in view his name, address and profession, at this stage it cannot be said that he is different person than that of Govind Sen, named in the suicide note.

So far as the alleged allegations are concerned, contents of the suicide note written with respect to the petitioner are relevant, which are as follows:

> गोविंद सेन नाई मेरा चेक बाजार में लगा दिया और मुझे रोज परेशान करता है।

It is apparent from the above contents that deceased in his suicide note only states about the misuse of his cheque and harassment made by the petitioner, he no where mentioned that he had taken any amount on interest as loan from the petitioner. He has also not stated about the specific acts of the petitioner as to how he harassed him. In view of the legal position as discussed by this Court as well as by the Hon'ble Apex Court in the judgements cited above, this Court is of the view that if the deceased was being harassed for repayment of loan advanced to him by the petitioner, he was having the remedy to take recourse to law by filing complaint against the petitioner, but the deceased instead of choosing legal remedy had ended his life by committing suicide, thereby implicating the petitioner in the instant case. Hence, no case is made out against the petitioner. This Court finds force in the submission made by the learned counsel for the petitioner and in the light of the judgments, cited above, it is a fit case for quashment of charge.

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142. INDIAN PENAL CODE, 1860 – Sections 141 and 302 r/w/s 149
CRIMINAL PROCEDURE CODE, 1973 – Section 156

(i) Unlawful assembly – Five persons, whose names were mentioned in the FIR were tried separately – Whether section 149 of the Code attracted? Held, Yes.

(ii) Unlawful assembly – Conviction of less than five persons – Can be convicted with the aid of section 149 IPC, if the Court is able to hold that the person(s) who were found guilty were members of an assembly of five or more persons, known or unknown, identified or unidentified.

(iii) Delay in lodging FIR – Effect of – If the delay is sufficiently and properly explained, no benefit of doubt should be given to the accused.

भारतीय दण्ड संहिता, 1860 – धाराएं 141 एवं 302 सहपठित 149
दण्ड प्रक्रिया संहिता, 1973 – धारा 156

(i) विधि विरूद्ध जमाव – प्रथम सूचना रिपोर्ट में पाँच लोगों के नाम वर्णित थे और उनका अलग – अलग विचारण किया जा रहा था – क्या भारतीय दण्ड संहिता की धारा 149 आकर्षित होगी ? अभिनिर्धारित, हॉ ।

(ii) विधि विरूद्ध जमाव – पांच से कम लोगों की दोषसिद्धि – वे संहिता की धारा 149 की सहायता से भी दोषसिद्ध किये जा सकते हैं यदि न्यायालय यह अवधारित करने में सक्षम है कि दोषी पाये गये व्यक्ति ज्ञात या अज्ञात, जो पहचाने गये हो अथवा नहीं, पाँच या अधिक व्यक्तियों के जमाव के सदस्य थे।

(iii) प्रथम सूचना रिपोर्ट में विलंब – प्रभाव – यदि देरी का पर्याप्त और उचित कारण स्पष्ट किया गया हो तो अभियुक्त को संदेह का लाभ नहीं दिया जाना चाहिए।

Surendra Singh v. State of Rajasthan and anr.

Judgment dated 11.04.2023 passed by the Supreme Court in Criminal Appeal No. 1059 of 2023, reported in 2023 (2) Crimes 117 (SC)

Relevant extracts from the judgment:

The High Court has not properly considered the fact that in the report/FIR there were specific allegations against five accused persons and five accused persons were named in the FIR. However, the investigating officer charge-sheeted only two persons. The remaining three accused persons came to be added as accused by the learned trial Court while allowing the application under Section 319 Cr.P.C. As they absconded and therefore their trial came to be ordered to be separated and it is reported that the trial against the remaining accused is still pending who are also facing the charges for the offence under Section 302/149 IPC. In that view of the matter when five persons were specifically named in the FIR and five persons are facing the trial may be separately, Section 149 IPC would be attracted. At this stage the decision of this Court in the case of ***Bharwad Mepa Dana & anr. v. State of Bombay, 1960 (2) SCR 172*** on applicability of Section 149 IPC is required to be referred to. Before this Court it was the case on behalf of the prosecution that thirteen named persons formed an unlawful assembly and the common object of which was to kill the three brothers. Twelve of them were tried by the Sessions Court who acquitted seven and the High Court acquitted one more. This brought the number to four. It was the case on behalf of the accused that as the High Court convicted only four persons falling below the required number of five, they could not have been convicted with the aid of Section 149 IPC. The aforesaid contention was negated by this Court. This Court observed that merely because two other persons forming part of the unlawful assembly were not convicted as their identity was not established, the accused cannot be permitted to say that they are not forming part of the unlawful assembly and they cannot be convicted with the aid of Section 149 IPC. In the said decision it is specifically observed and held that the essential question in a case under Section 147 is whether there was an unlawful assembly as defined under 141, I. P. C., of five or more than five persons. The identity of the persons

comprising the assembly is a matter relating to the determination of the guilt of the individual accused, and even when it is possible to convict less than five persons only, Section 147 still applies, if upon the evidence in the case the Court is able to hold that the person or persons who have been found guilty were members of an assembly of five or more persons, known or unknown, identified or unidentified.

The submission on behalf of the accused that there was a delay of 3½ days has been elaborately dealt with and considered by the learned trial Court in detail. A proper explanation has been given by the complainant - Surendra Singh. Immediately after the occurrence the injured were taken to the hospital for treatment. The condition of Bhawani Singh was serious. Complainant concentrated on his treatment. Another injured Narendra Singh was also remained busy for the treatment. Thus, when the delay has been sufficiently and properly explained, we see no reason to give benefit of doubt to the accused on the aforesaid ground that there was a delay of 3½ days in lodging the FIR.

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143. INDIAN PENAL CODE, 1860 – Sections 201 and 302

Circumstantial evidence – No eye witness to the incident – Well from which the bodies of deceased persons were recovered does not belong to the accused – Autopsy Surgeon deposed that injuries found on the person of deceased could have been sustained due to her falling into the well – Family members of deceased persons clearly stated that there was no previous enmity between the accused and their parents – Recovery of an axe from the courtyard which although contains human blood, in absence of matching of blood group, cannot be the singular reason for affirming conviction – Complete chain must be established meticulously with forensic clarity.

भारतीय दण्ड संहिता, 1860 – धाराएं 201 एवं 302

परिस्थितिजन्य साक्ष्य – घटना का कोई प्रत्यक्षदर्शी साक्षी नहीं – कुऑ जहां से मृतकों के शरीर बरामद हुए अभियुक्त से संबंधित नहीं – शव परीक्षण करने वाले चिकित्सक द्वारा कथन किये गये कि मृतकों के शरीर पर पाई गई चोटें कुऍ में गिरने के कारण आ सकती थी – मृतकों के परिवार के सदस्यों ने स्पष्ट रूप से व्यक्त किया कि अभियुक्त और उनके अभिभावकों के मध्य कोई शत्रुता नहीं थी – आंगन से बरामद हुई कुल्हाड़ी में मानव रक्त का पाया जाना दोषसिद्धि की पुष्टि करने का एकमात्र कारण नहीं माना जा सकता जबकि रक्त समूह का मिलान न हुआ हो – पूरी श्रृंखला को सावधानीपूर्वक और न्यायिक विज्ञान की स्पष्टता के साथ स्थापित किया जाना चाहिए।

In Reference v. Ramjag Bind
Judgment dated 05.12.2022 passed by the High Court of Madhya Pradesh in CRRFC No. 14 of 2019, reported in ILR 2023 MP 717 (DB)

Relevant extracts from the judgment:

It can be safely held that there is no eye witness to the incident, Well in which bodies of deceased persons were recovered does not belong to the appellant. Autopsy Surgeon deposed that injuries found on the person of deceased Shanti could have been sustained due to her fall into well. The family members of deceased persons Ramrati (PW-7) and Munni Bai (PW-9) clearly stated that there was no previous enmity between the appellant and their parents. Munni Bai (PW-9) even deposed that the relation of appellant and deceased were cordial. Munni Bai (PW-9), the daughter of deceased persons further deposed that she falsely arraigned the present appellant because her brothers misguides her. The recovery of stones from open places cannot be the sole reason for conviction. Similarly, recovery of an axe from the courtyard which although contains human blood, in absence of matching of blood group cannot be the singular reason for affirming conviction. The complete chain must be established meticulously and with forensic clarity.

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144. INDIAN PENAL CODE, 1860 – Sections 201 and 302

Murder – Circumstantial evidence – Dead body of victim exhumed after several months – No medical proof of homicidal death but chain of circumstances fully established – Conviction proper.

भारतीय दण्ड संहिता, 1860 – धाराएं 201 एवं 302

हत्या पीड़ित का शव कब्र से कई माह बाद – यद्वपरिस्थितिजन्य सा – निकाला गया – मानव वध का कोई चिकित्सीय प्रमाण नहींपरन्तु परिस्थितियों की श्रृंखल । पूरी तरह से स्थापित – दोषसिद्धि उचित।

John Anthonisamy alias John v. State
Judgment dated 19.01.2023 passed by the Supreme Court in Criminal Appeal No. 466 of 2017, reported in (2023) 3 SCC 536

Relevant extracts from the judgment:

So far as the submissions made on behalf of the appellant that the prosecution has failed to prove that the death of deceased was the homicidal as in the post- mortem report the cause of death was unascertainable is concerned, it is required to be noted that as the dead body was buried and was found after number

of months, it may not be possible for the prosecution to prove that the death was a homicidal death. However, at the same time and as rightly observed by the High Court, by other circumstances the prosecution has established and proved that the deceased was killed after his car was stolen/taken away by the appellant–Accused No. 1.

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145. INDIAN PENAL CODE, 1860 – Section 302

(i) Identification parade – Value – If the accused are previously known to the witness, identification parade does not hold much value .

(ii) Judgment – Basis of – To avoid miscarriage of justice, it should consist of reasons and appreciation of evidence but should not be based on the principle of preponderance of probability.

भारतीय दण्ड संहिता, 1860 – धारा 302

(i) शिनाख्त परेड – महत्व – यदि साक्षी अभियुक्त को पहले से जानता है तब शिनाख्त परेड किया जाना अनुपयोगी है।

(ii) निर्णय – आधार – न्याय की विफलता से बचने के लिये निर्णय में कारणों और साक्ष्य के मूल्यांकन पर आधारित होना चाहिए न कि अधिसंभावना की प्रबलता के सिद्धांत पर ।

Udayakumar v. State of Tamil Nadu

Judgment dated 16.03.2023 passed by the Supreme Court in Criminal Appeal No. 1741 of 2010, reported in 2023(2) Crimes 58 (SC)

Relevant extracts from the judgment:

Examining the testimony of PW-1, we find him to be materially contradicted and his version belied through the testimony of the Investigation Officer, (PW-23). This is with regard to the identification of the accused. Whereas the former states that he identified the accused in front of the judge, pursuant to the summons issued to him for making himself available at Pulhal Jail, Chennai for the purpose of identifying the accused, but the latter, in unequivocal terms states that, "… it is correct to say that PW-1 would give the statement that they came to know that the second accused Udayakumar had murdered Purushothaman" and that "it is correct to say that only after identifying the accused at the Police Station, they had identified the accused at the identification parade." Now, if the identity of the accused was already in the knowledge of the police or the witnesses, then we only wonder, where would the question of conducting the identification parade arise? We reiterate that the entire necessity for holding an investigation parade can arise only when the accused are not previously known to

the witnesses. The whole idea of a test identification parade is that witnesses who claim to have seen the culprits at the time of occurrence are to identify them from the midst of other persons without any aid or any other source. [***Heera v State of Rajasthan, (2007) 10 SC 175***]. We may also state that the investigation parade does not hold much value when the identity of the accused is already known to the witness. [***Sheikh Sintha Madhar v. State, (2016) 11 SCC 265***].

Unfortunately in the impugned judgement, there is neither any reasoning, nor any appreciation of evidence on record. We cannot convict the accused on the basis of the principles of preponderance of probability. It is our duty to make sure that miscarriage of justice is avoided at all costs and the benefit of doubt, if any, given to the accused.

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146. INDIAN PENAL CODE, 1860 – Sections 302, 363, 365 and 376 (2)(f)

(i) Death sentence – Rape and murder of 7-8 year old physically and mentally challenged minor victim – Punishment based on "crime test", "criminal test" and "rarest of the rare test"– Possibility of reformation ruled out – Conviction and sentence held proper.

(ii) Life imprisonment – Imposition of – Minimum or non-remittable term of imprisonment – Condition when can be imposed? Explained.

भारतीय दण्ड संहिता, 1860 – धाराएं 302, 363, 365 एवं 376 (2)(च)

(i) मृत्युदंड – शारीरिक और मानसिक रूप से निःशक्त 7–8 वर्ष की अवयस्क पीड़िता के साथ बलात्कार और हत्या – ''अपराध परीक्षण'', ''अपराधी परीक्षण'' और ''विरल से भी विरलतम परीक्षण'' के आधार पर सजा – सुधार की संभावना नहीं – दोषसिद्धि एवं दण्डादेश उचित अभिनिर्धारित।

(ii) आजीवन कारावास – अधिरोपण – कारावास की न्यूनतम या गैर परिहार योग्य अवधि – शर्त कब लगाई जा सकती है ? व्याख्या की गई।

Manoj Pratap Singh v. State of Rajasthan

Judgment dated 24.06.2022 passed by the Supreme Court in Criminal Appeal No. …of 2022, reported in (2022) 9 SCC 81 (Three Judge Bench)

Relevant extracts from the judgment:

The majority view, being the declaration of law by this Court in the case of ***Union of India v. V. Sriharan, (2016) 7 SCC 1***, could be usefully noticed from the relevant question and its answer as follows: -

"Question 52.1: Whether imprisonment for life in terms of Section 53 read with Section 45 of the Penal Code meant imprisonment for rest of the life of the prisoner or a convict undergoing life imprisonment has a right to claim remission and whether as per the principles enunciated in paras 91 to 93 of ***Swamy Shraddananda (2) v. State of Karnataka, (2005) 13 SCC 767***, a special category of sentence may be made for the very few cases where the death penalty might be substituted by the punishment of imprisonment for life or imprisonment for a term in excess of fourteen years and to put that category beyond application of remission?

Answer:

Imprisonment for life in terms of section 53 read with section 45 of the Penal Code only means imprisonment for the rest of the life of the convict. The right to claim remission, commutation, reprieve, etc. as provided under Article 72 or Article 161 of the Constitution will always be available being constitutional remedies untouchable by the Court.

We hold that the ratio laid down in ***Swamy Shraddananda*** (2) (supra) that a special category of sentence; instead of death can be substituted by the punishment of imprisonment for life or for a term exceeding 14 years and put that category beyond application of remission is well founded and we answer the said question in the affirmative."

This Court, *inter alia*, held as in the case of ***Rajendra Pralhadrao wasnik v. State of Maharashtra, (2019) 12 SCC 460 as*** under: -

"45. The law laid down by various decisions of this Court clearly and unequivocally mandates that the probability (not possibility or improbability or impossibility) that a convict can be reformed and rehabilitated in society must be seriously and earnestly considered by the courts before awarding the death sentence. This is one of the mandates of the "special reasons" requirement of Section 354 (3) CrPC and ought not to be taken lightly since it involves snuffing out the life of a person. To effectuate this mandate, it is the obligation on the prosecution to prove to the court, through evidence, that the probability is that the convict cannot be reformed or rehabilitated. This can be achieved by bringing on

record, *inter alia,* material about his conduct in jail, his conduct outside jail if he has been on bail for some time, medical evidence about his mental make-up, contact with his family and so on. Similarly, the convict can produce evidence on these issues as well.

47. Consideration of the reformation, rehabilitation and reintegration of the convict into society cannot be over emphasised. Until ***Bachan Singh v. State of Punjab, (1980) 2 SCC 684*** the emphasis given by the courts was primarily on the nature of the crime, its brutality and severity. Bachan Singh placed the sentencing process into perspective and introduced the necessity of considering the reformation or rehabilitation of the convict. Despite the view expressed by the Constitution Bench, there have been several instances,… where there is a tendency to give primacy to the crime and consider the criminal in a somewhat secondary manner. As observed in ***Sangeet v. State of Haryana, (2013) 2 SCC 452,***"in the sentencing process, both the crime and the criminal are equally important." Therefore, we should not forget that the criminal, however ruthless he might be, is nevertheless a human being and is entitled to a life of dignity notwithstanding his crime. Therefore, it is for the prosecution and the courts to determine whether such a person, notwithstanding his crime, can be reformed and rehabilitated. To obtain and analyse this information is certainly not an easy task but must nevertheless be undertaken. The process of rehabilitation is also not a simple one since it involves social reintegration of the convict into society. Of course, notwithstanding any information made available and its analysis by experts coupled with the evidence on record, there could be instances where the social reintegration of the convict may not be possible. If that should happen, the option of a long duration of imprisonment is permissible."

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147. INDIAN PENAL CODE, 1860 – Sections 302 and 364-A

(i) Sentencing – Right to be heard – A meaningful, real and effective hearing should be offered to the accused, even if the Court is to be adjourned for a separate hearing.

(ii) Capital punishment – Mitigating circumstances – Only gruesome nature of crime is not sufficient – Duty of the State to place all

material and circumstances on record bearing on the probability of reform – The process and power of the Court may be utilised to ensure that such material is available to frame a just sentence.

भारतीय दण्ड संहिता, 1860 – धाराएं 302 एवं 364-क

(i) दण्डादेश – सुनने का अधिकार – अभियुक्त को एक सार्थक, वास्तविक और प्रभावी सुनवाई की पेशकश की जानी चाहिए, भले ही न्यायालय को पृथक सुनवाई हेतु स्थगन करना पड़े।

(ii) मृत्युदण्ड – लघुतरकारी परिस्थितियां – केवल अपराध की वीभत्स प्रकृति पर्याप्त नहीं है – सुधार की संभावना पर असर डालने वाली समस्त सामग्री और परिस्थितियों को अभिलेख पर रखना राज्य का कर्तव्य है – न्यायालय की कार्यवाही और शक्ति के उपयोग से यह सुनिश्चित किया जा सकता है कि ऐसे तथ्य उचित सजा देने हेतु उपलब्ध हैं।

Sundar @ Sundarrajan v. State by Inspector of Police

Judgment dated 21.03.2023 passed by the Supreme Court in Review Petition (Crl.) No. 159 of 2013, reported in 2023 (2) Crimes 29 (SC) (Three Judge Bench)

Relevant extracts from the judgment:

In the present case, the judgment of the Trial Court dealing with sentencing indicates that a meaningful, real and effective hearing was not afforded to the petitioner.

The Trial Court did not conduct any separate hearing on sentencing and did not take into account any mitigating circumstances pertaining to the petitioner before awarding the death penalty. In the course of its judgment, the trial court merely noted the following, before awarding the death penalty:

> "In present day circumstances it has become common of kidnapping of children and elders for ransom and kidnapped being murdered if expected ransom is not received. In this situation unless the kidnappers for ransom are punished with extreme penalty, in future kidnapping of children and elders for ransom would get increased and the danger of society getting totally spoiled, would have to faced is of no doubt. Hence having regard to all these it is decided that it would be in the interests of justice to award to the 1st accused the extreme penalty. Not only that the court saw the mother of the deceased boy profusely crying and weeping in court over the death of

her son in court and the scene of onlookers in court having wept also cannot be forgotten by anyone. Hence it is decided that such offenders have to be punished with extreme penalty; in the interests of justice."

The High Court took into account the gruesome and merciless nature of the act. It reiterated the precedents stating that the death penalty is to be awarded only in the rarest of rare cases. However, it did not specifically look at any mitigating circumstances bearing on the petitioner. It merely held that:

> "In a given case like this, it is an inhuman and a merciless act of gruesome murder which would shock the conscience of the society. Under the circumstance, showing mercy or leniency to such accused would be misplacing the mercy. That apart, showing leniency would be mockery on the criminal system. Therefore, the death penalty imposed by the trial Judge, has got to be affirmed, and accordingly, it is affirmed."

No such inquiry has been conducted for enabling a consideration of the factors mentioned above in case of the petitioner. Neither the trial court, nor the appellate courts have looked into any factors to conclusively state that the petitioner cannot be reformed or rehabilitated. In the present case, the Courts have reiterated the gruesome nature of crime to award the death penalty. In appeal, this Court merely noted that the counsel for the petitioner could not point towards mitigating circumstances and upheld the death penalty. The state must equally place all material and circumstances on the record bearing on the probability of reform. Many such materials and aspects are within the knowledge of the state which has had custody of the accused both before and after the conviction. Moreover, the court cannot be an indifferent by-stander in the process. The process and powers of the court may be utilised to ensure that such material is made available to it to form a just sentencing decision bearing on the probability of reform.

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148. INDIAN PENAL CODE, 1860 – Sections 324, 366 and 376-AB PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012 – Sections 3 (a), 4, 5 (i), 5 (m) and 6

(i) Sentencing – Death sentence – Even if one circumstance including his young age favours accused, imposition of capital punishment is not proper.

(ii) DNA report – Chain of custody – Blood samples were collected and sent to FSL promptly – Seal of hospital was intact – No procedural impropriety found – DNA report cannot be doubted – Conviction can solely be based on DNA report.

(iv) Recovery of article from open place – Recovery was made from bushes and open place but was not accessible to public; it can be relied upon – No straight jacket formula that every recovery from open space is vitiated.

भारतीय दण्ड संहिता, 1860 – धाराएं 324, 366 एवं 376–कख

लैंगिक अपराधों से बालकों का संरक्षण अधिनियम, 2012 – धाराएं 3 (क), 4, 5 (झ), 5 (ड) एवं 6

(i) दण्डादेश – मृत्युदण्ड – यदि अभियुक्त के हित में केवल एक परिस्थिति हो जिसमें उसका अल्प आयु का होना हो, तब भी मृत्युदण्ड उचित नहीं है।

(ii) डी.एन.ए. प्रतिवेदन – अभिरक्षा की श्रृंखला – रक्त का नमूना एकत्रित कर एफ.एस.एल. जॉच हेतु शीघ्रता से भेजा गया – अस्पताल की मुद्रा अखंडित – कोई प्रक्रियात्मक त्रुटि नही पाई गई – डी.एन.ए. प्रतिवेदन पर अविश्वास नहीं किया जा सकता – दोषसिद्धि केवल डी.एन.ए. प्रतिवेदन के आधार पर की जा सकती है।

(iii) खुले स्थान से वस्तु की बरामदगी – बरामदगी खुले स्थान से की गई जहाँ घास थी, पर आम जन की पहुँच नहीं थी; इस पर विश्वास किया जा सकता है – ऐसा कोई निश्चित सूत्र नहीं है कि खुले स्थान से की गई हर बरामदगी दूषित होती है।

Santosh Markam v. State of M.P.
Judgment dated 05.09.2022 passed by the High Court of Madhya Pradesh in Criminal Appeal No. 1579 of 2020, reported in ILR 2023 MP 281 (DB)

Relevant extracts from the judgment:

The recovery of underwear of victim through Ex.P/36 from an open space is called in question. The factual matrix of this matter clearly shows that the incident had taken place in the intervening night of 24-25/6/2019. The recovery of underwear was made on the basis of information furnished by the appellant from a place which may be an open space but was not accessible to the public. In other words, the place from where recovery was made was under the bushes and it was only on the appellant's information, the materials i.e. underwear and *Gamchha* were recovered. There is no strait-jacket formula that every recovery from the

open space stands vitiated. It is relevant to consider the judgment of Supreme Court on this aspect reported in ***State of Himachal Pradesh v. Jeet Singh, (1999) 4 SCC 370***. Para-26 and 27 read thus:-

> "26. There is nothing in Section 27 of the Evidence Act which renders the statement of the accused inadmissible if recovery of the articles was made from any place which is "open or accessible to others". It is a fallacious notion that when recovery of any incriminating article was made from a place which is open or accessible to others, it would vitiate the evidence under Section 27 of the Evidence Act. Any object can be concealed in places which are open or accessible to others. For example, if the article is buried in the main roadside or if it is concealed beneath dry leaves lying on public places or kept hidden in a public office, the article would remain out of the visibility of others in normal circumstances. Until such article is disinterred, its hidden state would remain unhampered. The person who hid it alone knows where it is until he discloses that fact to any other person. Hence, the crucial question is not whether the place was accessible to others or not but whether it was ordinarily visible to others. If it is not, then it is immaterial that the concealed place is accessible to others.
>
> 27. It is now well settled that the discovery of fact referred to in Section 27 of the Evidence Act is not the object recovered but the fact embraces the place from which the object is recovered and the knowledge of the accused as to it ***Pulukuri Kottaya v. Emperor, AIR 1947 PC 67***. The said ratio has received unreserved approval of this Court in successive decisions. ***(Jaffar Hussain Dastagir v. State of Maharashtra, (1969) 2 SCC 872, K. Chinnaswamy Reddy v. State of A.P., AIR 1962 SC 1788, Earabhadrappa v. State of Karnataka, (1983) 2 SCC 330, Shamshul Kanwar v. State of U.P., (1995) 4 SCC 430 and State of Rajasthan v. Bhup Singh, (1997) 10 SCC)."***

In this case, since seal put on the blood samples were of the hospital and not of the prosecution agency, we find no reason to hold that the purity and custody of sample is questionable.

The aforesaid blood samples were collected and the same were sent to FSL promptly. Thus, there is no inordinate delay in sending the blood samples to the FSL.

In this view of the matter, we do not find any procedural impropriety or illegality in the collection, custody and sending of blood samples and other materials to the FSL. In ***Santosh Dhondiram Kende v. State of Maharashtra, 2019 SCC Online Bom 7319,*** the Court opined that proof of mathematical precision is not required in cases of collection and sending of material to FSL. In another judgment of ***Amol v. State of Maharashtra, 2022 SCC Online Bom 107,*** the Bombay High Court opined that great care is required to be taken in case of DNA analysis. In the fitness of things, Chemical Analyzer who prepared the DNA report required to be examined. In the instant case, the said expert entered the witness box as a court witness and established the procedure with accuracy and a precision. No infirmity in handling and examination process could be established which creates any doubt on the DNA report. Thus, we are inclined to uphold the finding of the Court below based on DNA report. We also find support in our view from ***State of Chhattisgarh v. Sunil, 2016 SCC Online Chh 1177***.

In our opinion, the Court below has not committed any error of fact or law in accepting the DNA report. The said scientific report alone can be a reason to record conviction. Thus, the statement of victim to the extent pointed out by the learned counsel for the appellant/Amicus Curiae does not improve the case of the appellant. The Court below rightly opined that the prosecution could establish its case beyond reasonable doubt. We do not find any infirmity and illegality in the finding whereby conviction is recorded by the Court below. We find support in our view from the judgment of Apex Court in the case of ***Kamti Devi (Smt.)*** **and** ***another v. Poshi Ram (2001) 5 SCC 311.***

If the capital punishment imposed in the instant case is examined on the anvil of aforesaid principles and the judgment of this Court in ***Deepak @ Nanhu Kirar v. State of M.P.***, Criminal Appeal No. 7544 of 2019, it will be clear that death sentence can be imposed only when their exists no other alternative. Imposition of life imprisonment is the rule. As noticed above, in the case in hand, certain mitigating circumstances were available in favour of the appellant. As per judgment of Apex Court in the case of ***Channulal Verma v. State of Chhattisgarh, 2018 SCC Online 2570*** even if one circumstance favours the accused which includes his young age, the imposition of capital punishment is not justifiable/proper.

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***149. INDIAN PENAL CODE, 1860 – Section 326**

Criminal practice – Testimony of injured witness – Injury to a witness is an inbuilt guarantee of his presence at the scene of crime – Unless there are strong grounds for its rejection based on major contradictions and discrepancies, it should be relied upon.

भारतीय दण्ड संहिता, 1860 – धारा 326

आपराधिक प्रथा – आहत साक्षी की अभिसाक्ष्य – साक्षी को आई हुई चोट स्वतः प्रमाण है कि वह घटना स्थल पर मौजूद था – जब तक तात्विक श्रेणी के विरोधाभास एवं विसंगतियों जैसे ठोस आधार उसे खारिज करने के न हों, विश्वास किया जाना चाहिये।

Raju @ Rajkumar v. State of M.P.

Judgment dated 17.11.2022 passed by the High Court of Madhya Pradesh (Indore Bench) in Criminal Appeal No. 718 of 1999, reported in ILR 2023 MP 319

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150. INDIAN PENAL CODE, 1860 – Sections 405 and 406
CRIMINAL PROCEDURE CODE, 1973 – Sections 202 and 204

(i) Issuance of process – Facts to be considered – The requirement of Section 204 of the Code is that the Magistrate should carefully scrutinize the evidence brought on record – Only upon being satisfied that there is sufficient ground for summoning the accused to stand the trial, summons should be issued.

(ii) Accused resides outside the jurisdiction of court – It is obligatory upon the Magistrate to inquire into the case himself or direct investigation be made by a police officer for finding out whether or not there is sufficient ground for proceeding against the accused.

भारतीय दण्ड संहिता, 1860 – धाराएं 405 एवं 406

दण्ड प्रक्रिया संहिता, 1973 – धाराएं 202 एवं 204

(i) आदेशिका जारी किया जाना – विचार में लिये जाने वाले तथ्य – संहिता की धारा 204 की अपेक्षा यह है कि मजिस्ट्रेट अभिलेख पर प्रस्तुत किये गये साक्ष्य का सावधानी से परीक्षण करें – केवल उसके बाद ही संतुष्ट होने पर कि अभियुक्त को विचारण के लिये आदेशिका जारी करने के लिये पर्याप्त आधार है तब आदेशिकाएं जारी की जाना चाहिए।

(ii) अभियुक्त का न्यायालय के क्षेत्राधिकार के बाहर निवास – मजिस्ट्रेट के लिए बाध्यकारी है कि वह प्रकरण की जांच स्वयं करे या पुलिस अधिकारी को अन्वेषण के लिए निर्देशित करे कि क्या अभियुक्त के विरूद्ध कार्यवाही किये जाने के पर्याप्त आधार दर्शित होते हैं।

Deepak Gaba and ors. v. State of Uttar Pradesh and anr.
Judgment dated 02.01.2023 passed by the Supreme Court in Criminal Appeal No. 2328 of 2022, reported in 2023 (1) Crimes 1 (SC)

Relevant extracts from the judgment:

The court must cautiously examine the facts to ascertain whether they only constitute a civil wrong, as the ingredients of criminal wrong are missing. A conscious application of the said aspects is required by the Magistrate, as a summoning order has grave consequences of setting criminal proceedings in motion. Even though at the stage of issuing process to the accused the Magistrate is not required to record detailed reasons, there should be adequate evidence on record to set the criminal proceedings into motion. The requirement of Section 204 of the Code is that the Magistrate should carefully scrutinise the evidence brought on record. He/She may even put questions to complainant and his/her witnesses when examined under Section 200 of the Code to elicit answers to find out the truth about the allegations. Only upon being satisfied that there is sufficient ground for summoning the accused to stand the trial, summons should be issued.

While summoning an accused who resides outside the jurisdiction of court, in terms of the insertion made to Section 202 of the Code by Act 25 of 2005, it is obligatory upon the Magistrate to inquire into the case himself or direct investigation be made by a police officer or such other officer for finding out whether or not there is sufficient ground for proceeding against the accused.

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151. LIMITATION ACT, 1963 – Article 58

(i) Suit for Partition – Limitation – Right to sue for partition is a recurring right and its cause of action arises on a day-to-day basis, which will be governed by Article 58 of the Act.

(ii) Suit for partition – Requirement of separate relief – Suit inherently includes relief of delivery of separate possession – Not necessary for plaintiff to independently seek such relief.

परिसीमा अधिनियम, 1963 – अनुच्छेद 58

(i) विभाजन के लिए वाद – परिसीमा – विभाजन के लिये वाद का अधिकार एक निरंतर अधिकार है और इसके लिये वाद कारण दिन प्रतिदिन के आधार पर उत्पन्न होता है जो अधिनियम के अनुच्छेद 58 से शासित होगा।

(ii) विभाजन के लिए वाद – पृथक अनुतोष की आवश्यकता – वाद में पृथक से आधिपत्य प्रदान किये जाने का अनुतोष अन्तर्निहित है – वादी के लिये ऐसा अनुतोष स्वतंत्र रूप से प्रार्थित किया जाना आवश्यक नहीं है।

Ashok Kumar v. Vimla Devi and anr.
Judgment dated 28.11.2022 passed by the High Court of Madhya Pradesh (Indore Bench) in Second Appeal No. 1797 of 2022, reported in ILR 2023 MP 668

Relevant extracts from the judgment:

The claim has been instituted by her in the year 2007 for relief of declaration of her half share in the suit land and for partition of the same. The claim is hence essentially for partition which would be governed by Article 58 of the Limitation Act, 1963. The right to sue for partition is a recurring right and its cause of action arises on a day to day basis. Thus, only because plaintiff was aware of execution of sale deeds by defendant No.1 and the consequent revenue proceedings, it would not make any difference. Mere knowledge to that effect did not oblige her to institute the claim for partition particularly when sale deeds had been executed by defendant No.1 of land much less than his share in the entire suit land. It is not a case where sale deeds were executed by him in excess of his share.

Since plaintiff's claim is for declaration of her title over half share in the suit land total measuring 0.222 hectare which would be 0.111 hectare there was no necessity for her to seek any declaration to the effect that the sale deeds executed by defendant No.1 in favour of third persons are illegal since the lands sold thereunder were much less than his total share in the entire land and can very well be apportioned in his share. Thus, the claim for partition was very much maintainable which inherently includes relief of delivery of separate possession and it was not necessary for plaintiff to independently seek such relief.

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152. MOTOR VEHICLES ACT, 1988 – Section 147 (1)

Pay and recover – Goods Vehicle – Liability of insurance company – "Owner of goods" means the person who travels in the cabin of the vehicle – Deceased was not sitting in cabin – Insurance Company not liable – However, Tribunal can order for pay and recover. [*National Insurance Co. Ltd. v. Cholleti Bharatamma, 2008 ACJ 268 (SC)* followed]

मोटर यान अधिनियम, 1988 – धारा 147 (1)

भुगतान करे और वसूलें – मालवाहक वाहन – बीमा कंपनी का दायित्व – ''माल का स्वामी'' के अंतर्गत केवल वही व्यक्ति आएगा जो वाहन के केबिन में बैठकर यात्रा करे – मृतक केबिन में नहीं बैठा था – बीमा कंपनी उत्तरादायित्व से मुक्त – परंतु अधिकरण भुगतान करे और वसूलें का आदेश कर सकती है। [*नेशनल इश्योरेन्स कं. लिमिटेड विरूद्ध चोलैटी भारतम्मा, 2008 ए.सी.जे. 268 (एस.सी.)* अनुसरित]

Laxmi Devi Kushwah and ors. v. Uttam Singh Rathore and anr.

Judgment dated 07.05.2022 passed by the High Court of Madhya Pradesh (Gwalior Bench) in Miscellaneous Appeal No. 602 of 2015, reported in 2023 ACJ 675

Relevant extracts from the judgment:

Learned counsel for the claimants has argued that in view of the case law of ***Iffco-Tokyo General Insurance Company Limited v. Sudamati, 2019 ACJ 272 (Bombay)*** and ***Manager, Cholamandalam Ms General Insurance Company Limited v. Ajay Coudhary, 2020 ACJ 649 (MP),*** in which the Maharashtra High Court and this Court had taken a view that in a goods vehicle where there is no cabin and the deceased was traveling as a representative of the owner, the insurance company is liable to pay the compensation. However, in this case, the offending vehicle is a Matador having a cabin in it and, therefore, the arguments of the learned counsel for the claimants is not acceptable.

The Apex Court in the case of ***National Insurance Company Limited v. Cholleti Bharatamma, 2008 ACJ 268 (SC)*** has held that the owner of the goods means only the person who travels in the cabin of the vehicle. In the present case, it is not disputed that at the time of accident, the deceased was not sitting in the cabin. According to the eye witness AW-2 Pawan Kushwaha, the deceased was sitting on Daala (back side of the vehicle). Therefore, in the light of the case law of ***Cholleti Bharatamma*** (supra), the insurance company is not liable to pay the compensation. However, in view of the case law of ***National Insurance Company Limited v. Swarn Singh, 2004 ACJ 1 (SC)***, the Tribunal has rightly held that the insurance company shall first pay the compensation amount to the claimants and thereafter, it has the right to recover the same from respondent No. 4 - Uttam Singh Rathore - owner of the offending/insured vehicle.

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153. MOTOR VEHICLES ACT, 1988 – Section 147 (1)

Liability of Insurance Company – Tractor-trolley insured for agricultural purpose – Liability of Insurance Company – No premium was paid for carrying the passenger – Use of tractor for other business activities – Insurance Company cannot be held liable.

मोटर यान अधिनियम, 1988 – धारा 147 (1)

बीमा कम्पनी का दायित्व – ट्रेक्टर ट्राली कृषि प्रयोजन के लिये बीमित – यात्री परिवहन हेतु कोई प्रीमियम का भुगतान नहीं किया गया – ट्रेक्टर का उपयोग अन्य व्यापारिक गतिविधियों हेतु किया गया – बीमा कंपनी उत्तरदायी नहीं मानी जा सकती।

Vishan Singh v. Daulat Singh and ors.
Judgment dated 29.04.2022 passed by the High Court of Madhya Pradesh (Gwalior Bench) in Miscellaneous Appeal No. 315 of 2013, reported in 2023 ACJ 576

Relevant extracts from the judgment:

The oral evidence of the witness (PW-1) Daulat Singh, reveals that at the time of accident, he alongwith the deceased was sitting on the trolley. At para-14, he categorically stated that he had taken the tractor and trolley on rent from Bisan Singh and the incident occurred while coming back from Ashoknagar after selling the crop of *masoor*. (PW-2) Prakash Singh has also corroborated the above facts.

The appellant/owner at para-7 of his cross examination himself admitted that he got the tractor insured for agricultural purposes not for carrying passengers. He had not paid any premium for carrying the passengers.

In the case of ***National Insurance Company Ltd. v. Babulal, 2012 ACJ 2054 (M.P.); National Insurance Company Ltd., 2014 (1) TAC 870 (M.P.)*** and ***National Insurance Company Ltd. v. V. Chinnamma, 2004 ACJ 1909 (SC),*** the Apex Court held that the use of tractor for agricultural purposes would not be considered to mean that tractor-trolley can be used for carriage of goods by another person for its business activities and held that the vehicle was not being used for agricultural purposes.

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154. MOTOR VEHICLES ACT, 1988 – Sections 149 and 166

Theft of vehicle – Insurance Company failed to lead any evidence to prove the violation of any specific terms and conditions of policy – Held, insurance company liable to pay compensation.

मोटर यान अधिनियम, 1988 – धाराएं 149 एवं 166

वाहन की चोरी – बीमा कंपनी पॉलिसी के किसी विनिर्दिष्ट नियम और शर्त के उल्लंघन को साबित करने वाला प्रमाण प्रस्तुत करने में विफल रही – अभिनिर्धारित, बीमा कम्पनी उत्तरदायी है।

National Insurance Company Ltd., Jabalpur v. Sunita and ors. Order dated 30.01.2023 passed by the High Court of Madhya Pradesh in Miscellaneous Appeal No. 3831 of 2019, reported in 2023 (1) MPLJ 711

Relevant extracts from the order:

In view of the judgments rendered in ***Manager, Bajaj Allianz General Insurance Company Limited v. Bhimraj, ILR 2015 Karnataka 4759, National Insurance Company Limited through its Regional Manager v. Smt. Golana & anr., 2014 ACJ 1165*** and ***National Insurance Company Limited v. Nitin Khandelwal, (2008) 11 SCC 259***, there is no iota of doubt that even if the theory of theft is accepted then also the Insurance Company is liable to pay compensation and it cannot be exonerated from its liability especially when it failed to lead any evidence to prove the factum of theft or the vehicle being driven by the unauthorised person or violation of any specific term & condition of the Insurance Policy. Even otherwise, the theory of theft appears to be an afterthought because no Robber will appear before the Claims Tribunal to submit his written statement and to deny the factum of his involvement in the accident. The Property Seizure Memo of the Truck Exhibit P/5 also does not reveal that it was seized from the possession of Arjun Kashyap (Non-Applicant No.1).

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155. MOTOR VEHICLES ACT, 1988 – Section 166

Compensation – Assessment of – Steep increase in income of deceased, revealed from Income Tax Returns of previous year – Assessment on the basis of last year Income Tax Return to be made and not on the average of last three years Income Tax Returns.

मोटर यान अधिनियम, 1988 – धारा 166

प्रतिकर – निर्धारण – पिछले वर्ष के आयकर निर्धारण पत्रक से मृतक की आय में तीव्र वृद्धि दर्शित – निर्धारण पिछले वर्ष के पत्रक अनुसार किया जाएगा न कि पिछले तीन वर्षो के औसत के आधार पर।

Rupali Kailas Mamode and ors. v. National Insurance Co. Ltd. and ors.
Judgment dated 15.09.2022 passed by the Supreme Court in Civil Appeal No. 6678 of 2022, reported in 2023 ACJ 327

Relevant extracts from the judgment:

The High Court while reducing the compensation has arrived at the conclusion that the income as indicated in the last returns would not be justified and the average of three years is taken and therefore has reduced the compensation. Though learned counsel for the respondent Insurance Company seeks to contend that the High Court having taken note of the decisions rendered by this Court has arrived at such conclusion, we are of the opinion that in the present facts of the case, in any event such conclusion by the High Court was not justified. This is for the reason that as noted the deceased was an architect and he was doing contract work, the income-tax returns which he had filed from the period 2004- 2005 onwards indicated that there was a steep increase in his income as compared to a sum of Rs. 89,964/- declared in the year 2004-2005 and that benefit cannot be denied. If this aspect of the matter is kept in perspective, the income was bound to increase many folds if he had survived and such income which is denied to the family is the loss of dependency which was required to be determined.

If above stated aspect of the matter is kept in view, we need not advert to any other aspect of the matter inasmuch as the MACT has rightly assessed the compensation that had been reduced by the High Court without justification.

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156. MOTOR VEHICLES ACT, 1988 – Section 166

Compensation – Assessment of – Bakery business running during the life time of deceased was not closed after death – Dependents are young wife and minor son without experience – It cannot be expected from them to run the business in the same manner – Loss of income due to death would be at least 50% of normal way in which the business was conducted.

मोटर यान अधिनियम, 1988 – धारा 166

प्रतिकर – निर्धारण – मृतक की मृत्यु हो जाने पर पूर्व से संचालित बेकरी का व्यवसाय बंद नहीं हुआ – आश्रित युवा पत्नी एवं नाबालिक पुत्र जिन्हे कोई पूर्व

अनुभव नहीं – उनसे यह अपेक्षा नहीं की जा सकती कि वे उसी तरह व्यवसाय संचालित कर सकते हैं – मृत्यु हो जाने से सामान्य अनुक्रम में व्यवसाय जिस प्रकार संचालित होता था उसमें कम से कम 50 प्रतिशत आय की हानि होगी ।

Sushma H.R. and anr. v. Deepak Kumar Jha and ors.
Judgment dated 15.09.2022 passed by the Supreme Court in Civil Appeal No. 6671 of 2022, reported in 2023 ACJ 331

Relevant extracts from the judgment:

It is true that there is no material on record to indicate that the Bakery business which was being run during the life time of the deceased has been closed after his death. Even if that aspect of the matter is kept in view, there is also no contrary material on record to indicate that the appellants herein who is a young lady and minor son are well versed in Bakery business. In that light keeping in view the young age of the appellants without experience, it cannot be expected that the Bakery can be run by them in the same manner as it was being run by the deceased nor is there definite evidence on record in this regard.

Therefore in the matter of determining the compensation certain larger aspects have to be kept in perspective and even if it is expected that the Bakery business is continued, the loss due to the death of the husband and his expertise in such business certainly would be at least to the extent of 50% of the normal way in which the business was conducted. If this aspect of the matter is kept in view and in that light the income that was being earned during his life time which was almost Rs.50,000/- per month is kept in perspective even from the income tax return for the years 2012-2013, the loss of dependency in any event cannot be less than Rs.25,000/- per month. Therefore, on reckoning the same for the purpose of determining the loss of dependency, 40% is to be added towards future prospects. Thus from the amount of Rs.35,000/-, if one third is deducted for personal expenses and the remainder is taken into consideration with the multiplier of the `17', the amount of loss of dependency will work out to Rs.47,59,993/-.

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157. MOTOR VEHICLES ACT, 1988 – Section 166

Compensation – Assessment of – Deceased lady was homemaker and took tuitions – Pregnant at the time of accident resulting in loss of foetus – Assessment of income at ₹ 7,500/- p.m., added 40% for future prospects, allowed ₹ 1,00,000/- for loss of foetus and ₹ 80,000/- towards loss of consortium.

मोटर यान अधिनियम, 1988 – धारा 166

प्रतिकर – निर्धारण – मृतक महिला गृहिणी थी एवं ट्यूशन पढ़ाती थी – दुर्घटना के समय गर्भवती थी परिणामस्वरूप भ्रूण की हानि हुई – 7,500/– प्रतिमाह की दर से आय जिसमें 40 प्रतिशत भविष्य की संभावनाओं को जोड़ा गया, अजन्मे बच्चे के संबंध में क्षतिपूर्ति 1 लाख रूपये और 80,000/– साहचर्य की हानि जोड़ी गई।

Shri Kumar and ors. v. Gainda Lal and ors.
Judgment dated 21.10.2022 passed by the Supreme Court in Civil Appeal No. 7629 of 2022, reported in 2023 ACJ 588 (SC)

Relevant extracts from the judgment:

Insurance Company has submitted that in the facts and circumstances of the case and more particularly when the deceased was only a housewife, it cannot be said that the High Court has committed any error in awarding the loss of dependency considering the income of the deceased at the rate of Rs. 6,000/ per month. However, has fairly conceded that the High Court ought to have awarded the loss of dependency considering future prospects.

Having heard learned counsel appearing on behalf of the respective parties and considering the fact that at the relevant time the deceased was a housewife aged 25 years only and there was contribution of the wife in the family and there is evidence that she was also doing the tuition work, we are of the opinion that the High Court ought to have considered the income of the deceased at least Rs. 7,500/ per month. The High Court has also not considered the future prospects. As per the settled position of law while considering the loss of dependency 40% of the income is required to be added towards future prospects.

We are of the opinion that the claimants shall be entitled to a sum of Rs.1 lakh each instead of Rs. 50,000/ as awarded by the High Court for loss of foetus.

The claimants-husband and the minor son shall also be entitled to Rs. 40,000/ each towards loss of consortium or loss of love and affection.

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158. MOTOR VEHICLES ACT, 1988 – Section 166

Compensation – Assessment of – Injured, aged 12 years – Amputation of right leg sustaining permanent disability to the extent of 97% – Tribunal awarded compensation including cost of prosthesis and its maintenance – Held, as prosthesis needs to be changed four times in every five years – Tribunal awarded cost component for 20 years – Award upheld, further allowed transportation and attendant charges.

मोटर यान अधिनियम, 1988 – धारा 166

प्रतिकर – निर्धारण – आहत की आयु 12 वर्ष – दाहिना पैर कट कर अलग हो जाने से 97 प्रतिशत तक की स्थाई निःशक्तता – अधिकरण ने कृत्रिम अंग की कीमत तथा रखरखाव की राशि क्षतिपूर्ति में सम्मिलित की – अभिनिर्धारित, अगले 20 साल में कृत्रिम अंग को हर पाँच साल बाद चार बार बदला जाना है – अवार्ड की पुष्टि की गई, साथ ही परिवहन व्यय एवं सहायक का व्यय भी दिलाया गया।

G . Vivek v. National Insurance Co. Ltd. and anr.
Judgment dated 12.10.2022 passed by the Supreme Court in Civil Appeal No. 7192 of 2022, reported in 2023 ACJ 585 (SC)

Relevant extracts from the judgment:

While accepting the appeal preferred by the Insurance Company in part, thereby reducing the compensation amount of Rs. 56,00,000/-, the only reason discernible from the Order passed by the High Court reads as follows:-

> "As the claimant sustained disability to the extent of 97% due to amputation of his right leg and other complications, learned Tribunal has applied the multiplier of `15' to calculate the loss of income. Taking the notional income of the claimant at Rs.10,000/- per month and adding 50% towards his future prospects, learned Tribunal has awarded Rs.27,00,000/-, towards loss of future income. Learned Tribunal has further awarded Rs. 16,82,497/- towards medical expenses, transport and attendant charges, Rs. 3,00,000/- towards pain and suffering, Rs. 2,00,000/- towards future medical expenses and Rs. 2,00,000/- towards loss of engagement and marriage prospects.
>
> Law is well settled that pecuniary loss suffered by the claimant is to be assessed on the basis of actual expenses incurred. Therefore, the claimant having filed bills and vouchers to show that he had incurred medical expenses of Rs.10,15,949/-, learned Tribunal was not justified in awarding Rs. 16,82,497/- towards medical expenses, transport and attendant fees. Moreover there is no basis for assessing the cost of new prosthesis at Rs. 5,00,000/- nor there is any basis for calculating medical future expenses at Rs. 2,00,000/. Though non pecuniary loss can be assessed on notional basis, the same must have a co-relation to the actual cost which an injured may incur in future for treatment of his injuries sustained in the accident. In other words, non-pecuniary loss towards future medical treatment, loss of income towards attendant expenses etc.

must have a nexus with the actual rate for incurring such expenses and not on mere assumption. The award of compensation must be just and fair irrespective of the claims made and the same should not be a bonanza for the claimant."

It may be seen that the High Court has not employed any reasoning, logic or evidence to reduce the cost of a new prosthesis from Rs. 5,00,000/- to Rs. 2,00,000/-. The High Court is also silent regarding its maintenance cost.

In our view, the Tribunal was justified in awarding a sum of Rs. 20,00,000/- towards cost of new prosthesis at the rate of Rs. 5,00,000/- to be changed four times in five years. In other words, the Tribunal awarded this cost component only for 20 years despite the fact that Appellant was hardly of the age of 15-16 years old at the time when the Award was passed.

There is no rationale for the High Court to reduce the cost of the prosthesis from Rs. 20,00,000/- to Rs. 5,00,000/-.

Having held so, the Appellant is indeed entitled to Rs. 26,00,000/- towards cost and maintenance of prosthesis and that being so, the compensation amount stands increased from Rs. 5,00,000/- (as awarded by the High Court) to Rs. 26,00,000/- and excluding a sum of Rs. 5,00,000/- awarded by the High Court towards cost of prosthesis, totaling to Rs. 71,00,000/-.

In addition to the above, we hold the Appellant entitled to a sum of Rs. 1,00,000/- towards transport expenses and attendant fees for dressing. In this manner, the compensation amount is increased to Rs. 72,00,000/- (Rs. 71,00,000/- + Rs. 1,00,000/-)

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159. NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 138
CRIMINAL PROCEDURE CODE, 1973 – Sections 91 and 482

Summons to produce document – Necessity and desirability of documents established – Trial Court ought to have called the documents to confront the witnesses – Application filed by the accused allowed.

परक्राम्य लिखत अधिनियम, 1881 – धारा 138
दण्ड प्रक्रिया संहिता, 1973 – धाराएं 91 एवं 482

दस्तावेज प्रस्तुत करने के लिये समंस – दस्तावेज की आवश्यकता और वांछनीयता स्थापित – विचारण न्यायालय को ऐसे दस्तावेजों को साक्षीगण से सामना कराने हेतु आहूत करना होगा – अभियुक्त द्वारा प्रस्तुत आवेदन स्वीकृत।

Prem Kumar v. Rajnish

Order dated 03.09.2022 passed by the High Court of Madhya Pradesh (Indore Bench) in Miscellaneous Criminal Case No. 36579 of 2019, reported in ILR 2023 MP 197

Relevant extracts from the order:

Once the necessity and desirability of documents to be summoned has been established then the trial Court ought to have called the documents to confront the witnesses. For doing complete justice between the parties, it is imperative that petitioner be allowed to confront the complaint by the documents to be summoned in the defence of the accused.

Resultantly, the impugned orders dated 08.06.2019 & 06.07.2019 passed by the learned Court below in Criminal Case No.329/2018 by JMFC, Dewas are hereby set aside and by allowing the applications filed by the petitioner under Section 91 of Cr.P.C. Matter is remitted back to the learned court below for consequential follow up action to summon the documents as mentioned in the applications preferred by the petitioner under Section 91 of Cr.P.C. while affording opportunity to confront the complaint with the aid and support of those documents.

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160. NEGOTIABLE INSTRUMENTS ACT, 1881 – Sections 138 and 141

Dishonour of Cheque – Liability of Company – Disputed cheque was given by the accused on behalf of the company – Demand notice was served only on the accused and not against the company – Without arraying company as an accused in complaint case, the petitioner cannot be prosecuted for the offence u/s 138 of the Act.

परक्राम्य लिखत अधिनियम, 1881 – धाराएं 138 एवं 141

चैक का अनादरण – कंपनी का उत्तरदायित्व – विवादित चैक कंपनी की ओर से अभियुक्त द्वारा दिया गया – माँग का सूचना पत्र केवल अभियुक्त पर तामील किया गया न कि कंपनी के विरूद्ध – कंपनी को अभियुक्त के रूप में संयोजित किये बिना याचिकाकर्ता को अधिनियम की धारा 138 के अंतर्गत अपराध में अभियोजित नहीं किया जा सकता।

Anil Kumar Lohadiya v. Ramlal Gupta (deceased) through LRs.

Order dated 29.11.2022 passed by the High Court of Madhya Pradesh in Miscellaneous Criminal Case No. 33390 of 2018, reported in ILR 2023 MP 736

Relevant extracts from the order:

It is explicit that for maintaining the prosecution under Section 141 of the NI Act, arraigning of a company as an accused is imperative. The other categories of the offender can only be brought in drag-net on the touchstone of vicarious liability as the same has been stipulated in the provision itself. In the case in hand, respondent complainant has clearly averred that he had worked with Navbharat Buildcon Private Limited Company and cheque was given to him for his work. As disputed cheque was given by the petitioner/accused on behalf of the company, a demand notice was served only on the petitioner/accused, no demand notice was issued against the company. Therefore, before arraying company as an accused in complaint case, the petitioner cannot be prosecuted for the offence under Section 138 of the NI Act.

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161. NEGOTIABLE INSTRUMENTS ACT, 1881 – Sections 138, 141 and 142

Offence by company – Company was not made a principal accused – No specific averments against the company in the complaint – Cheque was not issued in personal capacity – Vicarious liability in terms of section 141 cannot be fastened against persons mentioned in clause (1) or (2) of section 141.

परक्राम्य लिखत अधिनियम, 1881 – धाराएं 138, 141 एवं 142

कंपनी द्वारा अपराध – कंपनी को मुख्य अभियुक्त नहीं बनाया गया – परिवाद में कंपनी के विरूद्ध कोई विनिर्दिष्ट अभिकथन नहीं – चैक व्यक्तिगत क्षमता में जारी नहीं किया गया – धारा 141 के संदर्भ में प्रतिनिधिक दायित्व धारा 141 के खंड (1) या (2) में उल्लेखित व्यक्तियों के विरूद्ध आरोपित नहीं किया जा सकता।

Pawan Kumar Goel v. State of U.P. and anr.
Judgment dated 17.11.2022 passed by the Supreme Court in Criminal Appeal No. 1999 of 2022, reported in 2023 (2) MPLJ 19 (SC)

Relevant extracts from the judgment:

This Court has been firm with the stand that if the complainant fails to make specific averments against the company in the complaint for the commission of an offence under section 138 of NI Act, the same cannot be rectified by taking recourse to general principles of criminal jurisprudence.

Needless to say, the provisions of Section 141 impose vicarious liability by deeming fiction which pre-supposes and requires the commission of the offence by the company or firm. Therefore, unless the company or firm has committed the

offence as a principal accused, the persons mentioned in sub-Section (1) and (2) would not be liable to be convicted on the basis of the principles of vicarious liability.

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162. NEGOTIABLE INSTRUMENTS ACT, 1881 – Sections 138 and 147

Dishonour of cheque – Agreement between the parties to settle dispute amicably – Law permits parties to compound offence even at appellate stage – Appellate Court cannot override such compounding.

परक्राम्य लिखत अधिनियम, 1881 – धाराएँ 138 एवं 147

चैक का अनादरण – पक्षकारों के मध्य विवाद को सौहार्दपूर्ण रूप से सुलझाने का अनुबंध – विधि पक्षकारों को अपीलीय स्तर पर भी अपराध को शमन करने की अनुमति देती है – अपीलीय न्यायालय द्वारा ऐसा शमन अभिभावी नहीं किया जा सकता।

B. V. Seshaiah v. State of Telangana and anr.
Judgment dated 01.02.23 passed by the Supreme Court in Criminal Appeal No. 284 of 2023, reported in 2023 (2) MPLJ 281 (SC)

Relevant extracts from the judgment:

In the case of ***M/s. Meters and Instruments Private Limited and anr. v. Kanchan Mehta, (2018) 1 SCC 560,*** this court held that the nature of offence under section 138 of the N.I. Act is primarily related to a civil wrong and has been specifically made a compoundable offence. The relevant paragraph of the judgment has been extracted herein:

> "This Court has noted that the object of the statute was to facilitate smooth functioning of business transactions. The provision is necessary as in many transactions' cheques were issued merely as a device to defraud the creditors. Dishonor of cheque causes incalculable loss, injury and inconvenience to the Vide the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988 payee and credibility of business transactions suffers a setback. At the same time, it was also noted that nature of offence under Section 138 primarily related to a civil wrong and the 2002 amendment specifically made it compoundable."

This is a very clear case of the parties entering into an agreement and compounding the offence to save themselves from the process of litigation. When

such a step has been taken by the parties, and the law very clearly allows them to do the same, the High Court then cannot override such compounding and impose its will.

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163. TRADE MARKS ACT, 1999 – Section 29 (2) (c)
COPYRIGHT ACT, 1957 – Section 45
CIVIL PROCEDURE CODE, 1908 – Order 39 Rules 1 and 2

(i) Infringement of Trade Mark – Suit for injunction – Appellant is registered trade mark holder of 'Calcutta Bidi' since 1999 and also, registered under Copyright Act since 2005 – Respondents obtained a copyright registration in 2021 for an identical product by the name 'New Calcutta Bidi' – Plea of distinctive features taken by the respondent – Held, subsequent registration does not entitle the respondant to use deceptively similar trade mark – Injunction granted.

(ii) Territorial jurisdiction – Cause of action has arisen within the territorial jurisdiction of Jabalpur inasmuch as defendants are carrying business in Jabalpur, therefore, Jabalpur court has jurisdiction to try the suit in respect of the registered trade mark.

व्यापार चिन्ह अधिनियम, 1999 – धारा 29 (2) (ग)
प्रतिलिप्यधिकार अधिनियम, 1957 – धारा 45
सिविल प्रक्रिया संहिता, 1908 – आदेश 39 नियम 1 एवं 2

(i) व्यापार चिन्ह का अतिलंघन – व्यादेश हेतु वाद – अपीलार्थी 'कलकत्ता बीड़ी' के 1999 से रजिस्ट्रीकृत व्यापार चिन्ह के धारक हैं एवं 2005 से प्रतिलिप्यधिकार अधिनियम में भी पंजीकृत हैं – प्रत्यर्थी ने समरूप उत्पाद 'न्यू कलकत्ता बीड़ी' के नाम से प्रतिलिप्यधिकार 2021 में पंजीकरण कराया था – प्रत्यर्थी द्वारा विशिष्ट लक्षण का अभिवाक् लिया गया – अभिनिर्धारित, पश्चात्वर्ती पंजीकरण प्रत्यर्थी को भ्रामक समरूप व्यापार चिन्ह लेने हेतु अधिकृत नहीं करता – व्यादेश प्रदान किया गया।

(ii) क्षेत्रीय अधिकारिता – वाद कारण जबलपुर के क्षेत्रीय अधिकारिता में उत्पन्न हुआ एवं जैसा कि प्रत्यर्थीगण जबलपुर में व्यवसाय कर रहे हैं, इसलिए जबलपुर न्यायालय को पंजीकृत व्यापार चिन्ह के संबंध में वाद की सुनवाई का क्षेत्राधिकार प्राप्त है।

Hindustan Bidi Manufacturing, Nadia v. Sunderlal Chhabilal and anr.

Order dated 29.08.2022 passed by the High Court of Madhya Pradesh in Miscellaneous Appeal No. 1529 of 2022, reported in 2022 (4) MPLJ 582

Relevant extracts from the order:

These issues which have been raised in this appeal are whether words "Calcutta" for which there is a disclaimer in the trade mark registration certificate of 1997 will entitle the defendants to use disclaimed word "Calcutta" despite there being no disclaimer in the subsequent registered trade mark of the year 2013 and, therefore, whether registration of defendants under the Copyright Act or Excise Act will permit him to use similar trade mark namely "New Calcutta Bidi" merely on the basis of certain distinctive feature like use of rising sun rays and instead of use of a child within the circle, use of adult despite having many other similarities like use of Howrah Bridge, use of three languages i.e. Hindi, English and Bangla and also use of the similar colour combination which is used by the plaintiff.

On a close perusal of the judgment rendered in ***M/s Anshul Industries v. M/s Shiva Tobacco Company, ILR (2007) I Delhi 409***, the Delhi High Court has infact held that when question of deceptive similarity between the two marks is to be decided, then it cannot be decided by keeping both of them by the side of each other as consumer may not get such an opportunity. The question of deceptive similarity is to be determined keeping in mind the educational and social status of target consumer.

This aspect has been dealt with by the Supreme Court in the case of ***Parle Products (P) Ltd. v. J.P. and Co., Mysore, (1972) 1 SCC 618*** and that being the spirit of the law, therefore, it being a matter of evidence as to what are the points of similarity and dissimilarity, injunction should not have been denied by the trial court in favour of the plaintiff after conducting a roving enquiry without having regard to the legal issues namely and admittedly that defendant is not a registered trade mark holder of "New Calcutta Bidi". Registration under the Copyrights act will not give any exclusive right to the violation of trade mark as has been held in the case of ***Kaira District Co-operative Milk v. Bharat Confectionery Works ILR 1993 Delhi 285***.

The next issue is as to the territorial jurisdiction. In the plaint itself, the plaintiff has mentioned in paragraph 42 that cause of action has arisen within the territorial jurisdiction of Jabalpur inasmuch as defendant no. 1 is residing and carrying on business within the jurisdiction of this Hon'ble Court and also the goods of defendant nos. 1 and 2 bearing infringing trade mark/label comprising the words 'Calcutta bidi' and picture of Howrah bridge are being sold by the defendants within the jurisdiction of this Hon'ble court in Jabalpur and defendants are carrying business in Jabalpur, therefore, this Hon'ble court has a jurisdiction to entertain, try and disposed of the suit in respect of the registered trade mark. In reply, defendant submits that the plaintiff is not having any business within the territorial business in Jabalpur.

At this stage, learned counsel for the appellant submits that thereafter a fresh power of attorney was given in favour of the power of attorney holder. However, it is evident from the reply filed by the defendant that they have not denied the fact that they are not carrying the business of selling bidi with a similar wrapper having picture of Howrah bridge and using the words 'Calcutta Bidi' with prefix 'New'.

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"Criminal justice deals with complex human problems and diverse human beings. A Judge has to balance the personality of the offender with the circumstances, situations and the reactions and choose the appropriate sentence to be imposed."

- Dr Arijit Pasayat, J. *in State of Rajasthan v. Kheraj Ram, (2003) 8 SCC 224, para 26*

PART - III

CIRCULARS/NOTIFICATION

NOTIFICATION DATED 22.06.2023 OF THE LAW & LEGISLATIVE AFFAIRS DEPARTMENT, GOVERNMENT OF M.P. REGARDING AMENDMENT IN MADHYA PRADESH JUDICIAL SERVICE (RECRUITMENT AND CONDITIONS OF SERVICE) RULES, 1994

F.NO. 3106/XXI-B(One)/2023 - In exercise of the powers conferred by Article 234 read with the proviso to Article 309 of the Constitution of India, the Governor of Madhya Pradesh, in consultation with the High Court of Madhya Pradesh, hereby, makes the following amendments in the Madhya Pradesh Judicial Service (Recruitment and Conditions of Service) Rules, 1994, namely:-

AMENDMENTS

In the said rules,-

1. For rule 2, the following rule shall be substituted, namely:-

"2. **Definitions. -** In these rules, unless the context otherwise requires:

(a) **"Appointing Authority"** means the Governor of Madhya Pradesh;

(b) **"Commission"** means Madhya Pradesh Public Service Commission;

(c) **"Direct Recruitment"** means direct recruitment to the posts in category (1) of sub-rule (1) of rule 3 in manner prescribed in sub-rule (1) of rule 5 of the rules;

(d) **"Disorderly" conduct or using unfair means** refers to any means by exercising or attempting to influence the examination at any stage i.e., Preliminary Examination, Main Examination or Viva Voce;

(e) **"Government", "Governor" and "State"** means the Government of Madhya Pradesh, the Governor of Madhya Pradesh and the State of Madhya Pradesh, respectively;

(f) **"High Court"** means the High Court of Madhya Pradesh;

(g) **"Recruiting Authority"** means the Examination Cell of High Court;

(h) **Service** means the Madhya Pradesh Judicial Service.

2. For rule 3, the following rule shall be substituted, namely:-

"3. Constitution of Service:-

(1) The service shall consist of the following categories, namely;-

(i) **Civil Judge, Junior Division [Entry Level]**
Rs.77480-136520 level J-I

(ii) **Civil Judge, Junior Division Grade-II, Ist ACP**
Rs. 92960-136520 level J-II
[non-functional, after completion of 5 years]

(iii) **Civil Judge, Junior Division Grade-I, IInd ACP**
Rs. 111000-163030 level J-III
[non-functional, after completion of 5 years]

(iv) **Civil Judge, Senior Division - (Promotion Cadre)**
Rs. 111000-163030 Level J-III

(v) **Senior Civil Judge (Grade-II) Senior Division/Chief Judicial Magistrate/ Additional Chief Judicial Magistrate (Ist ACP Grade after completion of 5 years in the cadre in the Senior Civil Judge).**
Rs. 122700-180200 Level J-IV.

(vi) **Senior Civil Judge Grade-I/Chief Judicial Magistrate/Additional Chief Judicial Magistrate** (IInd ACP Grade after completion of another 5 years in the cadre of Senior Civil Judge)
Rs. 144840-194660 Level J-V

(2) **The service shall consist of the following persons.-**

(a) A person who, at the time of commencement of these rules, is holding substantially or in officiating capacity, the post of Civil Judge.

(b) Persons entitled to the service in accordance with the provisions of these rules.

3. For rule 5, the following rule shall be substituted, namely:-

"5. Method of Appointment and the Appointing Authority.-

(1) All appointments to category (i) of rule 3(1) shall be made by the Governor by direct recruitment in accordance with the recommendation of the High Court on selection.

(2) The candidates shall be considered on the basis of the preliminary examination, main examination and viva-voce/interview conducted by the High Court. The procedure and curriculum for holding examinations/ viva-voce/interview for the selection of the candidates shall be as prescribed by the High Court.

(3) The candidates belonging to the General and Other Backward Classess category must secure at least 60% marks and the candidates from the reserved category (Scheduled Castes and Scheduled Tribes) must secure at least 55% marks in the preliminary examination.

(4) The candidates belonging to the General and Other Backward Classess category must secure at least 50% marks and the candidates from the reserved category (Scheduled Castes and Scheduled Tribes) must secure at least 45% marks in each paper and at least 50% in aggregate in the main examination.

(5) The candidates must secure at least 40% marks in the viva-voce / interview.

(6) The order of merit shall be prepared on the basis of the marks obtained by the candidates in the main examination and the viva-voce/interview.

(7) Examinations shall be conducted by the High Court each year as far as possible on the basis of availability of vacancies for selection of candidates.

(8) Appointment to the cadre of Civil Judge, Senior Division shall be made by the High Court by selection on the basis of merit-cum-seniority from amongst the Civil Judges who have completed 5 years of continuous service.

(9) Appointment to the post of Chief Judicial Magistrate/Additional Chief Judicial Magistrate under section 12 of the Code of Criminal Procedure, 1973 (2 of 1974) shall be made from amongst the Civil Judges, Senior Division by the High Court, on the basis of merit- cum-seniority.

(10) Assured Career Progression scales as provided in categories (ii), (iii),

(v) and (vi) under sub-rule (1) of rule 3, may be granted by the High Court to the members of the service on appraisal of their work and performance and on completion of the requisite continuous period of service as indicated in that sub-rule.

4. After rule 5, the following rule shall be inserted, namely:-

"(5A). Duration of validity of the select list:-

In case of appointment under category (i) of rule 3(1), the select list of the successful candidates in the examination in any recruitment year shall be valid upto 12 months from the date of declaration of the select list."

5. In rule 6, for the existing marginal heading, the following marginal heading shall be substituted, namely:-

"6. Reservation of posts for Scheduled Castes, Scheduled Tribes, Other Backward Classes and Persons with Disabilities and after rule 6, the following rules shall be inserted, namely:-

"6A. 6% posts shall be horizontally reserved, only at the time of initial recruitment for persons suffering from locomotor disability including leprosy cured, dwarfism, muscular dystrophy and acid attack victims, excluding cerebral palsy, as specified under section 34 of the Rights of Persons with Disabilities Act, 2016 (49 of 2016):

Provided that if such reserved posts or any of them are not filled in a given recruitment year due to non availability of suitable candidates, such vacancy shall be carried forward into the succeeding recruitment year and if no suitable candidate is available, then they shall be treated as unreserved posts.

6B. Any candidate, except Persons with Benchmark Disability, who is not a bonafide resident (domicile) of the State of Madhya Pradesh, shall be treated as belonging to the general category in all respects."

6. For rule 7, the following rule shall be substituted, namely:-

"7. Eligibility:-

No person shall be eligible for appointment by direct recruitment to the posts in category (i) of rule 3 (1) unless,-

(a) he is a citizen of India;

(b) he has good character and is of sound health and free from any bodily defect which renders him, unfit for such appointment;

(c) he has attained the age of 21 years and not completed the age of 35 years on the first day of January of the following year in which the applications for appointment are invited;

(d) the upper age limit shall be relaxable up to a maximum of three years, if a candidate belongs to the Scheduled Castes, Scheduled Tribes or Other Backward Classes and Specially Abled Persons;

(e) the upper age limit of a candidate who is a Government Servant (whether permanent or temporary) shall be relaxable up to the age of 38 years ;

(f) the upper age limit of a candidate shall be relaxable by the appropriate number of years, if no recruitment takes place for one year or more, to the Madhya Pradesh Judicial Service;

(g) he possesses a Bachelor Degree in Law from a university recognized by the Bar Council of India:

Provided that he has practiced continuously as an advocate for not less than 3 years on the last date fixed for submission of the application.

Or

An Outstanding law graduate with a brilliant academic career having passed all exams in the first attempt by securing at least 70% marks in the aggregate, in the case of General and Other Backward Classes category and at least 50% marks in the aggregate in case of candidates from the reserved categories (Scheduled Castes and Scheduled Tribes) in the five/three years in Law. .

Note:- The eligibility criteria for seeking benefits under rule 7, for Specially Abled Persons shall be as under:-

(i) For the purpose of getting benefit of this provision, the certificate issued only by the Medical Board of Central/State Government shall be valid;

(ii) On the date of submitting the application for the post, the applicant's Specially Ableness shall not be less than 40%.".

7. For rule 8, the following rule shall be substituted, namely:-

"8. Disqualification.-

(1) A candidate who is or has been declared by the Recruiting Authority or the Appointing Authority, as the case may be, guilty of impersonation or of submitting fabricated or tampered documents or of making statements which are incorrect or false or of suppressing material information or using or attempting to use unfair means in the examinations or interview or otherwise resorting to any other irregular or improper means for obtaining admission to the examinations or appearance at the interview shall, in addition to rendering himself liable to criminal prosecution, be debarred either permanently or for a specified period,-

(a) by the Recruiting Authority or the Appointing Authority, as the case may be, from admission to any examination or appearing at any interview held by the Recruiting Authority for selection of candidates; or

(b) by the Government from employment under the Government.

(2) A person shall be disqualified for appointment by direct recruitment, if he or she,-

(a) has more than one spouse living ;

(b) has been dismissed or removed from service by any High Court, Central or State Government, Statutory Body or Local Authority ;

(c) has been convicted of an offence involving moral turpitude or has been permanently debarred or disqualified by any High Court or Union Public Service Commission or any State Public Service Commission or any Services Selection Board or Staff Selection Commission constituted under statutory provisions by the Government;

(d) has been involved in such other criminal case which in the opinion of the Appointing Authority is not suitable to discharge the functions as a Judicial Officer ;

(e) has been found guilty of professional misconduct under the provisions of the Advocates Act, 1961 or any other law for the time being in force:

(f) has accepted or accepts dowry at the time of his marriage.

Explanation.- In this clause, the word "dowry" shall have the same meaning as assigned to it in Dowry Prohibition Act, 1961 (No.26 of 1961).".

8. In rule 10, in sub-rule (1), for the words "in order", the words "in the order" shall be substituted.

9. In rule 11,-

(i) for sub-rule (c), the following sub-rule shall be substituted, namely :

"(c) It shall be competent for the High Court at any time during the period of probation, in the case of Civil Judge, Junior Division (Entry Level) to recommend discharge from service.

(ii) in clause (d), in second line, for the word permanent the words a permanent shall be substituted and after word available a comma shall be inserted and thereafter the word "confirmed", for the word "on", the word "to" shall be substituted.

(iii) after clause (d), the following clause shall be added, namely:-

"(e) A probationer shall continue as such until confirmed or discharged from service, as the case may be.".

10. For rule 14, the following rule shall be substituted, namely:

"14. Pay, allowances and other conditions of service.- The dearness allowance of the members of Madhya Pradesh Judicial Service shall be governed by the Madhya Pradesh Judicial Services Revision of Pay (Revision of Pay, Pension and Other Retirement Benefits) Rules, 2003 and the Madhya Pradesh Judicial Services (Revision of Pay, Pension and Other Retirement Benefits) Rules, 2022 as amended from time to time and the same Dearness Allowance formula as being adopted by the Central Government shall be followed.

11. The existing rule 15 is deleted and in its place, the existing rule 16 is renumbered as rule 15.

12. For rule 16, the following rule shall be substituted, namely:-

"16. Resignation and Execution of Bond.-

The candidate on appointment on probation, shall execute a 'Bond' in the prescribed format for a sum of Rs. Ten Lakhs and also give an undertaking that, after joining service he shall serve for a minimum period of five years. In case he resigns from service or leaves service in any other manner, before the above mentioned period or in case of breach of any of the conditions of the 'Bond', the 'Bond' would be liable to be forfeited and he shall pay the 'Bond' amount of Rs. Ten Lakhs:

Provided that where the officer with prior permission tenders resignation, for accepting a job in the Central Government or the State Government of Madhya Pradesh, he may not be required to pay the 'Bond' amount.".

13. Rule 16A and 16AA shall be deleted.

14. For rule 18, the following rule shall be substituted, namely:-

"18. Deputation.-

Any member of the service, with the concurrence of the High Court, may be appointed on deputation, for a period not exceeding four years continuously, to perform the duties and obligations of any posts of the Central Government or the State Government, or for the post/service of any other organization, which is wholly or partly owned or controlled by the Central Government or the State Government.".

15. For rule 19, the following rule shall be substituted, namely:-

"19. Power to relax.-

Where the Hon the Chief Justice is satisfied that the operation of any of these rules causes undue hardship in aity particular case or class of cases, he may for reasons to be recorded in writing dispense with or relax the particular rule to such an extent and subject to such exceptions and conditions as may be deemed necessary:

Provided that as and when any such a relaxation is granted by the Hon'ble Chief Justice, the Governor shall be informed of the same.

16. For rule 20, the following rule shall be substituted, namely:-

"20. Interpretation.-

If any question arises relating to the interpretation of these rules, the decision of the High Court shall be final.

17. After rule 20, the following rule shall be added, namely:-

"21. Repeal and Saving.-

The Madhya Pradesh Judicial Service (Classification, Recruitment and Conditions of Service) Rules, 1955 are hereby repealed:

Provided that any order made or action taken under the rules so repealed shall be deemed to have been made or taken under the corresponding provisions of these rules.

By order and in the name of the Governor of Madhya Pradesh,

UMESH PANDAV, Secy.

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