JOTI JOURNAL

AUGUST 2012 (BI-MONTHLY)

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

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

JOTI JOURNAL AUGUST - 2012

SUBJECT- INDEX

PART-I
(ARTICLES & MISC.)

PART-II
(NOTES ON IMPORTANT JUDGMENTS)

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FROM THE PEN OF THE EDITOR

Manohar Mamtani
Director, JOTRI

Esteemed Readers!

With the advent of monsoon, celebrations and fragrance of independence, which inherently includes judicial independence, I once again have an occasion of sharing my views with you.

As planned, the Annual Academic Calendar of the Institute for the year 2012-2013 (July 2012 – June 2013) has been prepared in advance to streamline various training programmes for the knowledge of all the concerned Judicial Officers (Target Groups) in advance. Hon'ble the Acting Chief Justice Shri Shushil Harkauli was kind enough to release this Calendar in the presence of Hon'ble Shri Justice Rajendra Menon, Chairman, High Court Training Committee and Shri Subhash Kakade, Registrar General, High Court of M.P., Jabalpur.

By these continuous training programmes, the concerned Judicial Officers will no doubt be benefitted and will become more professional in rendering speedy justice with an enhanced judicial approach.

The Court should discharge its obligation by finding as to where in fact the truth lies. Right from the inception of the Judicial System, it has been expected that discovery, vindication and establishment of truth are the main purposes which underline the existence of the Courts of Justice.

Truth should be the guiding star in the entire judicial process. Truth alone has to be the foundation of justice. The entire judicial system has been created only to discern and find out the real truth. Judges at all levels have to seriously engage themselves in the journey of discovering the truth. That is their mandate, obligation and bounden duty. Justice System will acquire credibility only when people will be convinced that justice is based only on the foundation of truth.

A Judge in the Indian system has to be regarded as failing to exercise its jurisdiction and thereby discharging its judicial duty, if in the guise of remaining neutral, he opts to remain passive to the proceedings before him. He has to always keep in mind that "every trial is a voyage of discovery in which truth is the quest." In order to bring on record the relevant fact, he has to play an active

role; no doubt within the bounds of the statutorily defined procedural law. [As observed by Hon'ble Justice Dr. Dalveer Bhandari in ***Maria Margarida Sequeira Fernandes and others v. Erasmo Jack De Sequiera (Dead) through L.Rs, (2012) 5 SCC 370***]

In a democratic polity, justice in its conceptual eventuality and inherent quintessentiality forms the bedrock of good governance. In a democratic system that is governed by the rule of law, fairness of action, propriety, reasonability, institutional impeccability and non-biased, justice delivery system constitute the pillars on which its survival remains in continuum. [As observed by Hon'ble Mr. Justice Dipak Misra in ***Chandra Kumar Chopra v. Union of India and others, (2012) 6 SCC 369.***]

Now, going to the flashback regarding the activities of the Institute in the months of July and August. The Institute in the Institutional Training Programmes has organized a four week **First Phase Induction Training Programme** for the newly appointed Civil Judges Class II of 2012 Batch in the month of July 2012 and Training Programme on – **Gram Nyayaylayas Act, 2008** to the Nyayadhikaris appointed under the Act in two batches in the month of August 2012.

Apart from the above programmes, under the approved scheme of grant-in-aid provided under the recommendations of the XIII Finance Commission, the Institute has conducted Regional Training Programmes on **Negotiable Instruments Act, 1881** at Balalghat, Neemuch and Jabalpur and Protection of Women from Domestic Violence Act, 2005 at Ratlam. A Colloquium on **N.D.P.S. Act, 1988** for the Special Judges working under the Act has also been organised at Indore. One day Training Programme on **Juvenile Justice (Care & Protection of Children) Act, 2000** was organised on 21.07.2012 at JOTRI in which for Principal Magistrates of Juvenile Justice Boards participated. Two Specialised Training programmes at State Medico-legal Institute, Bhopal were also organised.

As usual, Part I of this issue contains Articles and Part II is abound with the pronouncements of Hon'ble the Apex Court and M.P. High Court, whereas in part III important Notifications and in Part IV Madhya Pradesh Govansh Vadh Pratishedh Rules, 2012 are included.

I hope that this issue will help to enhance and update our judicial approach.

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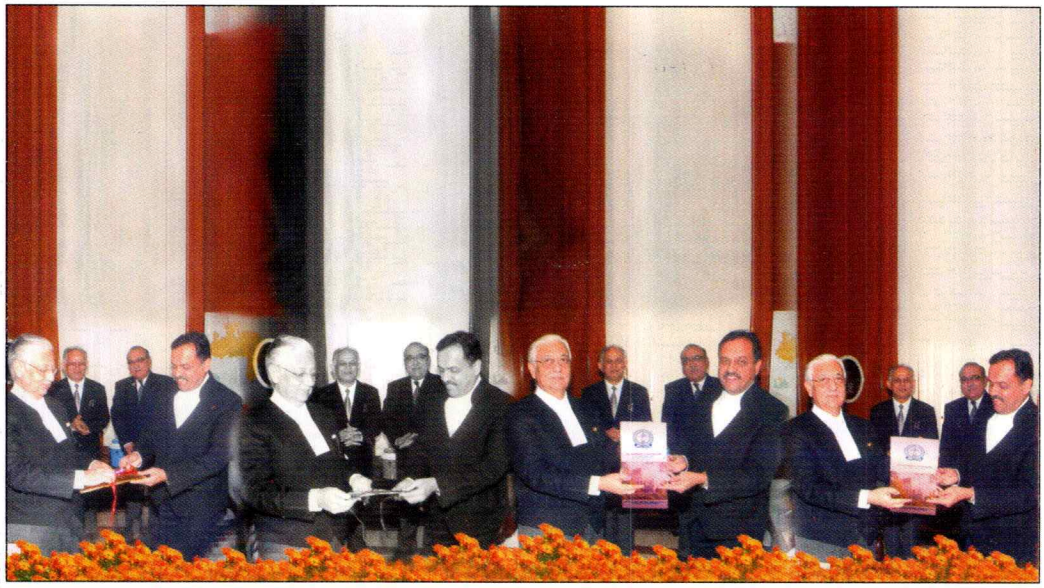
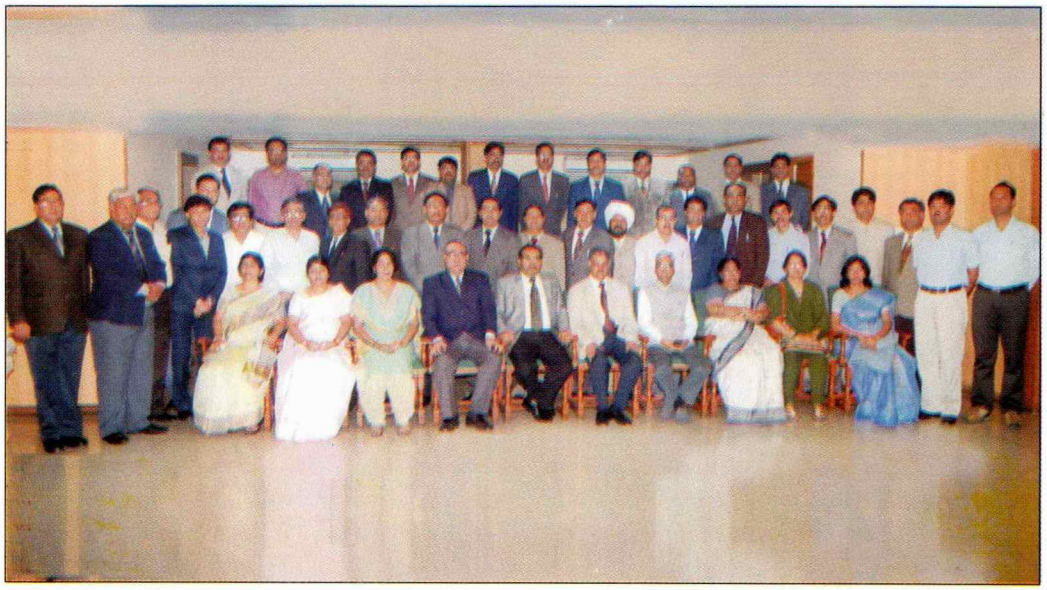
Hon'ble Shri Justice Rajendra Menon, Chairman,
High Court Training Committee unfurling the National Flag
on the occasion of Independence day on 15.08.2012 at JOTRI



Hon'ble the Acting Chief Justice releasing the Annual Academic Calendar
(July, 2012 - June, 2013) of JOTRI along with Hon'ble Shri Justice
Rajendra Menon, Chairman, High Court Training Committee in the presence of
Shri Subhash Kakade, Registrar General, High Court of M.P. &
Shri Manohar Mamtani, Director, JOTRI

TRAINING PROGRAMMES CONDUCTED BY THE INSTITUTE UNDER THE APPROVED SCHEME FOR UTILISATION OF GRANT-IN-AID RECOMMENDED BY THE XIII FINANCE COMMISSION

Juvenile Justice (Care & Protection of Children) Act, 2000
(21-07-2012 at JOTRI, Jabalpur)



Colloquium on Narcotic Drugs & Psychotropic Substance Act, 1985
(18 & 19 August 2012 at Indore)

PART - I

LEGIS VIEW OF THE SYMBOLS OF NATIONAL HONOUR

Ramkumar Choubey
HJS
O.S.D., J.O.T.R.I.

Our Constitution and its scheme envisages responsible citizens with the inclusion of Fundamental Duties by the Forty-second Amendment of the Constitution in 1976. Clause (a) of Article 51-A of the Constitution, which finds place in Part IV-A, enjoins a fundamental duty on every citizen of India to abide by the Constitution and respect its ideals and institutions, the National Flag and the National Anthem. However, the fundamental duties enumerated under Article 51-A are not self-executing. There must be a law for their implementation.

The duty to respect the ideals and institutions of the Constitution is enforced by three significant enactments, namely, the Prevention of Insults to National Honour Act, 1971 (as amended by the Amendment Act, 2003), the Emblems and Names (Prohibition of Improper Use) Act, 1950 and the State Emblem of India (Prohibition of Improper Use) Act, 2005 and Rules made thereunder. Apart from these enactments, the Flag Code of India, 2002 and Orders (I to V) relating to the National Anthem, issued by the Department of Home Affairs, Government of India, also exist to regulate the use and display of National Tri-colour and to play and sing the National Anthem, respectively. This article covers main legal facets of three symbols of National Honour viz. (i) Indian National Flag, (ii) Indian National Anthem and (iii) State Emblem of India.

INDIAN NATIONAL FLAG

The National Flag of India is a horizontal rectangular tri-colour of deep saffron, white and India green with Ashok Chakra – a 24 spokes wheel in navy blue at its centre. National Flag was adopted in its present form during a meeting of the Constituent Assembly held on 22nd July, 1947, when it became the official flag of the Dominion of India. The flag was subsequently retained as that of the Republic of India.

THE FLAG CODE OF INDIA, 2002

The Flag Code of India regulates the use and display of Indian National Flag. The flying of National Flag at private premises by any of the citizens of India was impermissible under the erstwhile Flag Code. This matter was considered by the Supreme Court in ***Union of India v. Naveen Jindal, AIR 2004 SC 1559.*** While pending ***lis***, a Committee was constituted by the Central Government in 2000 and on the basis of the recommendations made by the said Committee,

a new Flag Code of India was issued which came into force with effect from 26th January, 2002. The Flag Code of India, 2002 is divided into three parts. Part I of the Code contains the description of the National Flag, Part II provides for the mode and manner of hoisting/display/use of National Flag by the members of public, private organizations, educational institutions etc. Whereas, Part III of the Code relates to hoisting/display of the National Flag by the Central and State Governments and their organizations and agencies.

The right to fly the National Flag is a fundamental right subject to restrictions imposed by the Flag Code of India, 2002. This right is also regulated and controlled by the Prevention of Insults to National Honour Act, 1971 and the Emblems and Names (Prevention of Improper Use) Act, 1950. The Supreme Court in ***Naveen Jindal's case*** (supra) has held thus:

> "Right to fly the National Flag freely with respect and dignity is a fundamental right of a citizen within the meaning of Article 19(1)(a) of the Constitution of India being an expression and manifestation of his allegiance and feelings and sentiments of price for the nation."

The Apex Court observed that Flag Code is not a statute; thereby the fundamental right under Article 19(1)(a) is not regulated. However, the Court recognizes the Flag Code of India by saying that the guidelines laid down under the Flag Code deserve to be followed to the extent it provides for preservation of dignity and respect for the National Flag. The Apex Court, further held that the freedom of expression for the purpose of giving a feeling of nationalism and for that purpose all that is required to be done is that the duty to respect the flag must be strictly obeyed. The State may not tolerate even the slightest disrespect to the National Flag. In a recent decision of ***V.K. Naswa v. Union of India, (2012) 2 SCC 542***, the Supreme Court, in view of ***Naveen Jindal's*** case (supra), said that the National Flag is both a benediction and a beckoning. Thus, in case a person shows any kind of disrespect to the National Flag or does not observe the terms contained in the Code, legal action may be taken against him under the relevant statutory provisions.

The Karnataka High Court in ***N. P. Amrutesh v. State, AIR 1995 Kar 290*** was of the view that the statutory Scheme of honour and respect of Tricolour Flag and for all which it represents do not reveal nor provide any provision prohibiting the use of the National Flag.

THE PREVENTION OF INSULTS TO NATIONAL HONOUR ACT, 1971

The Prevention of Insults to National Honour Act, 1971 (as amended by the Amendment Act, 2003) provides for measures to prevent the insulting acts with regard to the Indian National Flag and other ideals. Section 2 of the 1971 Act, rules that whoever in any public place or within public view, burns, mutilates,

defaces, defiles, disfigures, destroys, tramples upon or otherwise shows disrespect to or brings into contempt the Indian National Flag or any part thereof, shall be punished with imprisonment for a term up to three years, or with fine, or with both. Section 3A, inserted vide Amendment Act, 2003, provides minimum sentence on a subsequent conviction for any such offence. Other forms of the National Flag like picture, painting, drawing or photograph, or other visible representation of it or any part thereof are also included in these provisions to fasten the penal liability.

Explanation 4 to Section 2, added by the Amendment Act, 2003, is significant to understand the disrespectful acts to the National Flag. This Explanation is inclusive and enumerates various acts as contemptuous to the Indian National Flag and for which a wrongdoer can be punished. Although, any comments expressing disapprobation or criticism of the Indian National Flag or of any measures of the Government with a view to obtain an alteration of the Indian National Flag by lawful means, do not constitute an offence under the 1971 Act as explained therein.

ELEMENT OF MENS REA FOR THE OFFENCE UNDER THE 1971 ACT

The maxim ***"actus non facit reum, nisi mens sit rea"*** leads to a presumption that mens rea is an essential ingredient in every criminal offence. But mens rea can be displaced by the words of the statute creating the offence. Therefore, a person cannot be held guilty of an offence of disrespectful acts to the National Flag unless he is having a guilty mind. In ***Ganesh Lal Bathri v. State of M.P., 2003 (3) MPLJ 326*** where inadvertently the National Flag was tied in reverse order by putting saffron down by a staff of the school on Republic day, it has been held that there is dearth of materials to show an intention or mens rea to disrespect the National Flag and thereby to undermine the sovereignty of nation, therefore, where there was an irregularity in hoisting the National Flag and no element of mens rea, it is outside the definition of contempt. In ***Amir Khan v. State of M.P., 2009(IV) MPJR 244,*** in which it was alleged that even after sunset, the National Flag continued to fly in the business premises and the same was pulled down in disrespectful manner by the persons who had arranged the function, it was ordered that the accused who was the chief guest in the said function cannot be held liable for the offence of dishonour of the National Flag.

THE EMBLEMS AND NAMES (PROHIBITION OF IMPROPER USE) ACT, 1950

It was felt that instances have come to light of the use of the Indian National Flag and Emblem and of the names or pictorial representations of national leaders for commercial and trade purposes and in a manner likely to offend the sentiments of the people. Therefore, the Emblems and Names (Prohibition of Improper Use) Act, 1950 was enacted by Parliament with a view to prevent the improper use of

certain emblems and names. Section 3 of the 1950 Act prohibits the use for the purpose of trade, business, calling or profession, or in the title of any patent, or in any trademark or design, any name or emblem or any colourable imitation of any such name or emblem specified in the Schedule of the Act. However, the use of specified names and emblems may be allowed by the Central Government. Section 5 provides for penalty up to rupees five hundred for violation of Section 3, though, the prosecution for any offence punishable under the 1950 Act shall not be instituted without the previous sanction of the Central Government.

Section 4 of the 1950 Act prohibits registration by a competent authority of any company, firm or other body of persons, or any trademark or design which bears any name or emblem, and also prohibits grant of any patent in respect of an invention which bears a title containing any name or emblem in contravention of Section 3 of the said Act. As the Indian National Flag is included in the Schedule of the 1950 Act, therefore, its use for the purpose of trade, business, calling or profession, or in the title of any patent, or in any trademark or design is prohibited.

The Apex Court in ***Sable Waghire and Co, M/s. v. Union of India, AIR 1975 SC 1172***, while considering the validity of 1950 Act, commented thus:

> "National or international significance gets attached to certain names or institutions over the years or ages and then they belong to the nation or to all nations. Human sentiments and often a deep sense of religiosity pervade through and provide a sacred mantle as it were to the nomenclature."

In ***N. P. Amrutesh's case*** (supra), it was held that the use of National Flag or any emblem referred to in the Schedule to the 1950 Act, if and when the use is improper within the four corners of language of Section 3 of that Act, or if and when it amounts to be an act of insult to national honour within the framework of the provisions of the 1971 Act, in those cases and situations only, the use thereof is prohibited and then only same amounts to be an offence.

In ***Eby J. Jose v. Union of India, AIR 2000 Kerala 79,*** wherein the allegations as to carry bag used in grocery shop for sale of its items alleged to be printed inscribing National Flag and cover depicting National Flag was alleged to be mutilated in a defaced manner near market after use, the Kerala High Court was of the view that it is clear violation of the Flag Code, as well as the provisions of the 1971 Act and the 1950 Act. Similarly, where, there was sale of tri-coloured cloth resembling National Flag as handkerchief and inscriptions of words 'India' and 'Mera Bharat Mahan' on borders thereof, the Andhra Pradesh High Court in ***A. Satya Phaneendra v. S. H. O., Kodad, AIR 2001 AP 247,*** held, amounts to misuse and disrespect of National Flag.

INDIAN NATIONAL ANTHEM

The National Anthem of India - "Jana Gana Mana..." is written in Sanskritized (Tatsama) Bengali. It is the first of five stanzas of a Brahmo hymn composed and scored by Nobel Laureate Shri Rabindranath Tagore. It was adopted in its Hindi version by the Constituent Assembly as the National Anthem of India on 24th January, 1950.

ORDERS (I TO V) RELATING TO THE NATIONAL ANTHEM OF INDIA

The "Orders (I to V) relating to the National Anthem of India" which consist of five parts, is the executive instruction issued by the Department of Home Affairs, Government of India to regulate the singing and playing of National Anthem and for paying respect to it by observance of proper decorum. Part I says about the full and short versions of National Anthem. Part II contemplates for singing or playing of both versions of National Anthem, whereas, Part III ruled about mass singing of National Anthem. Part IV is about playing of foreign anthem followed by National Anthem of India and Part V lays general instructions. Section 3 of the 1971 Act provides for punishment of obstruction or disturbance in singing of the Indian National Anthem. It says that whoever intentionally prevents the singing of the Indian National Anthem or causes disturbances to any assembly engaged in such singing shall be punished with imprisonment for a term which may extend to three years, or with fine, or with both. The 1971 Act does not define what is National Anthem, when and how it should be sung. Thus, recourse therefor shall be taken from the "Orders (I to V) relating to the National Anthem".

The Supreme Court in ***Sanjeev Bhatnagar v. Union of India, AIR 2005 SC 2841*** described the patriotic impact and cultural significance of the National Anthem by saying that:

> "It is a hymn or song expressing patriotic sentiments or feelings. The National Anthem is our patriotic salutation to our motherland, nestling between the Himalayas and the oceans and the seas surrounding her. The National Anthem is a reflection of the real India as a country - a confluence of many religions, races, communities and geographical entities. It is a message of unity in diversity. It has since the decades inspired many by arousing their patriotic sentiments when sung in rhythm."

The Apex Court in ***Bijoe Emmanuel v. State of Kerala, AIR 1987 SC 748,*** explained the legal position with regard to show of proper respect to the National Anthem as thus:

> "There is no provision of law which obliges anyone to sing the National Anthem nor it is disrespectful to the National Anthem if a person who stands up respectfully when the National Anthem is sung does not join the singing. Proper respect is shown to the National Anthem by standing up when the National Anthem is sung. It will not be right to say that disrespect is shown by not joining in the singing."

The Karnataka High Court, in ***N. R. Narayana Murthy v. Kannada Rakshana Vakeelara Vedike (Regd.), 2007 Cri. L. J. 4443*** has held that playing musical version of National Anthem instead of signing by mouth is not an offence punishable under S. 3 of the 1971 Act. The Court observed that on conjoint reading of the National Honour Act and the Orders relating to the Indian National Anthem, and particularly the words "sung or played" used in Order V makes it clear that playing or recorded musical version of the Indian National Anthem is not prohibited.

In a noted decision of ***Shyam Narayan Chouksey v. Union of India, AIR 2003 MP 233,*** which is a case relating to the film "Kabhi Khushi Kabhi Gum" wherein the National Anthem had been bifurcated into two parts the boy sings one part and the mother sings the rest, but the boy says, 'sorry' in the midst of the Anthem and mother after some time completes the same. The M.P. High Court restrained the exhibition of film unless the scene which depicts the National Anthem is deleted. His Lordship Dipak Misra J. speaking for the Bench observed as follows;

> "All this has been done to create a dramatic impact in the picture for the benefit of the producer. This should not be allowed to be done for the popularisation of the National Anthem as has been understood in this great country."

His Lordship further observed that

> "The National Anthem has been sung in the movie as if it is a song of advertisement for a commercial purpose. It is absolutely discernible. As the National Anthem is regarded as the honour and symbol of sovereignty of India it is not appropriate to show it in the manner like it has been projected."

NATIONAL ANTHEM IS PROHIBITED TO USE AS RING BACK TUNE/ CALLER TUNE

The National Anthem as Ring Back Tune/Caller Tune do not comply with the 1971 Act and the Executive Instructions relating to National Anthem. Therefore, Department of Telecommunications has directed service providers not to offer

the National Anthem – ***Jana Gana Mana*** as a caller tune as it is a violation of the 1971 Act. According to the statement issued by the Department of Telecommunications related to National Anthem under its order No. 800-43/ 2010-VAS, the licensees are directed to ensure that services provided by them comply with the provisions of the 1971 Act and the Executive Orders. They are further directed that any violation of the same shall be taken as violation of the terms and conditions of the licence.

STATE EMBLEM OF INDIA

The State Emblem of India is an adaptation from the Sarnath Lion Capital of Asoka. The profile of the Lion Capital showing three lions mounted on the abacus with a Dharma Chakra in the centre, a bull on the right and a galloping horse on the left, and outlines of Dharma Chakras on the extreme right and left has been adopted as the State Emblem of India. The motto ***Satyameva Jayate*** written in Devanagari script below the profile of the Lion Capital is part of the State Emblem. It is described and specified in the Schedule of the State Emblem of India (Prohibition of Improper Use) Act, 2005. Its use is regulated by the Act and Rules made thereunder.

The State Emblem of India, as it ratifies our religious belief in truth and value-laden culture, His Lordship R. S. Pathak, J. in ***S. P. Gupta v. President of India, AIR 1982 SC 149,*** has considered in following words;

> "..... In a land and among a people whose ancient values stemmed from truth as a reality, culminating in the adoption of a National Emblem confirming that creed, they could have done no less."

The 2005 Act is enacted to prohibit the improper use of State Emblem for professional and commercial purpose. The 2005 Act also provides for official seal consisting of State Emblem to be used by Governments and its officials, its design, use of the Emblem on stationery, the method of printing or embossing it on demi-official stationery and to restrict the display of Emblem on vehicles and on buildings in India and abroad.

Section 3 of the 2005 Act prohibits the use of the State Emblem and its colourable imitation in any manner which tends to create an impression that it relates to the Government or that it is an official document of the Government, without the previous permission of the Government. Section 4 restricts its use for the purpose of any trade, business, calling or profession or in the title of any patent, or in any trade mark or design, whereas, Section 5 rules the prohibition of registration of any trade mark or design which bears the emblem and grant of patent in respect of an invention which bears a title containing the emblem. Section 7 provides penalties for contravention of above said provisions. As per

Section 8, prosecution for any of the offences under 2005 Act shall not be instituted without the previous sanction of the Central Government or its authorised officer.

Section 6 empowers the Central Government to make provisions through rules to regulate the use of the State Emblem. The Central Government has also power to specify conditions for the use of the Emblem for various other purposes. Section 11 of the 2005 Act empowers the Central Government to make rules to carry out the purposes of the Act. Thus, in exercise of these powers, the Central Government has made the rules namely the State Emblem of India (Regulation of Use) Rules, 2007. These Rules ***inter alia*** provides for the design of the official seal consisting of the State Emblem. According to Rule, the design of the Official Seal shall have the emblem enclosed in an oval or round frame. The Rules restrict the use of the State Emblem on stationery and its display vehicles and public buildings in India and abroad. Schedules I and II appended to the Rules, 2007 specifies the authorities entitled to use the State Emblem of India and Schedule III contains some other purposes for which the State Emblem can be used. Rule 10 specifically restrict persons, institutions, organizations and associations mentioned therein to use the State Emblem. Rule 11 imposes restriction on the use of State Emblem and any colourable imitation thereof for the purpose of any trade, business, calling or profession or in the title of any patent, or in any trade mark or design.

USE OF STATE EMBLEM OF INDIA IS PROHIBITED IN ELECTION CAMPAIGNING

The use of the National Flag and the State Emblem of India is prohibited for the purpose of any election campaigning. Section 123(3) of the Representation of the Peoples Act, 1951 says that the use of the National Flag or the National Emblem for the furtherance of the prospects of the election or for prejudicially affecting the election of any candidate, shall be deemed to be a corrupt practice.

In the end, we may say that the idea behind the statutory scheme of symbols of our national honour is necessary to bring into knowledge of every one in the country to make themselves aware not only to pay proper respect to the ideals and institutions of the Constitution but also to prevent contemptuous acts of people that may be committed even inadvertently in regard to these symbols as well as the law, with pertinence, can be applied in a well-informed way to determine the cases relating to dishonour of national symbols.

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सिविल प्रक्रिया संहिता, 1908 की धारा 35, 35–ए, 35–बी और आदेश 20 के अधीन खर्चा अधिनिर्णीत करने की शक्ति का विस्तार

न्यायिक अधिकारीगण
जिला मंदसौर, दतिया, इंदौर

1. खर्चे या Costs की सिविल प्रक्रिया संहिता 1908 में कोई परिभाषा नहीं दी गई है लेकिन न्याय दृष्टांत ***मेसर्स गणेश दास रामगोपाल विरूद्ध मुंसिफ साउथ लखनऊ ए.आई.आर. 1976 इलाहाबाद 111*** खण्ड पीठ के निर्णय चरण 7 में खर्चे को इस तरह परिभाषित किया है :–

> "खर्चे से तात्पर्य उस वैधानिक भत्ते से है जो एक विजयी पक्षकार पराजित पक्षकार से पाने का अधिकारी होता है, जो उसने कार्यवाही के अभियोजन या प्रतिरक्षा में किये है ताकि उनकी प्रतिपूर्ति वह कर सके।"

2. सिविल प्रक्रिया संहिता में 4 प्रकार के खर्चे बतलाये गये है :–
   1. सामान्य खर्चे (धारा 35, सिविल प्रक्रिया संहिता)
   2. मिथ्या या तंग करने वाले दावों या प्रतिरक्षाओं के लिये प्रतिकारात्मक खर्चे (धारा 35–ए व्यवहार प्रक्रिया संहिता)
   3. विलंब कारित करने के लिये खर्चे (धारा 35–बी, व्यवहार प्रक्रिया संहिता)
   4. विविध खर्चे (आदेश 20–ए, सिविल प्रक्रिया संहिता)
3. इन चारों प्रकार के खर्चे को एक नजर में या At a Glance निम्न तालिका द्वारा समझा जा सकता है :–

क्र.	प्रावधान	प्रकृति	कार्यवाही का प्रकार	सीमा	अधिरोपण की स्टेज	खर्चे का प्रकार	वसूली का तरीका
1.	धारा 35, सी.पी.सी.	वैवेकीय	वाद	कोई सीमा नहीं	अंतिम निराकरण	विचारण में लगा खर्च	निष्पादन
2.	धारा 35–ए सी.पी.सी.	वैवेकीय	अपील रिवीजन के अतिरिक्त सभी कार्यवाहियां	3000	अंतिम निराकरण	असत्य व त्रासदायक दावे/प्रतिवाद की प्रारंभिक आपत्ति सही मान्य किये जाने पर देय प्रतिकर	निष्पादन

3.	धारा 35–बी सी.पी.सी.	वैवेकीय	वाद	कोई सीमा नहीं	कार्यवाही के दौरान	विलंब के कारण हुए अतिरिक्त व्यय की प्रतिपूर्ति	अग्रिम कार्यवाही में भाग न लेने देना
4.	आदेश 20–ए, सी.पी.सी.	वैवेकीय	वाद	कोई सीमा नहीं	अंतिम निराकरण	वाद/अपील दर्ज करने में लगा खर्च	निष्पादन

4. **धारा 35 सिविल प्रक्रिया संहिता** के अधीन खर्चे वाद के अंतिम निराकरण के समय दिलवाये जाते है जिनमें वाद या प्रतिरक्षा में लगे खर्चे वाद के परिणाम के अनुसार सामान्यतः विजेता पक्ष को पराजित पक्ष से दिलवाये जाते है और यदि खर्चे वाद के परिणाम के अनुसार नहीं दिलवाये जाते है तब न्यायालय को इसके कारण लेखबद्ध करना होते हैं।

इन खर्चे को दिलवाने में म.प्र. सिविल न्यायालय नियम, 1961 के नियम 179, 180, 181 एवं 182 के प्रावधान ध्यान में रखना चाहिये।

नियम 179 के अनुसार किसी पक्षकार को वाद, लिखित कथन, आवेदन पत्रों या शपथ पत्रों की प्रतिलिपियां विपक्षी को देने में लगा खर्च, साक्ष्य में प्रस्तुत करने के लिये दस्तावेजों की प्रतिलिपियॉ लेने में लगा खर्च, उन दस्तावेजों की तलाश पंजीकरण कार्यालय में करने में लगा शुल्क, खर्चे में जोड़ना चाहिये। यह कार्य लिपिक पर नहीं छोड़ना चाहिये। डिक्री के प्रारूप के नीचे दिये गये पद पूर्ण नहीं है और कोई पद यदि उस प्रारूप में न हो तो उसे हाथ से लिख कर जोड़ा जा सकता है।

अभिभाषक शुल्क निर्धारित स्केल से कम या अधिक मामले के तथ्यों और परिस्थितियों में दिलवायी जा सकती है।

अभिभाषक शुल्क खर्चे में जोड़ते समय नियम **523** से **535** ध्यान में रखना चाहिये।

नियम 180 में जिन खर्चे को न जोड़ने के बारे में निर्देश हैं उन्हें ध्यान में रखना चाहिये और इस नियम में उल्लेखित खर्चों को न जोड़ने से अनावश्यक आवेदन पत्र, अनावश्यक दस्तावेज या शपथ पत्र और साक्ष्य आदि प्रस्तुत होने पर रोक लग सकती है अतः इस नियम का खर्चे को जोड़ते समय कड़ाई से पालन करना चाहिये।

नियम 181 को विचारण के दौरान निराकृत आवेदन पत्रों के खर्चे जोड़ते समय ध्यान में रखना चाहिये।

नियम 182 को आनुपातिक खर्च जोड़ते समय ध्यान में रखना चाहिये और पक्षकार जिस सीमा तक सफल रहा है उसी सीमा तक उसे खर्चे मिलें, इसे ध्यान में रखना चाहिये।

न्याय दृष्टांत टी.एस. स्वामीनाथ ओ.डी.आर. वि. ऑफिशियल रिसीवर आफ डब्ल्यू. टी., ए.आई.आर. 1957 एस.सी. 577 में तीन न्यायमूर्तिगण की पीठ ने यह व्यवस्था दी है कि खर्चे परिणाम के अनुसार दिये जाते हैं।

न्याय दृष्टांत ***केशवलाल लालूभाई पटेल वि. लालभाई त्रिलोकमल मिल, ए.आई.आर. 1958 एस.सी. 512*** में तीन न्यायमूर्तिगण की पीठ ने यह प्रतिपादित किया है कि जहां प्रत्यर्थी का रूख सद्भावनापूर्ण नहीं है, उसने जो मुख्य बचाव लिये वे निरस्त किये गये जिस आधार पर वह विजयी हुआ वह आधार उसने अपील में पहली बार लिया था, इन परिस्थितियों में माननीय सर्वोच्च न्यायालय ने प्रारम्भ से अंत तक का कार्यवाही का खर्चा पक्षकार अपना–अपना वहन करेंगे, ऐसे निर्देश दिये।

न्याय दृष्टांत ***सलेम एडवोकेट बार एसोसिएशन वि. यूनियन आफ इंडिया, ए. आई. आर. 2005 एस.सी. 3353*** में तीन न्यायमूर्तिगण की पीठ ने यह व्यवस्था दी है कि यह परिपाटी विकसित हो रही है कि कोई खर्च अधिरोपित नहीं किया जाता या नाममात्र का खर्चा अधिरोपित किया जाता है, इससे असत्य दावों व प्रतिरक्षा को बढ़ावा मिलता है। न्यायालयों को वास्तविक खर्चा लगाना चाहिये। उच्च न्यायालयों को इन बिंदुओ का परीक्षण करना चाहिये व आवश्यक नियम बनाना चाहिये।

न्याय दृष्टांत ***श्रीमती शशि जैन वि. तारशेम लाल, ए.आई.आर. 2009 एस.सी. 2617*** के मामले में किरायेदार द्वारा उप किरायेदार रखा जाना प्रमाणित होने पर 500 रूपये प्रतिदिन अंतर्वती लाभ व 5000 रूपये प्रतिकर देने के आदेश दिये गये।

न्याय दृष्टांत ***लक्ष्मण प्रसाद वि. प्रोडीजी इलेक्ट्रॉनिक लिमिटेड, ए.आई.आर. 2008 एस.सी. 685*** में यह व्यवस्था दी गई है कि खर्चे लगाना न्यायालय का विवेकाधिकार होता है यदि न्यायालय ने मामले के तथ्यों के प्रकाश में 4000 रूपये खर्चा अधिरोपित किया है तो अपील न्यायालय सामान्यतः इसमें हस्तक्षेप नहीं करेगी।

न्याय दृष्टांत ***महेन्द्र बाबूराव वि. सुभाष कृष्ण, ए.आई.आर. 2005 एस.सी. 1794*** के मामले में पक्षकार ने असत्य कथन किये, न्यायालय के समक्ष गलत दस्तावेज पेश किये और ऐसा करके न्यायालय को भ्रमित करने का प्रयत्न किया। ऐसे पक्षकार पर 50000 रूपये खर्चा अधिरोपित किया गया और उस खर्चे को विधिक सेवा प्राधिकरण में जमा करवाने के निर्देश दिये गये।

न्याय दृष्टांत ***स्टेट आफ महाराष्ट्र वि. पांडुरंग, ए.आई.आर. 1996 एस.सी. 1202*** के मामले में पक्षकार न्यायालय के प्रति अनुचित पाया गया उस पर 10000 रूपये खर्चा लगाया गया।

न्याय दृष्टांत ***रामचंद्र गणतप शिंदे वि. स्टेट ऑफ महाराष्ट्र, ए.आई.आर. 1994 एस.सी. 1673*** में यह व्यवस्था दी गई है कि जहां विपक्षी मामले का प्रतिवाद नहीं करता वहां खर्चा अधिरोपित नहीं किया जाता है।

न्याय दृष्टांत ***रंगालाल वि. उत्कल राष्ट्र भाषा व अन्य, ए.आई.आर. 1975 उड़ीसा 137*** में यह प्रतिपादित किया गया है कि ऐसा पक्षकार जिसके विरूद्ध वादपत्र में कोई सहायता का दावा नहीं किया गया हो उसको खर्चा नहीं दिलवाया जाता है।

न्याय दृष्टांत ***म्यूनिसिपल कॉरपोरेशन देहली वि. कमला देवी, ए.आई.आर 1996 एस.सी. 1733*** में यह प्रतिपादित किया गया है कि विधिक प्रक्रिया के दुरूपयोग व उन पर विजय पाने के उददेश्य से कार्यवाही होने पर अनुकरणीय खर्चा लगाना चाहिये।

न्याय दृष्टांत ***रफिक विरूद्ध मुंशीलाल, ए.आई.आर. 1981 एस.सी. 1400*** के मामले में अपीलार्थी के अभिभाषक की चूक के कारण अपील निरस्त हुई थी। निरस्ती खर्चा लगाकर अपास्त की गई। अपीलार्थी इस खर्चे को अपने अभिभाषक से वसूल सकता है, ऐसे निर्देश भी दिये गये।

न्याय दृष्टांत ***रेमोन सर्विस प्रायवेट लिमिटेड वि. सुभाष कपूर, ए.आई.आर. 2001 एस. सी. 207*** के मामले में अभिभाषक के हड़ताल के कारण अनुपस्थित रहने से एकपक्षीय आज्ञप्ति पारित की गई थी जिसे खर्चा लगाकर अपास्त किया गया। पक्षकार इस खर्चे को संबंधित अभिभाषक से वसूल सकता है, ऐसे निर्देश दिये गये।

न्याय दृष्टांत ***देहली इलेक्ट्रिक सप्लाई अंडरटेकिंग वि. बसंती देवी, ए.आई.आर. 2000 एस.सी. 43*** के मामले में नियोक्ता को वेतन से प्रीमियम काटकर भारतीय जीवन बीमा निगम को देना था। नियोक्ता ने ऐसा नहीं किया। नियोक्ता को पच्चीस हजार रूपये खर्चा कर्मचारी के उत्तराधिकारीगण को कार्यवाही खर्च के रूप में देने के निर्देश दिये गये।

न्याय दृष्टांत ***एस.आर. भानराले वि. युनियन आफ इंडिया, ए.आई.आर. 1997 एस.सी. 27*** के मामले में प्रार्थी को क्लेम राशि के अतिरिक्त दो लाख रूपये ब्याज और कार्यवाही खर्च के रूप में देने के निर्देश दिये गये।

न्याय दृष्टांत ***लक्ष्मी नारायण वि. फर्स्ट एडीशनल डिस्ट्रिक्ट जज, ए.आई.आर. 1964 एस.सी. 489*** में यह प्रतिपादित किया गया है कि सामान्यतः न्यायालय के विरूद्ध कोई खर्च या कास्ट नहीं दिलवाई जाती है।

न्याय दृष्टांत ***विनोद सेठ वि. देवेन्द्र बजाज, (2010) 8 एस.सी.सी. 1*** में यह व्यवस्था दी गई है कि न्यायालय वादी से ऐसा लिखित वचन नहीं मांग सकता कि यदि वह वाद में सफल नहीं हुआ तो वह प्रतिवादी को एक निश्चित राशि क्षतिधन के रूप में देगा क्योंकि विधि में ऐसी कोई व्यवस्था नहीं है जो न्यायालय को ऐसी शक्ति देती हो।

संशोधन कार्यवाही – इन कार्यवाहियों में खर्च अधिरोपित करने के बारे में न्याय दृष्टांत ***मेसर्स रेवा जीतू बिल्डर्स वि. मेसर्स नारायण स्वामी एंड संस, ए.आई.आर. 2009 एस.सी. (सप्लीमेंट) 2897*** में महत्वपूर्ण मार्गदर्शक सिद्धांत बतलाये हैं जो संशोधन आवेदनपत्रों के निराकरण के समय ध्यान में रखना चाहिये जो इस प्रकार हैं–

1. संशोधन, कार्यवाही के किस प्रक्रम पर चाहा गया।
2. संशोधन विचारण के पूर्व चाहा गया या विचारण के पश्चात चाहा गया।
3. एक पक्षकार के द्वारा दूसरे पक्षकार के खर्च पर प्राप्त किये गये आर्थिक लाभ भी उचित रीति से गणना करने चाहिये और उस अनुरूप खर्च लगाना चाहिये।

4. खर्चे प्रतीकात्मक नहीं हों बल्कि वास्तविक हों।

5. विरोधी पक्षकार को संशोधन के कारण अतिरिक्त सुनवाई में लगने वाले खर्चे की गणना भी करके उस अनुरूप खर्चे अधिरोपित करना चाहिये।

6. अपील की अवस्था में संशोधन में पीड़ित पक्ष को उचित अतिरिक्त खर्चा भी दिलवाना चाहिये।

5. धारा 35–ए सिविल प्रक्रिया संहिता में अपील या पुनरीक्षण को छोड़कर शेष कार्यवाहियों, वाद, निष्पादन में मिथ्या या तंग करने वाले दावों और प्रतिरक्षाओं के लिये प्रतिकारात्मक खर्चा दिलवाने के प्रावधान है। इन खर्चो की सीमा 3000 रूपये या न्यायालय के आर्थिक क्षेत्राधिकार की सीमा में से जो भी कम हो वह रकम होती है। ये खर्चे वाद के अंतिम निराकरण पर लगाये जाते हैं।

न्याय दृष्टांत ***सत्यपाल सिंह विरूद्ध यूनियन ऑफ इंडिया, ए.आई.आर. 2010 एस.सी. 1138*** में यह प्रतिपादित किया गया है कि यदि दावा असत्य पाया जाता है या पक्षकार कपट या मिथ्या व्यपदेशन का दोषी हो वहां अनुकरणीय खर्चा (Exemplary cost) लगाना चाहिये। सामान्यतः दोषी पक्षकार से दूसरे पक्षकार को खर्चा दिलवाते है। अनुकरणीय खर्चा केवल न्याय के उद्देश्यों के लिये ही बहुत कम अवसरों पर लगाना चाहिये।

इस मामले में यह भी कहा गया है कि जहां दोनों ही पक्ष दोषी हों वहां विधिक सेवा प्राधिकरण में खर्चा जमा करवाना चाहिये।

न्याय दृष्टांत ***ईला विपिन पण्डया विरूद्ध स्मिता अंबालाल पटेल, ए.आई.आर. 2007 एस. सी. 2404*** के मामले में पक्षकार स्वयं उपस्थित था। उसने उसका मामला व विपक्षी द्वारा उठाये गये बिन्दुओं पर गुण दोष पर बहस करने से इंकार किया। अभद्र भाषा का प्रयोग कुछ अभिभाषक पर किये जो कार्यवाही से जुड़े थे। ऐसा चेतावनी देने के बाद भी किया। अज्ञानता या मानसिक संतुलन ठीक न होना भी प्रगट नहीं हुआ। पक्षकार न्यायिक कार्यवाही के संचालन व उसके मामले के तथ्य से परिचित थी, इन परिस्थितियों में माननीय सर्वोच्च न्यायालय ने ऐसे पक्षकार पर पांच लाख रूपये का खर्चा अधिरोपित किया।

न्याय दृष्टांत ***स्टेट आफ यू. पी. विरूद्ध मनोहर, ए.आई.आर. 2005 एस.सी. 488*** के मामले में राज्य पर पच्चीस हजार रूपये खर्चा अधिरोपित किया गया।

न्याय दृष्टांत ***गायत्री देवी विरूद्ध शशिपाल सिंह, ए.आई.आर. 2005 एस.सी. 2342*** में किरायेदार को पूरे प्रकरण में असद्भावी व डिक्री के फल से मकान मालिक को वंचित करने वाला पाया गया उस पर बीस हजार रूपये शिक्षात्मक खर्चा लगाया गया।

न्याय दृष्टांत ***टी. अरविंदम वि. टी.वी. सत्यपाल, ए.आई.आर. 1977 एस.सी. 242*** में यह प्रतिपादित किया गया है कि न्यायालय को वाद का अर्थपूर्ण अध्ययन करके, यदि वाद कारण गठित होना न पाया जावे तो आदेश 7 नियम 11 सी.पी.सी. के तहत कार्यवाही करना चाहिये। कार्यवाही त्रासदायक प्रतीत हो तब धारा 35–ए सी.पी.सी. के तहत कठोर कार्यवाही करना चाहिये।

न्याय दृष्टांत ***स्वर्णसिंह लांबा वि. यूनियन आफ इंडिया, ए.आई.आर. 1995 एस.सी. 1729*** में पांच न्यायमूर्तिगण की पीठ के मामले में तीन पुलिस निरीक्षकों ने प्रशासकीय न्यायाधिकरण के अध्यक्ष, उपाध्यक्ष व सदस्यों की नियुक्ति को चुनौती दी। ऐसी चुनौती जनहित में न होकर व्यक्तिगत लाभ के लिये दी गई जिसके पीछे अधिकरण को कार्य करने से रोकने का विचार निहित था, इस मामले में प्रत्येक प्रार्थी को 15 हजार रूपये खर्चा अधिरोपित किया गया।

लेकिन यहां यह उल्लेखनीय है कि धारा 35–ए.सी.पी.सी. के तहत लगाये गये खर्चे की सीमा 3000 रूपये या न्यायालय के आर्थिक क्षेत्राधिकार की सीमा में से जो भी कम हो वहां तक होती है। माननीय सर्वोच्च न्यायालय को भारतीय संविधान के तहत इस सीमा से अधिक खर्चे अधिरोपित करने की शक्तियां होती हैं।

6. धारा 35–बी सी.पी.सी. में विलंब कारित करने के लिये कार्यवाही के दौरान खर्चे अधिरोपित करने के प्रावधान हैं जिनका प्रयोग त्वरित विचारण के लिये करना चाहिये जिससे अनावश्यक स्थगन रोके जा सकें ये खर्चे जिस पक्ष पर लगाये जाते हैं उसके लिये खर्चे अदा करना आगे की कार्यवाही में भाग लेने के लिये पुरोभाव्य शर्त होती है।

न्याय दृष्टांत ***मनोहर सिंह विरूद्ध डी. एस. शर्मा, ए.आई.आर. 2008 एस.सी. 508*** में यह व्यवस्था दी गई है कि ऐसे खर्चे न देने पर वाद खारिज नहीं किया जाता है बल्कि वाद में आगे भाग लेने में रोक होती है शब्द "further prosecution of suit" का अर्थ "further participation in suit" है न कि वाद खारिज करना।

यदि वादी खर्चा नहीं देता है तो वह वाद में आगे भाग नहीं ले सकेगा और प्रतिवादी खर्चा नहीं देता है तो वह अपनी प्रतिरक्षा या बचाव में आगे भाग नहीं ले सकेगा। न्यायालय अपनी कार्यवाही जारी रखेगा। दूसरे पक्ष के प्रमाण लेगा उसके तर्क सुनेगा व गुणदोष पर प्रकरण निराकृत करेगा। साथ ही न्यायालय खर्चा अदा करने का समय धारा 148 सीपीसी के तहत अपवाद स्वरूप परिस्थितियों में बढ़ा सकती है। इस संबंध में भी व्यवस्था इस न्याय दृष्टांत में दी गई है।

न्याय दृष्टांत ***नारायण राव मृतक द्वारा वैध प्रतिनिधि गिरीश नारायण वि. स्टेट ऑफ एम. पी., 2003 (1) एम.पी. एच.टी. 90*** में यह प्रतिपादित किया गया है कि न्यायालय को ये शक्तियां हैं कि वह खर्चे अदा करने के लिये समय बढ़ा सकती है।

न्याय दृष्टांत ***नारायण राव राजा रघुनाथ राव खेर वि. स्टेट ऑफ एम.पी., 2002 (1) एम. पी.एल.जे. 28*** में यह व्यवस्था दी है कि धारा 35–बी सी.पी.सी. में खर्चे अदा न करने पर वाद खारिज करने का कोई प्रावधान नहीं है इन प्रावधानों में लगाये गये खर्चे वाद के खर्चे नहीं होते हैं इसी कारण वाद खारिज करने का और खारिजी को अपास्त करने का कोई प्रावधान नहीं है बल्कि ऐसे खर्चे वसूली योग्य होते हैं। ऐसे खर्चे न देने पर कार्यवाही में आगे भाग लेने पर रोक होती है।

इस मामले में यह भी व्यवस्था दी गई कि खर्चे न देने पर वाद खारिज करने का आदेश पक्षकारों के अधिकारों का निर्धारण नहीं करता है अतः ऐसा आदेश डिक्री नहीं होता है और उसकी अपील नहीं होती है बल्कि पुनरीक्षण होता है।

न्याय दृष्टांत ***संजीव कुमार जैन वि. रघुबीरशरण चेरीटेबल ट्रस्ट, (2012) 1 एस.सी.सी. 455*** में यह व्यवस्था दी गई है कि जहां प्रतिवादी के अवैध कृत्य के कारण वादी को न्यायालय तक आना पड़ा हो और वादी वाद में सफल हो जाता है तब उसे वाद में लगे खर्चे दिलवाना चाहिये और जहां प्रतिवादी को अनावश्यक और त्रासदायक कार्यवाही में न्यायालय में आना पड़ा हो और प्रतिवादी सफल हो जाता है वहां उसे भी विधि अनुसार खर्चे दिलवाना चाहिये।

इसी मामले में यह भी प्रतिपादित किया गया है कि यदि न्यायालय वाद के परिणाम के अनुसार धारा 35 सी.पी.सी. के अनुसार खर्चे दिलवाने की प्रथा विकसित नहीं करता है या जहां वाद के परिणाम के अनुसार खर्चे न दिलवाने के कारण नहीं देता है तब तक धारा 35 के प्रावधान निष्फल रहेंगे।

इस मामले में यह भी कहा गया है कि असत्य और त्रासदायक दावों में केवल प्रतिकारात्मक खर्चा अधिरोपित नहीं करना चाहिये बल्कि दंडात्मक खर्च अधिरोपित करना चाहिये।

खर्चे में न्याय शुल्क, प्रोसेस शुल्क, अधिवक्ता शुल्क, गवाहों के खर्च और अन्य खर्च नियमों के अनुसार दिलवाना चाहिये। माननीय सर्वोच्च न्यायालय ने इस मामले में यह सुझाव दिया कि वास्तविक खर्चे दिलवाने के लिये नियमों में आवश्यक संशोधन किये जाने चाहिये।

उक्त न्याय दृष्टांत विनोद सेठ में भी माननीय सर्वोच्च न्यायालय ने यह प्रतिपादित किया है कि असत्य और त्रासदायक तथा विद्वेषपूर्ण मामलों को निरूत्साहित करने के लिये वास्तविक खर्चे अधिरोपित करना चाहिये साथ ही यह भी कहा गया है कि धारा 35–ए और 35–बी, सी.पी.सी. के प्रावधान पर्याप्त नहीं हैं और इन प्रावधानों के उददेश्यों को प्राप्त करने के लिये इन प्रावधानों में आवश्यक संशोधन की आवश्यकता बतलाई गई है।

7. आदेश 20, नियम 6, उपनियम 2 के अनुसार डिक्री में वाद में लगे खर्चे की रकम और वे खर्च किसके द्वारा या किस संपत्ति से और किस अनुपात में देय होंगे इसका उल्लेख किया जायेगा। साथ ही उपनियम 3 के अनुसार पक्षकारों के खर्चे मुजरा या set off करने के प्रावधान हैं जिनका पालन उक्त निर्देशों को ध्यान में रखते हुए करना चाहिये।

8. आदेश 20–ए, नियम 1 सी.पी.सी. में भी कुछ मद दिये गये हैं जो वाद खर्च में शामिल करना चाहिये। ये खर्चे म.प्र. व्यवहार न्यायालय नियम, 1961 के नियम 179 से 182 को ध्यान में रखते हुए जोड़ना चाहिये।

इस प्रकार प्रत्येक न्यायालय को धारा 35, 35–ए, 35–बी एवं आदेश 20 नियम 6, आदेश 20–ए के उक्त प्रावधानों एवं म.प्र. व्यवहार न्यायालय नियम, 1961 के नियम 179 से 183 एवं नियम 523 से नियम 534 तक के प्रावधानों तथा माननीय सर्वोच्च न्यायालय एवं माननीय मध्यप्रदेश उच्च न्यायालय द्वारा विभिन्न न्याय दृष्टांतों में प्रतिपादित उक्त वैधानिक स्थिति को ध्यान में रखते हुए खर्चे अधिरोपित करने चाहिये और इन प्रावधानों के उददेश्यों को प्राप्त किया जा सके, इस तथ्य को ध्यान में रखते हुए कार्यवाही करना चाहिये।

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LAWYERS IN CRIMINAL COURT ARE NECESSITIES, NOT LUXURIES

Judicial Officers
District Ratlam, Shivpuri & Betul

"Audi Alteram Partem" – an old yet most relevant maxim in criminal trials which means that no man should be condemned unheard. What would one understand from the word "heard" or "hearing" in a criminal trial? US Supreme Court in ***Powell v. Alabam, 287 US 45 1932,*** observed :-

> "..... it has always included the right to the aid of counsel when desired and provided by the party asserting the right. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. If in any case, civil or criminal, a State or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense."

The above decision of the US Supreme Court was cited with approval by the Apex Court in ***A.S. Mohammed Rafi v. State of Tamil Nadu & Ors., AIR 2011 SC 308.***

> Articles 21, 22 (1) and 39-A of the Constitution of India read as under :
>
> **Article 21. – Protection of life and personal liberty. –**
>
> No person shall be deprived of his life or personal liberty except according to procedure established by law.

Article 22 (1). – Protection against arrest and detention in certain cases.–

(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

39-A. – Equal justice and free legal aid.–

The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

Section 304 Cr.P.C. makes it obligatory upon the Sessions Court to assign a pleader at the State's expense to the accused if the accused is not represented by a pleader and where it appears to the Court that the accused has not sufficient means to engage a pleader.

Eminent Jurist Seervai has in his ***Constitutional Law of India***; Third Edition Vol. I, Pg. 857 observed :-

> ".....the right of a person accused of an offence, or against whom any proceedings were taken under the Cr.P.C. is a valuable right which was recognized by Section 304 Cr.P.C. Article 22 (1) on its language makes that right a constitutional right, and unless there are compelling reasons, Article 22 (1) ought not to be cut down by judicial construction ..... It is submitted that Article 22 (1) makes the statutory right under Section 340 Cr.P.C. a Constitutional right in respect of Criminal or quasi-criminal proceedings."

Aforesaid fundamental provisions came up for consideration before Supreme court in ***Md. Sukur Ali v. State of Assam, AIR 2011 SC 1222*** wherein the question was whether in a criminal case if the counsel for the accused does not appear, for whatever reasons, should the case be decided in the absence of the counsel against the accused, or the Court should appoint an ***amicus curiae*** to defend the accused ? The Apex Court observed :

> "We are of the opinion that even assuming that the counsel for the accused does not appear because of the counsel's negligence or deliberately, even then the Court should not decide a criminal case against the accused in the absence of his counsel since an accused in a criminal case should not suffer for the fault of his counsel and in such a situation the Court should appoint another counsel as *amicus curiae* to defend the accused. This is because liberty of a person

> is the most important feature of our Constitution. Article 21 which guarantees protection of life and personal liberty is the most important fundamental right guaranteed by the Constitution. Article 21 can be said to be the 'heart and soul' of the fundamental rights. In our opinion, a criminal case should not be decided against the accused in the absence of a counsel."

Similar view was taken by the Apex Court in ***Man Singh & Anr. v. State of Madhya Pradesh, (2008) 9 SCC 542*** and ***Bapu Limbaji Kamble v. State of Maharashtra, (2005) 11 SCC 412.***

In ***M.H. Hoskot v. State of Maharashtra, (1978) 3 SCC 544,*** the Supreme Court has held that other ingredients of fair procedure to a prisoner, who has to seek his liberation through court's process is lawyer's services. Judicial justice, with procedural intricacies, legal submission and critical examination of evidence, leans upon professional expertise; and a failure of equal justice under the law is on the cards where such supportive skill is absent for one side. Our judicature, moulded by Anglo-American models and our judicial process, engineered by kindred legal technology, compel the collaboration of lawyer-power for steering the wheels of equal justice under the law. Free legal services to the needy is part of the English criminal justice system. And the American Jurist. Prof. Vance of Yale, sounded sense for India too when he said

> "What does it profit a poor and ignorant man that he is equal to his strong antagonist before the law if there is no one to inform him what the law is? or that the courts are open to him on the same terms as to all other persons when he has not the wherewithal to pay the admission fee?"

Legal aid and speedy trial have now been held to be fundamental rights under Article 21 of the Constitution available to all prisoners and enforceable by the courts. The State is under a duty to provide lawyer to a poor person and it must pay to the lawyer his fee as fixed by the Court. Article 39-A provides "equal justice" and "free legal aid". The State shall secure that the operation of the legal system promote justice. It means justice according to law. In a democratic policy, governed by rule of law, it should be the main concern of the State to have a proper legal system. The right to free legal aid, " is State's Duty and not Government's Charity." If a prisoner is unable to exercise his constitutional and statutory right of appeal including special leave to appeal for want of legal assistance, it is implicit on the court under Article 142 read with Articles 21 and 39-A of the Constitution, the power to assign counsel to the prisoner provided he does not object to the lawyer named by the court. Equally, is the implication that the State, which sets the law in motion must pay the lawyer an amount fixed by the Court. At the same moment, under Section 304 Cr.P.C., a duty has been imposed upon the court especially in Sessions Trials to assign a pleader to the accused at the state expense.

Indigence should never be a ground for denying fair trial or equal justice. Therefore, advocates competent to handle cases should be appointed. Sufficient time and complete papers should also be made available to them so that they may prepare the case and the accused also may feel confident that the counsel chosen by the Court has had adequate time and material to defend him properly.

It is the duty of the Court to see and ensure that an accused in a criminal trial is represented with diligence by a defence counsel and in case an accused during the trial remains unrepresented because of poverty etc., it becomes the duty of the Court to provide him legal aid at State expense.

The right to be defended by a legal practitioner, flowing from Article 22 (1) of the Constitution has further been fortified by the introduction of Directive Principles of State Policy embodied in Article 39-A of the Constitution by the 42nd Amendment Act of 1976 and enactment of sub-section (1) of Section 304 Cr.P.C. In ***Maneka Gandhi v. Union of India, AIR 1978 SC 597,*** it has been held by the Supreme Court that the procedure for depriving a person of his life or liberty should be fair, reasonable and just. It is not fair or just that a criminal case should be decided against an accused in the absence of a counsel. It is only a lawyer who is conversant with law who can properly defend an accused in a criminal case. Hence, in our opinion, if a criminal case (whether in trial or appeal/ revision) is decided against an accused in the absence of a counsel, there will be violation of Article 21 of the Constitution.

In ***Md. Sukur Ali*** (supra) the Apex Court underlined the need for incorporating Article 22 (1) as under :

> "The founding Fathers of our Constitution were themselves freedom fighters who had seen civil liberties of our people trampled under foreign rule, and who had themselves been incarcerated for long period under the formula 'Na vakeel, na daleel, na appeal' (No lawyer, no hearing, no appeal). Many of them there were lawyers by profession, and knew the importance of counsel, particularly in criminal cases. It was for this reason that they provided for assistance by counsel under Article 22 (1), and that provision must be given the widest construction to effectuate the intention of the founding Fathers."

Underlying the need and importance of representation of the accused by a pleader the Apex Court observed that we reiterate that in the absence of a counsel, for whatever reasons, the case should not be decided forthwith against the accused but in such a situation the Court should appoint a counsel who is practicing on the criminal side as *amicus curiae* and decide the case after fixing another date and hearing him. If on the next date of hearing the counsel, who ought to have appeared on the previous date but did not appear, now appears but cannot show sufficient cause for his non-appearance on the earlier date, then he will be precluded from appearing and arguing the case on behalf of the accused. But, in such a situation, it is open to the accused to either engage

another counsel or the Court may proceed with the hearing of the case by the counsel appointed as *amicus curiae*.

In ***Ram Naresh Yadav and Ors. v. State of Bihar, AIR 1987 SC 1500*** and ***Banchhanidhi Singh alias Nani Singh v. State of Orissa, 1990 Cri.L.J. 397*** the Supreme Court was of the view that decision of the Appellate Court in deciding the appeal by only hearing the Public Prosecutor in the absence of counsel representing the appellants or the appellants, cannot be justified in view of the settled position of law in this regard. In ***Ram Naresh Yadav*** (supra) it was held that in criminal cases the convicts must be heard before their cases are decided on merits. This was a case where the Court had dismissed the appeal without hearing the appellant or his counsel. Despite having noticed the fact that waiting for appearance by a counsel, when the criminal appeals are called, may hamper the working of the Court and creates a serious problem for it and thus being well conscious of this dimension, the Supreme Court went on to hold that the convicts or accused must be heard before the cases are decided. The Supreme Court observed that case can be disposed of on merits only after hearing the appellant or his counsel and in case no one is present, then the Court might as well appoint a counsel at the State cost to argue on behalf of the appellants. The order, convicting the appellants therein was set-aside and the matter was sent back to the High Court for passing an appropriate order in accordance with law after hearing the appellants or their counsel and on their failure to engage a counsel, then appoint one and decide the appeal after hearing the counsel so appointed by the Court.

In ***Khaili and Ors. v. State of Uttar Pradesh, 1982 SCC (Cri.) 143*** the Hon'ble Supreme Court has observed that howsoever diligent the learned Judge might have been and however careful and anxious to protect the interests of the Appellants in the absence of their counsel, his effort cannot take the place of an argument by an Advocate appearing on behalf of the appellants. The Court accordingly found that if the Advocate appearing for the appellants does not appear before the Court and argue, then the Judge should appoint an Advocate as ***amicus-curiae*** and then to proceed to dispose of the appeal on merits. Similar view has been expressed in ***S. Mohan Rao v. Bhubaneswar Rath, 1985 Cri.L.J. 228***.

In ***Ranchod Mathur Wasawa v. State of Gujarat, AIR 1974 SC 1143,*** the trial was held to be vitiated when the counsel for the accused was not given sufficient time and facilities for preparing the defence. The Court observed that sufficient time and complete papers should also be made available to the advocate chosen so that he may serve the cause of justice with all the ability at his command.

In ***Hussainara Khatoon and Ors. v. Home Secretary, State of Bihar, AIR 1979 SC 1369,*** it is held that the procedure which does not make available legal services for the accused cannot possibly be regarded as reasonable, fair and just. The right to free legal services is clearly an essential ingredient of reasonable, fair and just procedure for a person accused of an offence and it must be held implicit in the guarantee of Article 21 and the State is under the constitutional mandate to provide a lawyer to an accused person if the circumstances of the

case and the needs of justice so require, provided of course, the accused person does not object to the provision of such a lawyer.

In ***Suk Das & Anr v. Union Territory of Arunachal, AIR 1986 SC 991,*** appellant was not represented by a lawyer since he was admittedly unable to afford legal representation on account of his poverty and the result was that he could not cross-examine some of the witnesses of the prosecution. At the end of the trial, four of the accused were acquitted but the appellant and another accused were convicted and sentenced to undergo simple imprisonment for a period of two years. The appellant thereupon preferred an appeal before the High Court contending that he was not provided free legal aid for his defence and the trial was, therefore, vitiated. The High Court upheld the conviction of the appellant on the ground that no application for legal aid was made by him before the Addl. Deputy Commissioner and therefore, it could not be said that failure to provide legal assistance vitiated the trial. Allowing the appeal the Apex Court held that it is settled law that free legal assistance at State cost is a fundamental right of a person accused of an offence which may involve jeopardy to his life of personal liberty and this fundamental right is implicit in the requirement of reasonable, fair and just procedure prescribed by Article 21. Of course, it must be recognised that there may be cases involving offences, such as economic offences or offences against law prohibiting prostitution or child abuse and the like, where social justice may require that free legal service may not be provided by the State. The right to free legal service is a constitutional right of every accused person who is unable to engage a lawyer and secure legal service on account of reasons, such as, poverty, indigence or incommunicado situation and the State is under a mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of the justice so require, provided, of course, the accused person does not object to the provision of such a lawyer. It would make a mockery of legal aid if it were to be left to a poor ignorant and illiterate accused to ask for free legal services. Legal aid would become merely a paper promise and it would fail in its purpose.

In ***Khatri and Others v. State of Bihar& Ors., 1981 SCR (2) 408*** the Supreme Court observed that the Magistrate or the Sessions Judge before whom the accused appears must be held to be under an obligation to inform the accused that if he is unable to engage the services of a lawyer on account of poverty or indigence, he is entitled to obtain free legal services at the cost of the State. Unless he is not willing to take advantage, every other State in the country should make provision for grant of free legal services to an accused who is unable to engage a lawyer on account of reasons such as poverty, indigence or incommunicado situation. The only qualification would be that the offence charged against the accused is such that on conviction it would result in a sentence of imprisonment and is of such a nature that the circumstances of the case and the needs of social justice require that he should be given free legal representation. There may be cases involving offences such as economic offences or offences against law prohibiting prostitution or child abuse and the

like, where social justice may require that free legal services need not be provided by the State.

In this context, High Court of Madhya Pradesh held in ***Himachal Singh v. State of M.P., 1990 CRLJ 1490*** (MP) held that in trial by the special Judge, the advocate for the accused applied for adjournment, examined witnesses and also asked the advocate to cross-examine the witness. The Advocate did not cross-examine as he was not prepared with the case and was appearing for adjournment only and thereupon the court discharged the witness. It was held that the court has no power to order for engaging counsel against the choice of the accused and further, the court should have given time to the Advocate to prepare for cross-examination by adjourning the hearing of the case.

Section 303 Cr.P.C. reads thus-

> **303.-** Any person accused of an offence before a criminal court or against whom proceedings are instituted under this Code may of right be defended by a pleader of his choice.

Where a person is denied the right to be defended by a pleader of his own choice in violation of this section, the trial shall be illegal. The accused should have reasonable opportunity, if in custody of the police, of getting into communication with his legal adviser for the purpose of preparing his defence. The accused must ask for a lawyer, if he wants to engage one. Under this section the accused has no right to be provided with a lawyer by the State or by the police or by the Magistrate. The only duty of the Magistrate is to afford the accused necessary opportunity to engage a lawyer. No hard and fast rule can be laid down about the time which must elapse between the appointment of the counsel and beginning of the trial. It depends upon the circumstances in each case. The Court must ensure that the time granted to the counsel is sufficient to prepare for the defence. At the same time, the Apex Court while deciding the case of ***A.S. Mohd. Rafik v. State of Tamil Nadu, AIR 2011 SC 308,*** held that in case of resolution of Bar Association that lawyers will not defend certain accused persons, is against Constitution, Statute and professional ethics. Thus, a duty has been casted upon a lawyer to defend the accused irrespective of consequences.

Even, assuming that the counsel for the accused does not appear because of the counsels negligence or deliberately, even then the Court should not decide a criminal case against the accused in absence of his counsel since an accused in a criminal case should not suffer for the fault of his counsel and in such a situation the Court should appoint another counsel as amicus curiae to defend the accused. This is because liberty of a person is the most important feature of our Constitution. Article 21 which guarantees protection of life and personal liberty is one of the most important fundamental rights guaranteed by the Constitution. Article 21 can be said to be the heart and soul of the fundamental rights. It is only a lawyer, conversant with law, can properly defend an accused in criminal case. Hence, if a criminal case (whether a trial or appeal/revision) is decided against an accused in the absence of a counsel, that will be violation of

Article 21 of the Constitution. Even, in case titled ***Mansingh & another v. State of MP, (2008) 9 SCC 942*** and ***Bapu Limbaji Kamble v. State of Maharashtra, (2005) 11 SCC 413,*** the Apex Court remanded the said cases to the High Court, as the said appeals were decided without appointing any counsel/*amicus-curiae* on the behalf of concerned accused.

The pressures on State executive and Judicial Officers charged with the administration of criminal law are great. But it is precisely the predictability of those pressures that makes imperative a resolute loyalty to the guarantees that the constitution extends to us all.

In ***Hussainara Khatoon v. Home secretary, Bihar, AIR 1979 SC 1377,*** the Apex Court has held that it is the constitutional right of every accused who is unable to engage a lawyer and secure legal service on account of reason such as poverty, indigence or incommunicado situation, to have free legal services provided to him by the State and it is under constitutional duty to provide a lawyer to such person, if the needs of justice so require.

In a recent decision of ***Mohd. Hussain @ Julfikar Ali v. State (Govt. of NCT, Delhi), AIR 2012 SC 750*** it was observed that every person has a right to a fair trial by a competent court in the spirit of the right to life and personal liberty. The object and purpose of providing competent legal aid to undefended and unrepresented accused personsis to see that the accused gets free, fair, just and reasonable trial of in a criminal case.

CONCLUSION:

In the absence of a counsel, for whatever reasons, the case should not be decided forthwith against the accused, but, in such a situation the Court should appoint a counsel who is practicing on the criminal side as *amicus curiae* and decide the case after fixing another date for hearing. If on the next date of hearing the counsel, who ought to have appeared on the previous date but did not appear, now appears, but cannot show sufficient cause for his non-appearance on the earlier date, then he will be precluded from appearing and arguing the case on behalf of the accused. But, in such a situation, it is open to the accused to either engage another counsel or the Court may proceed with the hearing of the case by the counsel appointed as *amicus-curiae*. Thus, the court should also be cautious, while granting adjournments and not succumb to the whims of accused or his counsel, but at the same moment, the court should also be on guard that the constitutional rights of the accused of being defended properly, are not being infringed.

From the above judicial pronouncements, it is abundantly clear that a person accused of a crime has a fundamental right to be represented through a counsel and in absence of legal practitioner, there is violation of fundamental right of the accused. The courts are under an obligation to inform the accused of his fundamental right. Hence, in Criminal Court, as Mr. Justice Hugo Black of the US Supreme Court said, "Lawyers in criminal Court are necessities, not luxuries".

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सिविल प्रक्रिया संहिता के आदेश 7 नियम 14 (3) एवं आदेश 8 नियम 1 ए (3) के प्रावधानों के संदर्भ में आदेश 18 नियम 4(1) के परन्तुक का विस्तार

न्यायिक अधिकारीगण
जिला खण्डवा एवं विदिशा

सिविल प्रकृति के वादों में अनुतोष की वांछा करने वाले पक्षकार को अपना दावा प्रमाणित करना होता है। ऐसा वह मौखिक एवं दस्तावेजी साक्ष्य प्रस्तुत करके कर सकता है। भारतीय साक्ष्य अधिनियम, 1872 में साक्ष्य को परिभाषित किया गया है, जिसके अनुसार न्यायालय के निरीक्षण के लिये पेश किये गये सभी दस्तावेज जिनके अंतर्गत इलेक्ट्रॉनिक्स अभिलेख भी हैं, दस्तावेजी साक्ष्य कहलाते हैं।

सिविल प्रक्रिया संहिता, 1908 (संक्षेप में– "सी.पी.सी.") के आदेश 7 नियम 14 (1) के अनुसार जहां वादी किसी दस्तावेज के आधार पर वाद लाता है या अपने दावे के समर्थन में अपने कब्जे या शक्ति में के दस्तावेज पर निर्भर करता है तब वह ऐसे दस्तावेजों को वाद प्रस्तुत करते समय न्यायालय में प्रस्तुत करता है तथा उपनियम (2) के अनुसार यदि ऐसे दस्तावेज वादी के कब्जे में नहीं है तो वह यदि उसे ज्ञात है तो कथन करता है कि ऐसा दस्तावेज किसके कब्जे या शक्ति में है। इसी प्रकार आदेश 8 नियम (1क) के अनुसार जब प्रतिवादी अपना लिखित कथन प्रस्तुत करता है उसे ऐसे दस्तावेज जिन पर वह अपनी प्रतिरक्षा निर्भर करता है, सूची में प्रविष्ट करना होता है और यदि ऐसे दस्तावेज उसके आधिपत्य में नहीं है तो वह जहां संभव हो कथन करता है कि ऐसा दस्तावेज किसके कब्जे में है।

सिविल प्रक्रिया संहिता की यह मंशा है कि सर्वप्रथम अवसर पर उभयपक्ष के द्वारा ऐसे दस्तावेज जो अनुतोष प्राप्ति या प्रतिरक्षा के लिये आवश्यक हो सकते हैं, उन्हें प्रस्तुत किया जाए, परंतु यदि किसी कारणवश ऐसे दस्तावेज प्रस्तुत नहीं किये जाते हैं और पश्चात्वर्ती प्रक्रम पर पक्षकार ऐसे दस्तावेज प्रस्तुत करना चाहता है तब केवल तकनीकी के आधार पर ऐसे दस्तावेजों को अस्वीकार नहीं किया जा सकता।

सिविल प्रकृति के वादों के शीघ्र निराकरण करने के आशय से सी.पी.सी. में दिनांक 1.7.2002 से प्रभावशील संशोधन किये गये हैं। न्यायालय का समय साक्ष्य अंकित करने में व्यय न हो इस उद्देश्य से आदेश 18 नियम 4 में यह उपबंधित किया गया है कि साक्षी की मुख्य परीक्षा शपथ पत्र के माध्यम से की जा सकती है। अब महत्वपूर्ण प्रश्न यह है कि आदेश 7 नियम 14 (1) तथा आदेश 8 नियम (1क) के तहत पूर्व में प्रस्तुत दस्तावेज तथा शपथ पत्र में साक्षी द्वारा स्वयं प्रस्तुत–प्रदर्शित दस्तावेज ग्राह्य हैं अथवा नहीं ? इस संबंध में विचार करने से पूर्व सुसंगत प्रावधानों का उल्लेख करना समीचीन होगा।

आदेश 7 नियम 14 (3) के अनुसार –

> कोई दस्तावेज जो वादपत्र प्रस्तुत किये जाते समय वादी द्वारा न्यायालय में पेश किया जाना चाहिये था या वादपत्र के साथ जोड़ी गई या उपाबद्ध सूची में प्रविष्ट होना चाहिए था परंतु तद्नुसार प्रस्तुत या प्रविष्ट नहीं किया गया है, वह न्यायालय की अनुमति के बिना, वाद की सुनवाई के समय उसकी ओर से साक्ष्य में नहीं लिया जायेगा।

आदेश 8 नियम (1क) (3) के अनुसार –

कोई दस्तावेज जो प्रतिवादी द्वारा इस नियम के अंतर्गत न्यायालय में प्रस्तुत किया जाना चाहिए था लेकिन इस प्रकार पेश नहीं किया गया है, न्यायालय की अनुमति के बिना वाद की सुनवाई पर उसकी ओर से साक्ष्य में नहीं लिया जाएगा।

इन दोनों नियमों का अपवाद है कि दूसरे पक्ष के साक्षियों की प्रतिपरीक्षा या साक्षी की स्मृति ताजा करने के लिए प्रस्तुत दस्तावेजों के लिए न्यायालय की अनुमति से दस्तावेज पेश करने का बंधन लागू नहीं है।

आदेश 18 नियम 4 (1) के अनुसार –

(1) प्रत्येक मामले में, साक्षी की मुख्य परीक्षा शपथ पत्र पर होगी और उसकी प्रतियां प्रतिपक्ष को, उस पक्षकार द्वारा दी जाएगी जो उसे साक्ष्य के लिए बुलाता है।

परंतु जहां दस्तावेज फाईल किये जाते हैं और पक्षकार उन दस्तावेजों पर भरोसा करते हैं, ऐसे दस्तावेज, जो शपथपत्र के साथ फाईल किए जाते हैं, का सबूत और ग्राह्यता न्यायालय के आदेश के अध्यधीन होगी।

विधिक उपबंधों के आलोक से यह स्पष्ट दर्शित होता है, कि आदेश 7 नियम 14 तथा आदेश 8 नियम 1 का संबंध सुनवाई पूर्व दस्तावेजों के प्रस्तुतिकरण से संबंधित है तथा आदेश 18 नियम 4 (1) के परंतुक का संबंध सुनवाई तिथि के उपरांत साक्ष्य प्रस्तुत किये जाने के समय से है।

आदेश 7 नियम 14 एवं आदेश 8 नियम 1 के तहत समस्त दस्तावेज सुनवाई प्रारंभ होने से पूर्व यदि प्रस्तुत नहीं किये जाते हैं तब ऐसे दस्तावेज न्यायालय की अनुमति के बिना अभिलेख पर नहीं लिये जा सकते, परंतु यदि कोई ऐसे दस्तावेज जो की प्रतिपक्ष के साक्षियों की प्रतिपरीक्षा के प्रयोजन के लिये या स्मृति ताजा करने के लिए दर्शित किये जाते हैं उन पर यह प्रतिबंध लागू नहीं होता है। यद्यपि आदेश 7 नियम 14 (4) में भूलवश वादी के साक्षी शब्द का प्रयोग किया गया है, परंतु न्याय दृष्टांत ***सालेम एडवोकेट बार ऐसोसिऐशन विरूद्ध यूनियम ऑफ इंडिया, ए.आई.आर. 2005 एस.सी. 3353*** में यह स्पष्ट कर दिया गया है कि ऐसा भूलवश उपबंध कर दिया गया है और वादी के साक्षियों के स्थान पर प्रतिवादी के साक्षी पढ़ा जाना उचित होगा।

न्यायदृष्टांत ***ईश्वर सिंह विरूद्ध राजेन्द्र कुमार, 2006 (1) एम.पी. डब्ल्यू. एन. शॉर्ट नोट 135*** में म.प्र. उच्च न्यायालय द्वारा स्पष्ट किया गया है कि साक्षी की स्मृति ताजा करने या प्रतिपरीक्षा के दौरान पेश किए जाने वाले दस्तावेजों पर न्यायालय से अनुमति प्राप्त करने का नियम लागू नहीं होगा। वादी साक्ष्य के प्रक्रम पर यदि प्रतिवादी द्वारा वादी के साक्षियों को उनकी स्मृति ताजा करने के लिए कोई दस्तावेज प्रस्तुत किया जाता हैं या प्रतिरक्षा के लिए पेश किया जाता हैं तो उसके लिए प्रतिवादी को आदेश 8 नियम 1 क (3) सी.पी.सी. के तहत न्यायालय से अनुमति प्राप्त कर दस्तावेज पेश करने की आवश्यकता नहीं है इसी प्रकार प्रतिवादी के साक्षियों की स्मृति ताजा करने के लिए या प्रतिरक्षा के लिए वादी द्वारा प्रतिवादी के साक्ष्य के समय कोई दस्तावेज पेश किए जाते है तब भी आदेश 7 नियम 17 (3) सी.पी.सी. के तहत न्यायालय की अनुमति प्राप्त कर दस्तावेज पेश करने की आवश्यकता नहीं हैं किन्तु इसके अलावा यदि वादी द्वारा वाद पत्र के साथ दस्तावेज पेश नहीं किया

गया हो और वह बाद में पेश करना चाहता है तो उसे आदेश 7 नियम 14 (3) के तहत न्यायालय की अनुमति लेना आवश्यक हैं और अनुमति के लिए ऐसे कारण बताये जाना भी आवश्यक है कि वह दस्तावेज किन कारणों से वाद पत्र के साथ पेश नहीं किया गया या नहीं किया जा सकता। क्योंकि साक्ष्य की कमी की पूर्ति के लिए उक्त उपबंध का सहारा नहीं लिया जा सकता इस संबंध में सर्वोच्च न्यायालय द्वारा प्रतिपादित न्यायदृष्टांत ***हमीद बनाम कुम्मोट टुम्मल कुन्ही पी.पी.अम्मा, 2006 (4) ले.सु.को.टु. 79*** अवलोकनीय है।

दस्तावेज फाइल किए जाते समय दस्तावेज के गुण दोषों पर विचार किए जाने की आवश्यकता नहीं होगी। यदि न्याय के लिए दस्तावेज आवश्यक है तो आवेदन स्वीकार किया जाना चाहिए, जैसा कि म. प्र. उच्च न्यायालय द्वारा न्यायदृष्टांत ***महावीर प्रसाद जैन विरूद्ध शंभू कुचवंदिया, 2005 एम. पी. डब्ल्यू. एन. शॉर्ट नोट 76*** में प्रतिपादित किया गया है। दस्तावेज यदि प्रकरण के न्यायोचित निराकरण के लिए आवश्यक पाये जाये तो उन्हें केवल इस आधार पर अग्राह्य नहीं किया जा सकता हैं कि साक्ष्य समाप्त हो चुकी है और अंतिम स्टेज पर हैं इस संबंध में छत्तीसगढ़ उच्च न्यायालय द्वारा न्यायदृष्टांत ***गोकुल विरूद्ध राजवन्तिन बाई एवं अन्य, 2005 (3)*** मनीषा 33 अवलोकनीय है।

न्यायालय की कार्यवाही में सुनवाई की तिथि से पूर्व दस्तावेज प्रस्तुत किया जाना एवं सुनवाई तिथि पर ऐसे दस्तावेजों को साक्ष्य में ग्राह्य किया जाना सर्वथा भिन्न है, क्योंकि आदेश 7 नियम 14 तथा आदेश 8 नियम 1 यह अपेक्षा करता है कि समस्त महत्वपूर्ण दस्तावेज न्यायालय के अभिलेख पर सनुवाई तिथि से पूर्व प्रस्तुत कर दिया जाए तथा यदि सुनवाई तिथि पर या उसके उपरांत ऐसा दस्तावेज प्रस्तुत किया जाता है, तब न्यायालय की अनुमति के बिना अभिलेख पर नहीं लिया जा सकता। इसका अर्थ यह नहीं है कि मात्र अभिलेख पर दस्तावेज प्रस्तुत किये जाने के समय से वे साक्ष्य में ग्राह्य हो गये हैं।

नवीनतम संशोधित प्रावधानों के अनुसार पक्षकार अपनी ओर से प्रस्तुत साक्षियों का परीक्षण शपथ पत्र के माध्यम से प्रस्तावित करते हैं ओर ऐसे शपथ पत्र में समस्त दस्तावेज प्रदर्शित कर लिये जाते हैं, परंतु दस्तावेजों को साक्ष्य में ग्राह्य–अग्राह्य किये जाने का अधिकार मात्र न्यायालय को होता है।

ऐसा भी हो सकता है कि पक्षकार द्वारा कुछ दस्तावेज सुनवाई तिथि से पूर्व प्रस्तुत नहीं किये गये हो और न्यायालय की अनुमति के बिना ही ऐसे दस्तावेज शपथ पत्र में प्रदर्शित कर लिये गये हों। अतः ऐसे दस्तावेजों को सर्वप्रथम प्रदर्शित करने के पूर्व भी न्यायालय की अनुमति प्राप्त करना आवश्यक होता है और यदि अनुमति प्राप्त कर ली जाती है उसके उपरांत न्यायालय को यह निर्धारण करना होता है कि प्रस्तावित दस्तावेज साक्ष्य में ग्राह्य है या नहीं, क्योंकि ऐसा दस्तावेज जो कि साक्ष्य में ग्राह्य नहीं है और उन पर सर्वप्रथम स्तर पर प्रतिपक्ष द्वारा आपत्ति नहीं की जाती है तब वह पश्चातवर्ती प्रक्रम पर ऐसे दस्तावेजों के संबंध में आपत्ति प्रस्तुत करने से विरक्त हो जाता है।

इस प्रकार कुछ ऐसे दस्तावेज हो जाते हैं जिनकी प्राथमिक साक्ष्य प्रस्तुत न कर बिना अनुमति के द्वितीयक साक्ष्य दस्तावेज के रूप में पेश की जाए और वे प्रदर्शित कर लिये जायें, जबकि ऐसी द्वितीयक साक्ष्य को प्रस्तुत करने से पूर्व विधि द्वारा उपबंधित प्रक्रिया का पालन करना आवश्यक है। इसी प्रकार कोर्ट फीस एक्ट एवं स्टांप अधिनियम के तहत भी यदि अपर्याप्त स्टांपित दस्तावेज बिना

न्यायालय की अनुमति से अथवा प्रतिपक्ष को आपत्ति का अवसर दिये बिना शपथ पत्र में प्रदर्शित कर लिया जाता है, तब ऐसी स्थिति में भी विधिक बाधा है। इस संबंध में भारतीय स्टाम्प अधिनियम, 1899 की धारा 36 महत्वपूर्ण है, जिसके अनुसार जहां कि कोई लिखत साक्ष्य में ग्रहण की गयी है, वहां धारा 61 में यथा उपबंधित के सिवाय ऐसा ग्रहण इस आधार पर कि लिखत सम्यक् रूप से स्टांपित नहीं किया गया है उसे वाद कि प्रक्रिया के किसी भी प्रक्रम में प्रश्नगत नहीं किया जाऐगा।

अतः स्पष्ट है कि ऐसा दस्तावेज जो पर्याप्त रूप से स्टांपित नहीं है वह मात्र शपथपत्र में प्रदर्शित किये जाने से साक्ष्य में ग्राह्य नहीं हो जाता है, उसकी ग्राह्य के संबंध में प्रतिपक्ष को न्यायालय के समक्ष उचित अवसर पर आपत्ति करने का अधिकार है तथा न्यायालय भी ऐसे अपर्याप्त स्टांपित दस्तावेजों को साक्ष्य में ग्राह्य नहीं कर सकता है।

उपरोक्त उपबंधों को आदेश 18 नियम 4 (1) में किए गये प्रावधान मुताबिक देखें तो प्रत्येक मामले में साक्षी की मुख्य परीक्षा शपथपत्र पर होगी और उसकी प्रतियॉ प्रतिपक्ष को उस पक्षकार द्वारा दी जायेगी जो उसे साक्ष्य के लिए बुलाता है, उक्त नियम 4(1) के परन्तुक मुताबिक जहॉ दस्तावेज फाइल किए जाते है और पक्षकार उन दस्तावेजों पर भरोसा करते हैं, ऐसे दस्तावेज जो शपथ पत्र के साथ फाइल किए जाते हैं, के सबूत और ग्राह्यता न्यायालय के आदेश के अध्याधीन होगी। उक्त परन्तुक के संदर्भ में ऊपर वर्णित न्याय दृष्टांतों के मुताबिक दस्तावेजों की ग्राह्यता के संबंध में प्रक्रिया का अनुसरण किया जाना चाहिए अर्थात उक्त परन्तुक के मुताबिक बाद में पेश होने वाले दस्तावेजों के विलंब से पेश किए जाने का समुचित कारण बतलाया जाता है तो न्यायालय को दस्तावेज अभिलेख पर लेने के संबंध में अनुमति प्रदान करना चाहिए, ताकि न्याय का उद्देश्य विफल न हो।

इसी प्रकार यदि किसी पक्ष द्वारा उसकी साक्ष्य समाप्ति पश्चात् सुनवाई के प्रक्रम पर न्यायालय की अनुमति से कोई दस्तावेज प्रस्तुत किया हो तो दस्तावेजों को साक्ष्य में प्रदर्शित कराने के लिये आदेश 18 नियम 17 सीपीसी के अनुसार संबंधित पक्ष को न्यायालय द्वारा पुनः तलब किया जा सकता है। इस संबंध में ***बालकृष्ण विरूद्ध रामा, ए.आई.आर. 2005 बॉम्बे 200*** में माननीय बॉम्बे उच्च न्यायालय द्वारा प्रतिपादित किया गया है कि आदेश 18 नियम 4 के शपथ पत्र के साथ दस्तावेज प्रस्तुत नहीं करना पश्चातवर्ती प्रक्रम पर न्यायालय को दस्तावेज ग्राह्य करने से अक्षम नहीं बनाता है। न्यायालय पश्चातवर्ती प्रक्रम पर अनुमति देता है तो उस दस्तावेज की ग्राह्यता सदैव न्यायालय के आदेश के अधीन होगी।

एस. राथीन स्वामी विरूद्ध एस. भानुमति, ए.आई.आर. 2006 मद्रास 221, में माननीय मद्रास उच्च न्यायालय द्वारा प्रतिपादित किया गया है कि कोई दस्तावेज जो पहले नहीं मिला था, साक्ष्य उपरांत प्रस्तुत किया गया, वह दस्तावेज प्रकरण के निराकरण के लिये महत्वपूर्ण था, तो ऐसे दस्तावेज पर प्रदर्श अंकित कराने हेतु साक्षी को पुनः तलब किया जा सकता है।

इन न्याय–दृष्टांतों से भी स्पष्ट है कि पश्चातवर्ती प्रक्रम पर न्यायालय की अनुमति से प्रस्तुत दस्तावेजों की ग्राह्यता भी न्यायालय के आदेश के अध्याधीन होंगी और उस पर प्रदर्श अंकित करने के लिये साक्षी को न्यायालय द्वारा पुनः तलब किया जा सकता है।

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विधिक समस्याएं एवं समाधान

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

पक्षकार के व्यतिक्रम में खारिज वाद के प्रत्यावर्तन हेतु संस्थित कार्यवाही में अनावेदक (मूल वाद में प्रतिवादी) की मृत्यु का क्या प्रभाव होता है। ऐसे मामलों में परिसीमा संबंधी प्रावधानों की प्रयोज्यता क्या होगी ?

पक्षकार के व्यतिक्रम में खारिज वाद के प्रत्यावर्तन हेतु कार्यवाही सिविल प्रक्रिया संहिता, 1908 के आदेश 9 नियम 4 के अधीन संस्थित की जाती है। जो विविध न्यायिक मामले (Miscellaneous Judicial Case) के रूप में संस्थित होती है। ऐसे मामलों में प्रक्रिया के संबंध में संहिता की धारा 141 में यह प्रावधान किया गया है कि जो प्रक्रिया वादों के विषय में संहिता मे उपबंधित है वहीं प्रक्रिया, ***'जहाँ तक प्रयोज्य हो सकती हो (as far as it can be made applicable)'*** अनुसरित की जाएगी। वाद में किसी पक्षकार की मृत्यु होने पर आदेश 22 के प्रावधान प्रयोंज्य होते है। आदेश 22 के प्रावधान पक्षकार की मृत्यु पर वादाधिकार (Right to sue) शेष होने की दशा में परिसीमा अधिनियम, 1963 के प्रावधानों के अधीन रहते हुए मृत पक्षकार के विधिक प्रतिनिधि को पक्षकार के रूप में संयोजित कर वाद में अग्रसर होने की प्रविधि एवं वादों के उपशमन की परिस्थितियों को वर्णित करते हैं। प्रश्न यह है कि क्या संहिता की धारा 141 के प्रावधान के प्रकाश में संहिता के आदेश 9 के अधीन संस्थित कार्यवाहियों पर आदेश 22 के प्रावधान लागू होंगे। दूसरे शब्दों में पक्षकार के व्यतिक्रम में खारिज वाद के प्रत्यावर्तन हेतु संस्थित कार्यवाही में अनावेदक (मूल वाद में प्रतिवादी) की मृत्यु होने पर आवेदक को परिसीमा अधिनियम, 1963 की अनुसूची के अनुच्छेद 120 के अधीन अनावेदक की मृत्यु की तिथि से नब्बे दिवस के भीतर संहिता के आदेश 22 के अधीन कार्यवाही अग्रसर करना आवश्यक होगा या अन्यथा आदेश 22 के अधीन कार्यवाही न करने पर ऐसा मामला उपशमित. हो जाएगा।

इस संबंध में यह उल्लेखनीय है कि संहिता की धारा 141 स्वयं यह प्रावधान करती है कि प्रकीर्ण कार्यवाहियों में वादों के संबंध में संहिता में उपबंधित ऐसी प्रक्रिया अनुसरित की जाएगी ***जो जहाँ तक ऐसे मामलो में प्रयोज्य हो सकती हो(as far as it can be made applicable)***। चूंकि आदेश 22 के प्रावधान वादाधिकार (Right to sue) शेष होने एवं वादों के उपशमन से संबंधित हैं अतएव यह प्रावधान प्रकीर्ण कार्यवाहियों पर विस्तारित एवं प्रयोज्य नहीं होंगे क्योंकि प्रकीर्ण कार्यवाहियों में वादाधिकार (Right to sue) एवं उपशमन का कोई प्रश्न ही नहीं होता है। इस संबंध में ***सईदा बेगम विरूद्ध अशरफ हुसैन अनवर हुसैन, ए.आई.आर. 1980 एम.पी. 12 = 1980 एम.पी.एल.जे. 46*** में माननीय मध्यप्रदेश उच्च न्यायालय की खण्डपीठ ने प्रतिपादित किया है कि संहिता के आदेश 22 के प्रावधान पक्षकार के व्यतिक्रम में खारिज किए गए वाद के प्रत्यावर्तन हेतु आदेश 9 के अधीन संस्थित कार्यवाहियों पर प्रयोज्य नहीं है। इसी सिद्धान्त का अनुसरण माननीय मध्यप्रदेश उच्च न्यायालय की

एकल पीठ द्वारा ***शिखर चंद्र जैन विरूद्ध मध्यप्रदेश राज्य, 2004 (4) एम.पी.एच.टी. 402*** के मामले में भी किया गया है।

इस प्रकार यह स्पष्ट है कि व्यतिक्रम में खारिज वाद के प्रत्यावर्तन हेतु संस्थित कार्यवाही अनावेदक की मृत्यु होने पर उपशमित नहीं होती है। ऐसी कार्यवाहियों पर सिविल प्रक्रिया संहिता, 1908 के आदेश 22 एवं परिसीमा अधिनियम, 1963 की अनुसूची के अनुच्छेद 120 के प्रावधान प्रयोज्य नहीं है। अतएव अनावेदक की मृत्यु होने पर अनावेदक के विधिक प्रतिनिधियों को पक्षकार बनाने हेतु नब्बे दिवस की परिसीमा ऐसे मामलों में लागू नहीं होती है। ऐसे मामलों में मृत अनावेदक के विधिक प्रतिनिधियों को सिविल प्रक्रिया संहिता, 1908 के आदेश 1 नियम 10 के अधीन पक्षकार बनाया जा सकता है तथा परिसीमा अधिनियम, 1963 की अनुसूची के अनुच्छेद 137 के अधीन ऐसी कार्यवाही अनावेदक की मृत्यु से तीन वर्ष की अवधि में की जा सकती है।

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What should be the jurisdiction of 'Children's Courts notified by the Government of Madhya Pradesh vide Notification No. F.No. 17(E)38/2010/21-B(I), dated 07.01.2011 u/s 25 of the Commission for Protection of Child Rights Act, 2005?

Section 25 of the Commission for Protection of Child Rights Act reads as under:

> **"25. Children's Courts.** – For the purpose of providing speedy trial of offences against children or of violation of child rights, the State Government may, with the concurrence of the Chief Justice of the High Court by notification, specify at least a Court in the State or specify, for each district, a Court of Session to be a Children's Court to try the said offences:
>
> Provided that nothing in this section shall apply if –
>
> (a) a Court of Session is already specified a special Court; or
>
> (b) a special court is already constituted, for such offences under any other law for the time being in force."

After the constitution of Children's Courts in Madhya Pradesh, the problems in the subordinate Court have arose regarding the nature of cases which such Children's Court is competent to try under this provision, as in this Act, offences against children have not been defined specifically.

Looking to the problems, recently the Sessions Judge, East-Nimar, Khandwa had referred following four questions under Section 395 (2) of Cr.P.C., 1973 to the Hon'ble High Court of M.P.:

1. What should be the meaning of expression 'child' which is not defined in the Act of 2005?
2. Whether each and every offence irrespective of its gravity and nature in which a child happens to be a complainant or victim either alone or with other persons who are not child

has to be tried exclusively by the Children's Court, which is a Court of Sessions?

3. Whether the Children's Court can directly take cognizance in such matters or a committal order is required at the hands of the Magistrate?

4. What is the expense and scope of expression 'offence against child' and 'violation of child rights' and what sort of trial or proceedings are required to be carried out in case of 'violation of child rights' which are brought to the notice of the Children's Court?

The aforementioned four referred questions under Criminal Reference No. 1/2012 have been answered by the Division Bench of High Court of Madhya Pradesh, In ***reference v. Vinod, Jabalpu***r vide Order dated 07.08.2012 as under:

1. The meaning of expression 'Child' for the purpose of the Act would be a person who has not completed 18th year of age.

2. Each and every offence in which a child happens to be complainant or victim shall not necessarily be deemed to be an offence triable under the Act unless in respect of it a proceeding for prosecution has been initiated by concerned Government or authority on the recommendation of Commission constituted under the Act. In respect of the prosecution initiated by the complainant or police in the absence of there being recommendation from the Commission, ordinary procedure provided under the Code of Criminal Procedure has to be followed. Even if the complainant or a victim is a child alone or there are other persons who are not child, the case has to be tried exclusively by the Children's Court constituted under Section 25 of the Act, if prosecution has been recommended by the Commission.

3. Children's Court constituted under Section 25 of the Act cannot directly take cognizance in such matters. It can take cognizance only if the case has been committed to it by Magistrate as provided in the Code of Criminal Procedure.

4. Only those kind of cases in respect of which the Commission finds 'violation of child rights of a serious nature' or 'contravention of provisions of any law for the time being in force' and recommends to the concerned Government or authority for initiation of the proceedings for prosecution, shall be deemed to be cognizable and triable by the specified Children's Court constituted under Section 25 of the Act. In all other cases, ordinary procedure provided in the Code of Criminal Procedure shall be followed.

Therefore, now the matters may be dealt with by the Children's Courts under the Commission for Child Rights Act, 2005 as per the above mentioned legal position clarified by the Division Bench of our High Court.

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PART - II

NOTES ON IMPORTANT JUDGMENTS

212. ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Section 12(1)(a)
ACCOMMODATION CONTROL RULES, 1966 (M.P.) – Rule 15
EVIDENCE ACT, 1872 – Section 114 Illustration (f)
GENERAL CLAUSES ACT, 1897 – Section 27
Demand notice – Service – Notice was returned back with the endorsement of postman that despite information, defendant has not received the notice – Defendant has not disputed the address as given in the notice – Held, service of notice sent on the correct address by registered post may be presumed to be effective service of the said notice – Trial Court erred in law in refusing the decree of eviction on account of non-service of demand notice.

Agrawal Medical Agencies (M/S) v. Govind Prasad
Judgment dated 23.08.2011, passed by the High Court of M.P. in F.A. No. 788 of 2005, reported in ILR (2012) MP 942

Held:

It is apparent under illustration (f) of section 114 of Evidence Act that the court in the common course of business may presume the existence of any fact which it thinks likely to have happened. The said presumption may be drawn looking to the common course of natural events, human conduct and course of business in relation to the facts of the particular case.

It is clear under section 27 of General Clauses Act that the service of the notice sent on the correct address by registered post may be presumed to be effective service of the said notice. The Apex Court in the case of ***Jagdish Singh v. Natthu Singh, (1992) 1 SCC 647, State of M.P. v. Hiralal and others, (1996) 7 SCC 523*** and ***C.C. Alavi Haji v. Palapetty Muhammed and another, (2007) 6 SCC 555*** has held that when a notice is sent by registered post and is returned with a postal endorsement "refused" or "not available in the house" or "house locked" or "shop closed" or "addressee not in station", due service has to be presumed. In the context of the said legal position looking to the fact of the present case despite intimation the defendant was not found available, however, by the said endorsement summons were returned to Court. In the present case the defendant has not disputed the address as given in the notice, more so he himself filed affidavits endorsing the said address. Rule 15 of the person or by forwarding it to the person by registered post with acknowledgment due. The present case relates to subsequent mode wherein by forwarding the notice to the person it has been sent by registered post. After dispatch how the service be presumed it has not been specified in the said Rules of 1966. How the service of notice sent by registered post be accepted has been specified in section 27 of the General Clauses Act and the presumption as enumerated under section 114

Illustration (f) of the Evidence Act. Thus the finding of not having service of demand notice on person, recorded by the trial Court in reference to Rule 15 of the Rules of 1966 is based on the misinterpretation and liable to be set aside. In the opinion of this Court looking to the facts of this case notice of demand of rent sent by the landlord was duly served on the tenant.

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213. ARBITRATION AND CONCILIATION ACT, 1996 – Sections 5, 11, 12, 13 and 33

(i) Apprehension of bias against the arbitrator – Vague and general objection that arbitrator was bias and had pre-disposition to decide against objector is not sufficient to prove bias.

(ii) Bias of arbitrator – Arbitrator contesting case filed against arbitration award does not reflect bias of arbitrator since he has no choice to rebut allegations made against him as he was made one of the parties to the appeal.

Ladli Construction Company Private Limited v. Punjab Police Housing Corporation Limited and others

Judgment dated 23.02.2012 passed by the Supreme Court in Civil Appeal No. 947 of 2006, reported in (2012) 4 SCC 609

Held:

The Contractor consciously agreed for the disputes between the parties to be referred for arbitration to the Chief Engineer of the Corporation. The Contractor, at the time of agreement, was in full knowledge of the fact that the Chief Engineer is under full control and supervision of all civil engineering affairs of the Corporation, yet it agreed for resolution of disputes between the parties by him as an arbitrator. It is a fact that the Chief Engineer inspected the progress of the work given to the Contractor along with other engineers of the Corporation on October 26, 1990. In the course of inspection, the slow progress of the work was brought to the notice of the Contractor on that date. There was nothing unusual about it and, as a matter of fact, on the contract being terminated on May 8, 1991, it was the Contractor who made an application for appointment of arbitrator in terms of Clause 25A of the agreement as it was well aware that the inspection by the arbitrator did not disqualify him to be arbitrator.

In the application for appointment of arbitrator, no allegation of any bias or hostility was made against the named arbitrator, i.e., Chief Engineer of the Corporation, rather the Contractor prayed for appointment of arbitrator in terms of the arbitration Clause 25A. When the application came up for consideration before the Sub Judge on May 13, 1992, the advocate appearing for the Contractor also submitted for appointment of the arbitrator as named in the agreement. Before the Court, no allegation was made that the contract was terminated at the instance or behest of the Chief Engineer. These facts clearly show that no case of bias on the part of the Chief Engineer was pleaded or

pressed by the Contractor before the court in the proceedings for appointment of the arbitrator. There is nothing to indicate that something happened after May 13, 1992 which prompted the Contractor to write to the arbitrator on June 29, 1992 that it had lost faith in him.

It is pertinent to notice that on May 13, 1992 while referring the disputes between the parties for arbitration as per Clause 25A of the agreement, the Contractor as well as the Corporation were permitted to file claim and counter claim before the arbitrator. The Corporation filed its claim against the Contractor on June 15, 1992. Upon receipt of the claim by the Corporation, the arbitrator called upon the Contractor to appear before him on June 25, 1992. The Contractor did not appear and instead sent a letter to the arbitrator on June 29, 1992 intimating him that his appointment as arbitrator was not acceptable. No steps were taken by the Contractor for removal of the arbitrator immediately. The application for removal of the arbitrator was made almost after 26 days.

Although the Contractor prayed before the Sub Judge for stay of the proceedings before the arbitrator but it was not successful in getting any such order on July 24, 1992, or on the subsequent dates, namely, July 30, 1992, August 3, 1992 and August 6, 1992 from the court. In the absence of any stay order from the court and non-appearance by the Contractor, the arbitrator was left with no choice but to proceed ex parte and conclude the arbitral proceedings. Merely because the award came to be passed on August 18, 1992, i.e., a day before the next date fixed before the Sub Judge, it cannot be said that the arbitrator concluded the proceedings hastily or he was biased.

The legal position that a contractor is bound by the contract if he has agreed to submit the disputes to the engineer for arbitration although he has to deal with such engineer under the contract. It needs no emphasis that once the dispute is referred to such arbitrator, the arbitrator has to act fairly and objectively and the proceedings must meet the requirements of principles of natural justice.

Where parties enter into a contract knowing the role, authority or power of the Chief Engineer in the affairs relating to the contract but nevertheless agree for him to be arbitrator and name him in the agreement to adjudicate the dispute/s between the parties, then they stand bound by it unless a good or valid legal ground is made out for his exclusion.

Except raising the vague and general objections that the arbitrator was biased and had predisposition to decide against the Contractor, no materials, much less cogent materials, have been placed by the Contractor to show bias of the arbitrator. No sufficient reason appears on record as to why the arbitrator should not have proceeded with the arbitral proceedings. The test of reasonable apprehension of bias in the mind of a reasonable man is not satisfied in the factual situation.

We may now deal with the submission of the learned counsel for the Contractor that bias on the part of the arbitrator is also reflected from the fact that he has contested the present Appeal and filed the affidavit in opposition.

What would have the arbitrator done when he has been personally impleaded as respondent in the Appeal and the allegations of bias have been made against him. He was left with no choice but to rebut the allegations by filing his affidavit. The arbitrator did what any other person in his place would have done in the circumstances.

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214. ARBITRATION AND CONCILIATION ACT, 1996 – Section 31 (7) (a) (b) Payment of award to decree holder – The award amount deposited in Court is nothing but a payment to the decree holder – Liability of judgment debtor to pay interest ceases on the date amount is deposited in Court.

H.P. Housing & Urban Devt. Auth. & Anr. v. Ranjit Singh Rana
Judgment dated 12.03.2012 passed by the Supreme Court in Civil Appeal No. 2751 of 2012, reported in AIR 2012 SC 1337

Held:

The word 'payment' may have different meaning in different context but in the context of Section 37(1)(b); it means extinguishment of liability arising under the award. It signifies satisfaction of the award. The deposit of the award amount into the Court is nothing but a payment to the credit of the decree- holder. In this view, once the award amount was deposited by the appellants before the High Court on May 24, 2001, the liability of post-award interest from May 24, 2001 ceased. The High Court, thus, was not right in directing the appellants to pay the interest @ 18% p.a. beyond May 24, 2001.

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215. BENAMI TRANSACTIONS (PROHIBITION) ACT, 1988 – Section 5

(i) Saved transaction – Section 4 (3) (b) specifically saves a transaction where the property is held by a person who stands in a fiduciary capacity for the benefit of a person towards whom he stands in such capacity.

(ii) Fiduciary capacity – Connotation of – It implies a relationship that is analogous to the relationship between a trustee and beneficiaries of the trust.

(iii) Determination of fiduciary relationship – In determining whether a relationship is based on trust and confidence, relevant to determine whether they stand in a fiduciary capacity, the court shall have to take into consideration the factual context in which the question arises for it is only in the factual backdrop that the existence or otherwise of a fiduciary relationship can be deduced in a given case.

Marcel Martins v. M. Printer and others
Judgment dated 27.04.2012 passed by the Supreme Court in Civil Appeal No. 6645 of 2003, reported in (2012) 5 SCC 342

Held:

It is common ground that although the sale deed by which the property was transferred in the name of the appellant had been executed before the enactment of above legislation yet the suit out of which this appeal arises had been filed after the year 1988. The prohibition contained in Section 4 would, therefore, apply to such a suit, subject to the satisfaction of other conditions stipulated therein. In other words unless the conditions contained in Section 4(1) and (2) are held to be inapplicable by reason of anything contained in sub-section (3) thereof the suit filed by plaintiffs- respondents herein would fall within the mischief of Section 4.

Sub-section (3) to Section 4 is in two distinct parts. The first part comprises clause (a) to Section 4(3) which deals with acquisitions by and in the name of a coparcener in a Hindu undivided family for the benefit of such coparceners in the family. There is no dispute that the said provision has no application in the instant case nor was any reliance placed upon the same by learned counsel for the plaintiffs-respondents.

It is manifest that while the expression "fiduciary capacity" may not be capable of a precise definition, it implies a relationship that is analogous to the relationship between a trustee and the beneficiaries of the trust. The expression is in fact wider in its import for it extends to all such situations as place the parties in positions that are founded on confidence and trust on the one part and good faith on the other.

In determining whether a relationship is based on trust or confidence, relevant to determining whether they stand in a fiduciary capacity, the Court shall have to take into consideration the factual context in which the question arises for it is only in the factual backdrop that the existence or otherwise of a fiduciary relationship can be deduced in a given case.

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216. CIVIL PROCEDURE CODE, 1908 – Section 9 and Order 21 Rules 97, 101 & 103

Execution of decree, objection as to – If anybody is objecting to the execution of a decree, he becomes an objector and the only remedy is to file an objection under Order 21 Rules 97, 101 and 103 of CPC – No separate suit would be maintainable in this respect.

Mohd. Ayub Khan since deceased, through L.Rs. v. Ashif Ali and others

Judgment dated 24.04.2012 passed by the High Court of M.P. in F. A. No. 913 of 2007, reported in 2012 (2) MPLJ 693

Held :

In the Case of ***Pt. Ramgulam Choubey and another v. Mahendra Kumar and another, 1972 MPLJ 254 = ILR 1977 MP 693,*** this Court has considered the scope

of objection, has further dealt with whether a third party can make an objection or not and when a third party became an objector. It has been categorically held that if somebody is claiming right, title or interest over the property in respect of which a decree has been passed, he has a right to file an objection under Order 21, Rule 97 of Civil Procedure Code, This law has been further considered by the Full Bench of this Court in the case of ***Smt. Usha Jain and others v. Manmohan Bajaj and others, 1980 MPLJ 623 = ILR 1982 MP 837*** and has also clarified the scope of objection to be raised by an objector under the provisions of Order 21, Rule 97 of Civil Procedure Code.

A plain and simple reading of Order 21 Rules 97, 101 and 103 will make it clear that if anybody is objecting to the execution of a decree, he become an objector and then he has only remedy to file an application/objection under Order 21, Rules 97, 101 and 103 of Civil Procedure Code, and no separate suit would be maintainable in that respect. The Madras High Court has considered these aspect in light of the decision rendered by the Apex Court in some of the cases and has come to the conclusion that the provisions of Order 21, rule 97 and 101 of civil Procedure Code creates an embargo that no separate suit would lie in respect of the objections/claim made with respect to the property in respect of which a judgment and decree has been passed. However, an objection in that respect can be raised in the execution proceedings itself under the aforesaid provisions. This particular aspect is not to be adjudicated once again as it is not res integra.

As has been stated hereinabove, such law has already been considered in various cases by the different High Courts and in all such laws, it has been held that if an objection can be made under Order 21, Rules 97 and 101 of Civil Procedure Code, there is no right available to file a fresh suit with respect to the very same claim.

The appellants were in possession of the land which was required to be sold in execution of the decree granted in favour of the respondent No. 1. If they were of the opinion that their rights are going to be affected over the said land, they were nothing, but the objectors of the execution of the said judgment and decree and, therefore, were liable to file an objection under Order 21, Rules 97 and 101 of Civil Procedure Code. It was not necessary for them to file a suit independently.

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217. CIVIL PROCEDURE CODE, 1908 – Section 9 and Order 23 Rule 3-A

(i) Bar to lie suit – It does not apply to a decree passed by revenue authority of limited and restricted jurisdiction.

(ii) Under Section 9 of CPC, a Civil Court has inherent jurisdiction to try all types of suits unless barred expressly or by necessary implication of any law.

Horil v. Keshav & Anr.

Judgment dated 20.01.2012 passed by the Supreme Court in Civil Appeal No. 776 of 2012, reported in AIR 2012 SC 1262

Held:

We are of the view that Revenue courts are neither equipped nor competent to effectively adjudicate on allegations of fraud that has overtones of criminality and the courts really skilled and experienced to try such issues are the courts constituted under the Code of Civil Procedure.

It is also well settled that under section 9 of the Civil Procedure Code, the civil court has inherent jurisdiction to try all types of civil disputes unless its jurisdiction is barred expressly or by necessary implication, by any statutory provision and conferred on any other tribunal or authority. We find nothing in Order XXIII Rule 3-A to bar the institution of a suit before the civil court even in regard to decrees or orders passed in suits and/or proceedings under different statutes before a court, tribunal or authority of limited and restricted jurisdiction.

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***218. CIVIL PROCEDURE CODE, 1908 – Section 100**
LIMITATION ACT, 1963 – Article 65

(i) Question of fact – Finding of fact even if erroneous would not be disturbed unless the finding is shown to be perverse and based on surmises and conjectures.

(ii) Adverse possession – Party pleading adverse possession, apart from pleading actual possession has also to plead the period and date from which he claims possession – It has to prove that possession was continuous, exclusive and undisturbed to the knowledge that he is the real owner of the land – Also required to demonstrate hostile title and has to communicate his hostility to the real owner.

Ashok Kumar v. Krishna Chand & Ors.

Judgment dated 15.03.2012, passed by the High Court of M.P. in S.A. No. 138 of 1995, reported in ILR (2012) MP 985

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219. CIVIL PROCEDURE CODE, 1908 – Section 144
Restitution – Concept of restitution is that when a decree is reversed, law imposes an obligation on the party who received undue benefit of the erroneous decree to restore the other party what the other party has lost during the period when the decree was in operation.

State of Gujarat & Ors v. Essar Oil Limited and Anr.

Judgment dated 17.01.2011 passed by the Supreme Court in Civil Appeal No. 599 of 2012, reported in AIR 2012 SC 1146

Held:

The concept of restitution is basically founded on the idea that when a decree is reversed, law imposes an obligation on the party who received an unjust benefit of the erroneous decree to restitute the other party for what the

other party has lost during the period the erroneous decree was in operation. Therefore, the Court while granting restitution is required to restore the parties as far as possible to their same position as they were in at the time when the Court by its erroneous action displaced them. In the case of ***Lal Bhagwant Singh v. Sri Kishen Das*** reported in ***AIR 1953 SC 136,*** Justice Mahajan speaking for a unanimous three-Judge Bench of this Court explained the doctrine of restitution in the following words:-

> "...the principles of the doctrine of restitution which is that on the reversal of a judgment the law raises an obligation on the party to the record who received the benefit of the erroneous judgment to make restitution to the other party for what he had lost and that it is the duty of the Court to enforce that obligation unless it is shown that restitution would be clearly contrary to the real justice of the case..."

The concept of restitution is virtually a common law principle and it is a remedy against unjust enrichment or unjust benefit. The core of the concept lies in the conscience of the Court which prevents a party from retaining money or some benefit derived from another which he has received by way of an erroneous decree of Court.

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220. CIVIL PROCEDURE CODE, 1908 – Section 151 and Order 21 Rule 32 (5) Whether possession can be restored to decree holder under execution of decree of permanent prohibitory injunction, if judgment debtor had gained the possession on decretal property by violating the decree? Held, Yes – Executing Court can restore the possession by exercising power under Order 21 Rule 32 (5) read with its Explanation or by exercising power u/s 151 of CPC.

Toran Singh v. Imrat Singh and Others

Judgment dated 03.05.2012, passed by the High Court of M.P. in W.P. No. 4322 of 2007, reported in w2012 (3) MPHT 170

Held:

The main defence of the judgment debtor is that the suit was only for declaration and permanent injunction and it was not for possession and, therefore in execution proceedings the Trial Court cannot travel beyond what had been prayed and granted.

It is relevant to notice here that the Trial Court in its judgment has given a specific finding that petitioner is in possession and accordingly directed that his right and possession be not disturbed and a permanent injunction in this regard was issued. On the cost of repetition, it may be noticed that this finding of Trial Court was affirmed by this Court. Thus, this fact cannot be disputed that the allotment with regard to the petitioner was not disturbed and petitioner was in possession. Thus, in view of the aforesaid findings with regard to allotment and

possession in favour of the petitioner, if petitioner claims enforcement of judgment and decree, the question is, whether he can seek enforcement of this nature of decree in execution proceedings.

In my considered opinion, the Court below has given specific finding regarding allotment of land in favour of the petitioner which had not been cancelled, coupled with the finding that the petitioner is in possession. In the strength of these findings, the permanent injunction was granted with further direction to not to disturb the petitioner from the possession. If contrary to aforesaid judgment and decree, judgment debtor had disturbed and gained possession, it amounts to defeating the decree passed by the Court below. Thus, it has to be held that the judgment debtor forcibly dispossessed the plaintiff in violation of order or injunction and took possession of the property. The Executing Court has ample jurisdiction to prevent the decree being flouted and to do justice to the plaintiff by putting back the plaintiff in possession of the property.

In the opinion of this Court, the Executing Court has power and jurisdiction to pass any order to see that the decree is enforced and implemented and it is obeyed by the judgment debtor. Even a decree of a permanent prohibitory injunction needs to be enforced as per the said Explanation. If the judgment debtor had gained possession on the decree-holder's property by violating decree, said judgment debtor needs to be expelled by the Executive Court by exercising powers under Order 21 Rule 32 or by exercising inherent powers under Section 151 of CPC.

The Executing Court is not justified in closing the matter about delivery of possession on a hyper technical ground that decree for prohibitory injunction cannot be enforced in the manner prayed by the decree holder. The decision is bad in law and if this decision is permitted to stand, it will lead to a situation of lawlessness and the decree holder will be compelled to file another suit for possession. This is not the intention of Order 21 Rule 32 (5) and the Explanation. The duty of the Court is to see that the inherent powers are exercised when needs to be exercised, otherwise the litigant will lose faith in Courts and they may resort to other illegal short cuts than approaching the Civil Court.

Same view is taken by Punjab and Haryana High Court in judgment reported in ***Banwarilal v. Municipal Committee, Kanina, AIR 2007 Punjab and Haryana 55.*** On the basis of aforesaid analysis, I am unable to uphold reason given by the Court below.

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221. CIVIL PROCEDURE CODE, 1908 – Order 6 Rule 17

Amendment of pleadings – Suit came to be filed in 2007 and the amendment application was filed in 2008 i.e. before commencement of the trial – In the proposed amendment, plaintiff wanted to explain how the money was paid, though necessary averments in the form of foundation had already been laid in the original plaint – It was held that the plaintiff was not altering the cause of action and in no way prejudice the defendants – Legal position explained.

Rameshkumar Agarwal v. Rajmala Exports Private Limited and others

Judgment dated 30.03.2012 passed by the Supreme Court in Civil Appeal No. 3295 of 2012, reported in (2012) 5 SCC 337

Held:

In *Rajkumar Gurawara v. S.K. Sarwagi & Company Private Limited, (2008) 14 SCC 364,* this Court considered the scope of amendment of pleadings before or after the commencement of the trial. In paragraph 18, this Court held as under :–

> "18.....It is settled law that the grant of application for amendment be subject to certain conditions, namely, (i) when the nature of it is changed by permitting amendment; (ii) when the amendment would result in introducing new cause of action and intends to prejudice the other party; (iii) when allowing amendment application defeats the law of limitation....."

In *Revajeetu Builders & Developers v. Narayanaswamy & Sons, (2009) 10 SCC 84,* this Court once again considered the scope of amendment of pleadings. In paragraph 63, it concluded as follows:

> *"Factors to be taken into consideration while dealing with applications for amendments*
>
> 63. On critically analysing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment:
>
> (1) whether the amendment sought is imperative for proper and effective adjudication of the case;
>
> (2) whether the application for amendment is bona fide or mala fide;
>
> (3) the amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;
>
> (4) refusing amendment would in fact lead to injustice or lead to multiple litigation;
>
> (5) whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case; and
>
> (6) as a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

These are some of the important factors which may be kept in mind while dealing with application filed under Order 6 Rule 17. These are only illustrative and not exhaustive."

It is clear that while deciding the application for amendment ordinarily the Court must not refuse bona fide, legitimate, honest and necessary amendments and should never permit mala fide and dishonest amendments. The purpose and object of Order VI Rule 17 of the Code is to allow either party to alter or amend his pleadings in such manner and on such terms as may be just. Amendment cannot be claimed as a matter of right and under all circumstances, but the Courts while deciding such prayers should not adopt a hyper-technical approach. Liberal approach should be the general rule particularly, in cases where the other side can be compensated with costs. Normally, amendments are allowed in the pleadings to avoid multiplicity of litigations.

In view of the fact that the amendment application came to be filed immediately after filing of the suit (suit came to be filed in 2007 and the amendment application was filed in 2008) i.e. before commencement of the trial and taking note of the fact that the learned single Judge confined the relief only to a certain extent and also that in the proposed amendment the plaintiff wants to explain how the money was paid, though necessary averments in the form of foundation have already been laid in the original plaint, we hold that by this process the plaintiff is not altering the cause of action and in any way prejudice defendants.

By the present amendment, the plaintiff furnished more details about the mode of payment of consideration. Accordingly, we hold that there is no inconsistency and the amendment sought for is not barred by limitation. We fully agree with the conclusion arrived at by the learned single Judge and the Division Bench of the High Court.

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222. CIVIL PROCEDURE CODE, 1908 – Order 8 Rule 10

Non-filing of written statement, consequence of – Held, would not have penal consequence – Court should proceed consciously and exercise its discretion in a just manner – Even in absence of written statement, burden of proof would remain on the plaintiff to discharge it – Legal position explained.

C.N. Ramappa Gowda v. C.C. Chandregowda (dead) by LRs. and another

Judgment dated 23.04.2012 passed by the Supreme Court in Civil Appeal No. 3710 of 2012, reported in (2012) 5 SCC 265

Held:

Reliance placed on the affidavit in a blindfold manner by the trial court merely on the ground that the defendant had failed to file written statement would amount to punitive treatment of the suit and the resultant decree would

amount to decree which would be nothing short of a decree which is penal in nature.

We find sufficient assistance from the apt observations of this Court in ***Kailash v. Nanhku, (2005) 4 SCC 480***, which has held that the effect of non-filing of the written statement and proceeding to try the suit is clearly to expedite the disposal of the suit and is not penal in nature wherein the defendant has to be penalised for non filing of the written statement by trying the suit in a mechanical manner by passing a decree. We wish to reiterate that in a case where written statement has not been filed, the Court should be a little more cautious in proceeding under Order 8 Rule 10 CPC and before passing a judgment, it must ensure that even if the facts set out in the plaint are treated to have been admitted, a judgment and decree could not possibly be passed without requiring him to prove the fact pleaded in the plaint.

It is only when the Court for recorded reasons is fully satisfied that there is no fact which needs to be proved at the instance of the plaintiff in view of the deemed admission by the defendant, the Court can conveniently pass a judgment and decree against the defendant who has not filed the written statement. But, if the plaint itself indicates that there are disputed questions of fact involved in the case arising from the plaint itself giving rise to two versions, it would not be safe for the Court to record an ex-parte judgment without directing the plaintiff to prove the facts so as to settle the factual controversy. In that event, the ex-parte judgement although may appear to have decided the suit expeditiously, it ultimately gives rise to several layers of appeal after appeal which ultimately compounds the delay in finally disposing of the suit giving rise to multiplicity of proceeding which hardly promotes the cause of speedy trial.

However, if the Court is clearly of the view that the plaintiff's case even without any evidence is ***prima facie*** unimpeachable and the defendant's approach is clearly a dilatory tactic to delay the passing of a decree, it would be justified in appropriate cases to pass even an uncontested decree. What would be the nature of such a case ultimately will have to be left to the wisdom and just exercise of discretion by the trial court who is seized of the trial of the suit.

When we examined the instant matter on the anvil of what has been stated above, we have noticed that the trial court has decreed the suit without assigning any reason how the plaintiff is entitled for half share in the property. The same is absolutely cryptic in nature wherein the trial court has not critically examined as to how the affidavit filed by the plaintiff in support of his plea of jointness of the family was proved on relying upon Ex.P-1 to P-10 without even discussing the nature of the document indicating that the suit property was a joint property. Ex.P- 1 to P-10 are the preliminary records viz. Atlas, Tipni Book, R.R. Pakka Book, Settlement Akarband, sale deeds etc. The trial court although relied upon these documents, it has not elaborated critically as to why these documents have been believed without indicating as to how it proves the plea that the property always remained joint in nature and had never been partitioned between

the parties. Even if the trial court relied upon these documents to infer that the property was joint in nature, it failed to record any reason as to whether the property was never partitioned among the coparceners.

It is a well-acknowledged legal dictum that assertion is no proof and hence, the burden lay on the plaintiff to prove that the property had not been partitioned in the past even if there was no written statement to the contrary or any evidence of rebuttal. The trial court in our view clearly adopted an erroneous approach by inferring that merely because there was no evidence of denial or rebuttal, the plaintiff's case could be held to have been proved. The trial court, therefore, while accepting the plea of the plaintiff-appellant ought to have recorded reasons even if it were based on ex-parte evidence that the plaintiff had succeeded in proving the jointness of the suit property on the basis of which a decree of partition could be passed in his favour.

As a consequence of the aforesaid analysis and the reasons recorded hereinabove, we are of the view that the High Court was legally justified in setting aside the judgment and decree of the trial court and allowing the appeal to the limited extent of remanding the matter to the trial court for a ***de-novo*** trial after permitting the defendant-respondent to file the written statement. The appeal consequently stands dismissed. However, we are conscious of the fact that the plaintiff/appellant for no fault on his part has been forced to entangle himself in the appeal before the High Court as respondent giving rise to an appeal before this Court, although the defendant/respondent had leisurely failed to file written statement in spite of numerous opportunities to file the same and also had failed to cross-examine the plaintiff witnesses, but once the decree for partition of half share was passed in favour of the plaintiff/appellant, the defendant/respondent promptly challenged the same by filing an appeal before the High Court.

Since the disposal of the suit for partition has now been dragged into a protracted retrial of the suit, we consider it legally just and appropriate to balance the scales of equity and fairplay by awarding a sum of rupees twenty five thousand by way of a token cost to the plaintiff/appellant to be paid by the defendant / respondent expeditiously as the impugned order of the High court directing retrial shall be given effect to only thereafter.

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223. CIVIL PROCEDURE CODE, 1908 – Order 21 Rule 32 and Order 23 Rule 3

Pre-mature application for execution of compromise decree – Maintainability of – Held, there is nothing in the various provisions relating to execution under Order 21 CPC which lays down that pre-mature filing of an execution petition would entail its rejection – Position explained.

Pushpa Sahakari Avas Samiti Limited v. Gangotri Sahakari Avas Samiti Limited and others

Judgment dated 30.03.2012 passed by the Supreme Court in Civil Appeal No. 8297 of 2004, reported in (2012) 4 SCC 751

Held:

After referring to the dictum laid down in *Vithelbhai (P) Ltd. v. Union Bank of India (2005) 4 SCC 315* in extenso as we find that the Bench has given emphasis on various aspects, namely, an issue getting into the root of the jurisdiction of the Court; causing of irreparable and manifest injustice; adjustment of equities; concept of statutory bar; presentation that invites a void action and anything that affects the rights of the other party; and obtaining of leave of the Court or authority where it is a mandatory requirement, etc. On a perusal of the various provisions relating to execution as enshrined under Order XXI of the Code, we do not find anything which lays down that premature filing of an execution would entail its rejection. The principles that have been laid down for filing of a premature suit, in our considered opinion, do throw certain light while dealing with an application for execution that is filed prematurely and we are disposed to think that the same can safely be applied to the case at hand.

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224. CIVIL PROCEDURE CODE, 1908 – Order 21 Rule 32 and Order 39 Rule 2-A

CONTEMPT OF COURTS ACT, 1971 – Section 2(b)

(i) Disobedience/breach of an injunction – Application of Order 39 Rule 2-A CPC lies only where such injunction is granted under Order 39 Rules 1 and 2 CPC during the pendency of the suit – Order 39 Rule 2-A CPC does not include the case of violation of permanent injunction granted by decree – Position reiterated.

(ii) Breach of undertaking – If it is given to the Court during the pendency of the suit on the basis of which the suit itself has been disposed of becomes a part of the decree and breach of such undertaking has to be dealt with in execution proceedings under Order 21 Rule 32 CPC and not by means of contempt proceedings – Legal position explained.

(iii) Contempt proceedings – Availability of – Law does not permit to skip the remedies available under Order 21 Rule 32 CPC and restore contempt proceedings – Position explained.

Kanwar Singh Saini v. High Court of Delhi

Judgment dated 23.09.2011 passed by the Supreme Court in Criminal Appeal No. 1798 of 2009, reported in (2012) 4 SCC 307

Held:

Application under Order 39 Rule 2A CPC lies only where disobedience/ breach of an injunction granted or order complained of was one, that is granted

by the court under Order 39 Rules 1 & 2 CPC, which is naturally to enure during the pendency of the suit. However, once a suit is decreed, the interim order, if any, merges into the final order. No litigant can derive any benefit from mere pendency of case in a Court of Law, as the interim order always merges in the final order to be passed in the case and if the case is ultimately dismissed, the interim order stands nullified automatically. [Vide: ***Dr. A.R. Sircar v. State of U.P. 1993 Suppl. (2) SCC 734; Shiv Shanker v. UPSRTC, 1995 Suppl (2) SCC 726; Arya Nagar Inter College, v. Sree Kumar Tiwary, AIR 1997 SC 3071; GTC Industries Ltd. v. Union of India, AIR 1998 SC 1566;*** and ***Jaipur Municipal Corpn. v. C.L. Mishra, (2005) 8 SCC 423***].

In case there is a grievance of non-compliance of the terms of the decree passed in the civil suit, the remedy available to the aggrieved person is to approach the execution court under Order 21 Rule 32 CPC which provides for elaborate proceedings in which the parties can adduce their evidence and can examine and cross-examine the witnesses as opposed to the proceedings in contempt which are summary in nature. Application under Order 39 Rule 2A CPC is not maintainable once the suit stood decreed. Law does not permit to skip the remedies available under Order 21 Rule 32 CPC and resort to the contempt proceedings for the reason that the court has to exercise its discretion under the Act 1971 when an effective and alternative remedy is not available to the person concerned. Thus, when the matter relates to the infringement of a decree or decretal order embodies rights, as between the parties, it is not expedient to invoke and exercise contempt jurisdiction, in essence, as a mode of executing the decree or merely because other remedies may take time or are more circumlocutory in character. Thus, the violation of permanent injunction can be set right in executing the proceedings and not the contempt proceedings. There is a complete fallacy in the argument that the provisions of Order 39 Rule 2A CPC would also include the case of violation or breach of permanent injunction granted at the time of passing of the decree.

In ***Food Corporation of India v. Sukha Deo Prasad, AIR 2009 SC 2330,*** this Court held that the power exercised by a court under Order 39Rule 2A is punitive in nature, akin to the power to punish for civil contempt under the Act 1971. Therefore, such powers should be exercised with great caution and responsibility. Unless there has been an order under Order 39 Rule 1 or 2 CPC in a case, the question of entertaining an application under Order 39 Rule 2A does not arise. In case there is a final order, the remedy lies in execution and not in an action for contempt or disobedience or breach under Order 39 Rule 2A. The contempt jurisdiction cannot be used for enforcement of decree passed in a civil suit.

The proceedings under Order 39 Rule 2A are available only during the pendency of the suit and not after conclusion of the trial of the suit. Therefore, any undertaking given to the court during the pendency of the suit on the basis of which the suit itself has been disposed of becomes a part of the decree and

breach of such undertaking is to be dealt with in execution proceedings under Order 21 Rule 32 CPC and not by means of contempt proceedings. Even otherwise, it is not desirable for the High Court to initiate criminal contempt proceedings for disobedience of the order of the injunction passed by the subordinate court, for the reason that where a decree is for an injunction, and the party against whom it has been passed has wilfully disobeyed it, the same may be executed by attachment of his property or by detention in civil prison or both.

The provision of Order 21 Rule 32 CPC applies to prohibitory as well as mandatory injunctions. In other words, it applies to cases where the party is directed to do some act and also to the cases where he is abstained from doing an act. Still to put it differently, a person disobeys an order of injunction not only when he fails to perform an act which he is directed to do but also when he does an act which he is prohibited from doing. Execution of an injunction decree is to be made in pursuance of the Order 21 Rule 32 CPC as the CPC provides a particular manner and mode of execution and therefore, no other mode is permissible. (See: ***Hungerford Investment Trust Ltd. v. Haridas Mundhra, AIR 1972 SC 1826***).

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225. CIVIL PROCEDURE CODE, 1908 – Order 23 Rule 1 and Section 151 Whether Court can permit withdraw an application for withdrawal of suit? Held, Yes – Court can permit to withdraw an application for withdrawal of suit under its inherent power, but such power is exercised to secure the ends of justice.

Rattan Bai & Anr. v. Ram Dass & Ors.

Judgment dated 06.02.2012 passed by the Supreme Court in Civil Appeal No. 1614 of 2012, reported in AIR 2012 SC 1476

Held:

The issue is not whether the trial court has the power to permit the withdrawal of the applications filed earlier to the withdrawal of the suit but whether such powers was exercised in accordance with law and for the purpose for which it is meant. The mere existence of a power does not justify the exercise of the power. In the context of the powers of the judicial bodies, all powers are required to be exercised with a view to secure ends of justice. In neither of the above-mentioned two cases ***i.e. Jet Plywood (P) Ltd. and anr. v. Madhukar Nowlakha & Ors., AIR 2006 SC 1260*** and ***Rajendra Prasad Mishra & Ors., AIR 2011 SC 1137*** this Court had an occasion to examine whether the inherent power of the Civil Court under Section 151 CPC was properly exercised. In the 1st case, the suit had been withdrawn by the plaintiffs and the plaintiffs subsequently sought to go back upon the withdrawal and reopen the suits on the ground that they were induced to withdraw the suit on a misrepresentation made by the defendants. In the 2nd case, the plaintiff "changed his mind" after

filing the applications for withdrawal of the suit and sought to withdraw the said application even before a formal order permitting the withdrawal was passed by the Court. The argument in both the cases was that the trial Court lacked the jurisdiction to permit the course of action undertaken by the plaintiffs. This Court only laid down the principle that Section 151 of CPC recognizes (As per ***Manohar Lal Chopra v. Rai Bahadur Rao Raja Seth Hiralal, AIR 1962 SC 527*** Where in it has been stated that Section 151 CPC does not cater but only recognizes the powers which are inherent in civil Court) the existence of ample power on the Civil Court to permit the plaintiffs to pursue the course of action undertaken by them.

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

Actus curiae neminem gravabit **means act of the Court shall not harm anybody – An interim order passed by the Trial Court does not lapse on erroneous dismissal of suit by appellate Court for want of maintainability.**

Margret Almeida & Ors., etc. v. Bombay Catholic Co-op. Housing Society Limited & Ors.

Judgment dated 24.02.2012 passed by the Supreme Court in I.A. Nos. 4-6 of 2012, reported in AIR 2012 SC 1438

Held:

The erroneous conclusion of the Division Bench cannot operate to the prejudice of the plaintiffs, who successfully demonstrated before this Court that the order of the Division Bench cannot be sustained. The settled principle of law is that the actus curiae neminem gravabit - 'act of the court shall not harm anybody'. In ***South Eastern Coal Fields Limited v. State of M.P., AIR 2003 SC 4482,*** this Court held:

> "27. That no one shall suffer for an act of the court is not a rule confined to an erroneous act of the court; the act of the court embraces within its sweep all such acts as to which the court may form an opinion in any legal proceeding that the court would not have so acted had it been correctly appraised of the facts and the law. The factor attracting applicability of the restitution is not the act of the court being wrongful or mistake or error committed by the court; the test is whether on account of an act of the party persuading the court to pass an order held at the end as not sustainable has resulted in one party gaining an advantage which it would not have otherwise earned; or the other party has suffered an impoverishment which it would not have suffered but for the order of the court and the act of such party."

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

Temporary injunction – Plaintiff and defendants claiming title over the disputed property on the basis of Wills in their favour – Circumstances surrounding execution of each one of the Wills are sufficient to raise a reasonable suspicion as to its genuineness – Facts of the case clearly establish existence of substantial question to be investigated and consequent necessity to preserve *status quo* – Order of temporary injunction restraining appellant from alienating the property rightly granted – Appeal dismissed.

Jagdish Singh @ Jagdish Pratap Singh v. Mohanlal Agrawal & Ors.

Judgment dated 06.03.2012, passed by the High Court of M.P. in M.A. No. 3808 of 2011, reported in ILR (2012) MP 982

Held:

Circumstances surrounding execution of each one of the Wills are sufficient to raise a reasonable suspicion as to its genuineness. Moreover, the appellant's conduct in transferring the entire lands within a short period of the death of Smt. Aruna Kumari, can also not be termed as natural and probable.

As rightly pointed out by learned Government Advocate, if none of the Wills is found to be valid, the State would take the lands by escheat.

To sum up, facts of the case clearly establish existence of a substantial question to be investigated and the consequent necessity to preserve status quo. Accordingly, the positive findings on the points of prima facie case, balance of convenience and irreparable loss do not suffer from any apparent error or perversity. Further, it is well settled that interference with discretion exercised by the trial Court in granting temporary injunction should not be made only because a different opinion is possible (See ***Skyline Education Institute (Pvt.) Ltd. v. S.L. Vaswani, AIR 2010 SC 3221***).

In the result, the appeal stands dismissed and the temporary injunction granted by the trial Court is hereby maintained.

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228. CIVIL PROCEDURE CODE, 1908 – Order 41 Rule 23-A

Retrial/*de novo* trial – Permissibility of – The trial Court had disposed of the suit on merits and not on a preliminary issue – The first Appellate Court set aside the judgment and decree of the trial Court and directed the trial Court to decide the suit afresh after giving parties an opportunity to lead evidence – The order passed by the Appellate Court leaves no manner of doubt – The same has been passed in exercise of power under Order 41 Rule 23-A CPC.

Jegannathan v. Raju Sigamani and another

Judgment dated 02.04.2012 passed by the Supreme Court in Civil Appeal No. 3347 of 2012, reported in (2012) 5 SCC 540

Held:

Order 41 Rule 23 is invocable by the appellate Court where the appeal has arisen from the decree passed on a preliminary point. In other words, where the entire suit has been disposed of by the trial Court on a preliminary point and such decree is reversed in appeal and the appellate Court thinks proper to remand the case for fresh disposal. While doing so, the appellate Court may issue further direction for trial of certain issues.

Order 41 Rule 23-A has been inserted in the Code by Act 104 of 1976 w.e.f. 1.2.1977. According to Order 41 Rule 23A of the Code, the appellate Court may remand the suit to the trial Court even though such suit has been disposed of on merits. It provides that where the trial Court has disposed of the Suit on merits and the decree is reversed in appeal and the appellate Court considers that retrial is necessary, the appellate Court may remand the suit to the trial Court.

Insofar as Order 41 Rule 25 of the Code is concerned, the appellate Court continues to be in seisin of the matter; it calls upon the trial Court to record the finding on some issue or issues and send that finding to the appellate Court. The power under Order 41 Rule 25 is invoked by the appellate Court where it holds that the trial Court that passed the decree omitted to frame or try any issue or determine any question of fact essential to decide the matter finally. The appellate Court while remitting some issue or issues, may direct the trial Court to take additional evidence on such issue(s).

The trial Court had disposed of the suit on merits and not on a preliminary issue. The first appellate Court set aside the judgment and decree of the trial Court and directed the trial Court to decide the suit afresh after giving parties an opportunity to lead evidence–oral as well as documentary. The nature of the order passed by the appellate Court leaves no manner of doubt that such order has been passed by the appellate Court in exercise of its power under Order 41 Rule 23A of the Code.

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229. CONSTITUTION OF INDIA – Article 21
MOTOR VEHICLES ACT, 1988 – Sections 52, 53 and 92
CENTRAL MOTOR VEHICLES RULES, 1989 – Rule 100

(i) Right to safety – This right emerges from Article 21 of the Constitution of India – Trivial protection or inconvenience, if any, must yield in favour of larger public interest.

(ii) Prohibition of use of black films on glass panes of motor vehicles – Use of black film or any other matter upon safety glass, wind screen and side windows is impermissible – The Apex Court prohibits the use of black films of any VLT percentage or any other material upon the safety glass, wind screen and side windows of all vehicles throughout the country.

Avishek Goenka v. Union of India and another

Judgment dated 27.04.2012 passed by the Supreme Court in Writ Petition (C) No. 265 of 2011, reported in (2012) 5 SCC 321

Held:

The use of black films upon the vehicles gives immunity to the violators in committing a crime and is used as a tool of criminality, considerably increasing criminal activities. At times, heinous crimes like dacoity, rape, murder and even terrorist acts are committed in or with the aid of vehicles having black films pasted on the side windows and on the screens of the vehicles. It is stated that because of non- observance of the norms, regulations and guidelines relating to the specifications for the front and rear windscreens and the side windows of the vehicles, the offenders can move undetected in such vehicles and commit crimes without hesitation.

Besides aiding in commission of crimes, black films on the vehicles are also at times positively correlated with motor accidents on the roads. It is for the reason that the comparative visibility to that through normal/tinted glasses which are manufactured as such is much lesser and the persons driving at high speed, especially on highways, meet with accidents because of use of black filmed glasses. The use of black films also prevents the traffic police from seeing the activity in the car and communicating with the driver of the vehicle.

The Court can take a judicial notice of the fact that even as per the reports, maximum crimes are committed in such vehicles and there has been a definite rise in the commission of heinous crimes, posing a threat to security of individuals and the State, both.

Whatever are the rights of an individual, they are regulated and controlled by the statutory provisions of the Act and the Rules framed thereunder. The citizens at large have a right to life i.e. to live with dignity, freedom and safety. This right emerges from Article 21 of the Constitution of India. As opposed to this constitutional mandate, a trivial individual protection or inconvenience, if any, must yield in favour of the larger public interest.

Rule 100 of Central Motor Vehicle Rules, 1989 provides for glass of windscreen and windows of every motor vehicle. The glass used has to be 'safety glass'. Then it provides for the inner surface angle on the windscreen. Rule 100 (2) provides that the glass of the windscreen and rear window of every motor vehicle shall be such and shall be maintained in such a condition that VLT is not less than 70 per cent and on side windows not less than 50 per cent and would conform to Indian Standards [IS:2553–Part 2–1992]. The said IS, under clause 5.1.7, deals with VLT standards and it provides for the same percentage of VLT through the safety glass, as referred to in Rule 100(2) itself.

Rule 100(2) specifies the VLT percentage of the glasses at the time of manufacture and to be so maintained even thereafter. In Europe, Regulation No. 43 of the Economic Commission for Europe of the United Nations (UN/ECE)

and in Britain, the Road Vehicles (Construction and Use) Regulations, 1986, respectively, refer to the International Standard ISO 3538 on this issue, providing for VLT percentage of 70 and 75 per cent respectively.

In light of the above discussion, we have no hesitation in holding that use of black films or any other material upon safety glass, windscreen and side windows is impermissible. In terms of Rule 100(2), 70 per cent and 50 per cent VLT standard are relatable to the manufacture of the safety glasses for the windshields (front and rear) and the side windows respectively. Use of films or any other material upon the windscreen or the side windows is impermissible in law. It is the VLT of the safety glass without any additional material being pasted upon the safety glasses which must conform with manufacture specifications.

The competent officer of the traffic police or any other authorized person shall challan such vehicles for violating Rules 92 and 100 of the Rules with effect from the specified date and thereupon shall also remove the black films from the offending vehicles.

The manufacturer of the vehicle may manufacture the vehicles with tinted glasses which have Visual Light Transmission (VLT) of safety glasses windscreen (front and rear) as 70 per cent VLT and side glasses as 40 per cent VLT, respectively. No black film or any other material can be pasted on the windscreens and side glasses of a vehicle.

For the reasons afore-stated, we prohibit the use of black films of any VLT percentage or any other material upon the safety glasses, windscreens (front and rear) and side glasses of all vehicles throughout the country. The Home Secretary, Director General/Commissioner of Police of the respective States/ Centre shall ensure compliance with this direction. The directions contained in this judgment shall become operative and enforceable with effect from 4.5.2012.

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***230. CONSUMER PROTECTION ACT, 1986 – Section 2 (1) (o) (g)**

Service – Meaning of – Activities of the appellant Company in the given case involving offer of plots for sale to its customer/members with an assurance of development of infrastructure/amenities, layout approvals, etc. was a "service" within the meaning of Section 2 (1) (o) of the Act. [*LDA v. M.K. Gupta, (1994) 1 SCC 243* relied on].

Narne Construction Private Limited and others v. Union of India and others

Judgment dated 10.05.2012 passed by the Supreme Court in Civil Appeal No. 4432 of 2012, reported in (2012) 5 SCC 359

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231. **CRIMINAL PROCEDURE CODE, 1973 – Section 87**
NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 138
Issuance of arrest warrant – Case under Section 138 of the Negotiable Instruments Act – Magistrate satisfied that accused is absconding the process of Court – Service is not possible in ordinary course – Magistrate has power to compel presence of accused by issuance of arrest warrant under Section 87 even if the case is summarily triable.

Madhu Gupta (Smt.) v. Veer K. Shrivastava & Ors.
Judgment dated 24.02.2012, passed by the High Court of M.P. in M.Cr.C. No. 1284 of 2012, reported in ILR (2012) MP 1097

Held:

A bare perusal of the statutory provisions contained in section 87 Cr.P.C. would show that in case it is not possible to serve summons to an accused person in the ordinary course, then the court is not powerless to compel his presence through issuance of warrants of arrest against him. The view taken by the trial court in the impugned order that since the complaint under section 138 NI Act is to be decided summarily, warrants of arrest cannot be issued against the accused person, appears to be contrary to law and in the present case if the said view is accepted then it will occasion in miscarriage of justice to the petitioner. She is not able to prosecute the complaint under section 138 NI Act for want of service upon respondent No. 1. In case summons have already been issued to respondent No. 1 twenty times as submitted by the learned counsel for the petitioner, then there is every reason to believe that respondent No. 1 is absconding from the process of court and it would be necessary to compel his presence through warrant of arrest.

In view of the foregoing and having regard to the facts and circumstances of the case, the impugned order of the trial court is set aside. This petition is allowed. The Trial Court is directed to direct issuance of warrants of arrest against respondent No. 1 to compel his presence before it in the proceedings under section 138 NI Act pending against the respondents.

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232. **CRIMINAL PROCEDURE CODE, 1973 – Section 154**
EVIDENCE ACT, 1872 – Sections 3 and 24
INDIAN PENAL CODE, 1860 – Section 302

(i) **Whether F.I.R. recorded by a Police Officer on the confessional statement of the accused admissible? Held, No.**

(ii) **Conviction based on circumstantial evidence – Conditions reiterated.**

(iii) **Rarest of rare case – Murder of wife and children – Accused suspected the character of his wife – Crime committed out of that suspicion and frustration – Thereafter, accused tried to commit suicide and informed police about incident – In the facts and circumstances, the case does not come under the category of rarest of rare case.**

Brajendrasingh v. State of Madhya Pradesh

Judgment dated 28.02.2012 passed by the Supreme Court in Criminal Appeal No. 113 of 2010, reported in AIR 2012 SC 1552

Held:

FIR was recorded by Sub-Inspector Mohan Singh Maurya, PW16 based on the statement of the appellant itself, made in the Police Station. This cannot be treated, in law and in fact, as a confessional statement made by the accused and it would certainly attain its admissibility in evidence as an FIR recorded by the competent officer in accordance with law.

There is no doubt that it is not a case of direct evidence but the conviction of the accused is founded on circumstantial evidence. It is a settled principle of law that the prosecution has to satisfy certain conditions before a conviction based on circumstantial evidence can be sustained. The circumstances from which the conclusion of guilt is to be drawn should be fully established and should also be consistent with only one hypothesis, i.e. the guilt of the accused. The circumstances should be conclusive and proved by the prosecution. There must be a chain of events so complete so as not to leave any substantial doubt in the mind of the Court. Irresistibly, the evidence should lead to the conclusion inconsistent with the innocence of the accused and the only possibility that the accused has committed the crime. To put it simply, the circumstances forming the chain of events should be proved and they should cumulatively point towards the guilt of the accused alone. In such circumstances, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. Furthermore, the rule which needs to be observed by the Court while dealing with the cases of circumstantial evidence is that the best evidence must be adduced which the nature of the case admits. The circumstances have to be examined cumulatively. The Court has to examine the complete chain of events and then see whether all the material facts sought to be established by the prosecution to bring home the guilt of the accused, have been proved beyond reasonable doubt. It has to be kept in mind that all these principles are based upon one basic cannon of our criminal jurisprudence that the accused is innocent till proven guilty and that the accused is entitled to a just and fair trial. [Ref. ***Dhananajoy Chatterjee v. State of W.B., 1995 AIR SCW 510 Shivu & Anr. v. R.G. High Court of Karnataka, (2007) 4 SCC 713;*** and ***Shivaji @ Dadya Shankar Alhat v. State of Maharashtra, AIR 2009 SC 56***].

We have already held the appellant guilty of an offence under Section 302, IPC for committing the murder of his three children and the wife. All this happened in the spur of moment, but, of course, the incident must have continued for a while, during which period the deceased Aradhna received burn injuries as well as the fatal injury on the throat. All the three children received injuries with a knife similar to that of the deceased Aradhna. But one circumstance which cannot be ignored by this Court is that the prosecution witnesses have clearly stated

that there was a rift between the couple on account of her talking to Liladhar Tiwari, the neighbor, PW10. Even if some credence is given to the statement made by the accused under Section 313 Cr.P.C. wherein he stated that he had seen the deceased and PW10 in a compromising position in the house of PW10, it also supports the allegation of the prosecution that there was rift between the husband and wife on account of PW10. It is also clearly exhibited in the FIR (P27) that the accused had forbidden his wife from talking to PW10, which despite such warning she persisted with and, therefore, he had committed the murder of his wife along with the children. It will be useful to refer to the conduct of the accused prior to, at the time of and subsequent to the commission of the crime. Prior to the commission of the crime, none of the prosecution witnesses, including the immediate blood relations of the deceased, made any complaint about his behaviour or character. On the contrary, it is admitted that he used to prohibit Aradhna from speaking to PW10 about which she really did not bother. His conduct, either way, at the time of commission of the crime is unnatural and to some extent even unexpected. However, subsequent to the commission of the crime, he was in such a mental state that he wanted to commit suicide and even inflicted injuries to his own throat and also went to the bye-pass road with the intention of committing suicide, where he was stopped by PW4, Head Constable and taken to the Police Station wherein he lodged the FIR Exhibit P27. In other words, he felt great remorse and was sorry for his acts. He informed the Police correctly about what he had done.

Still another mitigating circumstance is that as a result of the commission of the crime, the appellant himself is the greatest sufferer. He has lost his children, whom he had brought up for years and also his wife. Besides that, it was not a planned crime and also lacked motive. It was a crime which had been committed out of suspicion and frustration. The circumstances examined cumulatively would, to some extent, suggest the existence of a mental imbalance in the accused at the moment of committing the crime. It cannot be conceived much less accepted by any stretch of imagination that the accused was justified in committing the crime as he claims to have believed at that moment.

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233. CRIMINAL PROCEDURE CODE, 1973 – Sections 154 and 401
INDIAN PENAL CODE, 1860 – Section 302
The revisional Court in revision against framing of charges, cannot confine its attention only to the recitals in the F.I.R. because an F.I.R. can never represent entire evidence of the case.

Tej Bir and Anr. v. State of Haryana and Anr.
Judgment dated 14.02.2011 passed by the Supreme Court in Criminal Appeal No. 452 of 2011, reported in AIR 2012 SC 943

Held:

It is well settled that at the stage of framing of charges the High court

should not exercise its power of revision by way of quashing the charges by confining its attention only to the recitals in the F.I.R.

An F.I.R. can never represent the entire evidence of the case. In the instant case, even though in the F.I.R., a reference was made to Kewal Kishan as masterminding of the conspiracy, the High Court should have refrained itself from quashing the charges by just referring to the recitals in the F.I.R.

In the case of *State of M.P. v. S.B. Johari and Ors., AIR 2000 SC 665,* it has been held that High Court in criminal revision cannot appreciate and weigh the materials on record for coming to the conclusion that charge against the accused could not have been framed. This Court held that the settled legal position is that at the stage of framing of charge, the High Court has to prima facie consider whether there is sufficient ground for proceeding against the accused and the High Court is not required to appreciate the evidence and arrive at the conclusion whether the materials on record are sufficient for conviction of the accused or not. The test at this stage should be, whether after accepting the charge, as framed, any case is made out.

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234. CRIMINAL PROCEDURE CODE, 1973 – Sections 154 and 438

(i) FIR – Prompt and delayed – Significance of – Object of insisting upon prompt lodging of FIR is to obtain information regarding circumstance in which crime was committed, name of actual culprits, part played by them as well as names of eye witnesses – Delayed FIR loses advantage of spontaneity.

(ii) Anticipatory bail – Parameters can be granted only in exceptional cases where Court is prima facie of the view that applicant was falsely enroped in crime and is not likely to misuse his liberty.

Jai Prakash Singh v. State of Bihar and another

Judgment dated 14.03.2012 passed by the Supreme Court in Criminal Appeal No. 525 of 2012, reported in (2012) 4 SCC 379

Held:

FIR in criminal case is a vital and valuable piece of evidence though may not be substantive piece of evidence. The object of insisting upon prompt lodging of the FIR in respect of the commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of the actual culprits and the part played by them as well as the names of the eyewitnesses present at the scene of occurrence. If there is a delay in lodging the FIR, it looses the advantage of spontaneity, danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of large number of consultations/deliberations. Undoubtedly, the promptness in lodging the FIR is an assurance regarding truth of the informant's version. A promptly lodged FIR reflects the first hand account of what has actually happened, and who was responsible for the offence in question. (Vide: ***Thulia***

Kali v. The State of Tamil Nadu, AIR 1973 SC 501; State of Punjab v. Surja Ram, AIR 1995 SC 2413; Girish Yadav v. State of M.P., (1996) 8 SCC 186; and *Takdir Samsuddin Sheikh v. State of Gujarat, AIR 2012 SC 37*).

There is no substantial difference between Sections 438 and 439 Cr.P.C. so far as appreciation of the case as to whether or not a bail is to be granted, is concerned. However, neither anticipatory bail nor regular bail can be granted as a matter of rule. The anticipatory bail being an extraordinary privilege should be granted only in exceptional cases. The judicial discretion conferred upon the court has to be properly exercised after proper application of mind to decide whether it is a fit case for grant of anticipatory bail.

The learned counsel appearing for the accused/respondents has vehemently advanced the arguments on the concept of life and liberty enshrined in Article 21 of the Constitution of India placing a very heavy reliance on the observations made by this Court in ***Siddharam Satlingappa Mhetre v. State of Maharashtra, AIR 2011 SC 312,*** and submitted that unless the custodial interrogation is warranted in the facts and circumstances of the case, not granting anticipatory bail amounts to denial of the rights conferred upon a citizen/person under Article 21 of the Constitution.

This Court in ***Siddharam Satlingappa Mhetre*** (supra) after considering the earlier judgments of this Court laid down certain factors and parameters to be considered while considering application for anticipatory bail:

"112. The following factors and parameters can be taken into consideration while dealing with the anticipatory bail:

(i) The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;

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

(iii) The possibility of the applicant to flee from justice;

(iv) The possibility of the accused's likelihood to repeat similar or (the) other offences.;

(v) Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her;

(vi) Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people;

(vii) The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the

case. The cases in which accused is implicated with the help of sections 34 and 149 of the Indian Penal Code, the court should consider with even greater care and caution because over-implication in the cases is a matter of common knowledge and concern;

(viii) While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;

(ix) The court to consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;

(x) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail.

113. The arrest should be the last option and it should be restricted to those exceptional cases where arresting the accused is imperative in the facts and circumstances of that case. The court must carefully examine the entire available record and particularly the allegations which have been directly attributed to the accused and these allegations are corroborated by other material and circumstances on record."

Parameters for grant of anticipatory bail in a serious offence are required to be satisfied and further while granting such relief, the court must record the reasons therefore. Anticipatory bail can be granted only in exceptional circumstances where the court is prima facie of the view that the applicant has falsely been enroped in the crime and would not misuse his liberty. [See: ***D.K. Ganesh Babu v. P.T. Manokaran, (2007) 4 SCC 434; State of Maharashtra v. Mohd. Sajid Husain Mohd. S. Husain, (2008) 1 SCC 213;*** and ***Union of India v. Padam Narain Aggarwal, (2008) 13 SCC 305***].

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235. CRIMINAL PROCEDURE CODE, 1973 – Sections 190 and 204

(i) The expression "cognizance", meaning of – It merely means, "become aware of" and when used with reference to a Court or a Judge, it connotes "to take notice of judicially" – It is entirely a different thing from initiation of proceedings, rather it is a condition precedent to the initiation of proceedings by the Magistrate or a Judge.

(ii) Summons – Issuance of – Law does not mandate to explicitly state the reasons for issuance of summons – However, the Magistrate must have taken notice of the accusation and apply his mind to the allegations made in the police report and the materials filed therewith.

Bhushan Kumar and another v. State (NCT of Delhi) and another

Judgment dated 04.04.2012 passed by the Supreme Court in Criminal Appeal No. 612 of 2012, reported in (2012) 5 SCC 424

Held:

In *Chief Enforcement Officer v. Videocon International Ltd., (2008) 2 SCC 492,* the expression "cognizance" was explained by this Court as it merely means 'become aware of' and when used with reference to a court or a Judge, it connotes 'to take notice of judicially'. It indicates the point when a court or a Magistrate takes judicial notice of an offence with a view to initiating proceedings in respect of such offence said to have been committed by someone. It is entirely a different thing from initiation of proceedings; rather it is the condition precedent to the initiation of proceedings by the Magistrate or the Judge. Cognizance is taken of cases and not of persons. Under Section 190 of the Code, it is the application of judicial mind to the averments in the complaint that constitutes cognizance. At this stage, the Magistrate has to be satisfied whether there is sufficient ground for proceeding and not whether there is sufficient ground for conviction. Whether the evidence is adequate for supporting the conviction can be determined only at the trial and not at the stage of enquiry. If there is sufficient ground for proceeding then the Magistrate is empowered for issuance of process under Section 204 of the Code.

A "summon" is a process issued by a Court calling upon a person to appear before a Magistrate. It is used for the purpose of notifying an individual of his legal obligation to appear before the Magistrate as a response to violation of law. In other words, the summons will announce to the person to whom it is directed that a legal proceeding has been started against that person and the date and time on which the person must appear in Court. A person who is summoned is legally bound to appear before the Court on the given date and time. Willful disobedience is liable to be punished under Section 174 IPC. It is a ground for contempt of court.

Section 204 of the Code does not mandate the Magistrate to explicitly state the reasons for issuance of summons. It clearly states that if in the opinion of a Magistrate taking cognizance of an offence, there is sufficient ground for proceeding, then the summons may be issued. This section mandates the Magistrate to form an opinion as to whether there exists a sufficient ground for summons to be issued but it is nowhere mentioned in the section that the explicit narration of the same is mandatory, meaning thereby that it is not a pre-requisite for deciding the validity of the summons issued.

Time and again it has been stated by this Court that the summoning order under Section 204 of the Code requires no explicit reasons to be stated because it is imperative that the Magistrate must have taken notice of the accusations and applied his mind to the allegations made in the police report and the materials filed therewith.

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236. CRIMINAL PROCEDURE CODE, 1973 – Section 378
EVIDENCE ACT, 1872 – Sections 3, 27 and 154
INDIAN PENAL CODE, 1860 – Section 302

(i) Appellate Court in appeal against acquittal, re-appreciated evidence – Did not state as to how the impugned judgment was perverse in law or in appreciation of evidence but only recording that judgment was perverse – Approach of the appellate Court illegal.

(ii) Whether a Police Officer can be a sole eyewitness? Held, as a rule it cannot be stated that a Police Officer cannot be a sole eyewitness in a criminal case – It will always depend upon the facts and circumstances of each case.

(iii) How to appreciate evidence of a Police Officer? If the statement of a Police Officer is reliable, trustworthy, cogent and duly corroborated by other evidence on record, then the statement of such witness cannot be discarded only on the ground that he is a Police Officer and may have some interest in the case.

(iv) Recovery of article – If the same does not aspire confidence, accused would be entitled to benefit of doubt.

(v) How to act upon the testimony of a hostile witness? Explained.

Govindaraju alias Govinda v. State by Sriramapuram P.S. & Anr.
Judgment dated 15.03.2012 passed by the Supreme Court in Criminal Appeal No. 984 of 2007, reported in AIR 2012 SC 1292

Held:

The judgment of the High Court, though to some extent, reappreciates the evidence but has not brought out as to how the trial court's judgment was perverse in law or in appreciation of evidence or whether the trial court's judgment suffered from certain erroneous approach and was based on conjectures and surmises in contradistinction to facts proved by evidence on record. A very vital distinction which the Court has to keep in mind while dealing with such appeals against the order of acquittal is that interference by the Court is justifiable only when a clear distinction is kept between perversity in appreciation of evidence and merely the possibility of another view. It may not be quite appropriate for the High Court to merely record that the judgment of the trial court was perverse without specifically dealing with the facets of perversity relating to the issues of law and/or appreciation of evidence, as otherwise such observations of the High Court may not be sustainable in law.

The question that arises for consideration is whether a police officer can be a sole witness. If so, then with particular reference to the facts of the present case, where he alone had witnessed the occurrence as per the case of the prosecution. It cannot be stated as a rule that a police officer can or cannot be a sole eye-witness in a criminal case. It will always depend upon the facts of a given case. If the testimony of such a witness is reliable, trustworthy, cogent and duly corroborated by other witnesses or admissible evidences, then the statement of such witness cannot be discarded only on the ground that he is a police officer and may have some interest in success of the case. It is only when his interest in the success of the case is motivated by overzealousness to an extent of his involving innocent people; in that event, no credibility can be attached to the statement of such witness.

The statement of a police officer can be relied upon and even form the basis of conviction when it is reliable, trustworthy and preferably corroborated by other evidence on record.

It is also not always necessary that wherever the witness turned hostile, the prosecution case must fail. Firstly, the part of the statement of such hostile witnesses that supports the case of the prosecution can always be taken into consideration. Secondly, where the sole witness is an eye-witness who can give a graphic account of the events which he had witnessed, with some precision cogently and if such a statement is corroborated by other evidence, documentary or otherwise, then such statement in face of the hostile witness can still be a ground for holding the accused guilty of the crime that was committed. The Court has to act with greater caution and accept such evidence with greater degree of care in order to ensure that justice alone is done. The evidence so considered should unequivocally point towards the guilt of the accused.

We are certainly not indicating that despite all this, the statement of the Police Officer for recovery and other matters could not be believed and form the basis of conviction but where the statement of such witness is not reliable and does not aspire confidence, then the accused would be entitled to the benefit of doubt in accordance with law. Mere absence of independent witnesses when the Investigating Officer recorded the statement of the accused and the article was recovered pursuant thereto, is not a sufficient ground to discard the evidence of the Police Officer relating to recovery at the instance of the accused. (See: ***State Government of NCT of Delhi v. Sunil & Anr., 2000 AIR SCW 4398***) Similar would be the situation where the attesting witnesses turn hostile, but where the statement of the Police Officer itself is unreliable then it may be difficult for the Court to accept the recovery as lawful and legally admissible. The official acts of the Police should be presumed to be regularly performed and there is no occasion for the courts to begin with initial distrust to discard such evidence.

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237. CRIMINAL PROCEDURE CODE, 1973 – Sections 437 and 439

(i) Whether as a rule delay in trial a ground for granting bail ? Held, No – The same rule should not be applied mechanically to all cases.

(ii) Factors for consideration of bail, explained.

Dipak Shubhashchandra Mehta v. C.B.I. & Anr.

Judgment dated 10.02.2012 passed by the Supreme Court in Criminal Appeal No. 348 of 2012, reported in AIR 2012 SC 949

Held:

This Court has taken the view that when there is a delay in the trial, bail should be granted to the accused. [Vide ***Babba v. State of Maharashtra, (2005) 11 SCC 569*** and ***Vivek Kumar v. State of U.P., AIR 2000 SC 3406***] But the same should not be applied to all cases mechanically.

The Court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Though at the stage of granting bail, a detailed examination of evidence and elaborate documentation of the merits of the case need not be undertaken, there is a need to indicate in such orders reasons for prima facie concluding why bail was being granted, particularly, where the accused is charged of having committed a serious offence. The Court granting bail has to consider, among other circumstances, the factors such as (a) the nature of accusation and severity of punishment in case of conviction and the nature of supporting evidence; (b) reasonable apprehension of tampering with the witness or apprehension of threat to the complainant and; (c) prima facie satisfaction of the court in support of the charge. In addition to the same, the Court while considering a petition for grant of bail in a non-bailable offence apart from the seriousness of the offence, likelihood of the accused fleeing from justice and tampering with the prosecution witnesses, have to be noted. Considering the present scenario and there is no possibility of commencement of trial in the near future and also of the fact that the appellant is in custody from 31.03.2010, except the period of interim bail, i.e. from 15.09.2011 to 30.11.2011, we hold that it is not a fit case to fix any outer limit taking note of the materials collected by the prosecution. This Court has repeatedly held that when the undertrial prisoners are detained in jail custody to an indefinite period, Article 21 of the Constitution is violated. As posed in the ***Sanjay Chandra v. Central Bureau of Investigation, 2011 AIR SCW 6838*** we are also asking the same question i.e. whether the speedy trial is possible in the present case for the reasons mentioned above.

As observed earlier, we are conscious of the fact that the present appellant along with the others are charged with economic offences of huge magnitude. At the same time, we cannot lose sight of the fact that though the Investigating Agency has completed the investigation and submitted the charge sheet including additional charge sheet, the fact remains that the necessary charges have not been framed, therefore, the presence of the appellant in custody may not be necessary for further investigation. In view of the same, considering the health

condition as supported by the documents including the certificate of the Medical Officer, Central Jail Dispensary, we are of the view that the appellant is entitled to an order of bail pending trial on stringent conditions in order to safe guard the interest of the CBI.

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***238. CRIMINAL PROCEDURE CODE, 1973 – Sections 438 and 439**

Bail application filed directly before the High Court without first approaching the Sessions Court/Trial Court – Permissible subject to the existence of satisfying special extraordinary convincing reasons by the applicant.

Chhote Khan v. State of M.P.

Judgment dated 27.01.2012, passed by the High Court of M.P. in M.Cri.C. No. 9314 of 2011, reported in ILR (2012) MP 1095

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239. EVIDENCE ACT, 1872 – Sections 3 and 9

INDIAN PENAL CODE, 1860 – Section 302

(i) Test identification parade – If the accused is a stranger to eye witnesses, then test identification parade would have been necessary at the time of investigation – Where the accused and eye witnesses are residing in the same locality and the eye witnesses were known to the accused, test identification parade not necessary.

(ii) Inconsistency between direct and medical evidence – How to be appreciated? Where medical evidence rules out all possibility of it being true, then direct evidence may not be believed.

Sayed Darain Ahsan alias Darain v. State of West Bengal & Anr.

Judgment dated 22.03.2012 passed by the Supreme Court in Criminal Appeal No. 1195 of 2006, reported in AIR 2012 SC 1286

Held:

In a recent judgment in ***Abdul Sayeed v. State of Madhya Pradesh, (2010) 10 SCC 259*** this Court after considering its earlier decisions in ***Ram Narain Singh v. State of Punjab, (1975) 4 SCC 497, State of Haryana v. Bhagirath, (1999) 5 SCC 96, Solanki Chimanbhai Ukabhai v. State of Gujarat, (1983) 2 SCC 174, Mani Ram v. State of U.P., 1994 Supp (2) SCC 289, Khambam Raja Reddy v. Public Prosecutor, AIR 2006 SC 3236, State of U.P. v. Dinesh, AIR 2009 SC (Supp.) 272*** and ***State of U.P. v. Hari Chand, 2009 AIR SCW 3605*** has held:

> "though the ocular testimony of witness has greater evidentiary value vis-a-vis medical evidence when medical evidence makes the ocular testimony improbable, that becomes a relevant factor in the process of evaluation of evidence. However, where the medical evidence goes so

far that it completely rules out all possibility of the ocular evidence being true, the ocular evidence maybe disbelieved".

In the facts of the present case, as we have seen, the medical evidence does not go so far as to rule out all possibility of the ocular evidence being true. Hence, the ocular evidence cannot be disbelieved.

Considering the evidence on record and the opinions of experts we have discussed, we have no doubt that the deceased has not been shot by a rifle from a long distance but by improvised or country-made handguns capable of firing .303 rifle cartridges from a short distance. PW-3 has described these as guns, whereas PW-5 has described these as revolvers because he has not been able to distinguish a revolver from a country-made handgun. PW-4 and PW-7 are silent on whether the appellant and his associates have used guns or revolvers. Some of these eyewitnesses have said that all the assailants fired but they could not have known how many projectiles were actually ejected from these defective improvised firearms as a result of firing. One bullet has been recovered from the occipital region of the deceased and another bullet and an empty cartridge have been recovered from the place of occurrence. Hence, in the present case, the fact that the other bullets were not recovered either from the body of the deceased or from the place of occurrence does not belie the prosecution story that the appellant and his associates fired and killed the deceased.

We also do not find any merit in the submission of lerned senior counsel for the appellent that as no Test Identification Parade was held at the time of investigation, the eyewitnesses could not have identified the appellant as one of the persons who fired at the deceased. The appellant, PW-3 and PW-4 were residents of Iron Gate Road, which was the part of the Garden Reach Police Station. PW- 5 and PW-7 were residents of Bichali Ghat Road which is also part of the same Police Station Garden Reach. Hence, the appellant and the four eyewitnesses belonged to the same locality and the four eyewitnesses knew the appellant before the incident and were able to immediately identify the appellant at the time of the incident. It is only if the appellant was a stranger to the eyewitnesses that Test Identification Parade would have been necessary at the time of investigation.

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240. EVIDENCE ACT, 1872 – Section 8
INDIAN PENAL CODE, 1860 – Sections 302 and 34

(i) When prosecution case is fully established by reliable ocular evidence coupled with medical evidence, the issue of motive becomes immaterial and loses practically all relevance.

(ii) Common intention can form and develop even in course of the occurrence.

Lokesh Shivakumar v. State of Karnataka
Judgment dated 10.02.2012 passed by the Supreme Court in Criminal Appeal No. 1326 of 2005, reported in AIR 2012 SC 956

Held:

As regards motive, it is well established that if the prosecution case is fully established by reliable ocular evidence coupled with medical evidence, the issue of motive loses practically all relevance. In this case, we find the ocular evidence led in support of the prosecution case wholly reliable and see no reason to discard it. The submission, therefore, that the appellant had no motive for the commission of offence is not of any significance.

It is well settled that common intention can form and develop even in course of the occurrence. It is true that the appellant had not brought with him any weapon but it is equally true that in the gobbaly tree wood piece lying at the place of occurrence he found one and used it with lethal effect.

It was the appellant who struck the first blow on the right side of the head of Dharmaraj and according to the post-mortem report that blow itself might have caused his death. We have, therefore, no doubt that the facts of the case clearly attract section 34 of the Penal Code in so far as the appellant is concerned.

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***241. FOREST ACT, 1927 – Sections 52 and 52-C**
CRIMINAL PROCEDURE CODE, 1973 – Sections 451 and 457
Whether Magistrate can release in interim custody a vehicle seized under the provisions of the Forest Act when intimation of confiscation proceedings is already given to him under Section 52 of the Act? Held, No – Being a Special Act, Forest Act has an overriding effect on the provision of other laws including Cr.P.C. – Once confiscation proceeding is initiated, the jurisdiction of Criminal Courts in terms of Section 52-C of the Act is barred. [*State of W.B. v. Sujeet Kumar Rana, (2004) 4 SCC 199, Kanhaiyalal v. State of M.P., 1987 Cr.L.J. 368 and Vishambhar Yadav v. State of M.P., 2002 (3) MPLJ 245* relied on]

Ramniwas v. Game Range Chambal Sanctuary, Bhind
Judgment dated 03.02.2012 passed by the High Court of M.P. in Misc. No. 213 of 2010, reported in 2012 (2) MPLJ 661

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242. HINDU SUCCESSION ACT, 1956 – Section 6
HINDU MARRIAGE ACT, 1955 – Section 16
Nature of property – Property in dispute originally belonged to father of respondent No. 1 which was subsequently partitioned between brothers after his death – Property falling to the share of respondent No. 1 would be self acquired property for all others except his male issue – Share allotted to respondent No. 1 would still be a

coparcenary property between him and the appellant though it may be his self acquired property for the others.

Share of daughters – Daughter of a coparcener is also entitled for the same share which a son of coparcener is having in a coparcenary property – Section 16 of the Hindu Marriage Act provides that children born out of void or voidable marriage shall be legitimate children – Although the second marriage of respondent No. 1 is void but the children out of such void marriage will be entitled for their share – Appellant entitled for 1/6th share in the property.

Rajesh v. Keshar Singh & Ors.

Judgment dated 24.11.2011, passed by the High Court of M.P. in S.A. No. 99 of 1999, reported in ILR (2012) MP 951

Held:

After the death of Dariyao Singh, a partition took place between Keshar Singh and his brother Rameshwar in which the suit property feel in the share of Keshar Singh. But, it will be his self acquired property for all others except his male issue. According to me, the share allotted to a coparcener after partition would still be a coparcenary property between him and his male issue though it may be his self acquired property for the others. In this regard Article 221 (4) of Mulla's Hindu Law, 21st Edition, page 337 may be seen. Hence, the disputed property which was acquired by Keshar Singh in partition, still it will be a coparcenary property between him and his male issue. It is proved that plaintiff is the son of Keshar Singh.

The question now would arise what share appellant/plaintiff is entitled to. The finding of fact of learned two Courts below is that Sampat Bai who is the mother of plaintiff is the first legally wedded wife of defendant no. 1 Keshar Singh and during the subsistence of first marriage, a second marriage has been solemnized by said Keshar Singh with Kanchan Bai from whom a male child namely Babu alias Sanjay (defendant no. 2/respondent no. 2) and two daughters namely Mamta and Pankti were born. During the pendency of this appeal, Section 6 of Hindu Succession Act, 1956 has been amended by Hindu Succession (Amendment) Act, 2005 with effect from 09.09.2005. Under the amended Section 6 of the said Act, the devolution of interest in coparcenary property is altogether different because under this provision, daughter of a coparcener is also entitled for the same share which a son of coparcener is having in a coparcenary property. Although a proviso has been enacted by the Legislature that nothing contained in sub-section (1) of Section 6 of the said Act shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before 20.12.2004. Since this proviso is not coming in the way to this case, therefore, the two daughters of Keshar Singh (defendant no. 1) namely Mamta and Pankti are also entitled for the same share in the coparcenary property. These daughters are born from the wedlock of Keshar Singh and Kanchan Bai. Under Section 16 of the Hindu Marriage Act,

1955, the children born from the void or voidable marriage shall be the legitimate children and thus second defendant Babu and the daughters of Keshar Singh namely Mamta and Pankti being the children of first defendant Keshar Singh from second wife Kanchan Bai shall be his legitimate children. Although the second marriage of first defendant Keshar Singh is void because during the subsistence of his first marriage, he solemnized second marriage with Kanchan Bai. In that regard, Section 5 (i) and 11 of Hindu Marriage Act, 1955 may be seen. The first legally wedded wife of defendant Keshar Singh namely Sampat Bai who is the mother of plaintiff is still alive.

On scanning the entire gamut, the picture which is formed is that the suit property is the coparcenary property of first defendant Keshar Singh in which plaintiff Rajesh, his mother Sampat Bai (first wife of Keshar Singh), defendant no. 1 Keshar Singh himself, second defendant Babu alias Sanjay and two daughters namely Mamta and Pankti born from the second wife Kanchan Bai are entitled for equal share. Thus, in this manner, the plaintiff is having 1/6th share in the entire suit property.

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243. INDIAN PENAL CODE, 1860 – Sections 96 to 106

Right of private defence – There is nothing on record to show that the deceased, his wife, his son or others had attacked the appellant nor would the surrounding circumstance indicate that there was a reasonable apprehension that the death or grievous hurt was likely to be caused to the appellant by them or others – Plea of private defence rejected.

Arjun v. State of Maharashtra

Judgment dated 03.05.2012 passed by the Supreme Court in Criminal Appeal No. 356 of 2007, reported in (2012) 5 SCC 530

Held:

The Law clearly spells out that the right of private defence is available only when there is a reasonable apprehension of receiving injury. Section 99 IPC explains that the injury which is inflicted by a person exercising the right should commensurate with the injury with which he is threatened. True, that the accused need not prove the existence of the right of private defence beyond reasonable doubt and it is enough for him to show as in a civil case that preponderance of probabilities is in favour of his plea. Right of private defence cannot be used to do away with a wrong doer unless the person concerned has a reasonable cause to fear that otherwise death or grievous hurt might ensue in which case that person would have full measure of right to private defence.

It is for the accused claiming the right of private defence to place necessary material on record either by himself adducing positive evidence or by eliciting necessary facts from the witnesses examined for the prosecution, if a plea of private defence is raised. (***Munshi Ram v. Delhi Administration, AIR 1968 SC 702,***

State of Gujarat v. Bai Fatima, AIR 1975 SC 1478, State of U.P. v. Mohd. Musheer Khan, AIR 1977 SC 2226, Mohinder Pal Jolly v. State of Punjab, AIR 1979 SC 577 and *Salim Zia v. State of U.P., AIR 1979 SC 391.*)

A plea of right of private defence cannot be based on surmises and speculation. While considering whether the right of private defence is available to an accused, it is not relevant whether he may have a chance to inflict severe and mortal injury on the aggressor. In order to find whether the right of private defence is available to an accused, the entire incident must be examined with care and viewed in its proper setting.

Section 97 deals with the subject matter of right of private defence. The plea of right comprises the body or property of the person exercising the right or of any other person, and the right may be exercised in the case of any offence against the body, and in the case of offences of theft, robbery, mischief or criminal trespass, and attempts at such offences in relation to the property.

Section 99 lays down the limits of the right of private defence. Sections 96 and 98 give a right of private defence against certain offences and acts. The right given under Sections 96 to 98 and 100 to 106 is controlled by Section 99. To plea a right of private defence extending to voluntary causing of death, the accused must show that there were circumstances giving rise to reasonable grounds for apprehending that either death or grievous hurt would be caused to him.

We are of the view that in the instant case, as rightly held by the High Court and Trial Court, there is nothing to show that the deceased, his wife (PW 8), his son (PW 1) or others had attacked the appellant, nor would the surrounding circumstances indicate that there was a reasonable apprehension that the death or grievous hurt was likely to be caused to the appellant by them or others. The plea of private defence, therefore, has no basis and the same is rejected.

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244. INDIAN PENAL CODE, 1860 – Sections 96, 97 and 100

CRIMINAL TRIAL:

Right of private defence – Exercise of – Held, just because one circumstance exists amongst the various factors which appears to favour the person claiming right of self-defence, does not mean that he gets the right to cause death of the other person – Further held, even the right of self-defence has to be exercised directly in proportion to the extent of aggression.

Mano Dutt and another v. State of Uttar Pradesh

Judgment dated 29.02.2012 passed by the Supreme Court in Criminal Appeal No. 77 of 2007, reported in (2012) 4 SCC 79

Held:

From the record, it appears that Ram Dutt had lodged a complaint of the incident that took place on 22nd October, 1977 at about 12.00 p.m. According

to this report the accused in that complaint (i.e., the deceased and his family members) had been putting earth on Ram Dutt's *sariya*, which he had forbade. There was verbal altercation between the parties and then the accused in that complaint (i.e., the deceased herein) started assaulting him with lathis and it was only by raising an alarm that the people of the village came to the place of occurrence and his life was saved. According to this complaint, he had suffered injuries on his head. Firstly, this complaint had not been proved by Ram Dutt during the trial. Accordingly, the concurrent view taken by the courts below, that this document cannot be relied in evidence, cannot be faulted with.

Furthermore, Ram Dutt did not examine a single witness in his defence to prove that he was attacked by the deceased and his family members or that they were putting earth at the door of Ram Dutt's *sariya*. No doubt, Ram Dutt was subjected to medical examination by the Medical Officer vide Ex.Kha 1. It was noticed that he had suffered lacerated wounds on the central and other regions of skull, and had complained of pain in left leg. This would show that Ram Dutt had suffered some injuries but where and how these injuries were suffered, was for him to establish, particularly when he had taken a specific stand that the deceased and his family members were at fault and were aggressive. He claims that they had caused serious injuries to his person and this incident happened in the presence of the villagers. It is a settled canon of evidence jurisprudence that one who alleges a fact must prove the same.

It is also Ram Dutt's case that the prosecution has not explained the injuries on his person and, therefore, the argument impressed upon the Court is that the attack with lathis was in exercise of self-defence and the failure of the prosecution to explain injuries on the person of Ram Dutt is a circumstance which creates a serious doubt in the story of the prosecution. We are not impressed with this contention primarily for the above reasons and also because of the fact that if the police was not investigating into the complaint, Ram Dutt was not helpless or remediless in law. He could have filed an application before the concerned Magistrate in accordance with the provisions of Code of Criminal Procedure, 1973 (Cr.P.C.) for directing the police to investigate and even to summon the accused in that complaint. But none of the accused, including Ram Dutt, took any of the steps available to them in law.

When a person claims exercise of private self-defence, the onus lies on him to show that there were circumstances and occasions for exercising such a right. In other words, these basic facts must be established by the accused. Just because one circumstance exists amongst the various factors, which appears to favour the person claiming right of self-defence, does not mean that he gets the right to cause the death of the other person. Even the right of self-defence has to be exercised directly in proportion to the extent of aggression.

As per the medical report, the injuries on the body of Ram Dutt were found to be 'simple in nature'. On the other hand, we have a complete version of the prosecution, duly supported by witnesses, out of which PW1 and PW2 are eye-

witnesses to the occurrence. The bone of contention between the parties was the statement of the deceased, that he was filling the earth over some land, which he claimed to be his land; according to the accused, the earth-filling was carried out in front of the door of Ram Dutt. According to both the parties, the villagers came to the spot. Out of the two versions, the one put forward by the prosecution and the other in the defence of the accused, the version of the prosecution, as has been disclosed by the eye-witnesses, is trustworthy, reliable and entirely plausible in the facts and circumstances of the case. The mere fact that the Investigating Officer has not been produced, or that there is no specific explanation on record as to how Ram Dutt suffered these injuries, would not vitiate the trial or the case of the prosecution in its entirety. These claims of the accused would have been relevant considerations, provided the accused had been able to establish the other facts alleged by them.

It is not always mandatory for the prosecution to examine the Investigating Officer, provided it can establish its case beyond reasonable doubt even in his absence. The present case certainly falls in the latter class. Where the accused lead no defence, they cannot take benefit of the fact that the prosecution did not examine any independent witnesses. The accused would be deemed to have been aware of the consequences in law when they gave a statement admitting the occurrence but attributing aggression and default to the deceased and his family members.

Accused Thakur Prasad is also stated to own a *sariya* and was also allegedly using his lathi in self-defence, as according to their story, four persons with the deceased and his family members had attacked them. Strangely, Thakur Prasad suffered no injury. These are the circumstances which, examined cumulatively, would provide support to the case of the prosecution.

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245. INDIAN PENAL CODE, 1860 – Sections 285, 286 and 304
EXPLOSIVE SUBSTANCES ACT, 1908 – Sections 3, 4, 5 and 6
CRIMINAL TRIAL:
***De novo* trial, permissibility of – Fresh trial of accused after obtaining sanction, although he was initially discharged due to lack of sanction – Held, offence was grave and at no stage was sanction refused by competent authority – Accused never contended that sanction-granting authority was incompetent to grant such sanction – Though sanction was obtained after a lapse of 3 years and thereafter, accused was asked to face trial but where 14 persons died and several others were injured due to explosion in accused's shop selling explosive substances, obtaining sanction after 3 years cannot be considered as delay which vitiated proceedings – Directions issued for framing of charges under Explosive Substances Act and for trial to be proceeded there with.**

Deepak Khinchi v. State of Rajasthan

Judgment dated 30.04.2012 passed by the Supreme Court in Criminal Appeal No. 719 of 2012, reported in (2012) 5 SCC 284

Held:

The proper course for the prosecution was to challenge that order and have it set aside by the High Court. Instead of taking that course, a fresh sanction was issued by the District Magistrate, Chittorgarh on 01.06.2008. The prosecution then filed an application under Section 311 of the Code. It was prayed that sanction issued under Section 7 of the said Act by the District Magistrate be taken on record and the appellant be tried for offences under Sections 3, 4, 5 and 6 of the said Act. The learned Sessions Judge while granting the said application, relied on the judgment of Rajasthan High Court, Jaipur Bench in ***Ramjani v. State of Rajasthan, 1993 CriLR 179 (Raj)*** wherein it was held that where sanction under Section 7 of the said Act is not obtained, the prosecution will have to be quashed but it would be open to the prosecution to start the prosecution afresh after obtaining sanction from the competent authority. The High Court upheld this order.

Before dealing with the submissions of learned counsel, we shall refer to the judgments on which reliance is placed by learned counsel for the appellant. In ***Rajendra Prasad v. Narcotic Cell, (1999) 6 SCC 110,*** this court explained when a court can exercise its power of recalling or re-summoning witnesses. While repelling the contention raised by counsel for the appellant therein that power under Section 311 of the Code was being exercised to fill in the lacuna, this court observed that a

> "lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna."

This court in ***Rajendra Prasad*** (supra) clarified that no party in a trial can be foreclosed from correcting errors and if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified. This court observed that:

> "8. ... After all, function of the criminal court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better."

In our opinion, the appellant cannot draw any support from the judgment in ***Rajendra Prasad*** (supra) because it arose out of a totally different facts scenario. If at all the observations of this court quoted by us would help the prosecution

rather than the appellant. No question of sanction was involved in that case. The prosecution and defence had closed their evidence and thereafter at the instance of the prosecution, two of the witnesses who had already been examined, were summoned for the purposes of proving certain documents for prosecution. In the circumstances, the question arose whether by making application under Section 311 of the Code, the prosecution was trying to fill in the lacuna.

In our opinion, ***Rajendra Prasad*** (supra) has no application to the present case. We do not want to express any opinion as to whether in this case, the application was made rightly under Section 311 of the Code by the prosecution. We find that, in substance, the application filed by the prosecution was for tendering the consent/sanction of the District Magistrate, on record and requesting the court to start trial against the appellant for the offences punishable under the said Act. The learned Sessions Judge granted the said application.

In ***State of H.P. v. Nishant Sareen, (2010) 14 SCC 527*** the respondent therein was caught red-handed accepting bribe from the complainant. Sanction was sought by the Vigilance Department under Section 19 of the Prevention of Corruption Act, 1988 to prosecute the respondent. The Principal Secretary (Health) found no justification in granting sanction to prosecute the respondent. Sanction was refused. Thereafter, Vigilance Department took up the matter again with the Principal Secretary (Health) for grant of sanction. The matter was reconsidered. Though no fresh material was available for further consideration, the competent authority granted sanction to prosecute the respondent. It is in these circumstances that this court observed that sanction to prosecute a public servant on review could be granted only when fresh materials have been collected by the investigating agency subsequent to earlier order. Reconsideration can be done by the sanctioning authority in the light of the fresh material, prayer for sanction having been once refused.

Nishant Sareen case (supra) also can have no application to the facts of the present case. Here, initially prosecution did show lackadaisical approach in obtaining sanction. But, at no point of time, sanction was refused. On 1.4.2008, the District Magistrate granted sanction but learned Sessions Judge rejected the application. Looking to the seriousness of the matter, that order ought to have been challenged by the prosecution but it was not challenged. Thereafter, the District Magistrate again granted sanction. Learned Sessions Judge took that sanction on record and directed the trial to proceed against the appellant for offences under Sections 3, 4, 5 and 6 of the said Act. The High Court affirmed the view taken by learned Sessions Judge. To these facts, judgment in ***Nishant Sareen*** (supra), where sanction was refused earlier by the Principal Secretary (Health) and was granted on the same material later on, can have no application.

In this connection, we may usefully refer to the judgment of this court in ***State of Goa v. Babu Thomas, (2005) 8 SCC 130***. In that case, the respondent therein was employed as Joint Manager in Goa Shipyard Limited, a Government of India Undertaking under the Ministry of Defence. He was arrested by the

CID, Anti-Corruption Bureau of Goa Police on the charge that he demanded and accepted illegal gratification from an attorney of M/s. Tirumalla Services in order to show favour for settlement of wages, bills/arrears certification of pending bills and to show favour in the day-to-day affairs concerning the said contractor.

The first sanction to prosecute the respondent in ***Babu Thomas*** Case was issued by an incompetent authority. The second sanction issued retrospectively after the cognizance was taken was also by an incompetent authority. This court held that when Special Judge took cognizance, there was no sanction under the law authorizing him to take cognizance. This was a fundamental error which invalidated the cognizance as being without jurisdiction. However, having regard to the gravity of the allegations levelled against the respondent, this court permitted the competent authority to issue a fresh sanction order and proceed afresh against the respondent from the stage of taking cognizance of the offence. It is pertinent to note that the offence therein was committed on 14/9/1994. Looking to the seriousness of the offence, this court permitted the competent authority to issue fresh sanction order after about 10 years. We have no hesitation in drawing support from this judgment.

The offence in this case is equally grave. At no stage, sanction was refused by the competent authority. It is not the case of the appellant that sanction is granted by the authority, which is not competent. It is true that the proceedings are sought to be initiated under the said Act against the appellant after three years. But, in the facts of this case, where 14 innocent persons lost their lives and several persons were severely injured due to the blast which took place in the appellant's shop, three years period cannot be termed as delay. It is also the duty of the court to see that perpetrators of crime are tried and convicted if offences are proved against them.

We are not inclined to accept the specious argument advanced by learned counsel for the appellant that the lapse of three years has caused prejudice to the accused. The case will be conducted in accordance with the law and the appellant will have enough opportunity to prove his innocence. Besides, equally dear to us are the victims' rights.

It is true that learned Sessions Judge has, by his order dated 13/9/2007 discharged the appellant of the charges under Sections 3, 4, 5 and 6 of the said Act because there was no sanction. But, the prosecution has now obtained sanction. The Sessions Judge has accepted the sanction and has directed that the trial should be started against the appellant for offences under Sections 3, 4, 5 and 6 of the said Act, as well. The order of the Sessions Judge is affirmed by the impugned order passed by the High Court.

In view of the legal position as discussed above, and in the facts of the case, as narrated above, we see no reason to interfere in the matter and we direct the trial court to frame additional charges against the appellant under Sections 3, 4, 5 and 6 of the said Act and to proceed with the trial.

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246. INDIAN PENAL CODE, 1860 – Section 302

CRIMINAL TRIAL:

Murder trial – Appreciation of evidence of child witness – Prosecution witness aged only 8 years, at the time of trial has given a very natural account of how the accused/appellant killed her mother – Her evidence is also corroborated by other evidence available on record – Conviction based on such evidence is sustainable.

Promode Dey v. State of West Bengal

Judgment dated 22.03.2012 passed by the Supreme Court in Criminal Appeal No. 405 of 2008, reported in (2012) 4 SCC 559

Held:

The learned counsel for the appellant submitted that the conviction of the appellant is based on the sole testimony of a child witness, PW2. Relying on the decision of this Court in ***Arbind Singh v. State of Bihar, 1994 SCC (Cri) 1418,*** he submitted that where the entire case is based on the evidence of a child witness, who is prone to tutoring, the conviction is not safe. He further submitted that the Magistrate before whom the statement under Section 164 CrPC was recorded has not been examined. He also submitted that Anath Dey, the granduncle of PW2, who was present in the house, has also not been examined. He argued that PW3, PW4, PW5, PW6, PW7 and PW9 have all turned hostile and not supported the prosecution case.

We have perused the decision of this Court in ***Arbind Singh v. State of Bihar, 1995 Supp (4) SCC 416*** cited by learned counsel for the appellant and we find that in that case the Court took the view that implicit faith and reliance could not be placed on the evidence of a child witness as there were variations in her statement recorded on 25.10.1984, 28.10.1984 and 05.11.1984 and there were traces of tutoring on certain aspects of the case and it was not corroborated by any independent and reliable evidence. In the present case, on the other hand, we find that PW-2 had answered the first few questions put by the court very smartly and intelligently and the Court has made a mention while recording her evidence that she could become a witness in this case. That apart, she has given a very natural account of how the appellant killed her mother. The relevant portion of the evidence of PW-2 is extracted hereinbelow:

> "On 10th Falgun, Saturday at around 10.00 Hrs. she was killed by a person. Promode Dey killed my mother by striking on her head, back, fingers and throat with a Dao. I know that Promode Dey. He is now standing inside the Court room.
>
> At the time of incident my mother Pratima Nandi was making bidi sitting in the courtyard of our house. I was sitting just beside her. That time Promode Dey came to that place and asked my mother as to why my mother gave him medicine.

> Promode Dey told my mother "you have tried to kill me by medicine. I shall kill you." By saying so Promode Nandi hit my mother's head with a Dao. My mother thus fled away and entered into our room. Promode Dey broke the said door and entered into that room and again hit my mother with Dao. Then my mother came out of that room and accused Promode Dey followed her and came out of that room and again assaulted her with Dao. Then my mother again ran and thereafter fell on the ground. The accused hit my mother on her throat with Dao and the major portion of her throat was thus out and only a remaining portion of the head was still attached with the neck. I have seen the entire incident. That time, I shouted to call my grand mother but none came at my shouting. In the meantime Promode Dey returned to his house along with Dao."

Moreover, soon after the incident on 23.02.2002 she has told her grandmother (PW-1) and her father (PW-11) that it was the appellant who had killed the deceased and both PW-1 and PW-11 have deposed before the Court in their evidence that they have been told by PW-2 that the appellant had killed the deceased with a dao. PW-8, who was a resident of the area, has also stated in his evidence that soon after the incident he had heard PW-2 saying that the appellant had killed the deceased. Moreover, two days after the incident on 25.02.2002 she had given a statement before the Magistrate under Section 164, Cr.P.C., that the Panchayat, namely, the appellant, had killed the deceased by a dao. Thus, right from the time of the evidence till the time she was examined in court, PW-2 has consistently said that the appellant had killed the deceased with the dao. We cannot, therefore, hold that PW-2 has been tutored to depose against the appellant.

The evidence of PW-2 is also corroborated by the fact that a blood-stained dao was recovered on the very date of the incident from a jungle by the side of the house of the appellant. This is clear from the evidence of PW-14, the I.O., who had said that after the appellant was interrogated he took him to the jungle by the side of his house and he drew one dao from that jungle and the dao was blood-stained at that time and he seized a dao from him and prepared a seizure list in the presence of the witnesses, which is marked as Ext.6.

The medical evidence of PW-10 does not also contradict the evidence of PW-2 that the appellant struck the deceased on her head, back, fingers and her throat. PW-10 has stated that there were sharp cutting injuries on the left side of neck, left cheek, both the upper arms and left thumb and the injures were ante-mortem in nature and are 100% sufficient for causing death of the victim and a sharp cutting weapon has been used to cause the injuries.

In our considered opinion, the High Court is right in sustaining the conviction of the appellant on the basis of the eyewitness account of PW-2 and the evidence of PW-1, PW-8 and PW-11 as well as the recovery of the dao under Ext.6 at the instance of the appellant. The impugned judgment of the High Court is, therefore, sustained and the appeal is dismissed.

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***247. INDIAN PENAL CODE, 1860 – Section 302**
EVIDENCE ACT, 1872 – Section 32 (1)

(i) Murder trial – Death by burning – Lower half of the body of the deceased had received more burn injuries than her upper part – Dying declaration recorded by the competent officer of the executive is found reliable and whatever is stated in it is supported by other evidence – Prosecution evidence shows that the deceased tried to fight before succumbing to burn assault by the accused – Moreover, the statements of the defence witnesses are untrustworthy – Conviction of the accused upheld.

(ii) Dying declaration – If recorded in accordance with law is reliable and gives a cogent and possible explanation of the occurrence of the event, then the dying declaration can certainly be relied upon by the Court and could form the sole piece of evidence resulting in conviction.

Bhajju alias Karan Singh v. State of Madhya Pradesh
Judgment dated 15.03.2012 passed by the Supreme Court in Criminal Appeal No. 301 of 2008, reported in (2012) 4 SCC 327

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***248. INDIAN PENAL CODE, 1860 – Section 302/34**
CRIMINAL PROCEDURE CODE, 1973 – Section 154
CRIMINAL TRIAL:

(i) Murder trial – Non-examination of independent witness – Effect of – By itself may not give rise to adverse inference against prosecution but, when evidence of alleged eye-witnesses raises serious doubt about their presence at the time of actual occurrence, unexplained omission to examine independent witnesses would assume significance.

(ii) Defective investigation – Effect of – Unless lapse on the part of the Investigating Authorities or such as to cast reasonable doubt on prosecution story or seriously prejudiced defence of accused, Court would not set aside conviction on such ground.

(iii) FIR – Variation in recording time of occurrence – In absence of any evidence to show that time of incident recorded in FIR was first written in pencil and thereafter, was erased and again overwritten, it cannot be held that time of incident as recorded was doubtful.

Hiralal Pandey and others v. State of Uttar Pradesh

Judgment dated 1704.2012 passed by the Supreme Court in Criminal Appeal No. 65 of 2008, reported in (2012) 5 SCC 216

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249. INDIAN PENAL CODE, 1860 – Section 302/149

CRIMINAL TRIAL:

(i) Evidence of common object to murder deceased couple – Could be inferred from: (a) motive evident from existence of prior animosity and clashes; (b) evidence of related witnesses and (c) medical evidence establishing brutality in attack indicative of intention of accused to kill victims.

(ii) Plea of alibi –Tenability of –Trial Court noticed the contradictions appearing in the defence witnesses and also examined the possibility that keeping in view the distance between the factory and the place of occurrence which was nearly 5 km or so, possibility of accused going to the factory after the occurrence could not be ruled out – Plea of alibi not tenable.

State of Haryana v. Shakuntla and others

Judgment dated 19.04.2012 passed by the Supreme Court in Criminal Appeal No. 658 of 2008, reported in (2012) 5 SCC 171

Held:

It is clear that, as per the case of the prosecution, there were more than five persons assembled at the incident. All these nine persons were also convicted by the Trial Court and the conviction and sentence of six of them has been affirmed by the High Court. The members of this assembly had acted in furtherance to the common object and the same object was made absolutely clear by the words of accused Matadin, when he exhorted all the others to 'finish' the deceased persons.

In other words, the intention and object on the part of this group was clear. They had come with the express object of killing Manohar Lal and his family members. It might have been possible for one to say that they had come there not with the intention to commit murder, but only with the object of beating and abusing Manohar Lal and others, but in view of the manner in which Matadin exhorted all the others and the manner in which they acted thereafter, clearly establishes that their intention was not to inflict injuries simplicitor. Manohar Lal, admittedly, had fallen on the ground. However, the accused still continued inflicting heavy blows on him and kept on doing so till he breathed his last. They did not even spare his wife Sushila and inflicted as many as 33 injuries on her body.

Where a person has the intention to cause injuries simplicitor to another, he/she would certainly not inflict 30/33 injuries on the different parts of the body of the victim, including the spine. The spine is a very delicate and vital part of

the human body. It, along with the ribs protects all the vital organs of the body, the heart and lungs, etc. Powerful blows on these parts of the body can, in normal course, result in the death of a person, as has happened in the case before us. The way in which the crime has been committed reflects nothing but sheer brutality. The members of the assembly, therefore, were aware that their acts were going to result in the death of the deceased. Therefore, we find no merit in this contention of the accused also.

Then the next argument advanced on behalf of the accused is that accused Kailash has neither been named in the FIR nor has been attributed responsibility for any injury and also, no material witness has been examined to attribute any role to Kailash in the commission of the crime. Thus, he is entitled to acquittal. Kailash is also related to the deceased as well as to PW-4 and PW-5. PW-4, in his statement, had clearly stated that accused Matadin, Rajender, Krishan and one of their other relations, who was later on identified to be Kailash, had reached there, armed with jailies. Even in the FIR, PW4 had made a similar statement that one other relative of his, whose name he did not know, had also come there. Thus, it was a case where PW-4 had duly identified that person, but did not know the exact name of that person.

Further, it is true that the witnesses have not attributed any specific role to Kailash, but their statement is clear that all the accused persons had started inflicting injuries upon the body of the deceased. In other words, being member of the unlawful assembly, Kailash, along with others, had also inflicted injuries upon the deceased, in furtherance to the common object and thus, would also be liable to be held guilty accordingly. Another important feature is that recovery of Ext. 11, Jaili was made at the behest of accused, Kailash and was taken into possession vide Ext. PUA–1.

Thus, it is not a case based on mere statements by the interested witnesses, but is also supported by other evidence. Further, if we examine this case from another point of view, i.e, if three persons whose plea of alibi has been accepted by the High Court were indeed absent and as per plea of alibi of other accused, namely, Krishan and Rajender along with Kailash, they were also not present there, then it could hardly have been possible for the remaining three persons to inflict 63 injuries on the bodies of the deceased in a short spam. Not that this is a determinative factor, but this is a rational manner of looking at the events, as they appear to have happened in the present case.

The prosecution also has examined other witnesses who have deposed unambiguously involving Kailash also in the crime.

Lastly, the learned counsel appearing for the appellant has contended that the plea of alibi of Rajender, Krishan and Kailash should have been accepted by the High Court. The accused have led their defence and produced defence witnesses to prove their plea of alibi. It is also their contention that the evidence of the defence witnesses should be appreciated at par with the prosecution witnesses.

In this regard, reliance is also placed upon the judgment of this Court in *Munshi Prasad v. State of Bihar, (2002) 1 SCC 351.*

The Trial Court as well as the High Court have disbelieved the plea of alibi of accused Rajender, Krishan and Kailash.

In paragraphs 62 to 67 of the judgment, the Trial Court has discussed, at some length, the reasons for disbelieving the pleas of alibi raised by the accused. In fact, the Trial Court noticed the contradictions appearing in the statement of DW-2 and DW-3. It also noticed that either Ext. DB, the certificate, was not correct or DW-3 Khem Chand was deposing falsely before the Court. The Trial Court also examined the possibility that keeping in view the distance between the factory and the place of occurrence, which was nearly 5 kilometers or so, the possibility of the accused going to the factory after the occurrence could not be ruled out. These findings recorded by the Trial Court have been accepted by the High Court.

The High Court, keeping in view the evidence led by the defence witnesses accepted the plea of alibi as far as Shakuntla, Premwati and Sarjeeta are concerned. In respect of the other three accused, we see no reason to interfere with these concurrent findings, as they neither suffer from any perversity in law nor any error in appreciation of evidence. Thus, we also reject the plea of alibi of all these three accused.

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250. INDIAN PENAL CODE, 1860 – Sections 302 and 376
EVIDENCE ACT, 1872 – Sections 3 and 8

(i) Interested witness – One who has some direct interest in having the accused somehow convicted for some extraneous reasons and near relative of the victim is not necessarily an interested witness.

(ii) Test identification parade – Would have been necessary if the accused was not previously known to eye witness.

(iii) Non-seizure of weapon of offence, when immaterial? Where there was clear and cogent evidence of grandmother of child on record, dead body and footwear recovered at the instance of accused, report of post mortem and F.S.L. was also against the accused – In view of above factual position, non-seizure of weapon of offence is immaterial.

Amit v. State of Uttar Pradesh

Judgment dated 23.02.2012 passed by the Supreme Court in Criminal Appeal No. 1905 of 2012, reported in AIR 2012 SC 1433

Held:

We may first consider the contention of the learned counsel for the appellant that the evidence of PW-3 who saw the appellant taking away Monika from her lap should not be relied on. PW-3 is no doubt the grandmother of Monika but she is not an interested witness. As has been held by this Court in *State of*

Rajasthan v. Smt. Kalki and another, AIR 1981 SC 1390, Myladimmal Surendran and others v. State of Kerala, AIR 2010 SC 3281 and *Takdir Samsuddin Sheikh v. State of Gujarat and another, AIR 2012 SC 37,* an interested witness must have some direct interest in having the accused somehow convicted for some extraneous reason and a near relative of the victim is not necessarily an interested witness. There is no evidence to show that PW-3 was somehow interested in having the appellant convicted. PW-3, however, is an aged woman and she has admitted in her cross-examination that she cannot see with her right eye but she has also stated in her cross-examination that she can see with her left eye and the sight of her left eye has not diminished on account of old age and she can fully see everything and can also pass a thread through the eye of the needle and that she does not use spectacles and can see without spectacles. Hence, the evidence of PW-3 that the appellant came to her house and took away Monika from her lap on the pretext of giving biscuits to her cannot be disbelieved.

We may now deal with the contention of the learned counsel for the appellant that no Test Identification Parade was conducted during investigation for the witness to identify the appellant as the person who had taken away the child from her lap. Test Identification Parade would have been necessary if the appellant was unknown to PW-3 but as the appellant was the neighbour of PW-3 and known to her no Test Identification Parade was necessary for PW-3 to identify the appellant. In fact when PW-1 returned home, he was told by PW-3 that the appellant had taken away Monika on the pretext of giving her biscuits because PW-3 knew the appellant. Moreover, on such information received from PW-3, PW-1 lodged the FIR naming the appellant as the person who had taken away Monika on the pretext of giving her biscuits. Hence, the argument of learned counsel for the appellant that no Test Identification Parade was conducted for PW-3 to identify the appellant is misconceived in the facts of this case.

Regarding the contention of learned counsel for the appellant that no independent witnesses were taken by the police for recovery of the articles and PW-1, who was the father of Monika and who was inimical to the appellant was made a witness to the recovery of the articles, we find from the memo Ex.Ka-10 recording the recovery of blood- stained shirt of the appellant that the recovery was made in presence of two Constables, namely, Harender Singh and Jasbir Singh, and PW-1 was not a witness to this recovery. Thereafter, the appellant made a confession that he had concealed the dead body of Monika in the wheat field and pursuant to this confession the dead body of Monika kept in a plastic bag was recovered in presence of not only PW-1 but also PW-4 (Iqbal Singh). The recovery memo (Ext.Ka-2) with regard to the dead body of Monika and the recovery memo Ext.Ka-3 with regard to plastic bag bear the signatures of the two witnesses PW-1 and PW-4. Pursuant to the statement made by the appellant, the chappals which Monika was wearing at the time of murder were also recovered from the house of the appellant in presence of PW-1 and PW-4 and the recovery memo with regard to the chappals (Ext.Ka-5) also bears the

signatures of PW-1 and PW-4. Thus, it is not correct, as has been submitted by learned counsel for the appellant, that only PW-1 was a witness to the recovery of various articles and that this was a case which PW-1 had planted on the appellant on account of previous enmity. PW-4 was also a witness to the recovery of the articles which implicate the appellant in the offence and it is not the case of the appellant that PW-4 was in any way inimical to the appellant.

Coming to the argument of the counsel for the appellant that the weapon with which Monika was killed has not been recovered, it appears from the evidence of the senior pathologist Dr. Vikrama Singh, PW-5, who carried out the post mortem report on the body of Monika that there were swelling marks on her head and left side of the face which established that she has been hit on her head and her left side of the face. PW-5 has also stated in his evidence that there was a ligature mark all around her neck which indicates that she was also strangulated. PW-5 has further deposed that there was a lacerated wound on the anterior part of arms anus and her vagina was inflamed and congested which prove that unnatural offence and rape was committed on her. PW-5 has opined that all the injuries together are the cause of the death of Monika. The report of the Forensic Science Laboratory (Ex.A-23) confirms human blood and human sperms on the underwear of Monika. Thus, even if the object with which Monika was hit has not been identified and recovered, the evidence of PW-3, the recovery of various articles made pursuant to the confession of the appellant, the evidence of PW-5 and the report of the Forensic Science Laboratory Ex.A-23 prove beyond all reasonable doubt that it is the appellant alone who after having kidnapped Monika committed unnatural offence as well as rape on her and killed her and thereafter caused disappearance of the evidence of the offences. The High Court has, therefore, rightly confirmed the conviction of the appellant under Sections 364, 376, 377, 302 and 201 IPC.

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251. INDIAN PENAL CODE, 1860 – Sections 302 and 376(2)(f)
EVIDENCE ACT, 1872 – Sections 3 and 45

(i) How to appreciate inconclusive F.S.L. report? If circumstantial evidence and medical evidence are taken in their entirety and the involvement of the accused is proved, inconclusive F.S.L. report will not grant benefit of doubt to accused.

(ii) Rarest of rare case – Accused took the victim on the pretext of buying biscuits and raped her – Killed the child and left her in open field without clothes – Crime was committed in the most brutal manner reflecting the most unfortunate and abusive facet of human conduct – Death sentence in above fact just and proper.

Rajendra Pralhadrao Wasnik v. State of Maharashtra

Judgment dated 29.02.2012 passed by the Supreme Court in Criminal Appeal No. 145 of 2011, reported in AIR 2012 SC 1377

Held:

It has been vehemently argued on behalf of the appellant that the report of the FSL does not connect the accused to the commission of the crime. This, being a very material piece of evidence which the prosecution has failed to establish, the accused would be entitled to the benefit of doubt. There were two kinds of Exhibits which were sent by the Police to the Forensic Science Laboratory for examination - one, the blood-stained clothes of the deceased and second, the sample of blood, semen and pubic hair sample of the accused which were sent vide Exhibit 57. The reports of the laboratory are Exhibits 76, 77, 78 and 79. As far as the reports in respect of the appellant's sample of semen and blood are concerned, they were inconclusive as was stated by the FSL in Exhibit 76. His clothes which were seized by the Police did not bear any blood or semen stains and that was duly recorded in Exhibit 78. Exhibit 77 were the clothes of the deceased which were blood stained. The clothes contained blood group 'O' which was the blood group of the deceased girl. From the report of the experts, it is clear that there is no direct evidence connecting the appellant to the commission of the crime but it is not the case of the defence that the FSL report was in the negative. Merely because the report was inconclusive, it is not necessary that the irresistible conclusion is only one that the accused is not guilty, particularly where the prosecution has been able to establish its case on circumstantial evidence as also by direct oral evidence. It is a settled principle of law that the evidence has to be read in its entirety. If, upon reading the evidence as such, there are serious loopholes or lacking in the case of the prosecution and they do not prove that the accused is guilty, then the Court would be justified in giving the benefit of doubt to the accused on the strength of a weak FSL report. The FSL report Exhibit P77 had clearly established that the blood of group 'O' was found on the clothes of the deceased and that was her blood group. The prosecution has been able to establish not only by substantial evidence but clearly by medical evidence as well, that the minor girl had suffered serious injuries on her private parts and there were bite marks on her chest.

We shall tentatively examine the facts of the present case in light of the above principles. First and foremost is that the crime committed by the accused is heinous. In fact, it is not heinous simplicitor, but is a brutal and inhuman crime where a married person, aged 31 years, chooses to lure a three year old minor girl child on the pretext of buying her biscuits and then commits rape on her. Further, obviously intending to destroy the entire evidence and the possibility of being identified, he kills the minor child. On the basis of the 'last seen together' theory and other direct and circumstantial evidence, the prosecution has been able to establish its case beyond any reasonable doubt. It can hardly be even imagined that what torture and brutality the minor child must have faced during the course of commission of this crime. All her private parts were swollen and bleeding. She was bleeding through her nose and mouth. The injuries, as described in EX.P17 (the post mortem report) shows the extent of brutal sexual urge of the accused, which targeted a minor child, who still had to see the

world. He went to the extent of giving bites on her chest. The pain and agony that he must have caused to the deceased minor girl is beyond imagination and is the limit of viciousness. This Court has to examine the conduct of the accused prior to, at the time as well as after the commission of the crime. Prior thereto, the accused had been serving with PW5 and PW6 under a false name and took advantage of his familiarity with the family of the deceased. He committed the crime in the most brutal manner and, thereafter, he opted not to explain any circumstances and just took up the plea of false implication, which is unbelievable and unsustainable. When the Court draws a balance-sheet of the aggravating and mitigating circumstances, for the purposes of determining whether the extreme sentence of death should be imposed upon the accused or not, the scale of justice only tilts against the accused as there is nothing but aggravating circumstances evident from the record of the Court. In fact, one has to really struggle to find out if there were any mitigating circumstances favouring the accused. Another aspect of the matter is that the minor child was helpless in the cruel hands of the accused. The accused was holding the child in a relationship of 'trust-belief' and 'confidence', in which capacity he took the child from the house of PW2. In other words, the accused, by his conduct, has belied the human relationship of trust and worthiness.

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252. INDIAN PENAL CODE, 1860 – Section 396

Imposition of death sentence when justified? Crime was pre-meditated – Murders were brutal, grotesque, diabolic, revolting and dastardly which indicated the criminality of the perpetrators of the crime – Death sentence proper.

Sonu Sardar v. State of Chhattisgarh

Judgment dated 23.02.2012 passed by the Supreme Court in Criminal Appeal No. 1333 of 2010, reported in AIR 2012 SC 1480

Held:

In a recent judgment in ***Sunder Singh v. State of Uttaranchal, 2011 AIR SCW 2455***, this Court found that the accused had poured petrol in the room and set it to fire and closed the door of the room when all the members of the family were having their food inside the room and, as a result, five members of the family lost their lives and the sixth member of the family, a helpless lady, survived. This Court held that the accused had committed the crime with pre-meditation and in a cold blooded manner without any immediate provocation from the deceased and all this was done on account of enmity going on in respect of the family lands and this was one of those rarest of rare cases in which death sentence should be imposed. The facts in the present case are no different. Five members of a family including two minor children and the driver were ruthlessly killed by the use of a knife, an axe and an iron rod and with the help of four others. The crime was obviously committed after pre-meditation with absolutely no consideration for human lives and for money. Even though the appellant was

young, his criminal propensities are beyond reform and he is a menace to the society. The trial court and the High Court were therefore right in coming to the conclusion that this is one of those rarest of rare cases in which death sentence is the appropriate punishment.

We have considered the submissions of the learned counsel for the parties and we find that the trial court has recorded the following special reasons under Section 354 (3) of the Criminal Procedure Code, 1898 for awarding the death sentence on the appellant:

(i) The crime was pre-meditated.

(ii) The crime has struck fear and terror in the public mind.

(iii) Helpless and defenceless women and two minor children aged eight and four years besides two adult men were murdered.

(iv) Asgar Ali, the driver of Shamim, who had only stopped in the house for his food, was also not spared.

(v) Taking advantage of earlier business relations with Shamim, the appellant made a friendly entry and committed the murders.

(vi) The intention was to kill all members of the family though surprisingly a six month old baby and a four year old child remained alive.

(vii) The five murders were brutal, grotesque, diabolical, revolting and dastardly, which indicated the criminality of the perpetrators of the crime.

(viii) No physical or financial harm appears to have been caused by the deceased to the accused.

As against these aggravating circumstances, the trial court did not find any mitigating circumstance in favour of the appellant to avoid the death penalty. This is, therefore, not one of those cases in which the trial court has not recorded elaborate reasons for awarding death sentence to the appellant as contended by learned counsel for the appellant.

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253. INDIAN PENAL CODE, 1860 – Section 494/109

Abetment of bigamy – If it is not proved that co-accused has known the fact that decree of divorce was set aside, they cannot be convicted for offence of abetment of bigamy.

Kannan v. Selvamuthukani

Judgment dated 30.01.2012 passed by the Supreme Court in Criminal Appeal No. 234 of 2012, reported in AIR 2012 SC 1217

Held:

The prosecution has clearly established that A1 was married to the complainant on 16.6.1980. It is also a fact that A1 obtained a decree of divorce on 20.2.1991 which was set aside on 10.2.1992 in the appeal carried by the

complainant against the said decree of divorce. Evidence of the complainant establishes beyond doubt that A1 married A4 on 8.3.1992. The question is whether the fact that the decree of divorce was set aside and the marriage between A1 and the complainant was revived was known to A3, A4 and A5. Merely because A3 is the sister of A1, it cannot be presumed that she knew that the decree of divorce was set aside. If A1 wanted to marry A4, it is possible that he would keep back these facts from his sister as also from A4 and A5 i.e. his second wife and her father respectively.

In our opinion, the evidence of PW-1, PW-2 and PW-3 does not conclusively establish the fact that the decree of divorce was set aside on 10.2.1992 was known to A3, A4 and A5 and, therefore, benefit of doubt must be given to A3, A4 and A5. In the circumstances, in our opinion, the impugned judgment and order dated 24.9.2008 so far as it convicts and sentences A3, A4 and A5 needs to be set aside.

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254. JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2000

Determination of age – Where school record is ambiguous and does not conclusively prove minority of accused, medical opinion assumes importance – If academic certificates and school records are alleged to have been withheld deliberately with ulterior motive, and authenticity of medical evidence is also under challenge by prosecution, the issue would be decided on the basis of evidence led by parties.

Om Prakash v. State of Rajasthan and another

Judgment dated 13.04.2012 passed by the Supreme Court in Criminal Appeal No. 651 of 2012, reported in (2012) 5 SCC 201

Held:

The benefit of the principle of benevolent legislation attached to Juvenile Justice Act would apply to only such cases wherein the accused is held to be a juvenile on the basis of at least prima facie evidence regarding his minority as the benefit of the possibilities of two views in regard to the age of the alleged accused who is involved in grave and serious offence which he committed and gave effect to it in a well planned manner reflecting his maturity of mind rather than innocence indicating that his plea of juvenility is more in the nature of a shield to dodge or dupe the arms of law, cannot be allowed to come to his rescue. Hence, if the plea of juvenility or the fact that he had not attained the age of discretion so as to understand the consequence of his heinous act is not free from ambiguity or doubt, the said plea cannot be allowed to be raised merely on doubtful school admission record and in the event it is doubtful, the medical evidence will have to be given due weightage while determining the age of the accused.

Adverting to the facts of this case, we have noticed that the trial court in spite of the evidence led on behalf of the accused was itself not satisfied that the accused was a juvenile as none of the school records relied upon by the respondent-accused could be held to be free from doubt so as to form a logical and legal basis for the purpose of deciding the correct date of birth of the accused indicating that the accused was a minor/juvenile on the date of the incident.

The observations made in ***Ramdeo Chauhan v. State of Assam, (2001) 5 SCC 714,*** no doubt were recorded by the learned Judges of this Court while considering the imposition of death sentence on the accused who claimed to be a juvenile, nevertheless the views expressed therein clearly lends weight for resolving an issue where the court is not in a position to clearly draw an inference wherein an attempt is made by the accused or his guardian claiming benefit available to a juvenile which may be an effort to extract sympathy and impress upon the Court for a lenient treatment towards the so-called juvenile accused who, in fact was a major on the date of incident.

However, we reiterate that we may not be misunderstood so as to infer that even if an accused is clearly below the age of 18 years on the date of commission of offence, should not be granted protection or treatment available to a juvenile under the Juvenile Justice Act if a dispute regarding his age had been raised but was finally resolved on scrutiny of evidence. What is meant to be emphasized is that where the courts cannot clearly infer in spite of available evidence on record that the accused is a juvenile or the said plea appear to have been raised merely to create a mist or a smokescreen so as to hide his real age in order to shield the accused on the plea of his minority, the attempt cannot be allowed to succeed so as to subvert or dupe the cause of justice.

Similarly, if the conduct of an accused or the method and manner of commission of the offence indicates an evil and a well planned design of the accused committing the offence which indicates more towards the matured skill of an accused than that of an innocent child, then in the absence of reliable documentary evidence in support of the age of the accused, medical evidence indicating that the accused was a major cannot be allowed to be ignored taking shelter of the principle of benevolent legislation like the Juvenile Justice Act, subverting the course of justice as statutory protection of the Juvenile Justice Act is meant for minors who are innocent law breakers and not accused of matured mind who uses the plea of minority as a ploy or shield to protect himself from the sentence of the offence committed by him.

The benefit of benevolent legislation under the Juvenile Justice Act obviously will offer protection to a genuine child accused/juvenile who does not put the court into any dilemma as to whether he is a juvenile or not by adducing evidence in support of his plea of minority but in absence of the same, reliance placed merely on shaky evidence like the school admission register which is not proved or oral evidence based on conjectures leading to further ambiguity, cannot be relied upon in preference to the medical evidence for assessing the age of the accused.

While considering the relevance and value of the medical evidence, the doctor's estimation of age although is not a sturdy substance for proof as it is only an opinion, such opinion based on scientific medical test like ossification and radiological examination will have to be treated as a strong evidence having corroborative value while determining the age of the alleged juvenile accused.

The Juvenile Justice Act which is certainly meant to treat a child accused with care and sensitivity offering him a chance to reform and settle into the mainstream of society, the same cannot be allowed to be used as a ploy to dupe the course of justice while conducting trial and treatment of heinous offences. This would clearly be treated as an effort to weaken the justice dispensation system and hence cannot be encouraged.

We therefore deem it just and appropriate to set aside the judgment and order passed by the High Court in ***Om Prakash v. State, Criminal Revision No. 597 & 2009, Order dated 19.8.2010 (Raj)*** as also the courts below and thus allow this appeal. Consequently, the accused Vijay Kumar, S/o Joga Ram shall be sent for trial before the court of competent jurisdiction wherein the trial is pending and not to the Juvenile Court as pleaded by him.

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255. LAND ACQUISITION ACT, 1894 – Sections 11, 12 and 18
Limitation for filing reference application – Reference application getting delayed for want of copy of award alongwith the notice under Section 12 (2) of the Act – Held, alongwith the notice under Section 12 (2) of the Act, the landowner, who is not present or is not represented before the Collector at the time of making of award should be supplied with a copy thereof so that he may effectively exercise his right under Section 18 (1) of the Act to seek reference to the Court.

Premji Nathu v. State of Gujarat and another
Judgment dated 09.04.2012 passed by the Supreme Court in Civil Appeal No. 3430 of 2012, reported in (2012) 5 SCC 250

Held:

In terms of Section 12 (2), the Collector is required to give notice of his award to the interested persons who are not present either personally or through their representatives at the time of making of awards.

Section 18(1) provides for making of reference by the Collector to the Court for the determination of the amount of compensation etc. Section 18(2) lays down that an application for reference shall be made within six weeks from the date of the Collector's award, if at the time of making of award the person seeking reference was present or was represented before the Collector. If the person is not present or is not represented before the Collector, then the application for reference has to be made within six weeks of the receipt of notice under Section 12(2) or within six months from the date of the Collector's award, whichever period shall first expire.

The reason for providing six months from the date of the award for making an application seeking reference, where the applicant did not receive a notice under Section 12(2) of the Act, while providing only six weeks from the date of receipt of notice under Section 12(2) of the Act for making an application for reference where the applicant has received a notice under Section 12(2) of the Act is obvious. When a notice under Section 12(2) of the Act is received, the landowner or person interested is made aware of all relevant particulars of the award which enables him to decide whether he should seek reference or not. On the other hand, if he only comes to know that an award has been made, he would require further time to make enquiries or secure copies so that he can ascertain the relevant particulars of the award.

What needs to be emphasised is that along with the notice issued under Section 12(2) of the Act, the land owner who is not present or is not represented before the Collector at the time of making of award should be supplied with a copy thereof so that he may effectively exercise his right under Section 18(1) to seek reference to the Court.

In ***State of Punjab v. Qaisar Jehan Begum, AIR 1963 SC 1604,*** the principle laid down in ***Harish Chandra Raj Singh v. Land Acquisition Officer, AIR 1961 SC 1500*** was reiterated and it was held:

> "5. ... It seems clear to us that the ratio of the decision in ***Harish Chandra*** case (supra) is that the party affected by the award must know it, actually or constructively, and the period of six months will run from the date of that knowledge. Now, knowledge of the award does not mean a mere knowledge of the fact that an award has been made. The knowledge must relate to the essential contents of the award. These contents may be known either actually or constructively. If the award is communicated to a party under Section 12(2) of the Act, the party must be obviously fixed with knowledge of the contents of the award whether he reads it or not. Similarly when a party is present in court either personally or through his representative when the award is made by the Collector, it must be presumed that he knows the contents of the award. Having regard to the scheme of the Act we think that knowledge of the award must mean knowledge of the essential contents of the award."

In ***Bhagwan Das v. State of U.P., (2010) 3 SCC 545,*** this Court interpreted Section 18 and laid down the following propositions:

(i) If the award is made in the presence of the person interested (or his authorised representative), he has to make the application within six weeks from the date of the Collector's award itself.

(ii) If the award is not made in the presence of the person interested (or his authorised representative), he has to make the application seeking reference within six weeks of the receipt of the notice from the Collector under Section 12(2).

(iii) If the person interested (or his representative) was not present when the award is made, and if he does not receive the notice under Section 12(2) from the Collector, he has to make the application within six months of the date on which he actually or constructively came to know about the contents of the award.

(iv) If a person interested receives a notice under Section 12(2) of the Act, after the expiry of six weeks from the date of receipt of such notice, he cannot claim the benefit of the provision for six months for making the application on the ground that the date of receipt of notice under Section 12(2) of the Act was the date of knowledge of the contents of the award."

The Court in ***Bhagwan Das*** (supra) then held:

"30. When a person interested makes an application for reference seeking the benefit of six months' period from the date of knowledge, the initial onus is on him to prove that he (or his representative) was not present when the award was made, that he did not receive any notice under Section 12(2) of the Act, and that he did not have the knowledge of the contents of the award during a period of six months prior to the filing the application for reference. This onus is discharged by asserting these facts on oath. He is not expected to prove the negative. Once the initial onus is discharged by the claimant/person interested, it is for the Land Acquisition Collector to establish that the person interested was present either in person or through his representative when the award was made, or that he had received a notice under Section 12(2) of the Act, or that he had knowledge of the contents of the award.

31. Actual or constructive knowledge of the contents of the award can be established by the Collector by proving that the person interested had received or drawn the compensation amount for the acquired land, or had attested the mahazar/panchnama/proceedings delivering possession of the acquired land in pursuance of the acquisition, or had filed a case challenging the award or had acknowledged the making of the award in any document or in statement on oath or evidence. The person

interested, not being in possession of the acquired land and the name of the State or its transferee being entered in the revenue municipal records coupled with delay, can also lead to an inference of constructive knowledge. In the absence of any such evidence by the Collector, the claim of the person interested that he did not have knowledge earlier will be accepted, unless there are compelling circumstances not to do so."

A careful reading of the averments contained in para 2 of the application filed by the appellant under Section 18(1) shows that the notice issued by the Collector under Section 12(2) was served upon him on 22.2.1985. Thereafter, his advocate obtained certified copy of the award and filed application dated 8.4.1985 for making a reference to the Court. This implies that copy of the award had not been sent to the appellant along with the notice and without that he could not have effectively made an application for seeking reference.

On behalf of the State Government, no evidence was produced before the Reference Court to show that copy of the award was sent to the appellant along with the notice. Unfortunately, while deciding issue No.3, this aspect has been totally ignored by the Reference Court which mechanically concluded that the application filed on 8.4.1985 was beyond the time specified in Section 18(2)(b). The learned Single Judge of the High Court also committed serious error by approving the view taken by the Reference Court, albeit without considering the fact that the notice issued by the Collector under Section 12(2) was not accompanied by a copy of the award which was essential for effective exercise of right vested in the appellant to seek reference under Section 18(1).

In the result, the appeal is allowed. The impugned judgment and the award passed by the Reference Court are set aside and the respondents are directed to pay enhanced compensation to the appellant at the rate of ₹ 450 per are for the irrigated land and ₹ 280 per are for non-irrigated land with an additional amount of ₹ 2 per square meter. The appellant shall also be entitled to other statutory benefits like solatium and interest. The respondent shall calculate the amount payable to the appellant and make payment within three months from the date of judgment.

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256. LAND ACQUISITION ACT, 1894 – Section 18
LIMITATION ACT, 1963 – Section 5
Limitation Act, applicability of – As the specific provision for limitation is made under the Land Acquisition Act, the provisions of Limitation Act are not applicable to such cases.
Application for making reference, limitation of – Where the award is not made in presence of claimant or no notice of award is served to him, the period of limitation will start running from the date of knowledge of the essential contents of the award.

Kashi Bai and others v. State of M.P. and others

Judgment dated 03.04.2012 passed by the High Court of M.P. in Civil Revision No. 122 of 2011, reported in 2012 (2) MPLJ 418

Held:

The Apex Court in the case of ***Bhagwan Das and others v. State of U.P. and others, 2010 (3) MPLJ 251*** has categorically held that in view of the specific provisions made under section 18 of the Act, section 29 (2) of the Limitation Act cannot be applied to the provisions of the aforesaid section 18 of the Act and, therefore, the benefit of section 4 to 24 of the Limitation Act, 1963, would not be applicable in regard to the application under section 18 (1) of the Act. It is also held by the Apex Court that the Collector is not a Court when he discharges his function as a statutory authority under section 18 (1) of the Act and, therefore, section 5 of the Limitation Act, 1963 cannot be invoked for extension of the period of limitation prescribed under the proviso to section 18 (2) of the Act. As Limitation Act itself is not applicable to the proceedings before the Collector, in the considered opinion of this Court if the application under section 5 of the Limitation Act filed by the petitioners was dismissed by the Collector, no wrong was committed.

The fact remains that the effective date of knowledge of the essential contents of the award is to be treated to be the date from which the limitation prescribed under section 18 of the Act would start running. It was categorically stated by the petitioners that they were not present when the award was passed.

It is stated that the petitioners were never intimated about passing of the award nor any information/notice under section 12(2) of the Act was served on them. It is stated by them in their application that when they went to the office of the Land Acquisition Officers on 4-4-2008, they could know that some award was passed and immediately an application for grant of certified copy of the award was made. The certified copy of the award was made available on 19-9-2008 and from that day they are making the application for making a reference within the limitation.

As has been pointed out in the case of ***Bhagwan Das*** (supra), the Apex Court has categorically held that the limitation would start running from the date of knowledge of the essential contents of the award and not from the date of award as is required because in a case the notice is not served or the award is not made in the presence, the date of award cannot be construed to be the date mentioned by the Land Acquisition officer in the award the date from which limitation for filing application would start, but it should be construed from the date, the essential contents of the award came to the notice of the person concerned or the claimants. At length considering all such aspects, the Apex Court has held in case of ***Bhagwan Das*** (supra) that in case such an assertion is made by the person interested making an application for reference, the Collector is required to take into consideration such facts and then make a reference to the Civil Court in exercise of his power under section 18 of the Act.

In the case in hand, a unique thing has been done. There were other claimants who have made the application for making the reference before the Collector under Section 18 of the Act. The award was the same and passed in their respect also on the same date. Their applications were considered and reference has been made to the Civil Court. However, without conducting any enquiry with respect to the assertion of the date of knowledge of award, the collector has refused to make reference of the claim of the petitioners to the Civil Court. This unique fact is proved from the certified copy of the note sheet produced before this Court in this revision. The application with respect to these petitioners along with eight more has been said to be rejected by the impugned order.

In the considered opinion of this Court, such proceedings done by the Collector in exercise of his power under section 18 of the Act cannot be said to be just and proper. In view of the law laid down by the Apex Court in ***Bhagwan Das*** (supra), such course was not open to the Collector. Consequently, the revision is allowed. The impugned order dated 22-3-2012 insofar as it relates to rejection of the application of petitioners for making a reference of their claim to the Civil Court, is hereby set aside. It is directed that the reference with respect to the claim of petitioners under section 18 of He Act be made to the Civil Court immediately.

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257. LAND ACQUISITION ACT, 1894 – Sections 18, 23 and 28

(i) Determination of compensation – When there are several exemplars with reference to similar land, it is a general rule that the highest of the exemplars, if it is satisfied then the bonafide transaction has to be considered and accepted – Position reiterated.

(ii) Interest on solatium – Claimant would be entitled to the interest on solatium and additional market value if the award of the Reference Court or that of the Appellate Court does not specifically refer to the question of interest on solatium and additional market value or where the claim had not been rejected either expressly or impliedly.

Mehrawal Khewaji Trust (Registered), Faridkot and others v. State of Punjab and others

Judgment dated 27.04.2012 passed by the Supreme Court in Civil Appeal No. 4005 of 2012, reported in (2012) 5 SCC 432

Held:

(i) The Reference Court failed to take note of the highest exemplar, namely, the sale transaction under Ext.A-61 dated 22.07.1977. In this regard, it is useful to refer the decision of this Court in ***M. Vijayalakshmamma Rao Bahadur v. Collector of Madras, (1969) 1 MLJ 45 (SC).*** In this case, this Court has held thus:

> "... where sale deeds pertaining to different transactions are relied on behalf of the Government, that representing

> the highest value should be preferred to the rest unless there are strong circumstances justifying a different course. In any case we see no reason why an average of two sale deeds should have been taken in this case."

In ***State of Punjab v. Hans Raj, (1994) 5 SCC 734,*** this Court has held that method of working out the 'average price' paid under different sale transactions is not proper and that one should not have, ordinarily recourse to such method. This Court further held that the bona fide sale transactions proximate to the point of acquisition of the lands situated in the neighbourhood of the acquired lands are the real basis to determine the market value.

This Court in ***Anjani Molu Dessai v. State of Goa, (2010) 13 SCC 710,*** after relying upon the earlier decisions of this Court in ***M. Vijayalakshmamma Rao Bahadur*** (supra) and ***Hans Raj*** (supra) held in para 20 as under:

> "20. The legal position is that even where there are several exemplars with reference to similar lands, usually the highest of the exemplars, which is a bona fide transaction, will be considered."

Again, in para 23, it was held that "the averaging of the prices under the two sale deeds was not justified."

It is clear that when there are several exemplars with reference to similar lands, it is the general rule that the highest of the exemplars, if it is satisfied, that it is a bona fide transaction, has to be considered and accepted. When the land is being compulsorily taken away from a person, he is entitled to the highest value which similar land in the locality is shown to have fetched in a bona fide transaction entered into between a willing purchaser and a willing seller near about the time of the acquisition. In our view, it seems to be only fair that where sale deeds pertaining to different transactions are relied on behalf of the Government, the transaction representing the highest value should be preferred to the rest unless there are strong circumstances justifying a different course. It is not desirable to take an average of various sale deeds placed before the authority/court for fixing fair compensation.

(ii) This aspect has been considered and answered by the Constitution Bench in the case of ***Sunder v. Union of India, (2001) 7 SCC 211.*** While considering various decisions of the High Courts and approving the decision of the Punjab and Haryana High Court rendered in ***State of Haryana v. Kailashwati, AIR 1980 P&H 117,*** this Court held that the interest awardable under Section 28 would include within its ambit both the market value and the statutory solatium. In view of the same, it is clear that the person entitled to the compensation awarded is also entitled to get interest on the aggregate amount including solatium.

The above position has been further clarified by a subsequent Constitution Bench judgment in ***Gurpreet Singh v. Union of India, (2006) 8 SCC 457.*** Based on the earlier Constitution Bench decision in ***Sunder*** (supra), the present Constitution

Bench held that the claimants would be entitled for interest on solatium and additional market value if the award of the Reference Court or that of the appellate Court does not specifically refer to the question of interest on solatium and additional market value or where the claim had not been rejected either expressly or impliedly.

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258. LIMITATION ACT, 1963 – Section 5

Condonation of delay for Government department – There should be reasonable and acceptable explanation for delay – Government departments are under special obligation to ensure that they perform their duties with diligence and commitment – Condonation of delay is an exception and should not be used as an anticipated benefit for Government departments – Law shelters everyone under the same light and should not be swirled for the benefit of a few.

Office of the Chief Post Master General and Ors. v. Living Media Ltd. and Anr.

Judgment dated 24.02.2012 passed by the Supreme Court in Civil Appeal No. 2474 of 2012, reported in AIR 2012 SC 1506

Held:

In our view, it is the right time to inform all the government bodies, their agencies and instrumentalities that unless they have reasonable and acceptable explanation for the delay and there was bonafide effort, there is no need to accept the usual explanation that the file was kept pending for several months/ years due to considerable degree of procedural red-tape in the process. The government departments are under a special obligation to ensure that they perform their duties with diligence and commitment. Condonation of delay is an exception and should not be used as an anticipated benefit for government departments. The law shelters everyone under the same light and should not be swirled for the benefit of a few. Considering the fact that there was no proper explanation offered by the Department for the delay except mentioning of various dates, according to us, the Department has miserably failed to give any acceptable and cogent reasons sufficient to condone such a huge delay.

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259. LIMITATION ACT, 1963 – Section 5

(i) The expression "sufficient cause", liberal consideration of – The expression "sufficient cause", is elastic enough to enable the courts to apply the law in a meaningful manner which serves the ends of justice – Though a liberal justice-oriented approach is likely to be adopted, the Courts can neither become oblivious of the fact that the successful litigant has acquired certain rights on the basis of the judgment under challenge and a lot of time is consumed at various stages of litigation apart from the cost.

(ii) Application for condonation of delay by the State and its agencies/instrumentalities – The Court can take note of the fact that sufficient time is taken in the decision-making process but no premium can be given for total lethargy or utter negligence on the part of the officers of the State and/or its agencies/ instrumentalities and the applications filed by them for condonation of delay cannot be allowed as a matter of course by accepting the plea that dismissal of the matter on the ground of bar of limitation will cause injury to the public interest.

Maniben Devraj Shah v. Municipal Corporation of Brihan Mumbai

Judgment dated 09.04.2012 passed by the Supreme Court in Civil Appeal No. 2970 of 2012, reported in (2012) 5 SCC 157

Held:

What needs to be emphasised is that even though a liberal and justice oriented approach is required to be adopted in the exercise of power under Section 5 of the Limitation Act and other similar statutes, the Courts can neither become oblivious of the fact that the successful litigant has acquired certain rights on the basis of the judgment under challenge and a lot of time is consumed at various stages of litigation apart from the cost.

What colour the expression 'sufficient cause' would get in the factual matrix of a given case would largely depend on bona fide nature of the explanation. If the Court finds that there has been no negligence on the part of the applicant and the cause shown for the delay does not lack bona fides, then it may condone the delay. If, on the other hand, the explanation given by the applicant is found to be concocted or he is thoroughly negligent in prosecuting his cause, then it would be a legitimate exercise of discretion not to condone the delay.

In cases involving the State and its agencies/instrumentalities, the Court can take note of the fact that sufficient time is taken in the decision making process but no premium can be given for total lethargy or utter negligence on the part of the officers of the State and/or its agencies/ instrumentalities and the applications filed by them for condonation of delay cannot be allowed as a matter of course by accepting the plea that dismissal of the matter on the ground of bar of limitation will cause injury to the public interest.

(ii) In the light of the above, it is to be seen whether the explanation given by the respondent for condonation of more than 7 years and 3 months' delay was satisfactory and whether the learned Single Judge of the High Court had correctly applied the principles laid down by this Court for the exercise of power under Section 5 of the Limitation Act.

Though it may appear repetitive, we consider it necessary to notice the following salient features of the applications filed by the respondent and the affidavit of Shri Ranindra Y. Sirsikar:

1. As per the office procedure, Shri Ranindra Y. Sirsikar had given intimation to the department concerned about the trial Court's judgment dated 2.5.2003. This statement is supported by a copy of the despatch extract dated 12.5.2003 (Ext. B) filed with his affidavit.

2. According to the Corporation, the papers required for filing the first appeals were misplaced and not traceable in spite of good efforts. In this context, Shri Sirsikar has made the following statement:

> "I say that thereafter, from the record it seems that the department concerned misplaced the papers and were not traceable. So nobody followed up on the matter"

3. As per the averments contained in the application, Shri Sirsikar was transferred from Civil Section to Criminal Section in June, 2004 and, therefore, lost track of the matter and the first appeals remained to be filed due to oversight and heavy work load. As against this, Shri Sirsikar states that he was transferred to Miscellaneous Court on 2.1.2004 and from Miscellaneous Court to Criminal Court on 5.6.2004, where he worked up to 28.9.2005. Thereafter, he was transferred to High Court on original side and was working there on the date of filing the affidavit.

4. As per the averments contained in the application, the advocate came to know that appellant fraudulently obtained alternative accommodation under the judgment of the trial Court even though she was given permission for constructing mezzanine floor to the extent of structure affected by road widening. In this context, Shri Sirsikar has disclosed that the issue relating to the claim made by the appellant for alternative accommodation was considered in the meeting held on 2.8.2010 in the chamber of Additional Municipal Commissioner and, on the basis of discussion held in that meeting, direction was given by him to the Managing Clerk on 19.8.2010 to file application for certified copy of the judgment. According to Shri Sirsikar, the application was made on 23.8.2010 and the certified copy was made available on 6.9.2010.

The applications filed for condonation of delay and the affidavits of Shri Sirsikar are conspicuously silent on the following important points:

a) The name of the person who was having custody of the record has not been disclosed.

b) The date, month and year when the papers required for filing the first appeals are said to have been misplaced have not been disclosed.

c) The date on which the papers were traced out or recovered and name of the person who found the same have not been disclosed.

d) No explanation whatsoever has been given as to why the applications for certified copies of the judgments of the trial Court were not filed till 23.8.2010 despite the fact that Shri Sirsikar had given intimation on 12.5.2003 about the judgments of the trial Court.

e) Even though the Corporation has engaged battery of lawyers to conduct cases on its behalf, nothing has been said as to how the transfer of Shri Ranindra Y. Sirsikar operated as an impediment in the making of applications for certified copies of the judgments sought to be appealed against.

Unfortunately, the learned Single Judge of the High Court altogether ignored the gapping holes in the story concocted by the Corporation about misplacement of the papers and total absence of any explanation as to why nobody even bothered to file applications for issue of certified copies of judgment for more than 7 years'. In our considered view, the cause shown by the Corporation for delayed filing of the appeals was, to say the least, wholly unsatisfactory and the reasons assigned by the learned Single Judge for condoning more than 7 years delay cannot but be treated as poor apology for the exercise of discretion by the Court under Section 5 of the Limitation Act.

In the result, the appeals are allowed. The impugned order Municipal Corpn. of ***Brihanmambai v. Moniben Devraj Shah, Civil Application No. 3625 of 2010*** in First Appeal (stamps) No. 24316 & 2010, order dated 21.12.2010..... is set aside and the appeals filed by the respondent against the judgments of the trial Court are dismissed.

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260. MOTOR VEHICLES ACT, 1988 – Sections 146 147 and 149
Insurer's liability against third-party risk – Extent of – When cheque issued for payment of premium was dishonoured and subsequent to the accident, insurer cancelled policy of insurance – Held, in such circumstances, statutory liability of insurer to indemnify third parties, which policy covered subsists and insurer has to satisfy award of compensation unless policy of insurance was cancelled by insurer and intimation of such cancellation had reached insured before the accident.

United India Insurance Company Limited v. Laxmamma and others

Judgment dated 17.04.2012 passed by the Supreme Court in Civil Appeal No. 3589 of 2012, reported in (2012) 5 SCC 234

Held:

In *Deddappa v. National Insurance Co. Ltd., (2008) 2 SCC 595,* the Court was concerned with the plea of the insurance company that although the vehicle was insured by the owner for the period from October 17, 1997 to October 16, 1998 but the cheque issued therefor having been dishonoured, the policy was cancelled and, thus, it was not liable. That was a case where for the above period of policy, the cheque was issued by the owner on October 15, 1997; the bank issued a return memo on October 21, 1997 disclosing dishonour of the cheque with remarks "fund insufficient" and the insurance company, thereafter, cancelled the policy of insurance by communicating to the owner of the vehicle and an intimation to the concerned RTO. The accident occurred on February 6, 1998 after the cancellation of the policy.

The Court in *Deddappa* (supra) again considered the relevant statutory provisions and decisions of this Court including the three decisions in *Oriental Insurance Co. Ltd. v. Inderjit Kaur, (1998) 1 SCC 371, New India Assurance Co. Ltd. v. Rula, (2000) 3 SCC 195* and *National Insurance Co. Ltd. v. Seema Malhotra, (2001) 3 SCC 151.* The Court observed as under:

> "24. We are not oblivious of the distinction between the statutory liability of the insurance company vis-a-vis a third party in the context of Sections 147 and 149 of the Act and its liabilities in other cases. But the same liabilities arising under a contract of insurance would have to be met if the contract is valid. If the contract of insurance has been cancelled and all concerned have been intimated thereabout, we are of the opinion, the insurance company would not be liable to satisfy the claim."

After Considering *Deddappa case* (supra), the Court invoked extraordinary jurisdiction under Article 142 of the Constitution of India and directed the insurance company to pay the amount of claim to the claimants and recover the same from the owner of the vehicle.

We find it hard to accept the submission of the learned counsel for the insurer that the three-Judge Bench decision in *Inderjit Kaur* (supra) has been diluted by the subsequent decisions in *Seema Malhotra* (supra) and *Deddappa* (supra). *Seema Malhotra* (supra) and *Deddappa* (supra) turned on the facts obtaining therein.

In *Seema Malhotra* (supra), the claim was by the legal heirs of the insured for the damage to the insured vehicle. In this peculiar fact situation, the Court held that when the cheque for premium returned dishonoured, the insurer was

not obligated to perform its part of the promise. Insofar as ***Deddappa*** (supra) is concerned, that was a case where the accident of the vehicle occurred after the insurance policy had already been cancelled by the insurance company.

In our view, the legal position is this : where the policy of insurance is issued by an authorized insurer on receipt of cheque towards payment of premium and such cheque is returned dishonoured, the liability of authorized insurer to indemnify third parties in respect of the liability which that policy covered subsists and it has to satisfy award of compensation by reason of the provisions of Sections 147(5) and 149(1) of the M.V. Act unless the policy of insurance is cancelled by the authorized insurer and intimation of such cancellation has reached the insured before the accident. In other words, where the policy of insurance is issued by an authorized insurer to cover a vehicle on receipt of the cheque paid towards premium and the cheque gets dishonored and before the accident of the vehicle occurs, such insurance company cancels the policy of insurance and sends intimation thereof to the owner, the insurance company's liability to indemnify the third parties which that policy covered ceases and the insurance company is not liable to satisfy awards of compensation in respect thereof.

Having regard to the above legal position, insofar as facts of the present case are concerned, the owner of the bus obtained policy of insurance from the insurer for the period 16.04.2004 to 15.04.2005 for which premium was paid through cheque on 14.04.2004. The accident occurred on 11.05.2004. It was only thereafter that the insurer cancelled the insurance policy by communication dated 13.05.2004 on the ground of dishonour of cheque which was received by the owner of the vehicle on 21.05.2004. The cancellation of policy having been done by the insurer after the accident, the insurer became liable to satisfy award of compensation passed in favour of the claimants.

However, the insurer shall be at liberty to prosecute its remedy to recover the amount paid to the claimants from the insured.

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261. MOTOR VEHICLES ACT, 1988 – Sections 163-A, 165 (1) and 166 Whether owner or driver of a vehicle can be held responsible for an accident which was caused by explosion on account of planting bomb under a bridge over which the vehicle passed? Held, No.

Union of India and another v. Bhagri and others

Judgment dated 14.12.2011 passed by the High Court of M.P. in Misc. Appeal No. 1275 of 2006, reported in 2012 (3) MPHT 117

Held:

The Apex Court in the case of ***Samir Chandra v. Managing Director, Assam State, Transport Corporation reported in 1998 (7) Supreme 66,*** while setting aside the Single Bench decision of the High Court of Guhati has held that in a situation where the bomb was planted inside the truck and the truck was blown up leading

to the death of several persons traveling in the truck, the owner and driver cannot be absolved of their liability to compensation since they failed to ensure that there was no bomb inside the truck especially when truck was plied in area of high security alert.

In the instant appeals, it is not in dispute that the bomb was not planted inside the truck. It is further not disputed that the bomb was planted under the bridge over which the truck passed at the time when the said bomb blew up. Evidently, the material that has come on record clearly indicates that the fact that the bomb was planted under the bridge could not have possibly come to the knowledge of the owner/driver despite exercise of due care and diligence by them.

From the analysis of the factual matrix and the judicial precedents on the point, this court is of the considered view that the accident which occasioned the death of the deceased was not caused due to the use of the motor vehicle but was caused due to the reason of explosion of the bomb which did not have the slightest connection with the use of the motor vehicle

From the law laid down by the Apex Court in case of ***Samir Chanda*** (supra), it becomes clear that in case before the Apex Court, the bomb which was planted inside the truck that impelled the Apex Court to held that since the owner of the driver was duty bound to ensure that their vehicle was bomb free, the duty which they failed to perform, the accident arising out of the explosion which lead to blowing up of the bomb can be inside the vehicle arise out of the use of motor vehicle. The distinguishing feature in this case is that the bomb was not inside the vehicle but was placed under the bridge over which the truck passed at the time of explosion. The owner/driver cannot by any stretch of imagination can be held responsible for planting bomb under a bridge or cannot be also held responsible for ensuring that the road bridge is free of any bomb for the simple reason that the owner and driver of the truck do not have any control over the construction and maintenance of the bridge and the road.

Therefore, the inference of owner/driver being negligent as drawn by the Tribunal in the impugned award is untenable, rendering the award to be unsustainable in the eyes of law.

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262. N.D.P.S. ACT, 1985 – Sections 50 (1)

Strict compliance of Section 50 (1), what amounts to? Circle Inspector who proposed to search person of accused asked them "whether they wanted any other gazetted officer for their search and seizure in addition to him" or that "they have a right to have another gazetted officer in addition to him" – Inadequate for strict complance with Section 50 (1) – Held, the above offer made by Circle Inspector to accused did not amount to a communication of their right to have the search conducted in presence of a Magistrate or a Gazetted officer, since there is no clear communication of the said right.

Myla Venkateswarlu v. State of Andhra Pradesh

Judgment dated 04.04.2012 passed by the Supreme Court in Criminal Appeal No. 611 of 2012, reported in (2012) 5 SCC 226

Held:

The Constitution Bench in ***Vijaysinh Chandubha Jadeja v. State of Gujarat, (2011) 1 SCC 609*** reiterated the principles laid down by this court in ***State of Punjab v. Baldev Singh, (1999) 6 SCC 172*** and added that the concept of substantial compliance with the requirement of Section 50 of the NDPS Act is neither borne out from the language of Section 50(1) nor it is in consonance with the dictum laid down in ***Baldev Singh*** (supra). Thus, it is no longer in dispute that strict compliance with the provisions of Section 50(1) of the NDPS Act is necessary. We need to see whether evidence adduced in this case establishes that there was strict compliance of Section 50(1) of the NDPS Act.

PW-1 PC Shaik Khasim, who was, at the relevant time, attached to the Tenali-III Town Police Station had apprehended the appellant, A-1 and A-2 on 5-1-2001. He stated that on 5-1-2001 at 6.15 p.m., Circle Inspector of Police took him in a jeep along with other police personnel to Chenchupeta Railway Over Bridge. They saw three persons sitting under the bridge. On seeing them, the said three persons started running away. They apprehended them and brought them to the Circle Inspector of Police. According to him, the appellant, A-1 and A-2 confessed that they were having Ganja packets in their pockets. He has further stated that the Circle Inspector of Police asked them whether they wanted any other gazetted officer for their search and seizure in addition to him to which they replied that they did not want any other gazetted officer and the checking by the Circle Inspector of Police was sufficient for them. Thereafter, the Circle Inspector of Police checked their pockets and recovered Ganja packets. In the cross- examination also, this witness has maintained the same story.

PW-2 SI Nageswara Rao was, at the relevant time, working as Sub-Inspector of Police at Tanali-III Town Police Station. He was in the police party which apprehended the appellant, A-1 and A-2. He has corroborated PW-1 PC Shaik Khasim as regards the apprehension of the appellant, A-1 and A-2. He has stated that before conducting the search, the Circle Inspector of Police asked the appellant, A-1 and A-2 "about the intention to have another gazetted officer and they replied that they do not want any other gazetted officer for their search and seizure." According to this witness, thereafter, the search was conducted and Ganja packets were recovered from their possession. From the evidence of PW-1 and PW-2, it is clear that the appellant, A-1 and A-2 were not communicated their right to have search conducted in the presence of a Magistrate or a gazetted officer.

At the relevant time, PW-3 CI Koteswara Rao was working as Inspector of Police. It is this witness who had received information about the illegal sale of

Ganja at Koneru Bazar. On receiving the information, he proceeded to Koneru Bazar along with PW 1, PW 2 and another police constable. He has corroborated PW-1 and PW-2 as regards the apprehension of the appellant, A-1 and A-2. He has stated that the appellant, A-1 and A-2 revealed their names and identity. According to him, A1 produced packets containing Ganja. Then he told him that if he wanted another gazetted officer, he will bring him. So far as A-2 and the appellant are concerned, he has stated that they produced packets containing Ganja. Thereafter, he revealed to them that they have a right to have another gazetted officer in addition to him to which they replied that his presence was sufficient. PW- 3 has thus come out with a new story viz. the appellant, A-1 and A-2 took out the Ganja packets from their pockets and, thereafter, he told the appellant, A-1 and A-2 that they had a right to have another gazetted officer in addition to him. This story that the accused themselves took out the Ganja packets from their pockets runs contrary to the version of PW-1 and PW-2 and, therefore, it does not inspire confidence. If the accused voluntarily took out Ganja packets, there was no question of conducting search in the presence of a gazetted officer or a Magistrate. But, assuming that this right can be communicated to a suspect after the seizure and assuming the evidence of this witness to be true, it still does not indicate that the requirement of Section 50(1) of the NDPS Act was fulfilled. There is no clear communication to the accused that they had a right to be searched in the presence of a gazetted officer or a Magistrate. As we have already noted, the concept of substantial compliance cannot be read into the provisions of Section 50(1) of the NDPS Act. We, therefore, have no hesitation in concluding that in this case, there is a breach of Section 50(1) of the NDPS Act. Since the conviction of the appellant is solely based on possession of Ganja recovered from him, it will have to be set aside.

A1 and A2 are not before us. However, the conclusion drawn by us applies to their case as well. This court in ***Ashok v. State of M.P., (2011) 5 SCC 123*** dealt with a somewhat similar fact situation. Out of the three accused convicted under Sections 8(c) and 20(b)(i) of the NDPS Act, only one accused had appealed to this court. The other two were in jail. This court set aside the conviction and sentence of the appellant therein and observed that the lapses which had weighed with it for setting aside the conviction of the appellant therein apply equally to the case of the accused who had not appealed and, therefore, it would be unjust to let them rot in jail even while allowing the appeal preferred by the appellant therein. We are respectfully inclined to follow the same course. In the circumstances, the impugned judgment and order convicting and sentencing the appellant, A1-Myla Rambabu and A2-Myla Muralikrishna is quashed and set aside. The appellant, A1-Myla Rambabu and A2-Myla Muralikrishna are acquitted of the charge under Section 8(c) read with Section 20(b)(i) of the NDPS Act.

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***263. NEGOTIABLE INSTRUMENTS ACT, 1881 – Sections 3, 72 and 138**
Offence of dishonour of cheque – Essential ingredients of – Cheque has to be produced before the "drawee bank" within six months under clause (a) of proviso to Section 138 – If a cheque of Bank 'J' was produced before Bank 'S' for encashment and the same was returned from Bank 'S' with the remark that concerned bank has no account with Bank 'J', it would be said that the cheque was not properly presented before the drawee Bank because it never reached the drawee bank for encashment – Held, condition mentioned in clause (a) of Proviso to Section 138 was not fulfilled and therefore the accused cannot be prosecuted. (Shri *Ishar Aloy Steels Ltd. v. Jayaswals Neco Ltd., 2000 (3) MPLJ 216* relied on.)

Amit Dubey v. Arvind Dubey

Judgment dated 10.01.2012 passed by the High Court of M.P. in Misc. Cri. Case No. 6687 of 2010, reported in 2012 (2) MPHT 437

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264. NEGOTIABLE INSTRUMENTS ACT, 1881 – Sections 138, 140 and 141
Whether a Director or authorized signatory of a Company would be liable for prosecution under Section 138 of the N.I. Act without the Company being arraigned as an accused? Held, No – For prosecution under Section 141 of the N.I. Act, arraigning of a Company as an accused is imperative.

Aneeta Hada v. Godfather Travels and Tours Private Limited

Judgment dated 27.04.2012 passed by the Supreme Court in Criminal Appeal No. 838 of 2008, reported in (2012) 5 SCC 661 (3 Judge Bench)

Held:

On a reading of the provision of Section 141, it is plain as day that if a person who commits offence under Section 138 of the Act is a company, the company as well as every person in charge of and responsible to the company for the conduct of business of the company at the time of commission of offence is deemed to be guilty of the offence. The first proviso carves out under what circumstances the criminal liability would not be fastened. Sub-section (2) enlarges the criminal liability by incorporating the concepts of connivance, negligence and consent that engulfs many categories of officers. It is worth noting that in both the provisions, there is a 'deemed' concept of criminal liability.

Section 139 of the Act creates a presumption in favour of the holder. The said provision has to be read in conjunction with Section 118(a) which occurs in Chapter XIII of the Act that deals with special rules of evidence. Section 140 stipulates the defence which may not be allowed in a prosecution under Section 138 of the Act. Thus, there is a deemed fiction in relation to criminal liability, presumption in favour of the holder, and denial of a defence in respect of certain aspects.

Section 141 uses the term 'person' and refers it to a company. There is no trace of doubt that the company is a juristic person. The concept of corporate criminal liability is attracted to a corporation and company and it is so luminescent from the language employed under Section 141 of the Act. It is apposite to note that the present enactment is one where the company itself and certain categories of officers in certain circumstances are deemed to be guilty of the offence.

The company can have criminal liability and further, if a group of persons that guide the business of the companies have the criminal intent, that would be imputed to the body corporate. In this backdrop, Section 141 of the Act has to be understood. The said provision clearly stipulates that when a person which is a company commits an offence, then certain categories of persons in charge as well as the company would be deemed to be liable for the offences under Section 138. Thus, the statutory intendment is absolutely plain. As is perceptible, the provision makes the functionaries and the companies to be liable and that is by deeming fiction. A deeming fiction has its own signification.

The word 'deemed' used in Section 141 of the Act applies to the company and the persons responsible for the acts of the company. It crystallizes the corporate criminal liability and vicarious liability of a person who is in charge of the company. What averments should be required to make a person vicariously liable has been dealt with in ***S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla, (2005) 8 SCC 89.*** In the said case, it has been opined that the criminal liability on account of dishonour of cheque primarily falls on the drawee company and is extended to the officers of the company and as there is a specific provision extending the liability to the officers, the conditions incorporated in Section 141 are to be satisfied.

Presently, we shall deal with the ratio laid down in the case of ***State of Madras v. C.V. Parekh, (1970) 3 SCC 491.*** In the said case, a three-Judge Bench was interpreting Section 10 of the Essential Commodities Act, 1955 Act. The respondents, ***C.V. Parekh***, were active participants in the management of the company. The trial court had convicted them on the ground the goods were disposed of at a price higher than the control price by Vallabhadas Thacker with the aid of Kamdar and the same could not have taken place without the knowledge of the partners of the firm. The High Court set aside the order of conviction on the ground that there was no material on the basis of which a finding could be recorded that the respondents knew about the disposal by Kamdar and Vallabhadas Thacker.

A contention was raised before this Court on behalf of the State of Madras that the conviction could be made on the basis of Section 10 of the 1955 Act. The three-Judge Bench repelled the contention by stating thus: -

> "The learned counsel for the appellant, however, sought conviction of the two respondents on the basis of Section 10 of the Essential Commodities Act under which, if the person contravening an order made under Section 3 (which covers an order under the Iron and Steel Control Order, 1956), is a company, every person who, at the time the contravention was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly. It was urged that the two respondents were in charge of, and were responsible to, the Company for the conduct of the business of the Company and, consequently, they must be held responsible for the sale and for thus contravening the provisions of clause (5) of the Iron and Steel Control Order. This argument cannot be accepted, because it ignores the first condition for the applicability of Section 10 to the effect that the person contravening the order must be a company itself. In the present case, there is no finding either by the Magistrate or by the High Court that the sale in contravention of clause (5) of the Iron and Steel Control Order was made by the Company. In fact, the Company was not charged with the offence at all. The liability of the persons in charge of the Company only arises when the contravention is by the Company itself. Since, in this case, there is no evidence and no finding that the Company contravened clause (5) of the Iron and Steel Control Order, the two respondents could not be held responsible. The actual contravention was by Kamdar and Vallabhadas Thacker and any contravention by them would not fasten responsibility on the respondents."

The aforesaid paragraph clearly lays down that the first condition is that the company should be held to be liable; a charge has to be framed; a finding has to be recorded, and the liability of the persons in charge of the company only arises when the contravention is by the company itself.

The said decision in the case of ***C.V. Parekh*** (Supra) has been distinguished in the case of ***Sheoratan Agarwal v. State of M.P., (1984) 4 SCC 352.*** The two-Judge Bench in the said case referred to Section 10 of the 1955 Act and opined that the company alone may be prosecuted or the person in charge only may be prosecuted since there is no statutory compulsion that the person in charge or an officer of the company may not be prosecuted unless he be ranged

alongside the company itself. The two-Judge Bench further laid down that Section 10 of the 1955 Act indicates the persons who may be prosecuted where the contravention is made by the company but it does not lay down any condition that the person in-charge or an officer of the company may not be separately prosecuted if the company itself is not prosecuted.

With greatest respect to the learned Judges in ***Sheoratan Agarwal*** (supra), the authoritative pronouncement in ***C.V. Parekh*** (supra) has not been appositely appreciated. The decision has been distinguished despite the clear dictum that the first condition for the applicability of Section 10 of the 1955 Act is that there has to be a contravention by the company itself. In our humblest view, the said analysis of the verdict is not correct. Quite apart, the decision in ***C.V. Parekh*** (supra) was under Section 10(a) of the 1955 Act and rendered by a three-Judge Bench and if such a view was going to be expressed, it would have been appropriate to refer the matter to a larger Bench. However, the two-Judge Bench chose it appropriate to distinguish the same on the rationale which we have reproduced hereinabove. We repeat with the deepest respect that we are unable to agree with the aforesaid view.

In the case of ***Anil Hada v. Indian Acrylic Ltd, (2000) 1 SCC 1,*** the two-Judge Bench posed the question: when a company, which committed the offence under Section 138 of the Act eludes from being prosecuted thereof, can the directors of that company be prosecuted for that offence. The Bench referred to Section 141 of the Act and expressed the view as follows: -

> "12. Thus when the drawer of the cheque who falls within the ambit of Section 138 of the Act is a human being or a body corporate or even firm, prosecution proceedings can be initiated against such drawer. In this context the phrase 'as well as' used in sub-section (1) of Section 141 of the Act has some importance. The said phrase would embroil the persons mentioned in the first category within the tentacles of the offence on a par with the offending company. Similarly the words 'shall also' in sub-section (2) are capable of bringing the third category persons additionally within the dragnet of the offence on an equal par. The effect of reading Section 141 is that when the company is the drawer of the cheque such company is the principal offender under Section 138 of the Act and the remaining persons are made offenders by virtue of the legal fiction created by the legislature as per the section. Hence the actual offence should have been committed by the company, and then alone the other two categories of persons can also become liable for the offence.

> If the offence was committed by a company it can be punished only if the company is prosecuted. But instead of prosecuting the company if a payee opts to prosecute only the persons falling within the second or third category the payee can succeed in the case only if he succeeds in showing that the offence was actually committed by the company. In such a prosecution the accused can show that the company has not committed the offence, though such company is not made an accused, and hence the prosecuted accused is not liable to be punished. The provisions do not contain a condition that prosecution of the company is ***sine qua non*** for prosecution of the other persons who fall within the second and the third categories mentioned above. No doubt a finding that the offence was committed by the company is ***sine qua non*** for convicting those other persons. But if a company is not prosecuted due to any legal snag or otherwise, the other prosecuted persons cannot, on that score alone, escape from the penal liability created through the legal fiction envisaged in Section 141 of the Act."

On a reading of both the paragraphs, it is evincible that the two-Judge Bench expressed the view that the actual offence should have been committed by the company and then alone the other two categories of persons can also become liable for the offence and, thereafter, proceeded to state that if the company is not prosecuted due to legal snag or otherwise, the prosecuted person cannot, on that score alone, escape from the penal liability created through the legal fiction and this is envisaged in Section 141 of the Act. If both the paragraphs are appreciated in a studied manner, it can safely be stated that the conclusions have been arrived at regard being had to the obtaining factual matrix therein.

However, it is noticeable that the Bench thereafter referred to the dictum in ***Sheoratan Agarwal*** (supra) and eventually held as follows:-

> "We, therefore, hold that even if the prosecution proceedings against the Company were not taken or could not be continued, it is no bar for proceeding against the other persons falling within the purview of sub-sections (1) and (2) of Section 141 of the Act."

We have already opined that the decision in ***Sheoratan Agarwal*** (supra) runs counter to the ratio laid down in the case of ***C.V. Parekh*** (supra) which is by a larger Bench and hence, is a binding precedent. On the aforesaid ratiocination, the decision in ***Anil Hada*** (supra) has to be treated as not laying down the correct law as far as it states that the director or any other officer can be prosecuted without impleadment of the company. Needless to emphasize, the matter would

stand on a different footing where there is some legal impediment and the doctrine of ***lex non cogit ad impossibilia*** gets attracted.

At this juncture, we may usefully refer to the decision in ***U.P. Pollution Control Board v. Modi Distillery, (1987) 3 SCC 684.*** In the said case, the company was not arraigned as an accused and, on that score, the High Court quashed the proceeding against the others. A two-Judge Bench of this Court observed as follows:-

> "Although as a pure proposition of law in the abstract the learned single Judge's view that there can be no vicarious liability of the Chairman, Vice-Chairman, Managing Director and members of the Board of Directors under sub-section. (1) or (2) of S.47 of the Act unless there was a prosecution against Modi Industries Limited, the Company owning the industrial unit, can be termed as correct, the objection raised by the petitioners before the High Court ought to have been viewed not in isolation but in the conspectus of facts and events and not in vacuum. We have already pointed out that the technical flaw in the complaint is attributable to the failure of the industrial unit to furnish the requisite information called for by the Board. Furthermore, the legal infirmity is of such a nature which could be easily cured. Another circumstance which brings out the narrow perspective of the learned single Judge is his failure to appreciate the fact that the averment in paragraph 2 has to be construed in the light of the averments contained in paragraphs 17, 18 and 19 which are to the effect that the Chairman, Vice-Chairman, Managing Director and Members of the Board of Directors were also liable for the alleged offence committed by the Company."

Be it noted, the two-Judge Bench has correctly stated that there can be no vicarious liability unless there is a prosecution against the company owning the industrial unit but, regard being had to the factual matrix, namely, the technical fault on the part of the company to furnish the requisite information called for by the Board, directed for making a formal amendment by the applicant and substitute the name of the owning industrial unit. It is worth noting that in the said case, M/s. Modi distilleries was arrayed as a party instead of M/s Modi Industries Limited. Thus, it was a defective complaint which was curable but, a pregnant one, the law laid down as regards the primary liability of the company without which no vicarious liability can be imposed has been appositely stated.

It is to be borne in mind that Section 141 of the Act is concerned with the offences by the company. It makes the other persons vicariously liable for commission of an offence on the part of the company. As has been stated by us earlier, the vicarious liability gets attracted when the condition precedent laid down in Section 141 of the Act stands satisfied. There can be no dispute that as

the liability is penal in nature, a strict construction of the provision would be necessitous and, in a way, the warrant.

A penalty is not to be imposed affecting the rights of persons whether juristic entities or individuals, unless they are arrayed as accused. It is to be kept in mind that the power of punishment is vested in the legislature and that is absolute in Section 141 of the Act which clearly speaks of commission of offence by the company. The learned counsel for the respondents have vehemently urged that the use of the term "as well as" in the Section is of immense significance and, in its tentacle, it brings in the company as well as the director and/or other officers who are responsible for the acts of the company and, therefore, a prosecution against the directors or other officers is tenable even if the company is not arraigned as an accused. The words "as well as" have to be understood in the context.

Applying the doctrine of strict construction, we are of the considered opinion that commission of offence by the company is an express condition precedent to attract the vicarious liability of others. Thus, the words "as well as the company" appearing in the Section make it absolutely unmistakably clear that when the company can be prosecuted, then only the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereof. One cannot be oblivious of the fact that the company is a juristic person and it has its own respectability. If a finding is recorded against it, it would create a concavity in its reputation. There can be situations when the corporate reputation is affected when a director is indicted.

In view of our aforesaid analysis, we arrive at the irresistible conclusion (that for maintaining the prosecution under Section 141 of the Act, arraigning of a company as an accused is imperative. The other categories of offenders can only be brought in the dragnet on the touchstone of vicarious liability) as the same has been stipulated in the provision itself. We say soon the basis of the ratio laid down in ***C.V. Parekh*** (supra) which is a three-Judge Bench decision. Thus, the view expressed in ***Sheoratan Agarwal*** (supra) does not correctly lay down the law and, accordingly, is hereby overruled. The decision in ***Anil Hada*** (supra) is overruled with the qualifier as stated in para 51. The decision in ***Modi Distilleries*** (supra) has to be treated to be restricted to its own facts as has been explained by us hereinabove.

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265. NEGOTIABLE INSTRUMENTS ACT, 1881 – Sections 138 and 147 COMPANIES ACT, 1956 – Section 391

(i) A scheme under Section 391 of the Companies Act will not have effect of automatically compounding the offence under Section 138 of the N.I. Act without consent of the complainant.

(ii) The other basic procedure of compounding an offence laid down in Section 320 of the CrPCs shall apply automatically to an offence under the N.I. Act in view of the provision of Section 4 (2) of the CrPC.

JIK Industries Limited & Ors. v. Amarlal V. Jumani & Anr.

Judgment dated 01.02.2012 passed by the Supreme Court in Criminal Appeal No. 263 of 2012, reported in AIR 2012 SC 1079

Held:

(i) The legal position is that a scheme under Section 391 of the Companies Act does not have the effect of creating new debt. The scheme simply makes the original debt payable in a manner and to the extent provided for in the scheme. In the instant appeal in most of the cases the offence under the N.I. Act has been committed prior to the scheme. Therefore, the offence which has already been committed prior to the scheme does not get automatically compounded only as a result of the said scheme. Therefore, even by relying on the ratio of ***M/S J.K. (Bombay) Private Ltd. v. M/s. New Kaiser-I-Hind Spinning and Weaving Co. Ltd. and others, AIR 1970 SC 1041*** that a scheme under Section 391 of the Companies Act is not a mere agreement but it has a statutory force, this Court cannot accept the appellant's contention that the scheme under Section 391 of the Companies Act will have the effect of automatically compounding the offence under the N.I. Act.

(ii) Offence under the N. I. Act, which was previously non-compoundable in view of Section 320 sub-Section 9 of the Code has now become compoundable. That does not mean that the effect of Section 147 is to obliterate all statutory provisions of Section 320 of the Code relating to the mode and manner of compounding of an offence. Section 147 will only override Section 320 (9) of the Code in so far as offence under Section 147 of N.I. Act is concerned. This is also the ratio in ***Damodar S. Prabhu v. Sayed Babalal H., AIR 2010 SC 1907*** see para 12.

In this connection, we may refer to the provisions of Section 4 of the Code. Section 4 of the Code, which is the governing statute in India for investigation, inquiry and trial of offences has two parts.

Section 4 sub-section (1) deals with offences under the Indian Penal Code. Section 4 sub-section (2) deals with offences under any other law which would obviously include offences under the N.I. Act. [See ***Kershi Pirozsha Bhagvagar v. State of Gujarat & anr., 2007 Crl. Law Journal 3958) (Guj)***]

In the instant case no special procedure has been prescribed under the N.I. Act relating to compounding of an offence. In the absence of special procedure relating to compounding, the procedure relating to compounding under Section 320 shall automatically apply in view of clear mandate of sub-section (2) of Section 4 of the Code.

Sub-section (2) of Section 4 of the Code is set out below :–

"4(2). All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to

the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences."

Interpreting the said Section, this Court in the case of ***Khatri and Ors. etc. v. State of Bihar and Ors., 1981 AIR SC 1068*** held that the provisions of the Code are applicable where an offence under the Indian Penal Code or under any other law is being investigated, inquired into, tried or otherwise dealt with.

In view of Section 4(2) of the Code, the basic procedure of compounding an offence laid down in Section 320 of the Code will apply to compounding of an offence under N.I. Act.

Therefore, 147 of the N.I. Act must be reasonably construed to mean that as a result of the said Section, the offences under N.I. Act are made compoundable, but the main principle of such compounding, namely, the consent of the person aggrieved or the person injured or the complainant cannot be wished away nor can the same be substituted by virtue of Section 147 of N.I. Act.

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266. P.C. & P.N.D.T. ACT, 1994 – Sections 3 and 17 (5)
Female infanticide – Prevention of female infanticide and misuse of pre-natal diagnostic techniques for determination of sex of foetus – Detailed directions are issued by Hon'ble the High Court regarding the same.

Smt. Yashi Jain v. State of M.P. & Others
Judgment dated 22.03.2012, passed by the High Court of M.P. in W.P. (PIL) No. 6523 of 2011, reported in 2012 (3) MPHT 163 (DB)

Held:

Parliament has enacted an Act, named as Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (hereinafter referred to as "Act of 1994"). The aim and object of the Act of 1994 is to prevent misuse of pre-natal diagnostic techniques for determination of sex of the foetus leading to female foeticide.

The aforesaid Act of 1994 also provides registration of all bodies under the PNDT Act, namely, Registration of Genetic Counseling Centres, Genetic Laboratories and Genetic Clinics. It further provides maintenance of records by USG Centres Declaration on each report that he/she has neither detected nor disclosed the sex of foetus. Declaration of pregnant woman that she does not want to know sex of the foetus. Report to be sent by 5th of every month to appropriate authority. There are powers to the appropriate authority to cancel registration or renewal of registration of institutions, if the center is unrecognized.

The Union of India has also framed Rules under the Act, 1994, named as Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Rules, 1996 (hereinafter referred to as "Rules of 1996"). In accordance with the aforesaid Rules of 1996, it is necessary to sent information by every Sonography Centre or Clinic to the appropriate authority at once in every month and record has to be kept and maintained as a register in the custody of appropriate authority.

Section 17 of the Act of 1994 prescribes appropriate authority and Advisory Committee. As per Section 17 (5) of the Act of 1994, the Central Government or State Government shall constitute an Advisory Committee for each appropriate authority to aid and advise the appropriate authority in discharge of its functions.

In view of the aforesaid legal provisions, enactment and constitutional provisions, in our opinion, this public interest litigation filed by the petitioner is disposed of with the following directions:-

(I) That in case of death of female child in womb it would be compulsory to all the nursing homes and Government Hospitals to inform the fact about the death of female child to the concerned Police Station.

(II) If there is any suspicion about the death of female child then the police authorities shall investigate the matter properly under the supervision of Deputy Superintendent of Police and also submit the report to the Superintendent of Police concerned.

(III) If any person informs the police concerned about the death of female child then the identity of such person be kept in secret and the police shall investigate the matter.

(IV) A direction be also issued to all Anganwadi Workers to keep records about the abortion or death of female foetus and inform the same to the police authorities or other authorities concerned.

(V) It is further directed that if in accordance with provisions of Section 17 (5) of the Act of 1994, an Advisory Committee has not been constituted by the State Government for aid to appropriate authority, the said Committee shall be constituted.

(VI) The appropriate authority shall ensure of receiving Form H as per Rules of 1996 from all Diagnostic Centres or Clinics, having registration under the Act of 1994.

(VII) The State Government shall also consider the development of proper mechanism in regard to submission of information by Sonography Centres through e-mail to the appropriate authority.

(VIII) The Collector(s) shall supervise work of Integrated Child Development Services (ICDS) Scheme and shall ensure that the benefit under the aforesaid Scheme which is upto 100% be reached to the children.

(IX) The appropriate Government shall appoint Member(s) of Juvenile Justice Board in accordance with Section 4 of Juvenile Justice (Care & Protection of Children) Act, 2000 for each district within the jurisdiction of this Bench.

(X) The respondents shall further appoint Child Welfare Committee in accordance with the provisions of Juvenile Justice (Care & Protection of Children) Act, 2000 for each district within the jurisdiction of this Bench.

(XI) These directions would be applicable to the Districts which are under the jurisdiction of this Bench and the State Government shall issue appropriate circular or order to all the authorities of the Districts under the jurisdiction of this Bench.

(XII) These directions shall be complied with within a period of eight weeks from the date of this order and the Member Secretary. General Administration Department or any person(s) authorized by him shall file comprehensive affidavit in regard to compliance of these directions before the Principal Registrar of this Court within the period mentioned in this order.

[Cases referred – ***Centre for Enquiry into Health and Allied Themes (CEHAT) and others v. Union of India and others, (2001) 1 SCC 577*** and ***People's Union for Civil Liberties v. Union of India and others, (2009) 16 SCC 598.]***

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267. SPECIFIC RELIEF ACT, 1963 – Sections 5, 6, 38, 39 and 41
CIVIL PROCEDURE CODE, 1908 – Order 6 Rule 2
Suit for possession – Requisites therefor – It is necessary to give all details of pleadings with particulars alongwith document to support claim and details of subsequent conduct which establishes claimant's possession – Legal position explained.

Maria Margarida Sequeira Fernandes and others v. Erasmo Jack De Sequeira (dead) through LRs.

Judgment dated 21.03.2012 passed by the Supreme Court in Civil Appeal No. 2968 of 2012, reported in (2012) 5 SCC 370

Held:

A title suit for possession has two parts - first, adjudication of title, and

second, adjudication of possession. If the title dispute is removed and the title is established in one or the other, then, in effect, it becomes a suit for ejectment where the defendant must plead and prove why he must not be ejected.

In an action for recovery of possession of immovable property, or for protecting possession thereof, upon the legal title to the property being established, the possession or occupation of the property by a person other than the holder of the legal title will be presumed to have been under and in subordination to the legal title, and it will be for the person resisting a claim for recovery of possession or claiming a right to continue in possession, to establish that he has such a right. To put it differently, wherever pleadings and documents establish title to a particular property and possession is in question, it will be for the person in possession to give sufficiently detailed pleadings, particulars and documents to support his claim in order to continue in possession.

In order to do justice, it is necessary to direct the parties to give all details of pleadings with particulars. Once the title is prima facie established, it is for the person who is resisting the title holder's claim to possession to plead with sufficient particularity on the basis of his claim to remain in possession and place before the Court all such documents as in the ordinary course of human affairs are expected to be there. Only if the pleadings are sufficient, would an issue be struck and the matter sent to trial, where the onus will be on him to prove the averred facts and documents.

The person averring a right to continue in possession shall, as far as possible, give a detailed particularized specific pleading along with documents to support his claim and details of subsequent conduct which establish his possession.

It would be imperative that one who claims possession must give all such details as enumerated hereunder. They are only illustrative and not exhaustive.

(a) who is or are the owner or owners of the property;

(b) title of the property;

(c) who is in possession of the title documents;

(d) identity of the claimant or claimants to possession;

(e) he date of entry into possession;

(f) how he came into possession - whether he purchased the property or inherited or got the same in gift or by any other method;

(g) in case he purchased the property, what is the consideration; if he has taken it on rent, how much is the rent, license fee or lease amount;

(h) If taken on rent, license fee or lease – then insist on rent deed, license deed or lease deed;

(i) who are the persons in possession/occupation or otherwise living with him, in what capacity: as family members, friends or servants etc.;

(j) subsequent conduct, i.e., any event which might have extinguished his entitlement to possession or caused shift therein; and

(k) basis of his claim that not to deliver possession but continue in possession.

Apart from these pleadings, the Court must insist on documentary proof in support of the pleadings. All those documents would be relevant which come into existence after the transfer of title or possession or the encumbrance as is claimed. While dealing with the civil suits, at the threshold, the Court must carefully and critically examine pleadings and documents.

The Court will examine the pleadings for specificity as also the supporting material for sufficiency and then pass appropriate orders.

Discovery and production of documents and answers to interrogatories, together with an approach of considering what in ordinary course of human affairs is more likely to have been the probability, will prevent many a false claims or defences from sailing beyond the stage for issues.

If the pleadings do not give sufficient details, they will not raise an issue, and the Court can reject the claim or pass a decree on admission. On vague pleadings, no issue arises. Only when he so establishes, does the question of framing an issue arise. Framing of issues is an extremely important stage in a civil trial. Judges are expected to carefully examine the pleadings and documents before framing of issues in a given case.

In pleadings, whenever a person claims right to continue in possession of another property, it becomes necessary for him to plead with specificity about who was the owner, on what date did he enter into possession, in what capacity and in what manner did he conduct his relationship with the owner over the years till the date of suit. He must also give details on what basis he is claiming a right to continue in possession. Until the pleadings raise a sufficient case, they will not constitute sufficient claim of defence.

The Court must ensure that pleadings of a case must contain sufficient particulars. Insistence on details reduces the ability to put forward a non-existent or false claim or defence. In dealing with a civil case, pleadings, title documents and relevant records play a vital role and that would ordinarily decide the fate of the case.

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268. SPECIFIC RELIEF ACT, 1963 – Section 6
REGISTRATION ACT, 1908 – Section 49
Restoration of possession under Section 6 – Requirement of law as to – Restoration under the provision can only be ordered if the plaintiff was in 'lawful possession' of the property and was dispossessed by the defendant unlawfully and not otherwise.

Aruna Gautam and others v. Arti and others

Judgment dated 03.04.2012 passed by the High Court of M.P. in Civil Revision No. 38 of 2012, reported in 2012 (2) MPLJ 337

Held:

The provisions of Section 6 of the Act are attracted only if a person is dispossessed of immovable property of which he is legal owner or is in possession of the said property by virtue of law. To establish such fact it is necessary to be examined whether the claim made by the respondent No. 1/ plaintiff in this respect was sustainable in the eye of law or not. Undisputedly, as both the parties have contended, the property was said to be purchased from the respondent No. 2/defendant No. 8 by an unregistered sale deed. The value of the said property is also categorically set forth which is ₹ 27,000. If that being so, whether any claim could have been made on the basis of such unregistered document in the Court of law, as per the provisions of the Registration Act, 1908 or not, which in fact confers right title or interest on a person claiming such benefits. If an instrument of transfer of immovable property of more than ₹ 100 is not duly stamped, and is registered, is inadmissible in evidence. If the said document could not have been admitted in the evidence, no claim could have been made on the basis of such document. It is the case of the respondent No.1 that land in dispute was purchased by her father by unregistered document. If the said document could not have been admitted in the evidence, no claim could have been made on the basis of such document. It is the case of the respondent No. 1 that land in dispute was purchased by her father by unregistered document. It is also the provisions of Transfer of Property act that a document of transfer if the immovable property is required to be transferred of more than ₹ 100 of value should be registered otherwise no right can be claimed on the basis of such a document. This what specifically provided in section 49 of the Registration Act. The Apex Court in case of ***Suraj Lamp and Industries Pvt. Ltd. v. State of Haryana and another, 2009 (4) MPLJ 315*** has categorically held that such unregistered document of transfer confers no rights. Thus, admittedly the plaint as submitted by the respondent No.1 was not to be accepted at all unless the document of sale was impounded under the Stamp Act and the same was admitted in evidence by the Court below merely because a claim of possession was made under Section 6. Theses important aspects of law of the Specific Relief Act, the Registration Act, the Indian Stamp Act and Contract Act were not to be ignored. The Court below was not right in not considering the aforesaid

aspects of the claim made by the respondent No.1/Plaintiff. It was to be seen by the Court below whether the claim made by the respondent No. 1/plaintiff was in accordance with) the law or not. The restoration of possession of property can be ordered under the provisions of section 6 of the Specific Relief Act, only if the said person was in lawful possession of the property and was dispossessed unlawfully by the person against whom the claim in made, not otherwise.

From evidence also it is not proved whether the respondent No. 1/plaintiff was at any point of time in lawful possession of the disputed property and therefore no decree under the provisions of Section 6 of Specific Relief Act could have been granted in favour of the respondent No. 1/ Plaintiff.

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269. SPECIFIC RELIEF ACT, 1963 – Section 34

Declaratory suit – Suit for declaration of right in joint family property is maintainable without a separate prayer for consequential relief of possession – Bar of Section 34 of the Act, not attracted.

Pheraniya & Anr. v. Mauji Lal & Ors.

Judgment dated 02.02.2012, passed by the High Court of M.P. in S.A. No. 76 of 2002, reported in ILR (2012) MP 968

Held:

The relief of declaration that may be granted by the court under Section 34 is discretionary in nature. However, the discretion that has to be exercised is a judicial discretion and has to be based on well settled principles. For granting a declaration as prayed for by the plaintiffs in the suit, the plaintiff must have a personal interest or right as distinguished from a mere chance or vague expectancy to get a share or interest in the suit property. The discretionary relief that can be granted under section 34 of the Act is based upon principles contained in legal maxim 'ex debito justiciae'. However, there is a rider in the nature of proviso appended to section 34 of the Act and that provides that no court shall make a declaration contemplated by section 34 where the plaintiff omits to seek further relief than a mere declaration. The bar to the grant of relief contained in the proviso to section 34 would not apply to the facts of the present case because the respondents who were the plaintiffs before the trial court admittedly had one fourth undivided share each in the suit property on the date of filing of the suit. As it was not disputed by the appellants that partition of the suit property had not taken place during the life time of their late fathers or even thereafter till filing of the suit, the respondents as also the appellants are deemed to be in constructive possession of the suit property and, therefore, the respondents were not required to seek a separate relief of possession. Here, at this stage, it would be relevant to notice the provisions contained in Order VII Rule 7 C.P.C.

A bare perusal of the statutory provisions contained in Order VII Rule 7 C.P.C. would show that it is within the realm of the plaintiffs to formulate appropriate reliefs for them which may be necessary in a given factual matrix and they were not required to have necessarily prayed for relief of possession when they were satisfied by the declaration to be given by the court in their favour that they were the owner of one fourth undivided share each in the suit property. The decree of declaration granted by the courts below in favour of the respondents to the effect that they had one fourth undivided share each in the suit property is based not only on admission of the appellants but also there is ample evidence on record of the trial court to support the said conclusion which cannot be faulted with in the present appeal. Both the courts below were absolutely right in their conclusion that the respondents were not required to claim separate relief of possession while seeking a declaration regarding their right in the suit property. They were in deemed possession of their share on the date of the suit. This Court is of the considered view that it was the choice of the respondents being the plaintiffs in the suit to have simply made a prayer for declaration with consequential relief of mandatory injunction in the form of direction to the revenue authorities to delete the names of the appellants from khasra entires and substitute their names to the extent of their shares in the suit property.

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270. SUCCESSION ACT, 1925 – Section 63 (c)
EVIDENCE ACT, 1872 – Section 68

(i) Execution of Will – Proof of – The propounder would be called upon to show by satisfactory evidence that the Will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the disposition and put his signature to the document of his own free will.

(ii) Proof of Will and other documents – Distinction between – Unlike other documents, the Will speaks from the death of the testator, and so when it is propounded or produced before a Court, the testator who has already departed cannot say whether it is his Will or not, and this aspect naturally introduces an element of solemnity in the decision of question as to whether the document propounded is proved to be the last Will and testament of the departed testator.

Mahesh Kumar (dead) by LRs. v. Vinod Kumar and others
Judgment dated 13.03.2012 passed by the Supreme Court in Civil Appeal No. 7587 of 2004, reported in (2012) 4 SCC 387

Held:

In one of the earliest judgments in ***H. Venkatachala Iyengar v. B.N. Thimmajamma, AIR 1959 SC 443,*** the three Judge Bench noticed the provisions of Sections 45, 47, 67 and 68 of the Indian Evidence Act, 1872 and Sections 59 and 63 of the 1925 Act and observed:

> "18. .....Section 63 requires that the testator shall sign or affix his mark to the will or it shall be signed by some other person in his presence and by his direction and that the signature or mark shall be so made that it shall appear that it was intended thereby to give effect to the writing as a will. This section also requires that the will shall be attested by two or more witnesses as prescribed. Thus the question as to whether the will set up by the propounder is proved to be the last will of the testator has to be decided in the light of these provisions. Has the testator signed the will? Did he understand the nature and effect of the dispositions in the will? Did he put his signature to the will knowing what it contained? Stated broadly it is the decision of these questions which determines the nature of the finding on the question of the proof of wills. It would prima facie be true to say that the will has to be proved like any other document except as to the special requirements of attestation prescribed by Section 63 of the Indian Succession Act 1925. As in the case of proof of other documents so in the case of proof of wills it would be idle to expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters.
>
> 19. However, there is one important feature which distinguishes wills from other documents. Unlike other documents the will speaks from the death of the testator, and so, when it is propounded or produced before a court, the testator who has already departed the world cannot say whether it is his will or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last will and testament of the departed testator. Even so, in dealing with the proof of wills the court will start on the same enquiry as in the case of the proof of documents. The propounder would be called upon to show by satisfactory evidence that the will was signed by the

testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to the document of his own free will. Ordinarily when the evidence adduced in support of the will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law, courts would be justified in making a finding in favour of the propounder. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts just indicated.

20. There may, however, be cases in which the execution of the will may be surrounded by suspicious circumstances. The alleged signature of the testator may be very shaky and doubtful and evidence in support of the propounder's case that the signature, in question is the signature of the testator may not remove the doubt created by the appearance of the signature; the condition of the testator's mind may appear to be very feeble and debilitated; and evidence adduced may not succeed in removing the legitimate doubt as to the mental capacity of the testator; the dispositions made in the will may appear to be unnatural, improbable or unfair in the light of relevant circumstances; or, the will may otherwise indicate that the said dispositions may not be the result of the testator's free will and mind. In such cases the court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last will of the testator. The presence of such suspicious circumstances naturally tends to make the initial onus very heavy; and, unless it is satisfactorily discharged, courts would be reluctant to treat the document as the last will of the testator. It is true that, if a caveat is filed alleging the exercise of undue influence, fraud or coercion in respect of the execution of the will propounded, such pleas may have to be proved by the caveators; but, even without such pleas circumstances may raise a doubt as to whether the testator was acting of his own free will in executing the will, and in such circumstances, it would be a part of the initial onus to remove any such legitimate doubts in the matter.

21. Apart from the suspicious circumstances to which we have just referred, in some cases the wills propounded

disclose another infirmity. Propounders themselves take a prominent part in the execution of the wills which confer on them substantial benefits. If it is shown that the propounder has taken a prominent part in the execution of the will and has received substantial benefit under it, that itself is generally treated as a suspicious circumstance attending the execution of the will and the propounder is required to remove the said suspicion by clear and satisfactory evidence. It is in connection with wills that present such suspicious circumstances that decisions of English courts often mention the test of the satisfaction of judicial conscience. It may be that the reference to judicial conscience in this connection is a heritage from similar observations made by ecclesiastical courts in England when they exercised jurisdiction with reference to wills; but any objection to the use of the word "conscience" in this context would, in our opinion, be purely technical and academic, if not pedantic. The test merely emphasizes that, in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is deciding a solemn question and it must be fully satisfied that it had been validly executed by the testator who is no longer alive."

The ratio of H. Venkatachala Iyengar's case was relied upon or referred to in ***Rani Purnima Devi v. Kumar Khagendra Narayan Deb, AIR 1962 SC 567, Shashi Kumar Banerjee v. Subodh Kumar Banerjee AIR 1964 SC 529, Surendra Pal v. Saraswati Arora, (1974) 2 SCC 600, Seth Beni Chand v. Kamla Kunwar, (1976) 4 SCC 554, Uma Devi Nambiar v. T.C. Sidhan, (2004) 2 SCC 321, Sridevi v. Jayaraja Shetty, (2005) 2 SCC 784, Niranjan Umeshchandra Joshi v. Mrudula Jyoti Rao, (2006) 13 SCC 433,*** and ***S. R. Srinivasa v. S. Padmavathamma, (2010) 5 SCC 274.***

In ***Jaswant Kaur v. Amrit Kaur, (1977) 1 SCC 369*** the Court analysed the ratio in ***H. Venkatachala Iyengar's case*** (supra) and culled out the following propositions:-

"1. Stated generally, a will has to be proved like any other document, the test to be applied being the usual test of the satisfaction of the prudent mind in such matters. As in the case of proof of other documents, so in the case of proof of wills, one cannot insist on proof with mathematical certainty.

2. Since Section 63 of the Succession Act requires a will to be attested, it cannot be used as evidence until, as required by Section 68 of the Evidence Act, one attesting witness at least

has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence.

3. Unlike other documents, the will speaks from the death of the testator and therefore the maker of the will is never available for deposing as to the circumstances in which the will came to be executed. This aspect introduces an element of solemnity in the decision of the question whether the document propounded is proved to be the last will and testament of the testator. Normally, the onus which lies on the propounder can be taken to be discharged on proof of the essential facts which go into the making of the will.

4.Cases in which the execution of the will is surrounded by suspicious circumstances stand on a different footing. A shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the will under which he receives a substantial benefit and such other circumstances raise suspicion about the execution of the will. That suspicion cannot be removed by the mere assertion of the propounder that the will bears the signature of the testator or that the testator was in a sound and disposing state of mind and memory at the time when the will was made, or that those like the wife and children of the testator who would normally receive their due share in his estate were disinherited because the testator might have had his own reasons for excluding them. The presence of suspicious circumstances makes the initial onus heavier and therefore, in cases where the circumstances attendant upon the execution of the will excite the suspicion of the court, the propounder must remove all legitimate suspicions before the document can be accepted as the last will of the testator.

5.It is in connection with wills, the execution of which is surrounded by suspicious circumstances that the test of satisfaction of the judicial conscience has been evolved. That test emphasises that in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is called upon to decide a solemn question and by reason of suspicious circumstances the court has to be satisfied fully that the will has been validly executed by the testator.

6. If a caveator alleges fraud, undue influence, coercion etc. in regard to the execution of the will, such pleas have to be proved by him, but even in the absence of such pleas, the very circumstances surrounding the execution of the will may raise a doubt as to whether the testator was acting of his own free will. And then it is a part of the initial onus of the propounder to remove all reasonable doubts in the matter."

In ***Uma Devi Nambiar*** (supra), the Court held that active participation of the propounder/beneficiary in the execution of the Will or exclusion of the natural heirs cannot lead to an inference that the Will was not genuine. Some of the observations made in that case are extracted below:

"16. A Will is executed to alter the ordinary mode of succession and by the very nature of things, it is bound to result in either reducing or depriving the share of natural heirs. If a person intends his property to pass to his natural heirs, there is no necessity at all of executing a Will. It is true that a propounder of the Will has to remove all suspicious circumstances. Suspicion means doubt, conjecture or mistrust. But the fact that natural heirs have either been excluded or a lesser share has been given to them, by itself without anything more, cannot be held to be a suspicious circumstance especially in a case where the bequest has been made in favour of an offspring. As held in ***P.P.K. Gopalan Nambiar v. P.P.K. Balakrishnan Nambiar, 1995 Supp (2) SCC 664*** it is the duty of the propounder of the Will to remove all the suspected features, but there must be real, germane and valid suspicious features and not fantasy of the doubting mind. It has been held that if the propounder succeeds in removing the suspicious circumstance, the court has to give effect to the Will, even if the Will might be unnatural in the sense that it has cut off wholly or in part near relations. (See ***Pushpavathi v. Chandraraja Kadamba, (1973) 3 SCC 291) In Rabindra Nath Mukherjee v. Panchanan Banerjee, (1995) 4 SCC 459*** it was observed that the circumstance of deprivation of natural heirs should not raise any suspicion because the whole idea behind execution of the Will is to interfere with the normal line of succession and so, natural heirs would be debarred in every case of Will. Of course, it may be that in some cases they are fully debarred and in some cases partly."

The same view was reiterated in *Pentakota Satyanarayana v. Pentakota Seetharatnam, (2005) 8 SCC 67.*

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271. TRANSFER OF PROPERTY ACT, 1882 – Section 116
Whether mere acceptance of rent would create new tenancy in absence of any express agreement to make the same ? Held, Yes.

Manohar v. Central Bank of India and another
Judgment dated 29.03.2012 passed by the High Court of M.P. in S. A. No. 703 of 1995, reported in 2012 (2) MPLJ 704

Held:

Section 116 of the Transfer of Property Act, 1882 provides that-

> "if a lessee or under-lessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or under lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in section 106".

It is pertinent to mention here that in the lease deed (Ex.P/1), there is no clause of renewal. Thus, the mode of renewal of lease has not been prescribed in the lease deed. In paragraph 11 of the Statement, the plaintiff who has been examined as plaintiff witness No. 1 has admitted that after the termination of the lease, the rent has been deposited in his account and copy of his statement of account in Ex.D/1. It has further been admitted by the plaintiff that he has withdrawn an amount of ₹ 7,000/-, 7,420/- and ₹ 9,100/- respectively on 31.3.1986, 28.4.1986 and 8.8.1986. In paragraph 13 of the Statement, plaintiff has further admitted that after 1986, he has not withdrawn the amount from his account. The statement of account Ex. D/1 clearly shows that after determination of the lease, the rent has been deposited in the account of the plaintiff. Thus, in view of admission made by the plaintiff in his statement, it was for the plaintiff to prove that he had not withdrawn any amount which was deposited after the determination of the lease. The plaintiff who has obtained LL.B. Degree, after determination of lease ought to have given written instructions to the Bank not to deposit the amount of rent in his account, as has been admitted by him in para 11 of his statement. Thus, the finding recorded by the lower Appellate Court that the plaintiff has withdrawn the amount of rent which has been deposited after determination of the lease cannot be said to be perverse or based on no evidence.

If the lease deed contains the renewal clause, the renewal of the lease has to be sought in the manner provided under the clause. In such a case, the lessee cannot claim that merely because the lessor has accepted the rent, "he is holding over". However, in the instant case, it is pertinent to mention here that the lease deed does not contain any clause of renewal. Therefore, the decision relied upon by learned counsel for the appellant in the case of ***Shanti Prasad Devi another v. Shankar Mahto and others, 2005 (II) MPJR 263,*** is of no assistance to the appellant. Similarly, the ratio laid down by this Court in ***Balwant Rail Agrawal v. Bharat Petroleum Corporation, 2010 (2) MPLJ 436,*** that renewal of lease cannot be automatic, is of no assistance to the appellant, as the same is distinguishable on facts and Section 116 of Transfer of Property Act has not been noticed. The appellant has accepted the rent after determination of the lease, therefore, under section 116 of the transfer of Properly Act the lease is renewed.

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272. WORD AND PHRASES

"Defraud" – Meaning of the expression explained.

Makhan Gir Mahant and others v. State of M.P. and others

Judgment dated 11.11.2011 passed by the High Court of M.P. in W.P. No. 3233 of 2012, reported in 2012 (2) MPLJ 360

Held:

The expression "defraud" as per Law Lexicon : P. Ramnatha Aiyer, 2nd Edn. Reprint 1999, means :-

> "To deprive of some right, interest, or property by deceitful devices to withhold from wrongfully to injure by embezzlement to cheat to overreach to withhold from another that which is justly due to him or to deprive him of a right by deception or artifice to deprive of a right by withholding from another by indirection or device that which he has a right to claim or obtain; to deprive of something dishonestly."

Defraud therefore, always denotes some from of dishonesty. Therefore, necessary it is to show in order to raise a presumption as to the fraudulent nature of a voluntary transfer that the gratuitous transferor at the time of the transfer was indebted to the transferee. Unless this burden is discharged, a voluntary transfer cannot be adjudged as a fraudulent transaction.

In ***Dr. Vimla v. Delhi Administration, AIR 1963 SC 1572 at Page 1576*** it is observed that expression "defraud" involves two elements, viz., (i) deceit, and (ii) injury which is something other than economic loss, that is deprivation of property whether movable or immovable or of money which include any harm caused to any person in body, mind, reputation on such others.

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NOTE: (*) Asterisk denotes short notes

PART - III

CIRCULARS/NOTIFICATIONS

NOTIFICATION REGARDING POSTPONEMENT OF ENFORCEMENT OF RULE OF HIGH COURT OF MADHYA PRADESH (CONDITIONS OF PRACTICE) RULES, 2012 RELATING TO FILING OF VAKALATNAMA

[Published in M.P. Rajpatra (Asadharan) dated 22.6.2012 page 575]

Notification No. Q-P.R. (J) dated the 21st June, 2012. – In exercise of the powers conferred by Rule 18 of the High Court of Madhya Pradesh (Conditions of Practice) Rules, 2012, Hon'ble the Acting Chief Justice has been pleased to Postpone the enforcement of Rule relating to filing of Vakalatnama in the format prescribed in Appendix 1 (A) and 1 (B) under Rule 4 (1) of the aforesaid Rules up to 15th July, 2012. The Rules relating to new format of Vakalatnama shall come into force w.e.f. 16th July, 2012.

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NOTIFICATION REGARDING DESIGNATING THE OFFICE OF INSPECTOR GENERAL OR POLICE, STATE CYBER POLICE, MADHYA PRADESH, BHOPAL AS CYBER AND HI-TECH CRIME POLICE STATION, BHOPAL

[Published in M.P. Rajpatra (Asadharan) dated 4.7.2012 page 602]

Notification No. F.-2(K)-49-2010-B-II dated the 4th July, 2012. – In exercise of the powers conferred by clause (s) of Section 2 of the Code of Criminal Procedure, 1973 (No. 2 of 1974), the State Government hereby declares the Office of Inspector General or Police, State Cyber Police, Madhya Pradesh, Bhopal to be Police station by the name of ***"Cyber and Hi-Tech Crime Police Station, Bhopal"*** having territorial jurisdiction over whole of the State of Madhya Pradesh for the purpose of investigation into cases related to Cyber Space, Information Communication Technology, Hi-Tech crimes, Copy Rights, Intellectual Property Rights, Piracy and other related offences under Indian Penal Code, 1860.

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NOTIFICATION DATED 15TH SEPTEMBER, 2011 OF MINISTRY OF LAW & JUSTICE REGARDING INCREASE IN THE LIMIT OF THE VALUE OF PROPERTIES IN DISPUTE FOR THE PURPOSE OF DETERMINIG JURISDICTION OF PERMANENT LOK ADALAT

Published in the Gazette of India, Extraordinary, Part II, Section 3(ii), No. 1742, dated 15th September, 2011.

NO. S.O. 2083 (E), dated September 15, 2011. – In exercise of the powers conferred under third proviso to sub-section (1) of Section 22-C of **the Legal Services Authorities Act, 1987 (39 of 1987),** the Central Government, in consultation with the Central Authority hereby **increases the limit of the value of properties** in dispute for the purpose of determining the **jurisdiction of Permanent Lok Adalat from "ten lakh rupees"** as specified in the second proviso to sub-section (1) of Section 22-C of the said Act to "twenty five lakh rupees" with effect from the date of publication of this notification in the Official Gazette.

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Every job is a self-portrait of the person who did it. Autograph your work with excellence.

PART - IV

IMPORTANT CENTRAL/STATE ACTS & AMENDMENTS

MADHYA PRADESH GOVANSH VADH PRATISHEDH RULES, 2012

Notification No. F-23-186-2003-XXXV dated the 12th June, 2012. – In exercise of the powers conferred by Section 17, read with Section 12 of the **Madhya Pradesh Govansh Vadh Pratishedh Adhiniyam, 2004 (No. 6 of 2004),** the State Government hereby makes the following rules, namely : –

Rules

1. Short title and commencement. – (1) These rules may be called the Madhya Pradesh Govansh Vadh Pratishedh Rules, 2012.

(2) It shall come into force from the date of its publication in the Madhya Pradesh Gazette.

2. Definitions. – In these rules, unless the context otherwise requires : –

(a) "Act" means the Madhya Pradesh Govansh Vadh Pratishedh Adhiniyam, 2004 (No. 6 of 2004);

(b) "Local Officer" means the Joint Director/Deputy Director of Veterinary Services of the Government of Madhya Pradesh which are posted at Division/District Level;

(c) All other words and expressions used herein but not defined shall have the same meaning respectively assigned to them in the Act.

3. Grant of Transit Permit. – (1) Any person including transporter who wants to transport any cow-progeny from one State to other via Madhya Pradesh State by any means, shall apply for a permit in Form-I to the Competent Authority after depositing a fee of Rs. 100 per trip.

(2) The competent authority may conduct such enquiry as he may deem necessary for his satisfaction for verification of details given in the application Form-I. After conducting such enquiry, if the competent authority is satisfied that details given in the application and documents attached with application are correct, he shall issue the Transit permit in Form-II to the applicant within two weeks from the date of receiving the application or reject the application by passing an order stating the reasons thereof and shall enter the related information in his official register under his own handwriting.

(3) The provisions relating to the Prevention of Cruelty to Animal Act, 1960 (No. 59 of 1960) and other related Acts and Rules shall be mentioned by the Competent Authority on the back of permit and compliance of the same shall be mandatory for the permit holder.

Explanation. – (i) Each herd shall not have more than twenty five Cow progeny, while transporting on foot.

(ii) If the transporter is a farmer, he must have rinpustika, animal purchased through cattle fares by the farmer, he must have sale receipt and related information shall be entered in rinpustika by the seller. Concerning farmer cannot transport more than four cattle at a time.

(iii) During transportation of cattle by any means each consignment shall accompany with feed/fodder, drinking water and proper rest facilities. Transportation of cattle on foot shall be restricted before sunrise and after sunset.

(iv) Individual health certificate shall be issued to each cow-progeny shall be mandatory.

4. Power of Inspection. – For the purpose of enforcing the provisions of section 11 of the Act, the Competent Authority or any person authorized by the Competent Authority in writing in this behalf shall have power to enter and inspect any premises within the local limits of his jurisdiction, where he has reason to believe that an offence under the Act has been, is being or is likely to be committed and shall take necessary action.

5. Confiscation by District Magistrate. – In case of any violation of section 4, 5, 6, 6A and 6B, the police shall be empowered to seize the vehicle, cow progeny and beef, and the District Magistrate shall confiscate such vehicles, cow progeny and beef as per the provisions of section 100 of Criminal Procedure Code, 1973 (No. 2 of 1974) in following manner: –

(i) He shall take possession of the vehicle;

(ii) He shall intimate the Veterinary Department to take in custody of the cow-progeny and beef.

(iii) The beef or cow-progeny shall be disposed of by the department by such procedure as he deems fit.

6. Manner of Appeal. – Any person aggrieved by an order of confiscation under sub-section (5) of section 11 of the Act, may prefer an appeal in writing to the Divisional Commissioner within thirty days of the date of knowledge of such order. Every appeal shall be made under sub-section (1) of section 11-A of the Act.

7. Fee. – The fee payable under sub-section (1) of section 11-B of the Act shall be rupees Five Hundred by Bank Draft or by cheque payable to the Divisional Commissioner.

8. Feeding and maintenance. – (1) The seized cow-progeny shall be kept in the Goshala or any Charitable Institutions registered under any enactment for the time being in-force established for the purpose of keeping, breeding and maintaining cow-progeny or for the purpose of reception, protection, care, management and treatment of infirm, aged and diseased cow-progeny.

(2) The feeding charges shall be @ Rupees 5/- per cattle per day.

(3) The Veterinary Department shall make necessary provision in the budget and shall provide the grant to the concerned institution for feeding and maintenance of the cow-progeny.

9. Aid and Grant to Institution. – (1) The Institution having a minimum of one hundred of unproductive infirm, aged and diseased Cow-progeny, shall get aid under various schemes of State Government/ Central Government.

(2) The Institution mentioned in sub-rule (1) shall also get grants from market committee under clause (iv) of sub-section (3) of section 17 of the Madhya Pradesh Krishi Upaj Mandi Adhiniyam, 1972 (No. 24 of 1973).

10. Handing over of impounded cow-progeny. – Wandering cow-progeny which are captured by employees of cattle pound and are not released or auctioned shall be handed over to the institution by the local authority.

11. Levy of Charges. – (1) The Institutions may levy and recover charges for care and maintenance of cow-progeny from their owners which shall be equivalent to the charges levied by the cattle pound of the local body.

(2) The cattle-pound, which are maintained by local bodies, may discharge the functions of institutions to the extent possible.

12. Economic rehabilitation Scheme. – (1) The Competent Authority of the Municipal Corporations, Municipalities and Nagar Panchayats shall prepare a list in Form-IV of persons, who are partially or fully affected by the provisions of the Act and display it on the notice-board in their office for inviting objections. The objections, if any, received, shall be disposed-off by such Competent Authority, thereafter a final list of affected persons shall be prepared and the affected person shall be informed.

(2) The Competent Authority of the local body shall send the final list to the Collector of the district.

(3) After receiving the final list from the local body, the Collector of the district shall get it scrutinized and after certification in the prescribed Form-V, he shall recommend various self-employment schemes of concerned Corporation and/or Board of the State Government on the basis of affected persons demand, and a copy of that list shall be endorsed to the local Officer for co-ordination.

(4) Such Corporation and Board after completing necessary formalities shall make funds available to the affected persons either directly or through banks.

(5) Monthly monitoring of economic rehabilitation of the affected person shall be done by the Collector, for which the local officer shall act as co-ordinator.

(6) The affected persons shall get benefit of this economic rehabilitation only once, after coming into force of the act.

13. Repeal and Savings. – The Madhya Pradesh Govansh Vadh Pratishedh Rules, 2004 are hereby repealed :

Provided that the repeal shall not effect : –

(i) the previous operation of any law so repealed or anything duly done or suffered thereunder;

(ii) any penalty, forfeiture or punishment incurred in respect of any offence committed against any law so repealed; or

(iii) any investigation, legal proceeding or remedy in respect of any penalty, forfeiture or punishment to aforesaid; and

(iv) any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if this rule had not been passed.

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