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पुरूषोत्तम विष्णु नामजोशी

"ज्योति" का मुख्य उद्देश्य ही बौद्धिक चेतना की ज्योति, दीप्ति एवं प्रभा को सतत् रूप से प्रज्ज्वलित रखना है, आलोकित होती रहना है। इसके लिए प्रशिक्षण संस्थान द्वारा आयोजित शिविरों में समय–समय पर न्यायिक अधिकारीगणों को आहूत किया जाता है। द्विमासिक पत्रिका का प्रकाशन भी अविरत रूप से अक्टूबर 1995 से हो रहा है। शुद्ध, सात्विक आशय से प्रशिक्षण के इस यज्ञ, अभियान, मिशन, आयोजन को सफल बनाने का कार्य हम सभी न्यायिक अधिकारीगणों का है। हमारी अपनी संस्था है। आप सबका सक्रिय सहयोग मूलभूत आवश्यकता है। यह सब तभी संभव है जब हम सतत् रूप से जागृत एवं चैतन्य अवस्था में पढ़ेंगे, समझेंगे एवं व्यवहार में उपयोग में लायेंगे। अधिवक्तागणों को शांति से सुनना उनके तर्कों को समझना भी एक कला है। किसी भी प्रकार की कोई उपेक्षा हमारी योग्यता को निखारेगी नहीं न ही ज्ञान भंडार में वृद्धि होने वाली है।

अभी कुछ दिन पूर्व दो बातें सुनने को मिलीं बड़ा अच्छा लगा। कहने वाले पुराने परिचित हैं। पूर्व परिचित लोग कई संख्या में मिले। उनमें से वरिष्ठजन भी थे। बड़ी दिलेर, बेबाक एवं धैर्यशील बातें हुई। मेरे से इस या उस शहर के लोग जब भी बातें करते हैं तो बिना लाग–लपेट के खुले मन से बिना पूर्वाग्रह के करते हैं। उन्हें विश्वास रहता है कि जो भी कहा सुना जा रहा है उसका विपरीत प्रभाव कहीं भी कभी भी नहीं होगा। यह उनका बड़प्पन है कि वे मेरे जैसे छोटे व्यक्ति पर इतना विश्वास रखते हैं। वे कह रहे थे कि साहब जो न्यायिक अधिकारी प्रशिक्षण हेतु जबलपुर में आते हैं वे प्रशिक्षण हेतु जाने के पहले किसी सीमा तक शिष्ट व समझदार होते हैं लेकिन जब प्रशिक्षण पश्चात लौटकर आते हैं तो अत्यन्त अशिष्ट व्यवहार करते हैं उनका यह भी विचार था कि समझदारी में या कार्य करने की पद्धति या प्रबंधन में कुछ अंतर आता हो ऐसी बात भी नहीं है। मैं ऐसा सुनकर निश्चित ही चौंका नहीं न मेरी अवसाद या उदासी की स्थिति ही थी। जिसकी तासीर या शरीर धर्म ही नैसर्गिक रूप से अवसाद या उदासी का हो उसको क्या फर्क पड़ता है। मुझे तो अच्छा लगा कि स्पष्ट बोलने वालों ने मुझे विश्वास के साथ कोई बात तो कही। मेरी कुछ प्रतिक्रियाएं हुई। तुरंत नहीं, लेकिन लगभग 10–12 दिन पश्चात। चिंतन कर रहा था। ऐसा लगा कि आधा अधूरा– अधकचरा ज्ञान जिसे कभी भी पढ़–लिखकर, सुन–समझकर परिष्कृत न

किया जावे तो सर्वसाधारण की प्रतिक्रिया तो यही होना है। यह बात कई लेखों के माध्यम से बताई गई है कि प्रशिक्षण वर्गों में भाई लोग यदि पुस्तकें लाए हैं तो पुस्तकें तक नहीं खोलते, न नोट्स बनाते हैं और न ही सुनने का प्रयत्न करते हैं अपितु अपनी ही बातें बताने हेतु इतने आतुर व अधीर होते हैं कि वक्ता को अपनी बात पूर्ण भी नहीं करने देते। वक्ता को सतत् रूप से टोका–टाकी करके भिड़न्त (Encounter) तक करने का प्रयत्न करते हैं। वे मानसिक रूप से नए विचारों को अपने मस्तिष्क पटल पर अंकित नहीं होने देना चाहते विपरीत इसके वे अपनी धारणा में, इरादे में, विचारों में इतने पक्के रहते हैं कि प्रतिचिंतन की गुंजाइश भी नहीं रखते। प्रत्येक वक्ता पूर्ण ज्ञान स्वरूप व्यक्ति नहीं होता है न ही वह कभी ऐसा दूसरों से प्रतिबिंबित या प्रतिलक्षित भी करना चाहता है। वह स्वयं अपनी मर्यादा, ज्ञान, अनुभव आदि बातों की सीमा से अवगत होता है उसे इन्हीं बातों से पुनः स्मरण कराने का अधिकार तो केवल ऐसे लोगों को है जो खुले दिल से खुले मन से विचार मंथन हेतु तत्पर हों। दूसरों के विचारों के साथ वैचारिक रूप से आदान–प्रदान हेतु स्वयं तत्पर होकर आगे आते हों। वे लोग प्रतिचिंतन के योग्य नहीं है तो स्वयं अपने विचारों के दायरे से बाहर नहीं आना चाहते। उनका दायरा तो उनके विचारों का एक कूप मात्र है जिसमें विचारों की जलधारा के प्रवेश के लिए कोई भी मार्ग खुला नहीं रखा है। किंकर्तव्य विमूढ़, हतबुद्ध (Perplex) एवं असावधान, अन्यमनस्क, उत्साहहीन भावना (perfunctory) से यदि कर्त्तव्यों को निष्पादित किया जाता है तो यंत्रवत कार्य होगा। जो कार्य किया जाएगा उसमें आत्मा नहीं होगी, आत्मीयता नहीं हो सकती।

उन मेहमानों का दूसरा चिंतन था कि अरब राष्ट्रों में विभिन्न देशों से नौकरी करने हेतु आने वाले डॉक्टर्स अथवा टेक्नोक्रेट्स आदि को पहले ही कह दिया जाता है कि अरबी भाषा अरबी लोगों की समस्या नहीं है। यदि नौकरी करना है तो भाषा को समझो–जानो। अधिवक्ताओं के साथ वार्तालाप में मैं बता रहा था कि संस्था के प्रत्येक प्रशिक्षण सत्र में माननीय मुख्य न्यायाधिपति महोदय एवं अन्य माननीय महोदयों ने तथा पत्रिका के माध्यम से भाषा के संबंध में सतत् चिंतन होता रहा है। पिछले अंक में ही (अक्टूबर '99) इस विषय पर लिखा गया है। प्रश्न यह है कि हम भाषा की दृष्टि से सुधरना क्यों नहीं चाहते। ऐसा कहकर कोई बच तो नहीं सकता कि उसे अंग्रेजी नहीं आती है। विधि प्रावधान, न्याय–दृष्टांत आदि सभी अंग्रेजी में हैं तो क्या हम उन्हें पढ़ें बगैर अंदाज से ही काम कर रहे हैं। क्या जो विधि पुस्तकें अथवा न्याय–दृष्टांत हिन्दी में प्रकाशित होते हैं उन्हें भी पढ़ पाते हैं। सही बात तो यह है कि हम हिन्दी भी नहीं जानते। एक ज्वलंत उदाहरण है, "संध्या का श्याम" "राधा का शाम"। एक अन्य उदाहरण है "मैं बहार जाना चाहता हूं" तथा "बगीचे में बाहर आई है"। ये और कोई

नहीं लिख रहा है, ये वो लिख रहे हैं जिनकी मातृभाषा हिन्दीं है। अभी कुछ ही दिन पूर्व अतिरिक्त जिला न्यायाधीशों के प्रशिक्षण वर्ग हेतु उनके द्वारा लिखे गए निर्णय आदेश जाँच हेतु बुलाए थे। स्त्रीलिंग व पुल्लिंग का भेद ही नहीं मालूम। "मैंने डिक्री दिया" "मैं घड़ी पहना" जैसे कई उदाहरण थे। इसको क्या कहा जावे। हम नौकरी में आकर स्थायित्व के विषय में सुरक्षितता अनुभव करते हैं, इसलिए योग्यता नहीं बढ़ा पाते, गुणवत्ता नहीं बढ़ा पाते, जानकारी एकत्र नहीं कर सकते। "सब कुछ चलता है" इस भावना से हम काम करते हैं। सुधार की भावना तो स्पर्श भी नहीं कर पाती। कुछ ही लोग क्रांतिवीर सिद्ध हो पाते हैं।

मेरे वरिष्ठ बंधु श्री सुगन्धीलालजी जैन ने एक प्रसंग तुलसीकृत रामायण के बाल कांड दोहा 251 पश्चात का माता सीता के स्वयंवर का सुनाया। स्वयंवर में कोई भी शूर धनुष्य को तोड़ नहीं पा रहा था। जनकजी दुःखी मन से कह रहे थे कि सीताजी क्या अविवाहित रह जाएगी। वे बोले, "वीर विहीन मही मैं जानी"। स्वभावगत रूप से भाई लक्ष्मण क्रोध में आए तथा कहने लगे "कन्दूक इव ब्रह्मांड उठावों, जोजन सत प्रमाण लै धावौं।" विश्वामित्रजी ने शुभ समय देखकर अति प्रेममय वाणी में भगवान रामचंद्रजी से बोले, उठहुँ राम भँजहु भव चापा। मेटहुँ तात जनक परितापा। "और देखते–देखते धनुष्य का भंजन/प्रभंजन हो गया। ये तो निर्धार की बात है, लक्ष्य यदि है तो हर यक्ष प्रश्न का उत्तर है। स्वामी विवेकानंदजी ने कहा था कि (Arise! Awake and stop not till the goal is reached) अर्थात उठो। जागो! और तब तक मत रुको जब तक लक्ष्य प्राप्त नहीं हो जाता। "उत्तिष्ठत ! जाग्रत! प्राप्य वरान्नि बोधत! अभी कुछ दिन पूर्व एक विज्ञापन में टी.व्ही. पर गीतकार जावेद अख्तर की पंक्तियाँ सुनने को मिली। बहुत प्रभावित किया। वे पँक्तियाँ थी; "जिन्दगी है तो ख्वाब है, ख्वाब है तो मंज़िलें, मंजिलें हैं तो फ़ासले, फ़ासले हैं तो रास्ते, रास्ते हैं तो मुश्किलें, मुश्किलें हैं तो हौसले, हौसले हैं तो विश्वास, विश्वास है तो संघर्ष, संघर्ष है तो सफलता"। बहुत गहन चिंतन है, आदर्श है, प्रेरणास्त्रोत है। मित्रों हमें परिवर्तन लाना होगा। बागड़ ही खेत को खा जाती है या बचाती है। हम ही हर बात के लिए उत्तरदायी हैं, चाहे श्रेय मिले या दोषारोपण। एक दम क्रांतिकारी विचारों से आगे बढ़ना है। हम जिला न्यायाधीश स्तर के लोग परिवर्तन ला सकते हैं। वे ही कनिष्ठ न्यायाधीशों को प्रतिनिधित्व करते हैं। जिला स्तर पर "Work Oriented awareness" "कर्म अभिमुख अभिज्ञा" का वातावरण निर्मित करना होगा। ऐसा तबही होगा जब हम जिला न्यायाधीश स्तर के अधिकारी कनिष्ठों को उत्साहित–प्रोत्साहित कर पाएंगे व वास्तविक रूप से मार्गदर्शित कर पाएंगे। उपदेश बोध से जरूरी है उनकी विधि संबंधी समस्याओं को हल करना। जैसे दस पन्न के प्रवचन से दस समस्याओं का हल करना (An

Ounce help is better than a pound preech) हमें स्वयं को इसके लिए लिखना–पढ़ना –बढ़ना पड़ेगा अन्यथा "सुद्द सुद्द इन्दि" बोलने वाले हिन्दी पढ़ायेंगे तो परिणाम क्या होगा बताने की आवश्यकता नहीं है। प्रशिक्षण में आने वाले विद्यार्थियों के साथ मेरे संबंध शुद्ध रूप से पालक–बालक के अथवा शिक्षक–शिक्षार्थियों के या यूँ कहें कि कनिष्ठ वरिष्ठ शिक्षार्थी जैसे हैं। मन मुक्त रूप से निःसंकोच वार्तालाप होता है। मर्यादाओं का उल्लंघन भी नहीं होता हैं लेकिन कुल मिलाकर सार यह है कि आभास यह होता है कि हम केवल कागज पर ही जिला न्यायाधीश हैं व कनिष्ठों के साथ हमारे सम्बन्ध न्यायिक परिवार के पालक के, मुखिया के, मार्गदर्शक के, आदर्श पुरूष के, दार्शनिक के, दीप–स्तंभ के आत्मीय व्यक्ति के नहीं होंगे, यहां तक कि संवाद स्थिति भी नहीं होगी, तो बॉसिज़्म के प्रतीक मात्र रह जायेंगे। जहाँ तक बॉस होने का प्रश्न है, तथ्य तथ्य है, उसके लिए प्रमाण की क्या आवश्यकता या कि दूसरों से यह बात हम क्यों अपने लिए अनुभव करवाना चाहते हैं? उन्हें व हमें दोनों को अनुभूति है। किसी प्रकार की कोई भ्रामक कल्पना किसी को नहीं है।

जिला न्यायाधीश की संस्था मज़बूत होनी चाहिए। बौद्धिक रूप से प्रभावोत्कर्षक विद्धवंशीय व्यवहारिक रूप से निष्काम कर्म प्रधान, वैचारिक रूप से संत–संप्रदाययुक्त निर्मोही। तब ही हम किसी एक टीम के सफल कोच हो पाएंगे। टीम–वर्क, सामूहिक नेतृत्व की नितांत आवश्यकता हर क्षेत्र में हैं, प्रबंधन के नये आयाम खुल रहे हैं व हम यदि जिले के प्रबंध में जिला न्यायाधीश के रूप में हैं तो हमें परामर्शदाता (Mentor) बनना पड़ेगा तथा हमारे पास जब परामर्श देने हेतु कुछ होगा तो ही तो दूसरा पक्ष परामर्शआदाता (Mentoree) होगा। ये परस्पर सम्बन्ध हैं अतः इसीलिए भी मिलकर काम करने की भावना, सामूहिक दायित्व की भावना जागृत करनी होगी। आशा की जानी चाहिए कि आने वाला नया साल, नई जागृति, नई चेतना, नया उत्साह, उमंग, संचारित कर सकेगा। **अवसर की आहट आएगी, चैतन्य स्वरूप बने रहना, कान खड़े रखना।**

राहों पे नज़र रखना, होठों पे दुआ रखना।
आ जाए कोई शायद, दरवाज़ा खुला रखना।

IF YOUR MIND IS NOT OPEN, KEEP YOUR MOUTH SHUT TOO.

न्यायिक चरित्र विकास : एक निरंतर प्रक्रिया

दिनांक 05-10-1999 से 12-10-1999 की अवधि में एक प्रशिक्षण शिविर उन अतिरिक्त जिला न्यायाधीशों हेतु आयोजित किया गया था जो चार माह पूर्व ही पदोन्नत किए गए थे। सत्र के उद्घाटन उद्बोधन समारोह में दि. 06-10-1999 को माननीय मुख्य न्यायाधिपति श्रीमान ए.के. माथुर महोदय ने प्रबोधनात्मक विचारों से मार्गदर्शित किया। पदोन्नति के अवसर पर प्रशिक्षुओं का अभिनंदन किया व कहा कि अब आपका दायित्व व जिम्मेदारी साधारण नहीं रही है। अब मृत्युदंड देने तक का अधिकार प्राप्त हुआ है तथा असीमित मूल्य के मूल्यांकन के सांपत्तिक प्रकरण भी सुनने का अधिकार मिला है। अतः इस बात पर महत्व देते यह कहा गया कि ज्ञान एक समुद्र है अतः पदोन्नति पश्चात का यह शिविर पुनश्चर्या के उद्देश्य से है जिसका लाभ लिया जाना चाहिए। जब जहां व जैसा भी अवसर आए किसी ने भी अपनी जानकारी ज्ञान बढ़ाने से न तो संकोच करना चाहिए न ही अवसर का लाभ लेने से वंचित रहना चाहिए। संसार ज्ञान का भंडार है अतः किसी को भी पूर्णज्ञान आना संभव भी नहीं। इस प्रकार जैसे जैसे व्यक्ति वरिष्ठ होता जाता है वैसे वैसे वह परिष्कृत हो जाता है अतः उसमें मानवोचित दयाभाव, सहृदयता अधिक मात्रा में आना चाहिए। व्यक्ति के मानवीय गुणों का वर्णन करते हुए माननीय ए.के. माथुर महोदय ने कहा कि मनुष्य मस्तिष्क अत्यंत सृजनशील होता है लेकिन बमुश्किल किसी छोटे अंश तक ही हम उसका उपयोग करते हैं। अतः इस गुण ग्राह्यशील मस्तिष्क का अधिकतम उपयोग करने की अपेक्षा भी श्रीमान ने की थी।

अतिरिक्त सत्र न्यायाधीशगण के रूप में प्रशिक्षार्थियों के दायित्व बोध का स्मरण करते हुए माननीय मुख्य न्यायाधिपति महोदय ने कहा कि सत्र प्रकरणों की तुलना न्यायिक दंडाधिकारी के प्रकरणों की बराबरी में नहीं हो सकती। ऐसे प्रकरण अत्यंत महत्वपूर्ण एवं जिम्मेदारी निभाने की अपेक्षा करते हैं क्योंकि किसी एक पक्ष के जीवन मृत्यु का प्रश्न होता है। अतः न्यायालयीन कार्य सतही रूप से अल्पज्ञ ज्ञान से नहीं होना चाहिए तथा इसके लिए गहन अध्ययनशीलता एवं गंभीरतापूर्वक चिन्तन मनन की आवश्यकता रहेगी। अतः उपेक्षा की बिल्कुल ही अपेक्षा नहीं है। ऐसे प्रकरणों में साक्ष्य लिपिबद्ध करना भी सहज कार्य न होकर साक्ष्य लिपिबद्ध करते समय पूर्ण एकाग्रता की आवश्यकता पर बल दिया। इस प्रकार न्यायालयीन कार्यवाहियां करते समय मर्यादा, सहनशीलता व गंभीरता का ध्यान रखने की अपेक्षा श्रीमान महोदय ने की। न्यायालय में संतुलन खोकर कार्य करने वाले न्यायाधीश को अकारण परेशान करना एवं चिड़चिड़ाहट उत्पन्न कराना बहुत सरल हो जाता है व इस कारण कार्य ठीक से

नहीं कर पाएगा। न्याय निर्णय भी सतही प्रकृति के नहीं होना चाहिए। साक्ष्य का अवलोकन, क्रमबंधन पर जोर देते हुए माननीय महोदय श्रीमान् माथुर साहेब ने यह कहा कि निर्णय लिखने में कोई काल्पनिक आधार नहीं हो सकता है। माननीय मुख्य न्यायाधिपति महोदय ने एक निर्णय का संदर्भ देते बताया कि अभियुक्त को मृत्युदंड से जब दंडित किया जा रहा है तो कल्पनाओं के आधार पर निष्कर्ष निकालकर निर्णय देना सर्वथा अनुचित था। निर्णय देने हेतु जो आवश्यक तत्व है जैसे साक्ष्य का मूल्यांकन, विश्लेषण आदि को समग्ररूप से देखा जाना चाहिए, साक्ष्य अधिनियम के सिद्धांतों को ध्यान रखना चाहिए। पोस्टमॉर्टम रिपोर्ट, मेडिकल रिपोर्ट का अवलोकन मेडिकल ज्यूरिसप्रूडन्स (विधि विज्ञान शास्त्र) का गहन अध्ययन होना चाहिए। विशेष कर यह भी बताया गया कि कोई साक्षी पक्ष विरोधी घोषित हो गया है यह मात्र पर्याप्त नहीं है उस साक्षी पर अविश्वास करने के पूर्व ऐसे विषय के सम्बन्ध में सिद्धांत की जानकारी प्राप्त कर प्रावधानों को लागू कर साक्ष्य का मूल्यांकन होना चाहिए। माननीय मुख्य न्यायाधिपति महोदय ने न्यायिक प्रक्रिया के संबंध में इस बात को गंभीरतापूर्वक लेते हुए नाराजगी व्यक्त की कि पीठासीन अधिकारी चेंबर में बैठते हैं व न्यायालय कक्ष में कर्मचारी साक्ष्य लिपिबद्ध करते हैं व ऐसे ही अन्य कार्य जो पीठासीन अधिकारीगणों को करना है उनके प्रति उदासीन रहते हुए कर्मचारी वृंद द्वारा कराए जाते हैं।

कार्यालयीन दायित्वों की ओर निर्देशित कर के श्रीमान माथुर महोदय ने यह कहा कि मालखाना, नाजरात आदि का हिसाब, लेन देन, जमा नामें के विषय में ध्यान नहीं दिया जा रहा है जिसके लिए पीठासीन अधिकारी, स्वयं जिम्मेदार हैं जो कर्त्तव्यों का निर्वाह नहीं करना चाहते हैं। ये अधिकारी अपने अपने प्रभारों की पंजियों में हस्ताक्षर तो करते हैं पर यह ज्ञात ही नहीं रहता है कि हस्ताक्षर किस उद्देश्य से किए हैं। दुर्विनियोजन की जो स्थिति विभिन्न जगह उत्पन्न हुई है या हो रही है उसके लिए पीठासीन अधिकारी स्वयं जिम्मेदार हैं।

न्यायिक अधिकारी समय पर नहीं आते हैं तथा जो आते हैं वे न्यायालय कक्ष में नहीं बैठते हैं तथा विश्राम कक्ष में बैठते हैं। ऐसे कृत्यों पर अप्रसन्नता व्यक्त कर यह अपेक्षा भी गई कि उच्च न्यायालय द्वारा दिये निर्देशों का पालन कठोरता पूर्वक किया जाएगा। साक्ष्य पीठासीन अधिकारी के चैतन्य अवस्था में लिपिबद्ध होने का परिणाम यह होगा कि निरर्थक रूप से समय व्यतीत नहीं होगा एवं अनावश्यक रूप से दीर्घ व नीरस प्रतिपरीक्षण नहीं होगा व न्यायालयीन रिकार्ड प्रज्ञावान व्यक्ति द्वारा रखा गया है ऐसा भी प्रकरण स्वयं बोलेगा व न्यायालय अपने प्रकरणों पर व न्यायालयीन कार्य पर कमांड (प्रभुत्व, नियंत्रण काबू) बनी रहेगी।

दि. 12-10-1999 को शिविर के समापन अवसर पर, अत्यंत अस्वस्थ होते हुए भी, माननीय प्रशासनिक न्यायाधिपति एवं अध्यक्ष, न्यायिक अधिकारी प्रशिक्षण संस्थान श्रीमान डी.पी.एस. चौहान महोदय ने न्यायिक अधिकारीगणों के प्रति पितृवत स्नेह के कारण अपनी गरिमाशाली उपस्थिति से संस्था को उपकृत किया। अपने गौरवपूर्ण सम्बोधन में माननीय महोदय ने कहा कि शिक्षक व शिक्षार्थी में, हर एक में, गुण होते हैं जिन्हें एक दूसरे ने ग्राह्य करना चाहिए व गुण ग्राही व्यक्ति बनना चाहिए। माननीय न्यायाधिपति श्रीमान् डी.पी. एस. चौहान महोदय ने अपने प्रबोधन वर्ग में इस बात पर बल दिया कि प्रजातंत्र को मजबूत तथा स्थिर रखने में न्यायपालिका की सर्वोत्तम भूमिका रही है। अब न्यायपालिका वैज्ञानिक पद्धति की ओर अग्रसर हो रही है। अतः हमें उक्त पद्धति को आज नहीं कल स्वीकार करना होगा। इसके लिए हमारी मानसिकता में बदलाव जरूरी है तथा नई तकनीक को जानना भी आवश्यक है। **न्याय की अनुभूति हेतु भाषण प्रवचन सोपान नहीं हो सकते हैं।** इसके लिए आवश्यक है कि समस्याओं का व्यवहारिक धरातल पर सामना किया जावे। मन में किंचित भी भय रहने पर न्यायाधीश निष्पक्ष रूप से कार्य नहीं कर सकेगा। **वर्तमान में न्यायिक अधिकारीगणों को न्याय का पर्यायवाची शब्द "निराकरण यूनिट्स" प्राप्त करना रह गया है व हर कोई यूनिट की परिभाषा में ही बोलता चालता व सोचता है।** न्यायालय में आने वाला प्रत्येक पक्षकार न्याय के प्रति आस्था रखकर ही आता है तथा न्यायाधीश को भी न्याय करने में इतनी आस्था व निष्ठा होना चाहिए कि जो पक्षकार हार भी जाएगा उसे यह आभास भी नहीं होना चाहिए कि उसके साथ अन्याय हुआ है साथ ही यह भी आवश्यक है कि न्यायाधीश ने अधिकारों का दुरुपयोग नहीं करना चाहिए। न्याय सर्वशक्तिमान है व हर एक को न्याय के प्रति आस्था है। अतः अधिकारों का लेश मात्र दुरूपयोग भी न्यायिक अधिकारी की छवि नष्ट करने हेतु पर्याप्त होकर प्रकारान्तर से न्यायपालिका की छवि नष्ट हो जाएगी। अतः आवश्यक यह है कि आचरण व्यवहार साधन एवं साध्य में सुचिता हो, शुद्धता हो एवं पवित्रता हो। यदि ऐसा है तो ज्ञान शक्ति प्राप्त होने में व ज्ञान का विकास होने में उक्त गुणों का सुगठित आधार बना रहेगा।

एक दूसरे के प्रति वरिष्ठ कनिष्ठ के प्रति अनाधिकार टीका–टिप्पणी आलोचना घटियापन का मात्र लक्षण होकर ऐसे कृत्यों से ऐसे अधिकारियों की योग्यता व ऊँचाईयाँ नहीं बढ़ती हैं। पदोन्नति एक सामान्य प्रक्रिया होकर योग्यता का मापदंड नहीं है। विपरीत इसके सतत् अध्ययन व उसका न्याय देने के आशय से उपयोग आवश्यक है। **पदोन्नति पश्चात महत्वपूर्ण बात यह नहीं है कि आप एक वरिष्ठ अधिकारी बन गए हैं अपितु आवश्यकता इस बात की है कि आप जिस पद पर कार्य कर रहे हैं उसकी क्या गरिमा बढ़ाई है।**

सत्र समापन के समय माननीय न्यायाधिपति श्रीमान डी.पी.एस. चौहान महोदय के ये उद्‌गार थे कि न्यायाधिपतियों की आशाओं का सम्मान करना होगा तथा ऐसा केवल तब ही होगा जब आपका आचरण न्यायाधीश के अनुरूप हो।

प्रशिक्षण सत्र में माननीय न्यायाधिपति श्रीमान व्ही.के. अग्रवाल माननीय न्यायाधिपति श्रीमान दीपक मिश्र एवं माननीय न्यायाधिपति श्रीमान एस.एस सराफ महोदय ने क्रमशः अपराधिक सिविल प्रकरणों में साक्ष्य का गुणदोष विवेचन एवं गुणग्रहण, विश्लेषण विषय पर, न्यायिक अनुशासन, न्यायिक आचार–विचार एवं व्यवहार पर मार्गदर्शनात्मक विचार प्रस्तुत किए।

एफ.एस.एल. विभाग से श्री एस.के. सुभेदार जाइंट डायरेक्टर, श्री आर.के. दुबे, एवं श्री जे.के. अग्रवाल विशेषज्ञ आये थे जिन्होंने केमिकल, फिजिकल, बैलास्टिक व हस्ताक्षर अंगुष्ठ चिन्ह विषयों पर न्यायिक विधि विज्ञान के विकास व संभावनाएं विषयों पर बौद्धिक चिंतन प्रस्तुत किया। पोस्टमार्टम विषय पर सहायक अधीक्षक मेडिकल कॉलेज जबलपुर प्रोफेसर डॉ. शाकल्ले, उपहती विषय पर डॉ. प्रोफेसर बी.पी. दुबे मेडिकल कॉलेज भोपाल एवं एसोसिएट प्रोफेसर डॉ. आर.के. सिंह ने बलात संग विषय पर विधि विज्ञान विषय पर अपना प्रबोधन प्रस्तुत किया। इसके अतिरिक्त श्री.के.सी. शर्मा एवं श्री टी.के. झा क्रमशः एडिशनल रजिस्ट्रार विजिलेंस एवं प्रशासन ने मोटर दुर्घटना दावा विषय पर एवं श्री सी.व्ही. सिरपुर एडिशनल रजिस्टार (न्यायिक ने) धारा 302–307 भा.द.वि. के तत्व एवं चिंतन विषय पर प्रकाश डाला मैंने स्वयं के विभिन्न विषयों पर अपने विचार व्यक्त किए थे।

प्रशिक्षण शिविरि में माननीय न्यायाधिपति श्रीमान दीपक मिश्रा महोदय द्वारा दिनांक 9-10-99 को दिये उद्‌बोधन में से कुछ अंश यहां दिया जा रहा है। संपादित अंश बाद में दिए जायेंगे।

"ब्रह्मज्ञान प्राप्त करने हेतु हमें RITUALS (धर्म, कर्म, धार्मिक रीति रिवाज पूजापाठ, अनुष्ठान, नित्य नियम नेम, उपवास, संयम प्रार्थना आदि) का पालन करना होता है। RITUALS पूजापाठ का अभिन्न अंग है उसी प्रकार न्यायदान की क्रिया में प्रक्रिया संबंधि विधि एवं सारवान विधि का पालन भी करना आवश्यक है। इस तथ्य को कोई नकार नहीं सकता है।"

ELEVATIONS

HON'BLE SHRI JUSTICE ARUN KUMAR MISHRA and **HON'BLE SHRI JUSTICE ABHAY MANOHAR SAPRE** have been appointed as Judges of the M.P. High Court. They were administered the oath of the office of Additional Judges, M.P. High Court on 25-10-1999. The Institute felicitate the Hon'ble Judges.

अस्थायी निषेधाज्ञा

पुरूषोत्तम विष्णु नामजोशी

इसी पत्रिका में एक दृष्टांत ***इंडस्ट्रियल क्रेडिट एण्ड इन्वेस्टमेन्ट कार्पोरेशन ऑफ इंडिया लिमिटेड विरुद्ध ग्राफ्को इंडस्ट्रीज लिमिटेड (1999) 4 एस.सी.सी 710*** प्रकाशित हो रहा है। उक्त दृष्टांत देखने योग्य है। पिछले तीन वर्षों से अधिक समय में न्यायिक अधिकारीगणों को अस्थायी निषेधाज्ञा के विषय में प्रक्रिया समझाने का विशेष प्रयत्न हुआ है। मैंने प्रत्येक सत्र में एवं माननीय न्यायाधिपतिगणों ने भी यथासमय इस विषय पर प्रकाश डाला था। जो शिविर व्यवहार न्यायाधीश वर्ग–1 एवं मुख्य न्यायिक दंडाधिकारी गणों के लिए आयोजित किए गए थे, वे ही न्यायिक अधिकारी पदोन्नति पश्चात पुनः प्रशिक्षण हेतु आहूत किए थे व उनके पूर्व के पीठासीन अधिकारियों को भी आहूत किया था। उनके निर्णय, आदेश जो संख्या में लगभग हजार के आसपास हो सकते हैं, का परीक्षण (न कि निरीक्षण) किया है। एक बात जो समान रूप से पाई गई वह यह कि किसी ने भी अपने स्वभाव में परिवर्तन नहीं किया व वहीं अपनी लीक, नित्यचर्या अथवा ढर्रे से कार्य किया। पूछा कि ऐसा क्यों किया तो एक पदोन्नत अधिकारी ने कहा रेकार्ड रूम से पुरानी फाइलें निकालकर देखीं व वैसा ही कार्य किया। लेकिन इस संस्था में मार्गदर्शित बातों को व्यवहार में न लाने का कोई कारण नहीं बताया। अबकी बार आयोजित सत्र (5 अक्टूबर से 12 अक्टूबर 99) में मुझे इसी प्रश्न का उत्तर मिल गया। मैंने वही प्रश्न किया था। इस बार आए प्रशिक्षणार्थी व्यवहारिक दृष्टि से अधिक समझदार थे। उन्होंने यह नहीं कहा कि रिकार्ड रूम से पुरानी फाइलें निकालकर देखी व वैसा ही कार्य किया अपितु ये कहा कि "महाजनों येन गतः सो पंथः" अर्थात जो व जैसा भी कार्य विद्वान पूर्वाधिकारीगणों ने किया उसी का मात्र अनुसरण। मैं क्या कहता। सोचा क्या कहूँ? फिर भी मैंने कहा कि मेरी ही फाइलें रिकार्ड रूम से निकालकर देख लेते। लेकिन उन्होंने तुरन्त कहा कि आप वाली फाइलें ही देखी थीं व ऐसी ही झलक मिली जैसा हम काम कर रहे हैं। मैंने कहा कि ऐसी बात है तो ये मान लो कि मैंने समय के साथ परिवर्तन कर सुधरने का प्रयत्न किया है। दूसरे प्रशिक्षु ने प्रथम प्रशिक्षु की बात की गंभीरता को अनुभव करते कहा कि नहीं सर आपकी फाईलों को हम नहीं देख पाए तो मैंने कहा कि ठीक है आपने मुझे महाजन (अनुभवी, अग्रज) नहीं माना अन्यथा देख लेते, तो भला होता। बात का व्यंग्य उनके समझ में आया। ठहाका लगाया व बात आई गई हो गई।

लेकिन एक बात सत्य है कि हम ऐसा कोई बदलाव नहीं चाहते जिससे मानसिक, बौद्धिक, व शारीरिक रूप से कुछ परिश्रमपूर्ण कार्य करना पड़े। एक सूत्र वाक्य है

OUR TROUBLE IS NOT IGNORANCE BUT IN-ACTION. (हमारी समस्या अनभिज्ञता नहीं, अपितु निष्क्रियता है)। ठीक है, हम पुराने लेकिन अनुभवहीन अथवा न्यून अनुभवी न्यायिक अधिकारियों के पुराने रिकार्ड ठीक नहीं हैं परंतु नए न्यायिक अधिकारियों की मति कहाँ गई? क्या वे स्वयं नया सोच विकसित नहीं कर सकते? विधि प्रावधानों को ठीक से नहीं समझ सकते? क्या वे परिश्रम नहीं कर सकते? ये सब बातें तब हैं जब पांच साल से अधिक समय से न्यायिक अधिकारीगणों के लिए प्रशिक्षण संस्था कार्य कर रही है। अब तो नये नये आयाम एवं विचारों के साथ पुस्तकें प्रकाशित हो रही हैं फिर भी यह बौद्धिक कमी, अभाव या अपूर्णता अथवा अयोग्यता क्यों? कारण स्पष्ट। **हम दूसरों के विचारों से न केवल असहमत होते हैं अपितु हमारे भी कोई विचार नहीं होते हैं। विचार विहीन असहमति अहं को जन्म देती है।** अतः खुले विचारों की एक बयार तो मस्तिष्क के गवाक्ष से प्रवेश होने दो मित्रो! चिंतन के क्षितिज तक न पहुँचने के अकाट्य सत्य को ध्यान रखते मुख्य विषय पर आते हैं।

स्थायी निषेधाज्ञा का मुख्य सिद्धांत विनिर्दिष्ट अनुतोष अधिनियम के अंतर्गत प्रतिपादित है तो अस्थायी निषेधाज्ञा का सिद्धांत व्यवहार प्रक्रिया संहिता की धारा 94,95,151 एवं आदेश 39 में बताया है।

प्रथमतः हम आदेश 39 नियम–3 को देखें। उक्त नियम का प्रथम भाग पढ़ने की कला है। उक्त नियम इस प्रकार है:–

आदेश 30 नियम-3

"व्यादेश देने से पहले न्यायालय निर्देश देगा कि विरोधी पक्षकार को सूचना दे दी जाए।

(वहाँ के सिवाय जहाँ यह प्रतीत होता है कि व्यादेश देने का उद्देश्य विलम्ब द्वारा निष्फल हो जाएगा) न्यायालय सब मामलों में व्यादेश देने से पूर्व यह निर्देश देगा कि व्यादेश के आवेदन की सूचना विरोधी पक्षकार को दे दी जाए..."

(कोष्टक चिन्ह मैंने अंकित किया है) इस वाक्य के मूल अंग्रेजी पाठ में जहां कोष्टक है मैंने डाले हैं जो इस प्रकार है:–

Order 39 R. 3:

"Before granting injunction Court to direct notice to opposite party:-

The Court shall in all cases, (except where it appears that the object of granting the injunction would be defeated by the delay) before granting an injunction, direct notice of the application for the same to be given to the opposite party."

उपरोक्त नियम को दो भागों में विभक्त कर कोष्टक के भाग को मात्र पढ़ने से व कोष्टक के भाग को छोड़कर शेष भाग पढ़ने से ज्ञात होगा कि यदि एक पक्षीय अस्थायी निषेधाज्ञा नहीं दी जाना है तो विपक्ष को केवल व्यादेश के आवेदन पत्र की सूचना विरोधी पक्षकार को दी जाना है। उपर कोष्टक का भाग पढ़ने से ज्ञात होगा कि यदि एक पक्षीय अस्थायी निषेधाज्ञा दी जाना है तो उन कारणों का स्पष्ट रूप से खुलासा होना चाहिए कि ऐसे कौन से कारण हैं कि यदि एक पक्षीय व्यादेश का आदेश नहीं दिया गया तो विलम्ब द्वारा व्यादेश देने का उद्देश्य विफल हो जाएगा। यहां यह बात ध्यान रखने योग्य है कि उक्त प्रावधान में "राय" (appears) शब्द आया है इसका अर्थ यह नहीं है कि केवल ऐसा लिखा जावे कि मेरी "राय" में एक पक्षीय अस्थायी निषेधाज्ञा दी जाना है। राय निर्मित करने के कारण स्पष्ट शब्दों में लिखे जाना चाहिये। सामान्य रूप से होता यह है कि एकपक्षीय अस्थायी निषेधाज्ञा न भी देना हो तो विस्तारपूर्वक विगतवार कारण लिखे जाते हैं कि एक पक्षीय अस्थायी निषेधाज्ञा क्यों नहीं दी जाना है। जबकि विधि की ऐसी कोई स्पष्ट अपेक्षा नहीं है। **विपरीत इसके जहाँ एकपक्षीय व्यादेश दिया जाना है वहां हम कोई भी स्पष्ट कारण नहीं लिखते एवं यह लिखते हैं कि "इस न्यायालय के अभिमत में एक पक्षीय निषेधाज्ञा दी जाना उचित है।" अर्थात ठीक विपरीत कार्य हो जाते हैं। अतः इस मुद्दे पर विशेष ध्यान देना होगा।**

अगला बिन्दु दावा तारीख को क्या स्थिति थी। यह जाँचने हेतु सबसे उत्तम माध्यम है पक्षकार फोटो एवं निगेटिव प्रस्तुत करें। फोटो मल्टी डायमेंशनल (बहुआयामी) हो तो संपत्ति का पूर्ण चित्रण सामने आएगा। आ. 26 व्य.प्र.सं. के अंतर्गत विवादित संपत्ति की वर्तमान स्थिति भी जाँचने हेतु (साक्ष्य एकत्रित करने के आशय से नहीं) रिपोर्ट बुलाई जा सकती है। इसके कई फायदे हैं। वादी गलत तथ्यों के आधार पर लाभ नहीं ले सकता। अन्यथा होगा यह कि न्यायालय में यह कहकर अस्थायी व्यादेश लिया जा सकता है कि प्रतिवादी वादी का निर्माण कार्य तोड़ रहा है व ऐसे आदेश की आड़ में वह निर्माण कार्य कर ले। ऐसा भी न हो कि किसी एक ही पक्ष को निर्माण करने से रोक लगाई जावे व दूसरा पक्ष बेरोकटोक निर्माण कर ले। आवश्यकतानुसार यथोचित निर्देश देना चाहिए।

प्रकरण की लगाम (नियंत्रण) न्यायालय के हाथों में रहना चाहिये। ऐसा न हो कि आपने तो आदेश (एक पक्षीय अस्थाई निषेधाज्ञा का) पारित कर दिया लेकिन तत्पश्चात पक्षकार उसकी आड़ में देरी करे। अतः आवश्यक बात यह है कि एक पक्षीय आदेश देते समय ही सीमित अवधि 8–10 दिन की निर्धारित की जा सकती है तथा गुण दोष पर ऐसे आवेदन पत्र के निराकरण तक टुकड़ों–टुकड़ों में अवधि बढ़ाई जा सकती है। ध्यान रहे आ. 39 नि. 3–क यह अपेक्षा रखता है कि एक पक्षीय याचना

के आवेदन पत्र का गुण दोष पर निराकरण एक पक्षीय आदेश के पारित होने से तीस दिन में हो जाना चाहिए। अंतिम आदेश पारित करते समय भी समय सीमा का ध्यान रखा जाना चाहिए। ऐसा करने से प्रकरण में पक्षकार न्यायालय के ऐसे आदेश का दुरूपयोग नहीं कर सकेंगे। जैसे अंतिम आदेश जब ऐसे आवेदन पत्र पर दें तब नीचे अनुसार आदेश पारित किया जा सकता है यदि किसी के भी पक्ष में आदेश दिया है। **"यह कि उपरोक्त आदेश आज से एक वर्ष तक के लिए अथवा प्रकरण के निराकरण तक के लिए, जो भी शीघ्र हो, कायम रहेगा। यदि प्रकरण का निराकरण उक्त अवधि में नहीं होता है तथा प्रकरण में देरी करने हेतु अस्थाई निषेधाज्ञा प्राप्त करने वाला पक्षकार जिम्मेदार नहीं होगा तो उक्त आदेश का प्रवर्तन समय-समय पर ऐसे पक्षकार द्वारा आवेदन पत्र विधिवत प्रस्तुत करने पर यथोचित रूप से बढ़ाया भी जा सकेगा।"** ऐसा करने से प्रकरण पर न्यायालय का पूर्ण नियंत्रण रह सकेगा। जिस पक्षकार ने अस्थायी निषेधाज्ञा अपने पक्ष में प्राप्त की है वह प्रकरण निराकरण करने में जानबूझकर विलंब नहीं करेगा।

आ. 39 नियम 2 (2) में महत्वपूर्ण बात लिखी है उसे ध्यान से पढ़ना है।

आ. 30 नि. 2 (2) "न्यायालय ऐसा आदेश, **ऐसे आदेश की अवधि के बारे में, लेखा रखने के विषय में, प्रतिभूति देने के बारे में,** ऐसे निबंधनों पर, या **अन्यथा,** जो न्यायालय ठीक समझे, आदेश द्वारा दे सकेगा।",

अंग्रेजी अनुवाद इस प्रकार है:–

Order 39 Rule 2 (2):- The Court may by order grant, injunction on such terms as to duration of the injunction, keeping an account giving security or otherwise as the Court thinks fit.

इस प्रकार न्यायालय को समय सीमा निर्धारित करने का अधिकार है व प्रतिभूति हेतु भी आदेश देने का अधिकार है। इस बात का महत्व समझना है व व्यवहार में भी लाना है। ध्यान रहे कि आ. 39 नि. 1–2 का प्रयोग दावों की सीमा तक सीमित है। यह भी ध्यान रखा जाना है कि धारा 80 एवं आ. 39 के अंतर्गत म.प्र. संशोधनों की कभी भी उपेक्षा मत करना जिसके द्वारा न्यायालयों के लिए निर्देश है कि किन प्रकरणों में इन प्रावधानों का प्रयोग कैसा करना है या प्रयोग नहीं करना है। थोड़ी सी उपेक्षावृत्ति अनावश्यक कष्टों में परिवर्तित हो जाएगी। चूंकि आ. 39 व्य. प्र. सं. का आवेदन पत्र विशेष आवेदन पत्र है अतः कोर्ट फी अधिनियम (म.प्र. संशोधन) के अन्तर्गत अनुसूची दो के अनुच्छेद 1 के 7वें आइटम के अंतर्गत देय होगी। यदि किसी व्यक्ति ने गलत आधारों पर आदेश प्राप्त किया है तो क्षतिपूर्ति की राशि वसूल करने हेतु कोर्ट फी अनुसूची दो के अनुच्छेद 1 के 8वें आयटम के अनुसार देय होगी।

अस्थायी निषेधाज्ञा का आवेदन पत्र निराकृत करते समय प्रकरण में प्रस्तुत शपथ पत्रों के विषय में केवल यह न लिखें कि शपथपत्रों का अनुशीलन या परिशीलन किया अपितु वास्तव में गंभीरतापूर्वक ऐसा करें तथा यथा अनुभूति होने के लिए कि कनिष्ट न्यायालय ने ऐसा ही किया है, आदेश का कलेवर भी ऐसा हो कि उसे देखकर भी ज्ञात हो कि ऐसा किया है ऐसा करने हेतु अन्य पद्धतियों के अतिरिक्त एक पद्धति यह भी होती है कि शपथपत्रों पर विचार लिखते समय मार्जिन (हांसिया) कुछ ज्यादा ही छोड़ दें जिससे अन्य लिखी बातों से यह बात पृथक से ध्यान में आ जावे।

ढेर सारे न्याय–दृष्टांत प्रस्तुत किए जाते हैं। वास्तव में अधिकांश दृष्टांत अस्थायी निषेधाज्ञा देने के सिद्धांत के विषयक ही होते हैं। उनका उपयोग कैसा करना है यह भी ध्यान रखना है। सीधी सपाट बात यह है कि उन दृष्टांतों का भी आप क्रमबंधन (मार्शलिंग) कर लें । प्रथमतः वादी ने कौन से दृष्टांत व प्रतिवादी ने कौन से दृष्टांत निषेधाज्ञा देने के सिद्धांत विषय में प्रस्तुत किए हैं उन्हें पृथक पृथक फ्लेग लगाकर रख लें। शपथ पत्रों के विषय में कोई दृष्टांत हो अथवा अन्य मुद्दों पर भी जो भी दृष्टांत हो उन्हें भी क्रमबंधित करके फिर वादी प्रतिवादी की ओर से प्रस्तुत दृष्टांतों का सार एवं उन दृष्टांतों के अंतर्गत क्या तथ्य थे यह विचार में भी लें व अंकित भी करें। ऐसा करने से दोहराव भी नहीं होगा। (दृष्टांतों का प्रयोग कैसा हो इस विषय पर फिर कभी लेख लिखेंगे, फिलहाल इतना पर्याप्त है) चूंकि ये आवेदन पत्र अन्तरिम सहायता हेतु है अतः कलापूर्ण रूप से संक्षिप्तिकरण करना उचित एवं तर्कपूर्ण है।

अस्थायी निषेधाज्ञा का आदेश दीर्घ न हो तथा अपर्याप्त रूप से संक्षिप्त न हो अपितु आवश्यक तत्वों पर गंभीरतापूर्वक चिंतन भी हो। ऐसा आवेदन पत्र निराकृत करने हेतु सामान्य रूप से तीन तत्व देखे जाते हैं:– (1) प्रथम दृष्टया प्रकरण (Prima facie case) (2) सुविधा (न्याय) संतुलन Balance of justice (convenience) (3) अपरीमित हानि (Irreparable loss) किसको होगा। आदेश से किसी भी पक्ष को यह अनुभूति न हो कि न्यायालय ने अन्तरिम आवेदन पत्र के निराकरण के समय ही गुणदोष पर निर्णय कर लिया है। केवल ऐसा लिखना, किसी भी पक्षकार को संतोष प्रदान नहीं करेगा, कि "यह आदेश प्रकरण के गुण–दोष पर न होकर केवल अन्तरित आवेदन पत्र की सीमा तक मात्र है। इस आदेश में अभिव्यक्त विचारों का कोई प्रभाव प्रकरण के निर्णय पर नहीं पड़ेगा।" ऐसा करना कभी–कभी धनुष्य से तीर छोड़कर यह कहना होगा कि हमने किसी को लक्ष्य करके नहीं छोड़ा था यदि वादी या प्रतिवादी को लग गया तो हम क्या करें।

एक महत्वपूर्ण बात यह कि आदेश एक पक्षीय हो या द्वि–पक्षीय हो आदेश का प्रवर्तनशील भाग सुस्पष्ट हो। पक्षकारों को ज्ञात हो कि न्यायालय का आदेश किस

विषय वस्तु से संबंधित है, किन निर्देशों का किस प्रकार पालन करना है। घर भूमि आदि संपत्ति का वर्णन विवादित भाग आदेश में सुस्पष्ट हो। अस्पष्ट गोलमाल (Vague) न हो। कभी–कभी किसी प्रकरण में स्थिति अटपटी हो जाती है कि इस प्रकरण में क्या करें। कुछ समझ में नहीं आ रहा है तो हम दोनो पक्षकारों द्वारा यथा स्थिति बनाए रखने का आदेश दे देते हैं परंतु हमें खुद को नहीं मालूम कि दावे अनुसार विवादित स्थान पर विवादित संपत्ति की स्थिति क्या है जिसे बनाए रखने का आदेश दिया जाना है। ऐसे अस्पष्ट आदेश के कारण न्यायालय व पक्षकारों की स्थिति भ्रमपूर्ण हो जाती है कि परिणाम यह हो जाता है कि आ. 39 नि. 2–क व्य.प्र.सं. के अंतर्गत व्यादेश की अवज्ञा या भंग करने विषयक आवेदन पत्र का निराकरण भी प्रभावी रूप से नहीं हो सकेगा व पक्षकारगण ऐसे आदेश की आड़ में अधिकारों का दुरूपयोग भी करेंगे। समय के साथ निषेधाज्ञा के अधिकारों में न्यूनता आ रही है। इसके दो कारण हैं। एक ऐसे आदेशों का दुरूपयोग पक्षकारों द्वारा होना एवं दूसरा कारण न्यायालयों द्वारा असावधानीपूर्वक एवं अविवेकी रूप से (indiscriminate) अधिकारों का प्रयोग करना अथवा न्यायिक रूप से प्रयोग न करना। इन अधिकारों का प्रयोग नव–नियुक्त व्यवहार न्यायाधीश वर्ग–2 से लेकर प्रारंभिक क्षेत्राधिकार युक्त कोई भी न्यायालय भी कर सकता है अतः एक पक्षीय या द्विपक्षीय आदेश देने के पूर्व यथासांग प्रत्येक दृष्टिकोण से विचार करके आदेश पारित करना चाहिए। ऐसा भी न हो कि हम शपथ लेकर न्यायालय में यह कहकर बैठें कि हम किसी को एक पक्षीय या द्विपक्षीय निषेधाज्ञा देंगे ही नहीं। ऐसा करना न्यायिक विवेक का गुण नहीं माना जाएगा।

अस्थायी निषेधाज्ञा के संदर्भ में एक पक्षीय अथवा द्विपक्षीय रूप से जैसी भी स्थिति हो जो भी आदेश हो वह सुस्पष्ट हो। लेकिन, परन्तु के द्वारा निर्वचित करने की स्थिति उत्पन्न न हो। जैसे आ. 20 नि. 6 सपठित आदेश एवं नियम (व्यवहार) 166 (2) में दर्शाया गया है उसी अनुसार आदेश सुस्पष्ट हो।

आदेश को कैसा लिखा जावे यह भी महत्वपूर्ण है। ऐसे आदेश जिसमें नियमित अथवा विविध अपीलें होती हैं हमेशा जजमेंट पेपर पर लिखे जाना चाहिए। वाद प्रश्न भी सफेद रंग से भिन्न रंग के पेपर पर लिखें ताकि प्रकरण में उन्हें ढूंढने में देरी नहीं हो। रीडर के पास अत्याधिक कार्य होने के कारण प्रकरण नियमानुसार व्यवस्थित भी नहीं रखे जाते हैं। आदेश का शीर्षक निर्णय जैसा होगा। प्रथम चरण विषय वस्तु का प्रगटन होगा। दूसरे चरण में सारवान स्वीकृत तथ्य। तृतीय चरण में वादी के आवेदन पत्र (एवं दावे) की विषय वस्तु। चौथे चरण में प्रतिवादी का उत्तर आवेदन पत्र (एवं उत्तरवाद) की विषय वस्तु हो पांचवे चरण में आवेदन पर के निराकरण का मुद्दा व तत्पश्चात विश्लेषण सहित प्रथम दृष्टा निष्कर्ष। ये सब बातें सारभूत रूप से तभी लिखी जाती हैं जब पीठासीन अधिकारी आदेश पारित करने हेतु पूर्व तैयारी कर ले।

अन्यथा सीधे आदेश पारित करने हेतु डिक्टेशन देना हो या हाथ से लिखना हो तब ऐसा लगता है कि हर बात महत्वपूर्ण है जो दावे या आवेदन पत्र में लिखी है। तब होता ये है कि सारभूत रूप से आवेदन पत्र या दावे आदि के तथ्यों का संक्षिप्तिकरण नहीं हो पाता है। (Brevity is Art) सारभूत रूप से लिखना कला है अर्थात गुण विकसित किए बिना कला विकसित नहीं होती है। प्रारंभिक स्तर पर ही हमारी तैयारी ऐसे प्रकरणों में हो जाएगी तो गुणदोष पर प्रकरण निराकृत करने हेतु पूर्व तैयारी रहेगी, वाद प्रश्न अच्छे से बन सकते हैं व साक्ष्य लिपिबद्ध करते समय नियंत्रण रह सकता है।

आदेश 39 नि. 3 की ओर भी ध्यान रखें। आदेश 39 नि. 3 का महत्व कम नहीं है। यदि एक पक्षीय अस्थायी निषेधाज्ञा दी जाती है तब आदेश 39 नि. 3 के परंतुक (बी) का पालन अनिवार्य है। अतः उक्त नियम को गंभीरतापूर्वक पढ़ ले। अस्थायी निषेधाज्ञा के सिद्धांत आ. 39 को पूर्ण पढ़ लेने के बाद भी पूर्णता नहीं आएगी। विनिर्दिष्ट अनुतोष अधिनियम को पढ़ने से यह बात स्पष्ट होगी कि अस्थायी स्थायी निषेधाज्ञा किन विषयों से संबंधित प्रकरणों में दी जा सकती है व निषेधाज्ञा के कितने प्रकार हैं। अस्थायी निषेधाज्ञा के आवेदन पत्रों का निर्णय शीघ्रतिशीघ्र करना होता है।

हम आपका सद्विवेक, कल्पकता व इच्छाशक्ति यदि नए विचारों को सृजित करेगी तो परिणाम और भी अच्छे होंगे। तथास्तु!

आपके लिए त्वरित संदर्भ हेतु धारा 80 व्य.प्र.स. एवं आ. 39 नि. 1-2 के संदर्भ में म.प्र. संशोधनों को पुनः प्रकाशित कर रहा हूं। ये संशोधन ज्योति जनरल खंड III भाग III जून 1997 पृष्ठ 41 से 44 का अवलोकन करें। उक्त अंक में म.प्र. राज्य द्वारा किए गए समस्त संशोधन प्रकाशित करने का प्रयत्न किया है।

M.P. AMENDMENTS

Amendment of Order XXXIX of the First Schedule : In Order XXXIX of the First Schedule to the principal Act :

(a) in Rule 2, in sub-rule (2), the following proviso shall be inserted, namely :

"Provided that no such injunction shall be granted -

(a) where no perpetual injunction could be granted in view of the provision of Section 41 of the Specific Relief Act, 1963 (47 of 1963); or

(b) to stay to operation of an order for transfer, suspension, reduction in rank, compulsory retirement, dismissal, removal or otherwise termination of service of, or taking charge from, any person appointed to public service and post in connection with the affairs of the State including any employee of any Company or Corporation owned or controlled by the State Government; or

(c) to stay, any disciplinary proceeding pending or intended or, the effect of any adverse entry against any person appointed to public service and post in connection with the affairs of the State including any employee of the company owned or controlled by the State Government; or

(d) to restrain any election; or

(e) to restrain any auction intended to be made or, to restrain the effect of any auction made by the Goernment; or to stay the proceedings for the recovery of any dues recoverable as land revenue unless adequate security is furnished;

and any order for injunction granted in contravention of these provisions shall be void". [M.P. Act 29 of 1984 Section 8 (9).]

(b) In rule 4 :

(i) after the word 'by the court' the word 'for reason to be recorded, either on its own motion or' shall be inserted :

(ii) at the end. the following proviso shall be inserted. namely :

"Provided also if at any stage of the suit it appears to the court that the party in whose favour the order of injunction exists is delaying the proceedings or is otherwise abusing the process of court, it shall set aside the order for injunction."

In section 80 of the Principla Act in sub-section 1 for the words brackets and figures.

(2)", the word, brackets and figures "sub-section (2) or sub-section (4)", shall be substituted;

(ii) after sub-section (3), the following sub-section shall be inserted, namely :-

"(4) Where in a suit or proceeding referred to in Rule 3-B or Order I, the State is joined as a defendant or non-applicant or where the Court orders joinder of the State as defendant or non-applicant in exercise of powers under sub-rule (2) of Rule 10 of Order I such suit or proceeding shall not be dismissed by reason of omission of the plaintiff or applicant to issue notice under sub-section (1). [Vide M.P. Act 29 of 1984, Section 3.]

●

The mentor asked the mentoree, "Why you have done the work in a slap dash and perfunctory manner?"

The mentoree answered, "The new systems generate new problems. Systems should not be unnecessarily multiplied."

अवकाश के दिन पक्षकार की अनुपस्थिति : कारण तथा निवारण

पुरूषोत्तम विष्णु नामजोशी

दावे अथवा अन्य कार्यवाहियों में प्रकरण के विपक्षीगणों को समन्स (आव्हान पत्र) निर्गमित किए जाते हैं। विधिवत् सूचना पत्र व दावे अथवा कार्यवाहियों की नकलें भी भेजी जाकर उन्हें आहूत किया जाता है। समन्स निर्वाहित होकर पक्षकार उपस्थित भी हो जाते हैं लेकिन कभी–कभी विचित्र स्थिति उत्पन्न हो जाती है।

न्यायालय भूलवश ऐसी तिथि निर्धारित करता है जिस दिन सार्वजनिक अवकाश हो अथवा वह तिथि यद्यपि कार्यदिवस थी लेकिन अचानक या तो उसी दिन का अवकाश उसी दिन घोषित हो जाता है या एक दो दिन पूर्व या पूर्व में कभी भी। न्यायालयों में अग्रिम रूप से ही 3–3, 4–4 माह की तिथियों का निर्धारण हो जाता है। होता यह है कि ऐसे अवकाश के पश्चात के कार्य दिवस पर पक्षकार नहीं आता है तो कुछ पीठासीन न्यायिक अधिकारी उनके विरूद्ध एक पक्षीय कार्यवाही कर देते हैं। हमारी मानसिकता अतिशीघ्र एक पक्षीय कार्यवाही करने की होती है जबकि ऐसे कार्य शांति से, धीरज से शाम के समय अंतिम कालावधि में भी किए जा सकते हैं। अथवा दूसरे दिन भी उचित आदेश हेतु प्रकरण निर्धारित किया जा सकता है। देखें **[ए.आई.आर. 1956 भोपाल 25 (26) ए.आई.आर. 1941 अवध 91 (93) ए.आई.आर. 1928 अलाहाबाद 301 ए.आई.आर. मैन्युअल 5वां संस्करण भाग 5 पेज 637 नोट 2 दृष्टांत क्र. 8]** अन्यथा अनावश्यक रूप से इन्हीं प्रकरणों में दोहराव की स्थिति आती है व ऐसे प्रकरण पुनः कार्यवाही हेतु सामने आकर समय बर्बाद होता रहता है। प्रकरणों व कार्यवाहियों की बहुलता का दोष आ जाता है। स्मरण रहे कि अवकाश के दिन का समन्स हो तो पक्षकार का उपस्थित न होना स्वाभाविक ही है। अगले कार्य दिवस पर उसने स्वप्रेरणा से आना चाहिए या नहीं यह न्यायालयों के तर्क–वितर्क का विषय हो सकता है।

न्यायालयों को चाहिये कि प्रथमतः यह देखे कि जो तारीख निर्धारित की गई है वह कार्यदिवस है या नहीं। कभी–कभी ऐसा भी होता है कि शासकीय कैलेन्डर एवं उच्च न्यायालय के कैलेन्डर छपकर आने के पूर्व ही हमने अग्रिम रूप से आने वाले वर्ष की तिथियों का प्रकरणों में निर्धारण कर लिया होता है अतः कुछ जागरूकता हम न्यायिक अधिकारियों में होना चाहिये। प्रथमतः आने वाले वर्ष के चैत्र प्रतिपदा के पूर्व तक की तिथियाँ किसी भी शक संवत् एवं अंग्रेजी तिथियुक्त भारतीय पंचाग में उपलब्ध हो जाती है। उनको ध्यान करना चाहिये तत्पश्चात चालू वर्ष के कैलेन्डर के मई माह से आने वाले वर्ष का जनवरी फरवरी माह निर्धारित किया जा सकता है और

उसी अनुरूप थोड़े से समायोजन के साथ मार्च आदि महीने समायोजित किए जा सकते हैं अथवा कोई भी डायरी देखी जा सकती है जिसमें आने वाले वर्ष का सम्पूर्ण कैलेंडर होता है उसमें पंचांग से उन अवकाशों को निर्दिष्ट कर लेना चाहिये जो सामान्य रूप से सार्वजनिक अवकाश के रूप में घोषित होते रहते हैं आजकल नए वर्ष के कैलेण्डर तो सितंबर अक्टूबर मास में ही आ जाते हैं। जहां तक एडजेस्टेबल नॉन वर्किंग सेटरडेज जिला न्यायालयों के लिए हो सकते हैं उसकी कल्पना सहज की जा सकती है कि उक्त शनिवार के आगे पीछे सतत् रूप से अवकाश आ रहे हों तो वह ऐसा एडेजेस्टेबल सेटरडे हो सकेगा। लेकिन यदि आगे पीछे ऐसे शनिवार नहीं आ रहे हो तो सामान्य रूप से यह माना जा सकता है कि द्वितीय एवं तृतीय शनिवार ही अवकाश शनिवार होंगे। यह भी हो सकता है कि अधिकृत कैलेण्डर आने के पूर्व किसी भी शनिवार का दिन किसी भी प्रकरण हेतु निर्धारित न किया जावे इसके बाद भी गणना में कुछ त्रुटि होने की सहज संभावना है फिर भी उन भूलों की संख्या अत्यन्त न्यून होगी।

लेकिन कभी कभी कोई त्यौहार चन्द्रदर्शन के बाद ही माने जाते हैं जैसे ईद आदि। तब निश्चित ही कठिनाई होती है और पक्षकारों को असुविधा भी होती है। एवं भ्रमपूर्ण स्थिति उत्पन्न हो जाती है। कभी कभी यह भी होता है कि कुछ जिलों में ऐसे त्यौहार एक दिन मनाए जा रहे हों तो अन्य जिलों में अन्य दिन। ऐसे दो कारणों से होता है। एक तो जिलेवार ऐसे त्यौहार मनाने की घोषणा स्थानीय लोग करते हैं अथवा संबंधित जिले के पीठासीन अधिकारी स्थिति का निर्धारण ठीक से नहीं कर पाते हैं। इन सब परिस्थितियों के होते हुए भी न्यायालय कुछ कर सकता है और बात अपने हाथों से नहीं जा सकती है। जैसे चांद पर आधारित त्यौहारों के आगे पीछे दिन भी प्रकरण निर्धारित नहीं करें।

एक सील स्थायी रूप से बनाई जा सकती है कि **"यदि निर्धारित तिथि पर अवकाश घोषित हो जाता है अथवा किसी कारण से उक्त प्रकरण उस तिथि को नहीं लिया जा सकेगा तो अगले कार्यदिवस पर ये प्रकरण निर्धारित कार्यवाही हेतु ही लिया जायेगा।"** ऐसा करना तब तक आवश्यक है जब तक समन्स का प्रारूप उचित रूप से परिवर्तित नहीं हो जाता है। एक अच्छी बात यह है कि कुछ न्यायिक अधिकारी समाचार पत्रों में प्रकाशित होने वाले समन्स में यह पंक्तियाँ जोड रहे हैं तथा भाषा की शुद्धता की ओर भी ध्यान रख रहे हैं। इस सम्बन्ध में एक लेख **खंड-3 भाग-2 अप्रैल 1997 के ज्योति जर्नल में पृष्ठ क्रमांक 47 एवं 48** पर प्रकाशित हो चुका है उसकी ओर पुनः ध्यान देना जरूरी है ताकि उस अनुरूप कार्य न करने वाले ऐसा करने के लिए प्रेरित हो सकें। ऐसा करने से लाभ ही होगा नुकसान निश्चित ही नहीं। उक्त लेख को पुनः प्रकाशित किया जा रहा है।

दूसरी बात यह कि यदि किसी अवकाश की तिथि में परिवर्तन होने की अग्रिम सूचना हो जाती है और ऐसा करने के लिए पर्याप्त समय हो कि अग्रिम रूप से ही तिथि परिवर्तन की जानकारी सार्वजनिक रूप से न्यायालय पटल पर लगाना संभव है, तो ऐसा अग्रिम रूप से कर लेना चाहिये। जैसे चार तारीख को ही यह ज्ञात हो गया कि दिनांक आठ को अवकाश घोषित कर दिया गया है अथवा सात तारीख का अवकाश आठ तारीख को निर्धारित किया गया है तब भी सूचना पत्र न्यायालय के पटल पर लगाया जा सकता है उसके लिए कुछ व्यवहारिक कल्पनाएं होना चाहिये। जिससे ये कल्पनाएं भविष्य में विधिमान्य हो सकती है। ऐसा करने के लिए अच्छा माध्यम यह है कि अग्रिम रूप से सूचना तैयार करके एक प्रति न्यायालय के सूचना फलक पर लगाई जावे दूसरी अधिवक्ता संघ को भेजी जावे, तीसरी जिला न्यायालय कार्यालय को भेजी जावे एवं एक प्रति बोर्ड डायरी के संबंधित, तारीख के पृष्ठ पर चिपकाई जावे एवं एक प्रति अपने कार्यालयीन फाइल में लगाई जावे जिससे क्रास रेफरेन्सेस अर्थात प्रतिसंदर्भ किसी भी समय उपलब्ध हो सकेगा एवं पक्षकार अपनी बात आसानी से न्यायालय को बताने में सक्षम होगा ताकि यह बात न्यायालय के गले उतर सके।

एक बात ध्यान रखी जावे कि अचानक अवकाश घोषित हो जाता है जैसे कोर्ट से घर आने के पश्चात किसी आकस्मिक परिस्थिति के कारण दूसरे दिन अवकाश घोषित हो रहा है तो यह संभव नहीं है कि न्यायालय जाकर न्यायालय कक्ष के नोटिस बोर्ड पर सूचना फलक पर लगाई जा सकेगी। जब न्यायालय भवन के गेट पर ही ताला पड़ा होगा तो पक्षकार न्यायालय कक्ष तक नहीं पहुंच पायेगा। मुख्य द्वार पर यदि नोटिस लगाना संभव है और व्यवहारिक है तो बात दूसरी है अन्यथा किसी मुख्यालय पर जहाँ पर 30–40 न्यायालय कार्य कर रहे हों तो सूचना पत्रों द्वारा दी हुई सूचना को ही ग्रहण लग जावेगा। कोई व्यक्ति उसे ग्रहण नहीं कर पायेगा। अतः ऐसे प्रकरणों में कार्य दिवस पर ही पुनः तिथि का निर्धारण आवश्यक हो जाता है और उसमें न्यायालय को सबुरी का परिचय देना चाहिये। एक पक्षीय कार्यवाही करना यथासंभव कम से कम हो। ऐसा कहीं आवश्यक नहीं है कि हर मामले में हर समय प्रतिवादी का अथवा वादी का उपस्थित होना अपेक्षित होता है। एक पक्षीय कार्यवाही कब की जाना चाहिये या किसी कार्यवाही को कब खारिज करना चाहिये इसका भी सुस्पष्ट सिद्धांत है अन्य दृष्टांतों के अतिरिक्त नवीनतम दृष्टांत ***सतीश सागर विरूद्ध मैनेजिंग डायरेक्टर 1999 भाग-2 जे.एल.जे. 193*** देखना पर्याप्त होगा।

यहां पर इस प्रकार की घटनाओं के आधार से घटित दो दृष्टांतों का संदर्भ भी मैं दे रहा हूं जिन्हें नीचे अनुसार प्रकाशित किया जा रहा है वे इस प्रकार हैं–

1964 J.L.J NOTE 232

NANDA DAYARAM VS. RAJARAM

CIVIL P.C.,S. 27., O. 5, R. 1,O. 9, R. 9- LIMITATION ACT Art.164 (OLD) NEW 123 DECIDED ON 17-8-1962

In the original suit, the defendant was duly served for appearance on 14.1.61, which was declared a holiday. On the next date the Court issued another summons on the defendant which was affixed on the residence of the defendant. The defendant did not appear and the Court held the substituted service as sufficient service and passed an ex parte decree. The plaintiff decree holder started the execution of the decree and the Nazir went to the house of the defendant judgment debtor for attachment on 12.8.61. the defendant thereupon filed an applicaton for setting aside this ex-parte decree on 23.8.61. The ex-parte decree was set aside by the trial Court on the ground that the summons were not duly served. The plaintiff went in revision in the High Court.

Held : The Civil Procedure Code no where define what a summons is. But the date in the summons given for appearance by the defendant is an essential ingredient of summons. Section 27, C.P.C. says that when a suit has been duly instituted, a summons may be issued to the defendant to appear and answer the claim and may be served in the manner prescribed. The manner is prescribed in Order 5. Order 5,Rule 1 says that when a suit is instituted a summons may be issued to the defendant to appear and answer the claim on a day to be therein specified.

It is clear that the summons must mention the day when the defendant should appear. But if the summons mentions a wrong date for appearance or appearance on a wrong date when the Court is closed it ceases to be a summons as required under Order 5, Rule 1. There is no rule of law or of procedure that if a summons is issued for appearance on a day which happens to be a holiday, the party summoned should appear on the next following day. There was, therefore, no obligation on the part of the defendant to appear on the next day. The case was not taken up on the next day but was taken up on 16.1.61. The summons issued to the defendant did not indicate that be should appear continuously from 14.1.61.

Article 164, Limitation Act, says that limitation would start from the date of the decree or where the summons was not duly served, when the applicant has knowledge of the decree. From the facts stated above it is clear that the defendant, was not duly served to appear on 20.2.61 when the date was fixed.

It was contended that the applicant bad. knowledge of the suit when received the. summons on 14.1.61. A knowledge of the decree is different from the knowledge of the suit. **If a person has knowledge of the suit he cannot be said to have knowledge of the decree.** What the second part of Art. requires is that limitation of 30 days starts from the date of the knowledge of the decree.

The application for restoration held to be within limitation. Revision dismissed.

1964 J.L.J., S. NO. 78

RAGHURAJ SINGH VS. KALYAN

WORKING DAY SUBSEQUENTLY DECLARED TO BE A HOLIDAY. PROCEDURE TO BE FOLLOWED IN THE CASES- CIVIL P.C. O-9, R. 9. DECIDED ON 4-12-1963

The case was fixed for hearing on 27-1-63 which was declared to be a holiday. On the next day, as the applicant or his counsel were not present, the Court dismissed the case for default. The applicant, in the High Court relied on **AIR 1957 Punjab 80** wherein it is held that although on the occurrence of an unexpected holiday, all cases and appeals fixed for the day are deemed to have been automatically adjourned to the next working day, and it will be the duty of the parties or their counsels to attend Court on that day yet all that the presiding officer could do on the following day is to issue notice to the parties to appear on another date.

Held : "I do not agree with the broad proposition laid down by the Punjab High Court. The parties should follow the practice of the Court, and invariably appear in Court on the next day after the date on which a case had been fixed if it turns out to be a holiday, or is later on declared to be a holiday. It would be proper for the Court as soon as a day is declared to be a holiday, to put up a notice on the Notice-Board mentioning the numbers of cases fixed on that day stating therein that they shall all be taken up on the next following day. If this thing is done by the Court concerned, the parties and counsel would have no right to say that on the next following day all that the presiding officer could do was to issue a fresh notice to them to appear on another date.

But even this precautionary measure does not appear to have been taken in the present case, Case restored to file on payment of Rs. 10 as costs.

ए.आई.आर. 1957 पंजाब पृष्ठ 80 श्रीमति धपन विधवा विरूद्ध रामशरण चिट्टू का दृष्टांत जो 1964 जे.एल.जे. (नोट नं. 78) में संदर्भित किया है को अच्छे से पूरा पढ़ लीजिए उसमें ए.आई.आर. मैन्युअल के कामेंट्री के संदर्भ (एनोटेशन) दिए हुए है जिससे कि ए.आई.आर. के सी.पी.सी. में उक्त कामेंट्री में अन्य जानकारी भी इस विषय पर हो सकेगी।

आशा की जाना चाहिये कि उक्त संक्षिप्त खुलासे के पश्चात भविष्य में ऐसी समस्या उत्पन्न हो जाती है तो व्यवहारिक धरातल पर चिंतन करके इस प्रकार कार्यवाही हो जिससे कि प्रकरणों में अनावश्यक रूप से बहुलता उत्पन्न न हो। पक्षकारों के अधिकारों से खिलवाड़ न हो एवं साथ ही साथ न्यायसंगत कार्यवाही हो सके। जब–जब कक्षा में इस प्रकार की बातें बताई जाती है तो ले देकर बात यूनिट्स पर आकर टिक जाती है कि हर कार्य के यूनिट्स देना पड़ते हैं लेकिन इस कारण से प्रक्रिया संबंधी दोष वैध हो जाते हों, यह संभव नहीं है। दुःखद कहानी के चित्रपट का पटाक्षेप भी सुखद ही होता है तब क्योंकर हम अपने न्यायिक कृत्यों का अंत यूनिट

में मात्र करें। यूनिट्स को भूत बाधा के रूप में मस्तिष्क पटल पर अंकित मत होने देना अन्यथा काल्पनिक भय (वहम) की दवा तो लुकमान हकीम के पास भी नहीं है।

ज्योति खंड 3 भाग 3 एप्रिल 1997 पृष्ठ 47-48 का पुनः प्रकाशन

प्रतिस्थापित निर्वाह

मित्रो, पूर्व में जितने भी सत्र प्रशिक्षण हेतु हुए उसमें बार–बार यह प्रभावशाली रूप से बताने का सतत् प्रयत्न किया गया कि समाचार पत्र में प्रकाशित होने वाला समन्स (आव्हान पत्र) किस प्रकास से प्रकाशित होना चाहिये। लेकिन समाचार पत्र को पढ़ने से ऐसा प्रतीत होता है कि इसका कोई भी प्रभाव न्यायिक अधिकारियों पर नहीं हुआ और वे पुराने ढर्रे पर ही कार्य करना चाहते हैं। स्वयं में गुणात्मक सुधार की या तो अपेक्षा नहीं है अथवा अधीनस्थ कर्मचारियों पर निर्भर रहते हैं एवं प्रोफार्मा में जो रिक्त स्थान होते हैं उन्हें कर्मचारी द्वारा भरने पर वे हस्ताक्षर कर देते हैं। ऐसे आव्हान पत्र प्रकाशित होने से सार्वजनिक रूप से उन्हें पढ़ा जाता है और जब विसंगतियां सर्वसामान्य व्यक्ति के ध्यान में आती हैं तो उनकी दृष्टि से न्यायालयों के प्रति प्रश्नवाचक चिन्ह उपस्थित हो जाता है कि क्या न्यायालयों का भाषा ज्ञान क्षमता में ह्रास हुआ है।

एक समन्स का प्रकाशन लगभग 500 रुपये से 10 या 15 हजार रुपये की लागत का होता है। निर्धारित तिथि के लिये पक्षकार, जिस दिन की पक्षकार की उपस्थिति अपेक्षित होती है उस दिन किसी कारण कार्य स्थगित हो जाता है तो उस व्यक्ति को उपस्थित होना विधि द्वारा बाध्य नहीं है क्योंकि सहज संभव है कि उस दिनांक को अवकाश घोषित होने से अथवा कार्य स्थगित होने से न्यायालय में प्रवेश वर्जित होता है ऐसे पक्षकार को दूसरे दिन उपस्थित होने की विधि द्वारा तब तक अपेक्षा नहीं की जा सकती जब तक प्रकाशित आव्हान पत्र में ऐसा निर्देश न हो। व्यवहार प्रक्रिया संहिता के दृष्टांत इस संबंध में उपलब्ध हो सकते हैं लेकिन दृष्टांत दोयम बात होती है। प्रथम बात विधि सिद्धांत की है और न्यायिक अधिकारियों ने अपनी विवेक शक्ति तीक्ष्णता से जागृत करने का सतत् प्रयत्न करते रहना चाहिये। आव्हान पत्र की भाषा शुद्ध बोधगम्य हो तथा जिस प्रकरण में विपक्ष को आहूत किया जा रहा हो, उसके लिये इस बात की माहिती भी उस आव्हान पत्र में सारभूत रूप से हो क्योंकर उसे न्यायालय द्वारा आहूत किया जा रहा है।

न्यायालयों का प्रकरणों में एक पक्षीय कार्यवाही करने के पूर्व यह देखना परम कर्त्तव्य है कि आव्हान पत्र उचित रूप से संबंधित व्यक्ति पर निर्वाह हो चुका है या नहीं। सार्वजनिक सूचना प्रकाशित करने के लिये आदेश देने से पूर्व पीठासीन

अधिकारियों ने गंभीरता से आदेश 5 नियम 20 व्य.प्र.स. के प्रावधानों को अवश्य पढ़ना चाहिए। उक्त प्रावधानों में 1976 के संशोधनों द्वारा कुछ बातें सम्मिलित करते हुए उपधारणा भी की गई है उसका भी अध्ययन होना चाहिए। समाचार पत्र के प्रकाशन के अतिरिक्त समानान्तर रूप से आदेश 5 नियम 17 एवं आदेश 5 नियम 19 (ए) के अंतर्गत आव्हान पत्र को निर्गमित करना भी अनुचित नहीं होगा। अनुच्छेद 123 मर्यादा अधिनियम के अंतर्गत उल्लिखित स्पष्टीकरण तथा आदेश 5 नियम 20 (2) के प्रावधानों का भी अध्ययन अवश्य कर लें। प्रकाशन का आदेश देते समय आदेशिका में यह लिखना भी न्यायसम्मत होगा कि निर्धारित तिथि पर किसी कारण से अवकाश घोषित हो जाता है अथवा कार्य स्थगित हो जाता है तो आने वाले कार्य दिवस पर प्रकरण लिया जायेगा।

आपके मार्गदर्शन के लिए समन्स का एक प्रारूप बनाकर दिया जा रहा है आप इस विषय पर चिंतन करें इसी संबंध में आदेश 5 नियम 20ए आदेश 9 नियम 7, आदेश 9 नियम 13 व्य.प्र.सं. के प्रावधान तथा अनुच्छेद 123 मर्यादा अधिनियम का अवलोकन करें और इससे संबंधित दृष्टांतों को ध्यान से पढ़ें। प्रारूप में आवश्यक परिर्वतन न्यायालयीन दावा अथवा कार्यवाही जिसके संबंध में आव्हान पत्र का प्रकाशन होना है में कर लें।

यह भी ध्यान रखें कि आपके द्वारा प्रकाशन के लिये दिये जाने वाले समन्स को स्वयं तैयार करें जिससे शुद्ध भाषा का प्रयोग हो सके, एवं दावे से संबंधित विषय सामग्री को सम्मिलित किया जा सके।

सारभूत रूप से संक्षिप्तिकरण करते हुए समन्स प्रकाशन के कारण व्यय भी कम लगेगा। समन्स में आपका नाम, पदनाम एवं न्यायालय भवन में यदि आपके न्यायालय के कक्ष क्रमांक दिया हो तो उसका उल्लेख भी करें। पदस्थापना वाला स्थान जिला, राज्य एवं पिनकोड नं. भी लिखें जिससे पक्षकार को असुविधा न हो। हम भी किसी बड़े चिकित्सालय में किसी अस्वस्थ व्यक्ति से मिलने जाते हैं तो वह स्थान पता लगाने में और वहां तक पहुंचने में कठिनाई होती है। हम जो भी कार्य करें उसमें हमारी अपनी भावना, आदर और श्रद्धा सम्मिलित कर लेते हैं तो कार्य में बहुत अंश तक पूर्णता होती है।

यहां बताना भी समीचीन होगा कि समाचार पत्र के प्रकाशन कार्यालय में कम्पोज करने वाले व्यक्ति अधिक पढ़े लिखे नहीं होते है और यदि होते भी हों तो न्यायालीन प्रक्रिया से एवं शब्दावली से अवगत होने की अपेक्षा उनसे नहीं हो सकती है। जिनसे अपेक्षा की जाती है वे भी कभी–कभी खरे नहीं उतरते हैं।

प्रारूप

(आवश्यकतानुसार परिवर्तन करें)

सार्वजनिक सूचना

न्यायालय श्री स.दा. सत्य

प्रथम व्यवहार न्यायाधीश वर्ग 1, न्यायनगर (म.प्र.) 400 001

बैठक कक्ष क्र. 1 सांपत्तिक वाद क्र. 1/97

अ– पुत्र ब – ..... वादी

विरुद्ध

स– पुत्र द – एवं अन्य ..... प्रतिवादी

प्रति,

फ पुत्र ग आयु 25 निवास ..... व्यवसाय ..... आपके विरुद्ध वादी ने एक वाद घोषणा एवं स्थायी निषेधाज्ञा हेतु संस्थित किया है कि विवादित संपत्ति सर्वे क्रमांक 1 क्षेत्रफल 1 हेक्टर ग्राम मुसाखेड़ी तहसील एवं जिला इन्दौर, उसके स्वामित्व व आधिपत्य की होकर आपका उक्त संपत्ति पर कोई अधिकार नहीं है।

प्रकरण में आप स्वयं, अथवा आपके अधिवक्ता अथवा अभिकर्ता जिसको प्रकरण की समस्त माहिती हो तथा न्यायालय द्वारा पूछे प्रश्नों का उत्तर दे सके, के माध्यम से, दिनांक 23 जून 1997 (सोमवार) को ठीक 11 बजे उपस्थित होकर प्रकरण में भाग लें। यदि आप उक्त दिनांक 23 जून 1997 (सोमवार) को उपस्थित नहीं होते हैं तो आपके विरुद्ध एक पक्षीय कार्यवाही कर के प्रकरण का निराकरण किया जाएगा।

यदि किसी कारण उक्त दिनांक को सार्वजनिक अवकाश घोषित हो जाता है अथवा कार्य स्थगित हो जाता है तो अगले कार्य दिवस पर प्रकरण का श्रवण किया जाएगा।

आज दिनांक 1 अप्रैल 1997 को मेरे हस्ताक्षर एवं न्यायालय की मुद्रा से निर्गमित किया गया।

मुद्रा
(न्यायालय)

हस्ताक्षर
(न्यायाधीश)

क्रियाशील भाग

पुरूषोत्तम विष्णु नामजोशी

सतत् रूप से यह अनुभव होता रहा है कि हम उन प्रावधानों को तथा नियमों की सहजरूप से उपेक्षा कर देते हैं जिनका कठोरता पूर्वक पालन करना हमारा कर्त्तव्य है। विद्वत् वृंद ने समय–समय पर जो बातें बताई हैं उन्हें संस्था की पत्रिका के माध्यम से संप्रेषित करने का प्रयत्न किया है लेकिन एक माननीय महोदय का कहना था कि एक ही इंजेक्शन से पेशेंट सुधर जाएगा तो डॉक्टर, दवा कंपनी सभी का दिवाला निकल जाएगा। अतः सतत् प्रेरणा, प्रकाश प्रदान करने हेतु प्रयत्न होना चाहिए। इसी आशय से विभिन्न प्रकार की माहिती, जानकारी पत्रिका के माध्यम से प्रकाशित करने का प्रयत्न किया जा रहा है। ऐसी जानकारी संक्षिप्त होगी लेकिन बोधगम्य, बोझिलता से मुक्त, सहज ग्राह्य होने युक्त, सुपाच्य तथा स्मरण शक्ति को नवजीवन, ऊर्जा देने युक्त भी होगी। यह स्तंभ यथा समय नियमित रूप से लेख के माध्यम से अथवा "प्रतिबोध" शीर्षक के अंतर्गत प्रकाशित करने का प्रयत्न होगा। इस शीर्षक के अंतर्गत प्रथम प्रयास निर्णय/आदेश का "क्रियाशील भाग" इस विषय पर है। करत करत अभ्यास के..... नहीं! आप जो पद मन में गुन गुना रहे हैं वह मैं नहीं कह रहा हूं। मैं यह कह रहा हूं कि करत करत अभ्यास के सुजन होय सुजान!

"क्रियाशील भाग"

डिक्री या आदेश का क्रियाशील भाग सुस्पष्ट एवं बोधगम्य होना चाहिए। लेकिन परन्तु, किन्तु आदि किसी भी शंका कुशंका से मुक्त हो। निर्णय या आदेश के माध्यम से आप क्या सहायता प्रदान करना चाहते हैं या नहीं करना चाहते हैं इसका भी स्पष्ट खुलासा हो। आदेश या निर्णय का क्रियाशील भाग सबसे अंत में लिखा जाना चाहिये। ऐसा न हो कि निर्णय/आदेश लिखते समय बीच–बीच में ही हम कोई निष्कर्ष निकालकर आगे बढ़ जाएं तथा निर्णय को अचानक समाप्त कर केवल यह लिखे कि दावा/अपील/आवेदन पत्र पारित होता है/खारिज होता है आदि। वास्तव में वाद प्रश्न या विचारणीय बिंदु **"सहायता एवं व्यय"** अथवा **"दोष सिद्धि एवं दंडादेश"** बनाया ही इस लिए जाता है कि उक्त बिन्दु के अंतर्गत समस्त क्रियाशील भाग लिखा जा सके। डिक्री या आदेश का क्रियाशील भाग सम्पूर्ण दावे या अन्य कार्यवाही के परिणाम का ऐसा दर्पण है कि जिसे पढ़ने मात्र से प्रकरण को सारवान रूप से जाना जा सकता है। अन्यथा परिणाम यह होगा कि अपील न्यायालय अथवा प्रारंभिक न्यायालय ने यदि यह लिखा कि दावा या अपील खारिज होती है तो कुछ भी ज्ञात

नहीं होता है। ज्ञात केवल यह हो रहा है कि हम केवल एक तर्ज पर कार्य कर रहे हैं बिना वैचारिक आधार के यहां तक कि **"सहायता एवं व्यय"** अथवा **"दोष सिद्धि एवं दंडादेश"** का मुद्दा भी हम निर्मित नहीं कर रहे हैं जबकि इस विषय पर बार–बार कहा गया है। कोई भी न्यायिक अधिकारी प्रतितर्क देकर यह बताने की इच्छा भी नहीं रखता कि ऐसा क्यों नहीं होना चाहिए। यदि नकारात्मक तथ्य का औचित्य प्रतिपादित नहीं किया जा रहा है तो सकारात्मक कृत्य क्यों नहीं होना चाहिए। संस्था की 'ज्योति' में खंड चार भाग 2 अप्रैल 1998 में 'अपराधिक प्रकरणों में विचारणीय बिंदु' लेख में बताया है जो पृष्ट 19, 20, 21 पर प्रकाशित हुआ है। इसी अंक में पृष्ठ 56 से 67 में "वाद प्रश्नों की निर्मित" शीर्षक में भी बताया है। ज्योति खंड तीन भाग पांच अक्टूबर 1997 में निर्णय लेखन "आरोपों का सुगम विवरण" पृष्ठ 13 से 18 में बताया है कि अपराधिक प्रकरण में प्रारंभिक भाग कैसा लिखा जाएगा तो क्रियाशील भाग कैसा लिखा जाएगा। इसी प्रकार ज्योति खंड चार भाग चार अगस्त 1998 के पृष्ठ 21 पर "निर्णय का क्रियात्मक भाग पूर्ण एवं सारगर्भित कैसा हो" में पृष्ठ 21 से 27 तक तथा खंड चार भाग छः दिसंबर 1998 में पृष्ठ 24 से 26 में शीर्षक How to write judgments/orders etc. etc. में ज्योति खंड चार भाग पांच अक्टूबर 1998 पृष्ठ 8 से 35 में भी बताया है। अतः यह आशा की जानी चाहिए तथा विधि की भी यह अपेक्षा है कि, जैसी अपेक्षा है वैसा ही किया जावे। ऐसा करना कर्तव्य है तथा न करना कर्तव्य विमुख होना है।

आ. 20 नि. 6 एवं 6 क व्य.प्र.स. इस प्रकार है-

डिक्री की अर्न्तवस्तु (1) डिक्री निर्णय के अनुरूप होगी, उसमें वाद का संख्यांक, पक्षकारों के नाम और वर्णन, उनके रजिस्ट्रीकृत पते और दावे की विशिष्टियां अन्तर्विष्ट होंगी और अनुदत्त अनुतोष या वाद या अन्य अवधारण उसमें स्पष्टतया विनिर्दिष्ट होगा।

(2) वाद में उपगत प्रश्नों की रकम भी और यह बात भी कि ऐसे खर्चे जिसके द्वारा या किस सम्पत्ति में से और किस अनुपात में संदत्त किए जाने हैं, डिक्री में कथित होगी।

(3) न्यायालय निदेश दे सकेगा कि एक पक्षकार को दूसरे पक्षकार द्वारा देय खर्चे किसी ऐसी राशि के विरुद्ध मुजरा किए जाएं जिसके बारे में यह स्वीकार किया गया है या पाया गया है कि वह एक दूसरे को शोध्य है।

6 क. दिए गए अनुतोष का निर्णय के अन्तिम पैरा में प्रमित शब्दों में उल्लिखित होना- (1) उन अनुतोष का कथन जो ऐसे निर्णय द्वारा किया गया है, निर्णय के अंतिम पैरा में प्रमित शब्दों में किया जाएगा।

(2) यह सुनिश्चित करने का पूरा प्रयास किया जाएगा कि डिक्री यथासंभव शीघ्र और हर दशा में उस तारीख से जिसको निर्णय सुनाया जाता है, पन्द्रह दिन के भीतर तैयार की जाए किन्तु जहां डिक्री पूर्वोक्त समय के भीतर तैयार नहीं की जाती है वहां न्यायालय, यदि डिक्री के विरुद्ध अपील करने के इच्छुक पक्षकार द्वारा ऐसा करने का अनुरोध किया जाए तो, प्रमाणित करेगा कि डिक्री तैयार नहीं की गई है और उस विलम्ब के लिए जो कारण हैं उन्हें प्रमाणपत्र में उल्लिखित करेगा और तब–

(क) डिक्री की प्रति फाइल किए बिना डिक्री के विरुद्ध अपील की जा सकेगी और ऐसे मामले में निर्णय या अन्तिम पैरा, आदेश 41 के नियम 1 के प्रयोजनों कि लिए डिक्री माना जाएगा; और

(ख) जब तक डिक्री तैयार नहीं की जाती है तब तक निर्णय का अन्तिम पैरा निष्पादन के प्रयोजनों के लिए डिक्री समझा जाएगा और हितबद्ध पक्षकार केवल उसी पैरा की प्रति के लिए आवेदन करने का हकदार होगा और उससे सम्पूर्ण निर्णय की प्रति के लिए आवेदन करने की अपेक्षा नहीं की जायेगी, किन्तु जैसे ही डिक्री तैयार हो जाती है, निर्णय का अन्तिम पैरा निष्पादन के प्रयोजनों कि लिए या किसी अन्य प्रयोजनों के लिए डिक्री के रूप में प्रभावी नहीं रहेगा।

परन्तु जहां आवेदन निर्णय के केवल अन्तिम पैरा की प्रति अभिप्राप्त करने के लिए किया गया है वहां ऐसी प्रति में वाद में सभी पक्षकारों का नाम और पत्ता उल्लेखित किया जावे।

म.प्र. व्यवहार न्यायालय हेतु म.प्र. उच्च न्यायालय, द्वारा बनाए गए नियम एवं आदेश के नियम क्र. 165 से 178 का प्रकाशन म.प्र. व्यवहार न्यायालय नियम 1961 द्वारा श्री शांतिकुमार जैन पूर्व जिला न्यायाधीश, चांदुरकर पब्लिशिंग हाऊस का आभार व्यक्त करके प्रकाशित कर रहा हूँ। आशा की जानी चाहिए की लेखक द्वारा परिश्रमपूर्वक जो टिप्पणियां तैयार की हैं वे भी मददगार होंगी।

2:- आज्ञप्तियों (जय पत्रों) का लिखा जाना (DRAWING UP OF DECREES)

165. आज्ञप्ति या आदेशों को बहुत सावधानी तथा सतर्कता से तैयार किया जाना चाहिए। आज्ञप्तियों या आदेशों के जो प्रारूप लिपिक–वर्गीय अधिकारियों द्वारा दोष पूर्ण रूप से तैयार किये जाते हैं, तथा स्वाभाविक क्रम में बगैर शुद्ध किये न्यायाधीश द्वारा पारित कर दिये जाते हैं, वे प्रवर्तन में अनेकों कठिनाइयों का कारण होते हैं। आदेश 20 नियम 7, की ओर ध्यान दिलाया जाता है, जिसके कि द्वारा यह अपेक्षित है कि न्यायाधीश को आज्ञप्ति या आदेश पर हस्ताक्षर करने के पूर्व यह संतोष कर लेना चाहिये कि वह उसके निर्णय के अनुसार है।

166. (1) आज्ञप्ति या आदेश निर्णय के अनुसार होगा, तथा वह न केवल स्वतः पूर्ण (Self-contained) होगा जिससे कि उसके समझने एवं प्रवर्तन में किसी अन्य प्रलेख या पत्र को देखने की आवश्यकता न पड़े, बल्कि उसके निर्बन्ध (शर्तें) स्पष्ट एवं निश्चित होंगे।

(2) कोई भी आज्ञप्ति या आदेश (एक पक्षीय या अन्यथा) में स्पष्ट एवं सन्देह रहित रूप में स्वीकृत सहायता का प्रकार एवं सीमा, उससे प्रभावित प्रत्येक पक्ष को क्या करने तथा क्या करने से विरत रहने को आदेशित किया गया है, और दावे के अन्य निश्चय (Determinations), उल्लेखित किये जावेंगे (आदेश 20 नियम 6) उसके द्वारा की गई स्वत्व की प्रत्येक घोषणा संक्षिप्त परन्तु सम्यक (Accurate) होना चाहिए, प्रत्येक निषेधाज्ञा सरल, निश्चित एवं स्पष्ट होना चाहिए।

(3) यदि आज्ञप्ति या आदेश अपील में पुष्ट (Affirm) किया जाता है तो उसके निर्देश उल्लेखित किये जावेंगे, जिससे कि अपील की आज्ञप्ति या आदेश अपने आप में पूर्ण हो। यदि आज्ञप्ति या आदेश परिवर्तित या संशोधित किया जाता है तो मूलतः स्वीकृत सहायता के स्थान पर या उसमें संशोधन सहित स्वीकृत सहायता पूर्ण एवं सम्यक् रूप में लिखी जाना चाहिये। यदि आज्ञप्ति या आदेश पलटा (Reverse) जाता है तो सफल पक्ष के हित में स्वीकृत सहायता भी उसी प्रकार लिखी जानी चाहिये।

नोट : (1) मानचित्र जो न्यायालय से तैयार किये गये हों, या जो न्यायालय द्वारा स्वीकृत किये गये हों तथा जो पारित आदेश के निर्देशों को स्पष्ट करने या समझाने के लिये आवश्यक हों, वे आज्ञप्ति या आदेश के साथ संलग्न किये जाना चाहिये और उनका भाग मान लिया जाना चाहिये तथा उन पर न्यायाधीश के हस्ताक्षर होंगे।

नोट : (2) जहां कि श्रवणाधिकार एवं न्यायशुल्क के भुगतान हेतु दावे का भिन्न मूल्यांकन किया गया हो तो वे दोनों मूल्य आज्ञप्ति या आदेश में लिखे जाना चाहिये। अर्न्तलाभ धन (Mesne profits) के रूप में मांगा गया धन पृथक रूप से दिखाया जाना चाहिये। अपील की आज्ञप्ति या आदेश की दशा में, प्रथम न्यायालय की आज्ञप्ति या आदेश में दिया गया मूल्य भी सन्निहित किया जाना चाहिये।

नोट : (3) ब्याज, यदि कोई हो, जो न्यायालय द्वारा दिलाया गया हो वह आज्ञप्ति या आदेश में स्पष्टतया बतलाया जाना चाहिये, तथा यह भी बताना चाहिये कि वह किस काल के लिये और किस दर से दिलाया गया है। उसमें यह भी स्पष्टतया उल्लेखित किया जाना चाहिये कि ब्याज, आज्ञप्ति–धन (Decretal amount) पर या उस धन तथा व्यय, दोनों पर लगाया जा रहा है।

167. तुष्टि, समझौता, या समाधान (Satisfaction, compromise or adjustment) की दशाओं में कार्यवाही करते समय पीठासीन न्यायाधीशों का ध्यान आदेश 23 नियम 3 के प्रावधानों की ओर आकृष्ट किया जाता है। इस नियम द्वारा, न्यायालयों द्वारा दो पृथक कार्यवाहियां अपेक्षित हैं– (1) सहमति, समझौता या भुगतान को अभिलेखित (Record) किये जाने का आदेश देना, (2) वह जहां तक दावे से संबंधित है, उसके अनुसार आज्ञप्ति (जय पत्र) प्रदान करना। इस कार्यवाही को उचित एवं प्रभाव पूर्ण रूप से कार्यान्वित करने का तरीका यह होगा कि या तो आज्ञप्ति में पूरा समझौता दोहराया जावे, तथा दावे के वाद विषय से संबंधित भाग के संबंध में आदेश देकर उसका अंत किया जावे, या उस समझौते को आज्ञप्ति के साथ परिशिष्ट (Schedule) के रूप में लगाया जावे।

168. जहां दावे का विषय अचल सम्पत्ति हो, तो आज्ञप्ति से प्रभावित सम्पत्ति का स्वरूप आदेश 20 नियम 9 के अनुसार, वाद–पत्र या अभिलेख के किसी अन्य भाग का सन्दर्भ दिये बगैर, स्पष्टतया बताया जावेगा।

नोट : भूमि के संबंध की आज्ञप्ति बनाये जाने में, प्रत्येक न्यायाधीश का कर्तव्य होगा कि वह स्वयं इस बात का संतोष करे कि उसमें ऐसे विवरण दिये गये हैं जिससे उस भूमि के क्षेत्रफल एवं चतुर्सीमा तथा न्यायालय द्वारा निर्णीत स्वत्व के प्रकार के संबंध में कोई त्रुटि होना असंभव है।

टिप्पणीः– आदेश 20 नियम 9, व्यवहार प्रक्रिया संहिता में यह प्रावधान है कि जहां दावे की विषय–वस्तु अचल सम्पत्ति हो, तो आज्ञप्ति (डिक्री) में ऐसी सम्पत्ति का उसकी पहचान के लिये पर्याप्त वर्णन रहेगा, और जहां ऐसी सम्पत्ति सीमाओं से या भू–प्रबंध या मापन की संख्याओं से पहचानी जा सकती हो, तो आज्ञप्ति (डिक्री) में ऐसी सीमाओं या संख्याओं का वर्णन होगा।

169. बन्धक (Mortgage) के दावे में प्रत्येक आज्ञप्ति के साथ एक पृथक पत्र संलग्न किया जाना चाहिये जिसमें कि विस्तार पूर्वक वह क्रिया जिसके द्वारा घोषित देय धन की राशि (Amount declared due) का हिसाब लगाया गया है, बताया जावे। वह हिसाब निम्न सामान्य शीर्षकों के अन्तर्गत लिखा जावेगाः–

(1) बन्धक द्वारा प्रतिभूत मूलधन।

(2) उस पर ..... दर से, दिनांक ..... माह ..... सन् ..... से ..... दिनांक ..... माह ..... सन् ..... तक का ब्याज।

(3) दावे के व्यय।

इस प्रकार तैयार किये जाने वाला अपेक्षित हिसाब का विवरण, उस प्रत्येक अभिभाषक द्वारा जो आज्ञप्ति पर हस्ताक्षर करता है हस्ताक्षरित किया जावेगा, तथा तत्पश्चात् वह आज्ञप्ति पर हस्ताक्षर करते समय न्यायाधीश द्वारा दिनांकित एवं हस्ताक्षरित किया जावेगा।

170. यदि न्यायालय द्वारा प्रदान किया गया व्यय, वास्तव में किये गये व्यय की सूची में उल्लेखित राशि का एक भाग है तो वह गणना जिसमें प्रदान किये गये व्यय की राशि निकाली गई है स्पष्टतया बताई जानी चाहिये। आज्ञप्ति पर तब तक हस्ताक्षर नहीं करना चाहिये जब तक कि व्यय की सूची भरी न गई हो तथा हर प्रकार से पूर्ण न हो।

171. उन प्रकरणों में जिनमें अंतिम निर्णय के पश्चात् प्रारंभिक डिक्री बनती है, अंतिम डिक्री (Final decree) अंतिम निर्णय के निर्देशों के अनुसार बनाई जावेगी। क्योंकि अंतिम डिक्री दावे के पूर्ण निराकरण तथा पक्षकारों के स्वत्वों के अंतिम रूप से निर्धारण का न्याय–निर्णय (Adjudication) है, इस कारण वह अपने आप में पूर्ण एवं सम्पूर्ण (Full and complete) होना चाहिये जिससे कि प्रारंभिक डिक्री के संदर्भ के बगैर यह समझे जाने और प्रवर्तन (Execution) योग्य हो जावे।

172. जबकि आज्ञप्ति पति या पत्नि के विरुद्ध दाम्पत्य अधिकारों के प्रत्यास्थापन (Restitution of conjugal rights) के लिये हो तो उसमें यह आदेश होना चाहिये कि पति या पत्नी वापस लौटे (The spouse do return)।

173. सामान्यतया निर्णय या आदेश के तीन दिवस के अन्दर आज्ञप्तियां तैयार की जावेंगी।

174. प्रत्येक आज्ञप्ति में न्यायाधीश की वे शक्तियां जिनके कि प्रयोग में वह वाद उसके द्वारा निर्णीत किया गया था तथा दिनांक जिस दिन के निर्णय या आदेश घोषित किया गया, का उल्लेख किया जावेगा।

175. संग्रह के आदेश 20 नियम 6 में निहित निर्देशों का पालन प्रायः पूर्ण रूप से नहीं किया जाता है। दावे के पक्षों का नाम एवं वृतान्त सदैव पूर्ण रूप से उल्लेक्षित किया जाना चाहिये, जबकि एक से अधिक वादी या प्रतिवादी हैं तो केवल एक व्यक्ति का नाम लिखना और बाद में 'आदि' जोड देना पर्याप्त नहीं है।

176. (1) जैसे ही आज्ञप्ति तैयार हो जावे, न्यायालय, पक्षकारों या उनके अभिभाषकों को आज्ञप्ति की तैयारी की सूचना (परिशिष्ट–2 के प्रारूप क्र. 211) हेतु एक सूचना पत्र न्यायालय के सूचना पटल पर प्रदर्शित करेगी, जिसमें कि यह लिखा जावेगा कि आज्ञप्ति तैयार हो चुकी है तथा उसे पक्षकारों या उनके अभिभाषकों द्वारा सूचना–पत्र चिपकाये जाने के तीन दिन के अन्दर देखा जा सकता है।

(2) जबकि ऐसा सूचना–पत्र चिपकाया जा चुका हो, उक्त नियम में निर्धारित समय के अन्दर पक्षकार या उसका अभिभाषक उस आज्ञप्ति को देख सकता है ताकि यदि वह सही रूप से नहीं बनी है तो उस विषय को न्यायालय के ध्यान में लाया जा सकता है।

(3) यदि सूचना–पत्र में निर्धारित दिनांक पर या उसके पूर्व ऐसी कोई आपत्ति नहीं की जाती है तो न्यायाधीश द्वारा आपत्ति को, हस्ताक्षर करने के दिनांक सहित, हस्ताक्षरित करेंगे।

(4) यदि आज्ञप्ति की शुद्धता (Correctness) के विषय में कोई अपील की जाती है तो वह न्यायाधीश द्वारा सुनी एवं निराकृत की जावेगी जिसका कि आदेश–पत्र पर लिखा जावेगा, तथा उसके द्वारा, निर्देशित शुद्धि या परिवर्तन, यदि कोई हो, आज्ञप्ति में किया जावेगा और न्यायाधीश द्वारा हस्ताक्षरित किया जावेगा। जब उक्त प्रारंभिक क्रियायें पूर्ण हो चुकें तब पीठासीन न्यायाधीश आज्ञप्ति एवं व्ययों की सूचि के शुद्धि के संबंध में संतोष करने के पश्चात् उसे हस्ताक्षरित करेंगे और हस्ताक्षर करने की तिथि लिखेंगे।

टिप्पणीः– नियम 176 (1) में जो प्रारूप का उल्लेख है वह परिशिष्ट 2 में जो प्रारूप निर्धारित है उनके सन्दर्भ में है। पक्षकारों या उनके अभिभाषकों को डिक्री बन चुकने की सूचना का प्रारूप (फार्म) क्रमांक–I, 211 है।

डिक्री पर हस्ताक्षर करने की दिनांक लिखना बहुत ही आवश्यक एवं महत्वपूर्ण है। यद्यपि अपील के आशयों के लिये डिक्री का दिनांक वही होगी जो निर्णय की दिनांक होती है, परन्तु फिर भी यह आवश्यक है कि मूल डिक्री में उस पर हस्ताक्षर करने का दिनांक लिखा जावे। डिक्री पर हस्ताक्षर करने का दिनांक, अवधि विधान के अन्तर्गत प्रतिलिपि में लगने वाले समय की गणना की दृष्टि से भी लिखा जाना आवश्यक है। इस संबंध में ***भगवन्त आदि वि. लिक्वीडेटर को-आपरेटीव सोसायटी (इन्डियन ला रिपोर्ट, 1955 नागपुर पृष्ठ 791)*** तथा ***म्युनिसीपल कार्पोरेशन इंदौर वि. गंगाबाई (द्वितीय अपील क्र. 440 सन 1963 मध्यप्रदेश उच्च-न्यायालय द्वारा निर्णीत)*** उल्लेखनीय है।

177. व्यवहार प्रक्रिया संहिता के आदेश 41 नियम 11 (1) के अंतर्गत निरस्ति की दशा में **आज्ञप्ति तैयार की जावेगी।** वाद–पत्र की अस्वीकृति (Rejection) धारा 47 या 144 के अन्तर्गत आनेवाले किसी प्रश्न के निराकरण, या किसी न्याय निर्णय (Adjudication) जिसके कि विरुद्ध किसी आदेश के विरुद्ध अपील की तरह अपील होती हो, या अनुपस्थिति के कारण निरस्ति के आदेश, की दशाओं में **आज्ञप्ति नहीं बनाई जावेगी।** परन्तु इन दशाओं में, दिये गये आदेश के ठीक नीचे व्ययों की सूची

बनाई जावेगी और पक्षकारों का नाम, जिनके द्वारा व्ययों का भुगतान किया जाना है, लिखा जावेगा तथा न्यायाधीश द्वारा हस्ताक्षरित किया जावेगा।

टिप्पणी : जबकि न्यायालय वाद पत्र को अवधि बाह्य होने के कारण अस्वीकृत करता है तो उस दशा में आज्ञप्ति बनाई जाना आवश्यक नहीं है तथा आदेश के नीचे व्ययों की सूची बनाई जाना चाहिये। इस संबंध में ***1979 म.प्र. ला जर्नल नोट 41, रानूलाल वि. स्टेट आफ मध्यप्रदेश,*** अवलोकनीय है। जबकि वाद पूर्व–निर्णीत विषय (ResJudicata) के आधार पर निरस्त किया जाता है तो इस नियम 177 के अनुसार आज्ञप्ति बनाई जाना चाहिए ***(1979 म.प्र. वीकली नोट 187 रामदुलारी बाई वि. गोमती बाई)***।

178. अकिंचन वादों (Pauper suits) (मुफलिसी के दावे) में प्रदान की गई समस्त आज्ञप्तियों, मूल या अपीलीय, की प्रतिलिपियां अविलम्ब उस जिले के कलेक्टर (जिलाधीश) को, जिसमें कि मूल आज्ञप्ति प्रदान करने वाली न्यायालय स्थित है, भेजी जावेगी।

HOW A JUDGE SHOULD BE

"God give us men! A time like this demands
Strong minds, great hearts,true faith and ready hands.
Men whom the lust of office does not kill;
Men whom the spoils of office cannot buy;
Men who possess opinions and a will;
Men who honour; Men who will not lie;
Men who can stand before a demagogue.
And damn his treacherous flatteries without winking
Tall Men, uncrowned, who live above the fog
In public duty and in private thinking."

आ. 8 नि 10 व्य. प्र. स. के अंतर्गत आदेशिका का लिखना

पुरुषोत्तम विष्णु नामजोशी

दोस्तो! हर क्षेत्र में फिर वह न्यायदान का हो या कूड़ादान का हो विज्ञान शास्त्र कला शास्त्र व तर्क शास्त्र, कल्पनाशक्ति सामाजिक व्यवस्था आदि विभिन्न पहलुओं का संगम होना आवश्यक हो गया है। न्यायिक कार्यवाही में न्यायिक चिंतन के अतिरिक्त विवेक शक्ति व तर्क शक्ति का प्रयोग बहुत ही ज्यादा होता है। वास्तव में वह मूलभूत आधार ही है। कोई आदेश पारित करने के पूर्व यह ज़रूरी है कि हम उक्त विषय से संदर्भित समस्त प्रावधानों को ज्ञात करें। तथ्यों पर विवेक व तर्क शक्ति के आधार से चिंतन करें, प्रावधानों का स्पष्ट व गर्भित अर्थ समझें, आशय समझें एवं प्रावधानों को टुकड़ों–टुकड़ों में अर्थपूर्ण रूप से पढ़ें। ऐसा न हो कि उपरोक्त सिद्धांतों के ठीक विपरीत ईश्वर उपासना के लिए जो स्त्रोत मंत्र आदि पढ़ते हैं तब चित्त सब दूर रहता है केवल उसी में ही नहीं रहता है। इसीलिए जैसा एक चित्त एक लक्ष्य का प्रयोग, हमारा ईश्वर के प्रति, असफल रहता है उसी प्रकार न्यायदान में भी ऐसा न हो। यांत्रिकी रूप से चिंतन किसी भी छोर पर हमें नहीं पहुंचाएगा। जिस छोर से हम चले थे उसे भी छोड़ देने के पश्चात मशीनीकृत चिंतन में कहीं न कहीं भटक जाएंगे व चक्रव्यूहात्मक दुर्गति हमारी मति भ्रम या अकुशाग्रता के कारण होगी। वो तो अलग ही बात है।

इस विषय पर प्रत्येक प्रशिक्षण शिविर में विस्तार से बताया जाता रहा है तथा आ. 8 नियम 01, 05, 09 एवं 10 की ओर ध्यान आकृष्ट करने का भी प्रयास रहा है।

प्रत्येक शिविर में कुछ विशेष दृष्टांतों का संदर्भ भी दिया है व बताया है कि न्यायाधीश की आदेशिका स्वयं में बोलना चाहिए। सोना बोलेगा पीतल या मुलम्मा नहीं बोलेगा। हमारी आदेशिका बोलेगी हमारा, घर–घर जाकर हमारी कार्यवाही का औचित्य एवं दोषी हावभाव के साथ स्पष्टीकरण नहीं बोलेगा। अतः किसी भी आदेशिका का यथा संभव पूर्ण तथा स्पष्ट होना आवश्यक है। यह बात आ. 8 नि. 10 व्य.प्र.स के संबंध में भी कही जा सकती है। विषय पर संक्षिप्त चिंतन प्रारंभ करने के पूर्व यहां पर आ. 8 नि. 01 (1) 05, 09 एवं 10 को ज्यों का त्यों प्रस्तुत किया जा रहा है जिससे लाभ यह होगा कि जिन न्यायिक अधिकारीगणों को अभी तक इन प्रावधान को पढ़ने का अलभ्य लाभ प्राप्त नहीं हुआ है उनके घर में ही गंगा आ गई ऐसा समझ लेना। ऐसा मत समझ लेना कि गोविंदा का गंगा जल युक्त नहाने का साबुन हो। ये बात भिन्न है कि विज्ञान ने और प्रगति की तो गंगा जल का भी इन्सेन्स मिल जाया करेगा तथा बाजार में शब्दशः इसेन्स गुलाब, केवडा जैसे ही इसेन्स ऑफ जस्टिस भी मिला करेगा। हम आपने न्यायदान के प्रति उपेक्षा की तो सहज संभव है

कि भाई लोक न्याय का भी इसेन्स बनाकर उसको भी आधुनिक भाषा में मार्केट में लॉच करेंगे। बचके रहना जी,....।

आ. 8 नियम 1 (1) लिखित कथन : प्रतिवादी अपनी प्रतिरक्षा का लिखित कथन (उत्तरवाद) पहली सुनवाई के समय या उसके पहले या इतने समय के भीतर **जितना न्यायालय अनुज्ञात करे**, उपस्थित करेगा।

इस प्रकार आ. 5 नि. (1) एवं (5) व्य.प्र.स. के प्रावधानों के अंतर्गत उत्तरवाद प्रस्तुत करने हेतु जो समय निर्धारित किया है उसके अतिरिक्त भी आ0 8 नि. 1 (1) के अंतर्गत पुनः समय देने की शक्ति न्यायालय को है।

ऊपर उल्लेखित नि. 01 (1) की शब्दावली को ध्यान से, अर्थपूर्ण रूप से पढ़ें। जिससे प्रावधान का युक्तार्थ, अभिप्राय, मंशा ज्ञात हो सके। अब आ. 8 नि. 5 को यहां प्रस्तुत कर रहा हूँ। जो इस प्रकार है:

आ. 8 नियम 5 : विनिर्दिष्टतः प्रत्याख्यान-

(1) यदि वादपत्र के तथ्य संबंधी हर अभिकथन का विनिर्दिष्टतः यह आवश्यक विवक्षा से **प्रत्याख्यान नहीं किया जाता है** या प्रतिवादी के अभिवचन में यह कथन कि वह स्वीकार नहीं किया जाता तो जहां तक निर्योग्यताधीन व्यक्ति को छोड़कर किसी अन्य व्यक्ति का संबंध है वह स्वीकार कर लिया गया माना जाएगा।

परन्तु ऐसे स्वीकार किए गए किसी भी तथ्य के ऐसी स्वीकृति के अलावा **अन्य प्रकार से साबित किए जाने की अपेक्षा न्यायालय स्वविवेकानुसार कर सकेगा।**

(2) **जहां प्रतिवादी ने अभिवचन फाइल नहीं किया है** वहां न्यायालय के लिए वादपत्र में अन्तर्विष्ट के आधार पर निर्णय सुनाना, जहां तक नियोग्यताधीन व्यक्ति को छोड़कर किसी अन्य व्यक्ति का संबंध है, विधिपूर्ण होगा, किन्तु न्यायालय किसी ऐसे तथ्य को साबित किए जाने की अपेक्षा स्वविवेकानुसार कर सकेगा।

(3) न्यायालय उपनियम (1) के परन्तु के अधीन या उपनियम (2) के अधीन अपने विवेकाधिकार का प्रयोग करने में इस तथ्य पर सम्यक् ध्यान देगा कि क्या वादी किसी प्लीडर को नियुक्त कर सकता था या उसने किसी प्लीडर को नियुक्त किया है।

(4) इस नियम के अधीन जब कभी निर्णय सुनाया जाता है तब ऐसे निर्णय के अनुसार डिक्री तैयार की जाएगी और ऐसी डिक्री पर वही तारीख दी जाएगी जिस तारीख को निर्णय सुनाया गया था।

आ. 8 नियम 9 पश्चातवर्ती अभिवचन : प्रतिवादी के लिखित कथन के पश्चात् कोई भी अभिवचन जो मुजरा के या प्रतिदावे के विरुद्ध प्रतिरक्षा से भिन्न हो, न्यायालय की इजाजत से ही और ऐसे निबंधनों पर जो न्यायालय ठीक समझे, उपस्थित किया जाएगा, अन्यथा नहीं; **किन्तु न्यायालय पक्षकारों में से किसी से भी लिखित कथन या अतिरिक्त लिखित कथन किसी भी समय अपेक्षित कर सकेगा और उसे उपस्थित करने के लिए कोई समय नियत कर सकेगा।**

आ. 8 नियम 10 जब न्यायालय द्वारा अपेक्षित लिखित कथन को उपस्थित करने में पक्षकार असफल रहता है तब प्रक्रिया : जहां ऐसा कोई पक्षकार **जिससे लिखित कथन 2 (नियम 1 या नियम 9 के अधीन अपेक्षित किया गया है)** उसे न्यायालय द्वारा, यथास्थिति, अनुज्ञात या नियत समय के भीतर **उपस्थित करने में असफल रहता है** वहां न्यायालय उसके विरुद्ध निर्णय सुनाएगा या वाद के संबंध में ऐसा आदेश करेगा जो वह ठीक समझे (और ऐसा निर्णय सुनाए जाने के पश्चात् डिक्री तैयार की जाएगी।)

स्मरण रहे कि 1976 के विभिन्न संशोधनों द्वारा आ 8 नि. 01– 05–09– 10 में कुछ संशोधन किए गए हैं। उसी प्रकार आ. 05 नियम नियम 01, 05 एवं व्य.प्र. सं. के अपेंडिक्स बी में दर्शाए प्रपत्र क्र.2 जो आ. 05 नि. 01–05 से संबंधित है में भी महत्वपूर्ण परिवर्तन हुए हैं। उन्हें ध्यान से देखें।

आ. 08 नि. 10 व्यप्र.स. के अन्तर्गत कोई आदेश पारित करने के पूर्व **राजरानी वि. यादराम चौरसिया 1979 जे.एल.जे. 172** एवं **महेश नारायण वि. शिखरचंद 1981 एम.पी.एल. जे. नोट 47** दृष्टांत को अच्छे से पूर्णरूप से अवश्य पढ़ लें। यदि और अधिक पक्की नींव बनाने की इच्छा हो तो **यूनियन वि. भगवानदास ए.आय.आर. 1976 देहली 96** का दृष्टांत भी देख सकते हैं। **1979 जे.एल.जे. 172** के दृष्टांत में तो पराकाष्ठा ये थी कि प्रतिवादी की ओर से यह घोषित भी कर दिया था कि वह उत्तरवाद प्रस्तुत नहीं करना चाहता है।

आदेश 8 नियम 10 व्य.प्र.सं. की आदेशिका कभी भी नीचे अनुसार न लिखें। सर्वथा गलत, अस्पष्ट और अनुचित होगा यथाः– प्रतिवादी की ओर से उत्तरवाद प्रस्तुत नहीं किया गया कई बार समय दिया गया अतः प्रतिवादी का उत्तरवाद प्रस्तुत करने का अधिकार समाप्त किया जाता है।

यह आदेशिका गलत क्यों है इस संबंध में कारण मीमांसा बताई जा रही है जिससे विषय–वस्तु को समझना सुविधायुक्त होगा। आदेश 8 नियम–1 सहपठित आदेश–5 नियम–1 एवं नियम–5 सामान्य रूप से यह अपेक्षा करते हैं कि प्रतिवादी उत्तरवाद प्रस्तुत करे। लेकिन यह अपेक्षा औपचारिक रूप से है इससे ज्यादा कुछ नहीं ऐसा

1979 जे.एल.जे. 172 का दृष्टांत कहता है। इसलिए जरूरी हो जाता है कि आदेश–8 नियम–9 को पढ़ा जावे। महत्वपूर्ण हिस्सा ऊपर उल्लेखित उक्त प्रावधान में बोल्ड अक्षरों में दर्शाया गया है। उसके अनुसार यदि उपरोक्तानुसार प्रतिवादी ने उत्तरवाद प्रस्तुत नहीं किया है तो न्यायालय का कर्तव्य है कि वह प्रतिवादी से यथावादी से प्रतिदावे के संबंध में लिखित कथन या अतिरिक्त लिखित कथन किसी भी समय अपेक्षित कर सकेगा और उसे उपस्थित करने के लिए कोई समय नियत कर सकेगा। इस प्रकार न्यायालय पर यह कर्तव्य निर्धारित किया गया है कि प्रतिवादी से उत्तरवाद अपेक्षित करे तथा यदि प्रतिदावा प्रस्तुत किया गया है तो उस प्रतिदावे का उत्तरवादी से उत्तरवाद अपेक्षित करे एवं ऐसा करने के लिए समय निर्धारित करे। अतः ऐसा करते समय न्यायालय को यह अधिकार नहीं है कि वह कोई हर्जाना किसी पक्ष पर निर्धारित करे। इसके बाद अब आदेश–8 नियम 10 व्य.प्र.स. के प्रावधान को देखें उससे बात और भी स्पष्ट हो जाती है। उसमें यह अपेक्षा की गई है कि आदेश–8 नियम–1 एवं आदेश–8 नियम–9 के अंतर्गत उत्तरवाद प्रस्तुत करने हेतु अपेक्षा की जाने के पश्चात भी यदि संबंधित पक्ष निर्धारित समय में उत्तरवाद प्रस्तुत नहीं करता है तो न्यायालय (अ) उसके विरुद्ध निर्णय सुनाएगा अथवा (ब) वाद के संबंध में ऐसा आदेश करेगा जो वह ठीक समझे।

इस प्रकार न्यायालय की आदेशिकाएं यह दर्शित करे कि न्यायालय ने आदेश–8 नियम–1 अथवा नियम 9 के अंतर्गत उत्तरवाद प्रस्तुत करने कि लिए संबंधित पक्ष का ध्यान आकृष्ट किया था और उत्तरवाद प्रस्तुत करने के लिए न्यायालय अपेक्षा करता था फिर भी प्रस्तुत नहीं किया है इसलिए अब आदेश–8 नियम–10 व्य.प्र.सं.के अन्तर्गत कार्यवाही की जा रही है।

इस प्रकार जब–जब प्रतिवादी उपस्थित होने के पश्चात उत्तरवाद के लिए समय मांगे न्यायालय यदि समय देना चाहता है तो समय दे तथा प्रत्येक बार पूर्व में दिए हुए समय का खुलासा भी नई आदेशिका में करें जिससे प्रत्येक आदेशिका सुस्पष्ट रूप से बता सके कि कितनी बार प्रतिवादी को समय दिया जा चुका है। यदि कई बार समय देने के पश्चात भी प्रतिवादी उत्तरवाद प्रस्तुत नहीं करता है तब भी आप अचानक उत्तरवाद प्रस्तुत करने का अधिकार समाप्त करते हुए ऊपर दर्शित आदेशिका मत लिख देना अपितु नीचे अनुसार आदेशिका लिखनाः–

प्रतिवादी को अमुक–अमुक तारीखों को उत्तरवाद प्रस्तुत करने के लिए समय दिया गया था लेकिन उसने उत्तरवाद प्रस्तुत नहीं किया। अतः प्रतिवादी का ध्यान आदेश–8 नियम–9 व्य.प्र.स. की ओर आकृष्ट किया जाता है तथा प्रतिवादी से यह अपेक्षा की जाती है कि वह अगले तिथि पर उत्तरवाद प्रस्तुत करे अन्यथा उसके विरुद्ध आदेश–8 नियम–10 के तहत कार्यवाही की जा सकेगी।

अब यदि निर्धारित तिथि पर उत्तरवाद प्रस्तुत नहीं होता है तब भी आपको प्रतिवादी अधिवक्ता द्वारा समय मांगने पर समय बढ़ाने का अधिकार है। ऐसा नहीं है कि अब आपको समय देने का अधिकार शेष नहीं रहेगा। उपर उल्लेखित आदेशिका के अनुसार आपके द्वारा पारित आदेश अनुलंघनीय अर्थात (inviolable, peremptory Infrangible) नहीं होता है अपितु आपको समय देने का अधिकार शेष रहता है यहां तक कि आदेश–8 नियम–10 व्य.प्र. स. के अंतर्गत कार्यवाही कर देने के पश्चात भी आप समय दे सकते हो इस संबंध में भी कुछ दृष्टांत यहां दर्शित करना उचित होगा ताकि दृष्टांत के आधार से भी चीज समझी जा सकती है। यथा, **मनरामन विरुद्ध लक्ष्मीबाई 1981 (भाग-2) म.प्र. वीकली नोट 99, 1981 एम.पी.एल.जे. नोट 47 महेश नारायण विरुद्ध शिखरचन्द।**

जब आदेश–8 नियम 1 और 9 के अंतर्गत ध्यान आकृष्ट करते हुए आदेशिका लिखी जा चुकी हो और उसके बावजूद भी अगली तिथि पर उत्तरवाद प्रस्तुत नहीं किया जाता है तो नीचे अनुसार आदेशिका लिखी जाना चाहिए।

> "प्रतिवादी को अमुक–अमुक तिथियों पर उत्तरवाद प्रस्तुत करने हेतु समय दिया गया था लेकिन उत्तरवाद प्रस्तुत नहीं किया गया। पूर्व तिथि अमुक–अमुक को प्रतिवादी का ध्यान आदेश–8 नियम 9 व्य.प्र.स. की ओर आकृष्ट करते हुए निर्देश किया गया था कि वह उत्तरवाद प्रस्तुत करे लेकिन उत्तरवाद प्रस्तुत नहीं किया गया अतः आज आदेश–8 नियम 10 व्य.प्र.स. के अंतर्गत प्रतिवादी का उत्तरवाद प्रस्तुत करने का अधिकार समाप्त किया जाता है एवं प्रकरण साक्ष्य हेतु निर्धारित किया जाता है।"

मेरा व्यक्तिगत निवेदन है कि उत्तरवादी ने उत्तरवाद प्रस्तुत न भी किया हो तब भी प्रकरण में विचारणीय बिन्दु क्या है यह वाद प्रश्नों के अनुरूप निर्मित करके रखना चाहिये। जैसे कि आदेश–20 नियम 4 (2) में अपेक्षा की गई है इस विषय पर किसी अन्य समय पर विस्तार से लेख लिखकर बताया जायेगा लेकिन यह व्यवहारिक और उचित ही है कि जब उत्तरवाद प्रस्तुत होता है तो वाद प्रश्न बनते हैं एवं उत्तरवाद प्रस्तुत न भी हो तब भी विचारणीय बिन्दु निर्मित होना चाहिये जिससे कि पक्षकारों को यह मालूम हो कि उन्हें किन मुद्दों पर साक्ष्य लिपिबद्ध करवाना है। यह इसलिए भी कि आ.8 नि. 5 एवं नि. 10 के अन्तर्गत न्यायालय वादी से साक्ष्य की अपेक्षा करता है।

अब जब प्रकरण साक्ष्य के लिए निर्धारित किया हो तथा प्रतिवादी ने उत्तरवाद प्रस्तुत न भी किया हो एवं साक्ष्य के दिन भी यदि प्रतिवादी उत्तरवाद प्रस्तुत करने को तत्पर हो तो उत्तरवाद को खर्चे पर आसानी से स्वीकार किया जा सकता है। इस संबंध में एक दृष्टांत **स्टेट विरुद्ध रामदयाल 1983 वीकली नोट 311** देखने योग्य है।

आदेश–8 नियम 10 के साथ–साथ आदेश–8 नियम 5 को पढ़ना न्यायोचित होगा। दोनों ही प्रावधानों को एक साथ पढ़ा जाना चाहिये क्योंकि दोनों ही में मुख्य रूप से एक भाव समान रूप से उपस्थित है। यदि कोई विशेष अपवाद हो तो बात अलग है अन्यथा यह ध्यान रहे कि उत्तरवाद प्रस्तुत न करने की स्थिति में अथवा प्रतिवादी के उपस्थित न होने की स्थिति में एवं उत्तरवाद प्रस्तुत न करने के कारण दावे के अभिकथनों के आधार से भूल से भी दावा डिक्री मत करना अन्यथा परिणाम भयावह हो सकेंगे। यथा, मैंने एक दावा इस आशय का प्रस्तुत किया कि यह स्कूल भवन मेरे सत्व स्वामित्व का है एवं विपरीत आधिपत्य के द्वारा मैं स्वामी बन चुका हूं। प्रतिवादी चाहे प्रायवेट पार्टी हो अथवा शासन हो मानो कि वह उत्तरवाद प्रस्तुत ही नहीं करता है अथवा वह एक पक्षीय हो जाती है तो आदेश–8 नियम 5 या आदेश 8 नियम 10 के अंतर्गत मेरा दावा अभिकथनों के आधार से पारित होने लग जाय तो संभवतः मैं इस भारत वर्ष का स्वामी बन चुका हूंगा। अतः ऐसे प्रावधानों का दुरूपयोग पक्षकार लोग न्यायालयों को माध्यम बनाकर न कर सकें। अन्यथा संपत्तियां बिना विक्रय पत्र और पंजीयन के विक्रय कर दी जा सकेंगी और घोषणा की सहायता के लिए मात्र कोर्ट फीस देकर न्यायालय के माध्यम से स्वत्व प्राप्त होते रहेंगे। ऐसी भूल किन्हीं पीठासीन अधिकारियों द्वारा भारी मात्रा में प्रकरणों में करने का तथ्य जानकारी में है।

जरूरी यह है कि उत्तरवाद प्रस्तुत न करने की स्थिति में अथवा आदेश 8 नियम 5 व्य. प्र. स. के अंतर्गत प्रतिवादी की ओर से उत्तरवाद उपलब्ध न होने की स्थिति में भी विचारणीय बिन्दु बनाकर प्रकरण साक्ष्य हेतु निर्धारित करना चाहिये। आदेश–8 नियम 5 की उपधारा 2 देखने योग्य है जो 1976 में संशोधित हुई है उसमें लिखा है कि **"जहां प्रतिवादी ने अभिवचन फाइल नहीं किया है"** इसका अर्थ ही यह है कि न्यायालय ने आदेश–8 नियम 1 और नियम 9 के अंतर्गत प्रतिवादी का ध्यान आकृष्ट किया गया हो और तत्पश्चात भी प्रतिवादी ने उत्तरवाद प्रस्तुत नहीं किया है एवं आदेश 8 नियम 10 व्य.प्र. सं. के अंतर्गत कार्यवाही की गई है और तब **"प्रतिवादी ने अभिवचन फाइल नहीं किया है"** तब आदेश–8 नियम 5 (2) के अंतर्गत कार्यवाही करने का अधिकार न्यायालय को प्राप्त होता है उसके पहले नहीं अतः प्रक्रिया संबंधी भूल नहीं हो इसका विशेष ध्यान रखा जावे।

आशा की जाना चाहिये कि न्यायिक अधिकारीगण इस लेख की भावना, भाव एवं विधि प्रावधानों को स्वयं अपनी ओर से अच्छी तरह से अध्ययन करके उचित रूप से अपने अपने प्रकरणों में लागू करेंगे ताकि न्यायालयों के द्वारा न्यूनतम भूलें होने की मात्र संभावना शेष रह सके।

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भेंट का समय एवं पोषाक

पुरूषोत्तम विष्णु नामजोशी

संसार हो या देश, संस्था हो या अपना ही घर बिना संस्कृति के, संस्कार के, तथा अध्यात्मिक चरित्र के मानव जीवन केवल नर्क हो जायेगा। हम राष्ट्र के रूप में अथवा व्यक्तिगत रूप में कितने भी अत्याधुनिक हो जाएँ जब तक संस्कृति, संस्कार एवं अध्यात्म का अभाव रहेगा, तो शेष शून्य है। हम हमारे बचपन से इन तीन शब्दों को सुनते आ रहे हैं व किसी सीमा तक हम उसका पालन भी करते हैं लेकिन व्यवहारिक रूप से अभी भी उस लक्ष्य को प्राप्त नहीं कर पा रहे हैं जिसकी अपेक्षा है। बाह्य सुख एवं सुविधाएं जिसे संक्षिप्त में भौतिक सुख कहा गया है तथा अन्य सुविधाएं, साधन जिसे अंग्रेजी में व्हाईट गुड्स (White Goods) कहा जाता है, से जीवन में पूर्णता तो आएगी ही नहीं विपरीत इसके जीवन में क्लेश, आपदा, कोफ्त, विपत्ति, वेदना ही उत्पन्न होगी तथा मनु स्मृति में वर्णित अष्ट अवगुण अर्थात अर्थ, दूषण, अस्या, ईर्ष्या द्रोह, पारूष्य, पशुता, वाग्दंड एवं साहस (दुःसाहस) से भी मुक्ति नहीं मिलेगी।

हमें संस्कार, संस्कृति, अध्यात्म एवं चरित्र शब्दों के अर्थ जान लेना जरूरी है ताकि उसके अनुरूप हम अपने जीवन को ढाल सकें।

संस्कार : शब्द का अर्थ है आचार, विचार, व्यवहार, चलन पद्धति, प्रणाली प्रथा, रीति, लोकनीति, विधान, शैली, तमीज़, रवायत, अदब, तकल्लुफ, तहजीब, भद्रता, सलीका, संस्कारयुक्तता, सज्जनता, सामूहिक शिष्टाचार, सामूहिक सुशीलता, लोक परंपरा सहजज्ञान, आदि

संस्कृति : शब्द का अर्थ है संस्कार प्रदान करना (संस्कारित करना) सुधार परिष्करण, सभ्यीकरण, निखारना, संवारना, सुसंस्कृत करना आदि

अध्यात्म : शब्द का अर्थ है अस्तित्व बोध, तत्वज्ञान, अंतर्ज्ञान, अनुभूति, आत्मानुभूति, आत्मबोध, यथार्थज्ञान, स्थितप्रज्ञता, स्थिरचित्तता, अंतःप्रकृति, आत्मा, चेतना आदि।

चरित्र : शब्द का अर्थ है पहचान असामान्यता, अस्मिता, खासियत, खुसुसियत, निजता, विशेषता, मौलिकता, व्यवहार, आचरणशैली (अर्थात संस्कारित चरित्र) शुचिता, शीलाचार, सम्यक व्यवहार आदि। चरित्र उपर से आरोपित होता है। तथा ऐसा चरित्र जो अंतर मन से अविर्भूत होता है, वह शील है। जीवन की शैली शील है।

विभिन्न शब्दभेद व शब्दार्थ प्रस्तुत करने का शुद्ध आशय यह है कि हमें हमारे

संस्कार, संस्कृति, अध्यात्म एवं व्यवहार को जीवन में अपनाना है। जैसा कि हम सब जानते ही हैं, प्रशिक्षण संस्थान में बौद्धिक वर्गों में हमेशा यह बताया गया है कि **न्यायाधीश को आचरण के आवरण की आवश्यकता नहीं होती है।** उसका सामान्य क्रिया कलाप चाहे वह कहीं भी हो शालीन होगा। अतः न्यायाधीश में इस गुण का होना सामाजिक अपेक्षा है।

अग्रलिखित प्रस्तावना के साथ अब मूल मुद्दे पर आईये।

इस लेख में मूल मुद्दा है, भेंट का समय व पोषाक। सामान्य शिष्टाचार तो यही है कि अवकाश के दिन किसी के यहां भी दोपहर 12 से 4 बजे तक निश्चित ही नहीं जाना चाहिये। अवकाश के दिन औसत व्यक्ति अपनी दिनचर्या थोड़ी देरी से ही प्रारंभ करता है इसलिए उसके यहां जाना भी है तो औसत रूप से 10 बजे के बाद ही जाना चाहिए। पूर्वानुमति की पद्धत हो तो पूर्वानुमति से व आकस्मिक भेंट करना हो तो तद्नुसार जाना चाहिये। शाम को भी अवकाश के दिन 4 बजे बाद ही जाना चाहिए। कार्यदिवस पर भी शाम को 7 बजे से 8 बजे तक या अधिक से अधिक 8.30 बजे तक ही जाना चाहिये। ये समय व्यक्ति से व्यक्ति तक कुछ कम ज्यादा हो सकता है। जैसे कुछ व्यक्ति कार्य निवृत्ति के पश्चात घर जाकर परिवार के साथ कुछ समय बिताकर विश्राम करते हैं क्योंकि उन्हें पुनः घर में दूसरे दिन के लिए पूर्व तैयारी करना होती है। सुबह के समय तो किसी के घर जाना ही नहीं चाहिए। सुबह सब लोग अत्यन्त व्यस्त रहते हैं। एक बात और ध्यान रखना चाहिए की संध्या के समय कार्यालयीन समय के तुरंत बाद किसी के यहां जाना तो अत्यंत निकृष्ट कृत्य हो सकता है। औसत रूप से एक व्यक्ति दूसरे व्यक्ति के यहां परिचय की गहनता के आधार से आता जाता है अन्यथा निजी काम से या गरज से। जिनका निजी काम या गरज है उन्होंने तो शिष्टाचार का और भी अधिक कठोरता से पालन करना चाहिए। किसी व्यक्ति से किसी की पहचान होना एक बात है एवं परिचय व निकटता होना अलग बात है। Acquaintance का अर्थ ही यह है कि (Slight knowledge about some body) बस इतना ही कि I know or He Knows लेकिन जब सम्बन्ध प्रगाढ़ हो जाते हैं तो हम Relation शब्द प्रयोग करते हैं अर्थात एक के दूसरे के साथ Links contacts, dealings का व्यवहार हो ऐसे सम्बन्ध व्यवहारिक, व्यापारिक अथवा दोस्ताना, पारिवारिक या रिश्तेदारी के हो सकते हैं। क्या ये सब बातें समान रूप से टेलीफोन पर वार्तालाप के लिए भी लागू नहीं होती?

जब हम आप पदीय सम्बन्धों से आबद्ध हैं तो हमारा व्यवहार अपने वरिष्ठ, बराबरी के या कनिष्ठ के साथ भी औपचारिक ही हो। व्यस्तता के इस दौर में किसी को औपचारिक सम्बन्धों का निर्वाह करने हेतु समय नहीं है, न कोई आवश्यकता है कि इस औपचारिक सम्बन्धों की मर्यादा को पार किया जावे। एक मीठा भ्रम यह पाल

कर रखा गया है कि वरिष्ठ जनों के यहाँ बार–बार जाना नितांत आवश्यक है। इसके दो कारण बताए जाते हैं। पहला यह कि हमारे विरूद्ध अन्य लोग कान भर सकते हैं। दूसरा यह कि वरिष्ठ की मर्जी (Favour) प्राप्त करना। एक निष्ठावान व्यक्ति को इन दोनों ही कारणों से वरिष्ठ के यहाँ बिलकुल ही जाने की आवश्यकता नहीं है। यदि हम किसी को वरिष्ठ मानते हैं तब हमें उसके गुणात्मक पहलू को भी ध्यान रखना चाहिए कि एक गुणी व्यक्ति के कान भरने से वह उस बात को ग्रहण नहीं करेगा चाहे सौ जन उसके कान भर दें। किसी की मर्जी संपादित करने हेतु तो निश्चित ही जाने की आवश्यकता नहीं है। हम अपना मूल्यांकन उस वरिष्ठ द्वारा स्वतंत्र रूप से करने हेतु उसे मुक्त क्यों नहीं रखना चाहते। वास्तविकता यह है कि हम गुणी न होने के कारण दूसरों को गुणी मानने में संकोच करते हैं। इसलिए पुनः निवेदन है कि संस्कार, संस्कृति व अध्यात्म शब्द के जो अनेकार्थ ऊपर दिए हैं पुनः पढ़ें उसमें एक शब्द है– आत्मानुभूति। हम अपने मन को आत्मा को संदेहास्पद बनाए रखते हैं उसी मापदंड से दूसरों की ऊँचाईयाँ नापते हैं। आत्म विश्वास बनाए रखना है।

हम दूसरों के यहाँ जाते हैं तो उसका ख्याल रखें कि हमारे व दूसरे के बीच सम्बन्धों की चादर कितनी बड़ी है। उसके समय का ध्यान रखें। उसके इशारे को समझें, उसके हावभाव को समझें इसी को तत्व–ज्ञान, तर्क–शक्ति कहेंगे। वार्तालाप से निवृत्त होने के पश्चात तुरंत अनुमति लेकर चले जाना चाहिए। जबरदस्ती बैठे रहने को बोलचाल की भाषा में ठसना कहते हैं। आप जिस व्यक्ति के यहां गए हैं वहां पर वरिष्ठ व्यक्ति बाद में आता है तो औपचारिक रूप से एक–दो मिनट बैठकर व अनुमति लेकर तुरन्त रवाना होना चाहिए। उसी प्रकार आप जब जाते हैं तब यदि अन्य वरिष्ठ जन आकर बैठे हैं तो आप जिसके यहां गए हैं उसकी अनुमति से ही एक–आध मिनट के लिए बैठें। उसकी अनुमति से कुछ ही समय के लिए और बैठ सकते हैं। किसी भी स्थिति में किसी के यहां जाकर दूसरे का समय नष्ट करने का हमें अधिकार नहीं है, न ही उसके नियोजित कार्य में बाधा डालने की आवश्यकता ही। वास्तव में अधिकांश मेल–मुलाकात, आना जाना, उठना बैठना केवल औपचारिक मात्र है अतः इस शब्द को ध्यान में रखकर व्यवहार किया जावे तो सहज ही बात ध्यान में आएगी। शासकीय कार्य हो, त्वरित कार्य हो तो बात अलग है। समय–गैर–समय भी जाना पड़ सकता है।

रविवार के दिन अथवा अवकाश के दिन औपचारिक शिष्टाचार की भेंट दोपहर 12 से 4 बजे तक तो कृपया टाल ही दें। दो माननीय न्यायाधिपतिगणों के यहाँ कुछ न्यायिक अधिकारी प्रशिक्षण काल में भरी दोपहर दो बजे पहुँचे। अत्यन्त सज्जनता व सहिष्णुता के व्यवहार के वे आदि व्यक्ति हैं, चेहरे पर कोई प्रतिक्रिया नहीं दर्शायी। औपचारिक रूप से वे भी मिले व आवश्यक–अपेक्षित शिष्टाचार का निर्वाह भी उन्होंने किया लेकिन ये उनका बड़प्पन था।

पृथ्वी के नक्शे में विभिन्न रेखाएँ जिसे हम अक्षांश–अक्षांतर तथा देशांतर रेखाएँ (Latitude & Longitude) कहते हैं उसी प्रकार लक्ष्मण रेखा भी होती है। पौराणिक रेखा होने से विचार भिन्नता तथा मत भिन्नता हो सकती है लेकिन रेखा तो वो भी है। यदि उस लक्ष्मण रेखा को अंग्रेजी में कहेंगे तो हिन्दी में जल्दी समझ में आ जाएगी जैसी पृथ्वी के सम्बन्ध में काल्पनिक रेखाएं हैं उस लक्ष्मण रेखा को भी Latitude ही कहा जाता है जिसका हिन्दी शाब्दिक अर्थ है, उदारता (Liberty) स्वच्छन्दता, स्वातंत्र्य, छूट (Freedom) एवं विस्तार गुंजाइश (Scope)। दो व्यक्तियों के बीच आपको कितनी छूट है, गुंजाइश है, तथा उसकी मर्यादा यह ध्यान में रखना मूलभूत आवश्यकता है। इसी को लक्ष्मण रेखा कहेंगे अर्थात मर्यादा का उल्लंघन नहीं होना है। भूगोल की रेखाओं का अध्ययन किया है। उसी प्रकार मनुष्य व्यवहार के संबंध में संस्कार, संस्कृति एवं अध्यात्म को थोड़ा सा भी समझा जावे तो चरित्र को समझा जा सकेगा।

दो माननीय न्यायाधिपतिगणों ने प्रशिक्षण काल में प्रशिक्षार्थियों के उक्त व्यवहार के कारण मुझे विशेष रूप से निर्देशित किया था। एक माननीय महोदय ने कहा था कि न्यायालय से घर जाने पर कुछ देर विश्राम करते हैं, परिवार जनों के साथ शांति, समाधान व संतोष से बैठकर खाना खाते हैं अतः कोई भी न्यायिक अधिकारी शाम 7.30 बजे से पूर्व नहीं आएगा। दूसरे माननीय महोदय ने कहा था कि एक न्यायिक अधिकारी 9 बजे रात को आए जब मेन गेट के लाईट व दरवाजे सुरक्षाकर्मी ने बंद कर दिए थे, फिर भी जबरदस्ती करके उन्होंने घर में संदेशा भिजवाया, तथा माननीय से मिले। केवल औपचारिक भेंट मात्र थी। क्या न्यायिक अधिकारी ने उनकी उदारता, स्वातंत्र्य छूट का दुरूपयोग करके लक्ष्मण रेखा का उल्लंघन नहीं किया? प्रशिक्षण शिविरों में, अन्य माननीय न्यायाधिपतिगणों के अतिरिक्त माननीय प्रशासनिक न्यायाधिपति (सेवा निवृत्त) श्रीमान एस.के. दुबे महोदय, माननीय प्रशासनिक न्यायाधिपति श्रीमान डी.पी. एस. चौहान, माननीय न्यायाधिपति श्रीमान एस.एस. सराफ महोदय ने भी समय–समय पर इस विषय पर विचार व्यक्त किए हैं।

अतिपरिचयादवज्ञा संतत गमनादनादरो भवति।
मलये भिल्लपुरंधी चंदनतरूकाष्ठ मिंधनं कुरुते।।

(अति परिचय से अवज्ञा होती है एवं सतत् रूप से आने जाने से अनादर होता है यथा मलय पर्वतमाला क्षेत्र की भिल्ल स्त्री चंदन की विपुलता के कारण उसका उपयोग जलाऊ काष्ठ के रूप में करती है) To a man of Business Speak Business, do business and leave him to his business.

जहाँ तक वेशभूषा का प्रश्न है भेंट के समय यथा संभव शर्ट (पूर्ण बांहों का) व पैन्ट तथा सैंडिल या जूते पहनना चाहिये। शारीरिक बीमारी अथवा अपवादात्मक

स्थिति में समुचित परिवर्तन तो क्षम्य होता ही है। यदि टाई व कोट हो तो ज्यादा ही अच्छा। कोट पहना हो तो कैसा पहनना चाहिए इस विषय में पूर्व में प्रशिक्षण शिविर में व्यक्त विचार जो माननीय प्रशासनिक न्यायाधिपति महोदय श्रीमान डी.पी. एस. चौहान महोदय ने व्यक्त किए थे, प्रकाशित हुए हैं। "ज्योति" खंड–पांच भाग दो अप्रैल 1998 पृष्ठ 78 को देखें। कुछ अंश नीचे दिये हैं।

समय–समय पर माननीय न्यायाधिपतिगणों से व अन्यत्र चर्चा के आधार से यह अपेक्षा की गई थी कि इस पत्रिका के माध्यम से न्यायिक चरित्र, व्यवहार विषय पर भी जानकारी मिलती रहना चाहिए ताकि शिष्ट शालीन न्यायिक अधिकारी के रूप में भी उनकी पहचान हो सके। अतः समय–समय पर व्यवहारिक बातों के आधार से सार–संक्षिप्त रूप से लिखा जाना है। चूंकि यह प्रथम पुष्प है अतः पूर्व पीठिका को विस्तार से मात्र बताया गया है। उद्देश्य केवल यह था कि संस्कार, संस्कृति, अध्यात्म व चरित्र इन शब्दों का अर्थ, शब्द झंकार, टंकार, शब्द ब्रह्म अनहद नाद, अनाहत नाद, आंतरिक ध्वनि, अलख, नाद, निनाद बताया जाना भी आवश्यक था।

ज्योति जनरल खंड पांच भाग दो एप्रिल' 99 के पृष्ठ 78 के कुछ अंश इस प्रकार है। वे अंश न्यायालय में वेशभूषा (Legal wear) से सम्बन्धित हैं।

न्यायिक वेशभूषा की ओर ध्यान आकृष्ट करते हुए माननीय चौहान साहेब ने कहा कि कोई कारण नहीं है, न औचित्य है कि हम निर्धारित परिधान नहीं पहन सकते। शर्ट के ऊपर मात्र टाई (अब बैंड्स) कोट होना चाहिए, स्वेटर आदि बिलकुल नहीं। स्वेटर पहनना हो तो शर्ट के अंदर होगा। कोट के बटन भी बंद रहेंगे। यदि शर्ट के ऊपर पत्ही अथवा बंडी (Vest to Waistcoat) पहनी है तो कोट के बटन खुले रखना चाहिए। माननीय चौहान साहेब स्वयं अपने विद्यार्थी जीवन में एन.सी.सी. से सक्रिय रूप से जुड़े होने के कारण स्वअनुभव से कहा है कि फौजी अनुशासन का लक्ष्य रखते हुए उसी अनुशासन का सतत् अनुसरण करें। आपकी चाल ढाल, वेशभूषा बोलने की पद्धति व कलेवर भी ऐसा हो कि देखने वाला अनुभव करे कि न्यायाधीश वास्तविक रूप से न्यायाधीश है न कि पद धारित व्यक्ति मात्र है।

अभी कल की ही बात है। किसी त्यौहार पर एक माननीय से मिलने गए। परंपरा यह रही है कि रजिस्ट्री के अधिकारी अलग एवं जिला न्यायालय के अधिकारी अलग–अलग मिलने जाते हैं। लेकिन सामूहिक रूप से जा धड़के। पूर्व सूचना भी माननाय महोदय को नहीं थी। पहुंचे। पितातुल्य व्यक्तित्व के व धनी व्यक्ति हैं। सबके लिए कुर्सियां जुटाईं। उन्होंने बिलकुल संतुलन नहीं खोया। लगभग 30 से अधिक अधिकारी थे। बाहर के विशाल बरामदे में सब नहीं बैठ पा रहे थे। कुछ तख़त पर

बैठे थे। तय हुआ कि लॉन में बैठा जावे तो सभी अधिकारी खड़े तो हो गए। अब लॉन में कुर्सियां ले जाने हेतु भृत्यों की राह देखी जाने लगी। किसी को यह आत्म प्रेरणा नहीं हुई थी अपनी अपनी कुर्सी उठाकर लॉन में ले ले। एक न्यायिक अधिकारी ने अपनी कुर्सी उठाई व एक और उठाकर लॉन में ले भी गया। लेकिन कोई अपनी अपनी कुर्सी उठाकर ले जाने को तत्पर नहीं था। लेकिन लॉन में सब जने आ गए। कुर्सी तखत भी आ गया। धूप तेज हो गई तो तय हुआ कि छाया में बहुत बड़े वृक्ष के नीचे बैठा जावे तो एक अधिकारी ने कहा तखत उठाने में कठिनाई होगी तो दूसरे ने कहा कि चार पांच जने उठा पाएंगे। तब एक ओर बोला काश यह सत्ता का तखत होता तो उठाकर ले जाने में छीना झपटी होती और कोई एक ही उठाकर चंपत हो गया होता। जैसे तैसे वृक्ष के नीचे बैठे। इतनी असुविधा के बावजूद भी सबके लिए नाश्ता आया तो वह भी सब जने व्यवस्थित रूप से खाना चाहते थे। ऐसा नहीं कि औपचारिक भेंट है अतः औपचारिक रूप से एक आध वस्तु नाममात्र की औपचारिकता के लिए ले ली जावे व मेजबान से जाने की अनुमति मांग ली जावे। वास्तव में ऐसी औपचारिक भेंट मुलाक़ात हम बड़ी ही बोझिल एवं चुभने वाली बना देते हैं हमने ऐसे समय व स्थान व परिस्थिति को देखकर स्वयं सेवक (व्हालेंटियर) या कार्यकर्ता के रूप में कार्य करना चाहिए। एक और खटकने वाली बात थी कि जैसे–जैसे कुर्सियां लगती गईं वैसे–वैसे छोटे बड़े सब बैठ गए। महिलाएं जो संख्या में केवल तीन थी के लिए किसी में भी स्त्रियोचित दाक्षिण्य प्रतिलक्षित नहीं हो रहा था। संभवतः पदीय बॉसिज़म या यूँ कहे कि हम घमंडी व्यवहार (इम्पेरिअस) करते हैं। विपरीत इसके हमने निश्चित ऐसे समय व स्थान पर एवं परिस्थिति में स्वयं सेवक या कार्यकर्ता (व्हॉलेंटियर) जैसा व्यवहार करना चाहिए। एक और माननीय के यहां यही टोली भरी दोपहर पहुंची। संभवतः वे विश्राम कर रहे थे। जागे उठे व औपचारिकता का निर्वाह हुआ। एक माननीय के यहां माननीय को कहना पड़ा कि यदि छोटे छोटे समूहों में आते तो ज्यादा प्रसन्नता होती। कुछ माननीय के यहां तो बाहर प्रांगण में ही अधिकांश जन यहां तक कि महिलाएं खड़ी रहीं। वास्तव में औपचारिक भेंट मात्र होती है। माननीय जनों से कोई जीवंत संपर्क नहीं होता है, वे छोटे–बड़े साथी भी नहीं न बराबरी के। तब हमने इन औपचारिक भेंट को "निपटा लेने के" उद्देश्य से नहीं जाना चाहिए। हम अपनी हंसी कर लेते हैं। तीज–त्यौहार की भेंट का लक्ष्य ही समाप्त हो जाता है। भारतीय तीज त्यौहारों की विशेषता यह है कि वे हमें संस्कारित करने हेतु हैं। लेकिन हमने ऐसा नहीं माना है या हमने चरित्र एवं संस्कारों को त्याग दिया है।

CULTURE IS TO KNOW THE BEST THAT HAS BEEN SAID AND THOUGHT IN THE WORLD.

- MATHEW ARNOLD

PAY BUNCHING

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Retd. Senior Audit Officer,
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High Court of M.P. Jabalpur

It is a very common experience that in each Revision of pay scales, the juniors are the gainers and the seniors are the losers. Not that the pay revision does not result in increase of pay and emoluments but that the juniors are in receipt of greater monetary benefits than seniors. Often while the seniors were getting more pay than their juniors before pay revision, after pay revisions they begin to get equal pay. This floods the offices concerned with representations to resolve the discrepancy. Even matters reach Courts.

The reason for such situation is that almost in each pay revision, the rate of increment is larger and minimum of Revised pay scale substantially higher than that of previous pay scale. This provides a larger leap to the pay of juniors some times reaching the pay of the senior in revised pay scale. Such situation is natural and inevitable. The large leap or higher rate of increment enables the revised pay to jump over several stages of pay in existing scale.

The bunching of pay provision in the revision of pay rules fully evidences the above fact and its unavoidability. The problems received special attention under M.P. Revision of (Pay) Rules, 1987 which came into force w.e.f. 1.1.1986. Rule 7 thereof deals with fixation of pay in the said revised pay scales. Note 2 below rule 7 reads as under:

"Where in the fixation of pay under this rule, the pay of Government servants drawing pay at **more than 5 consecutive stages in an existing scale gets bunched,** that is to say, **gets fixed in the revised scale at the same stage,** the pay in the revised scale of such of the Government Servants who are drawing pay beyond the first 5 consecutive stages in the existing scale shall be stepped up to the stage where such bunching occurs, as under, by the grant of increment (s) in the Revised Scale in the following manner, namely:-

(a) For Government Servants drawing pay from 6th upto 10th stage in the existing scale by one increment.

(b) For Government Servants drawing pay from 11th upto 15th stage in the existing scale if there is bunching beyond the 10th stage- **by 2 increments.**

Thus it is very clear that seniors up to 5 stages have to remain contented with the same pay in revised scale as that of their juniors. Similarly those drawing pay in existing scale up to 10th stage have to remain contented with pay equal to their juniors if pay in revised scale happens to be fixed at the same stage as that of juniors who too draw pay beyond 5 consecutive stages in the existing scale. The anomaly is incurable.

The provisions in this behalf under Central Civil Services (Revised pay) Rules 1986 which took effect from 1.1.86 also are similar vide note No. 3 below Rule 7 relating to initial fixation of pay in the revised scale.

Even the Central Civil Services (Revised pay) Rules 1997, effective from 1.1.96 in further proviso to rule 7 (1) (A) relating to initial fixation of pay in revised scales has made provision for bunching specifically. The further proviso reads as under:-

"Provided further that-

Where in the fixation of pay, the pay of the Government servant drawing pay at more than **4 consecutive stages is an existing scale gets bunched,** that is to say, gets fixed in the revised scale at the same stage, the pay in the revised scale of such of these Government servants who are drawing pay beyond the first 4 consequtive stages in the existing scale shall be stepped up to the stage where **such bunching** occurs, by grant of increment (s) in the following manner, namely:-

(a) For Government servants drawing pay from the 5th upto 8th stage in the existing scale - by one increment.

(b) For Government servants drawing pay from the 9th to the 12th stage in the existing scale, if there is **bunching** beyond the 8th stage by 2 increments.

(c) For Government servants drawing pay from 13th upto the 16th stage in the existing scale, if there is **bunching** beyond the 12th stage - by 3 increments.

In the M.P. Revision of (Pay) Rules 1998 made effective from 1-1-96, provision for bunching has been made in rule 7 relating to initial fixation of pay in revised scale. In this way bunching increments are provided in the Revision of pay rules as the only remedy.

सूचना

कुछ न्यायिक अधिकारीगणों ने अनौपचारिक रूप से बताया है कि उन्हें "ज्योति" जनरल पत्रिका प्राप्त नहीं हो रही है तथा वे जानना चाहते हैं कि क्या इस पत्रिका का प्रकाशन बन्द हो गया है। यह द्विमासिक पत्रिका प्रतिवर्ष फरवरी, अप्रेल, अगस्त, अक्टूबर एवं दिसम्बर में प्रकाशित होती है व नियमित रूप से समय पर प्रकाशित होकर वितरण हेतु संबंधित जिला न्यायाधीश आदि को सही संख्या में भेजी जाती है। किसी कारण किसी को उपलब्ध नहीं हुई हो तो संबंधित जिला न्यायाधीश से संपर्क कर प्राप्त करें। इस संस्था के पास अतिरिक्त रूप से प्रतियां उपलब्ध नहीं हो पाती हैं।

RAJDEO SHARMA "SECOND" FACTOR REITERATED BY THE SUPREME COURT

BY P.V. NAMJOSHI

(C.M.P. NO, 2326) OF 1999
IN
CRIMINAL APPEAL NO. 1045 OF 1998, I.E. (1998) 7 SCC 507

(This has reference to the Article written in 'Joti Journal' Vol. V Part IV, August 1999 at page 271.

A latest judgment delivered by the Supreme Court by 3 Judge Bench as per majority 2/1 on 22-9-1999 re-iterated the basic principle of the Rajdeo 'Sharma "First"'s case, (1998) 7 SCC 507 and clarified few points.

The Central Bureau of Investigation (C.B.I.) had filed this petition for clarifications/modifications of the directions issued by the 3 Judge Bench of this Court on 8-10-1998 in ***Raj Deo Sharma Vs. State of Bihar, (1998) 7 SCC 507*** (First). In the Said application following prayers were made requesting the Supreme Court to:-

"(a) Order holding in abeyance the operation of the Judgment/Order dated 08-10-1998 of this Hon'ble Court in Criminal Appeal No. 1045 of 1998:

(b) Clarify that the Judgment/Order dated 08-10-1998 in Criminal Appeal No. 1045/98, would only have prospective effect;

(c) Clarify that the time taken by the Courts on account of their inability to carry on day-to-day trial on account of pressure of work will be excluded.

(d) Clarify that the exceptions made in Para 4 of the 1st Common Cause Judgment reported in (1996) 4 SCC 33 and para III of 2nd Common Cause Judgment reported in (1996) 6 SCC 775, would still continue.

(e) Issue directions to the State Governments and Registrars of the High Court to come up with specific plans for the setting up of additional Courts/Special Courts (permanent/adhoc) to cope up with the pending work load".

The Supreme Court in Raj Deo Sharma" 1st case gave directions. Please refer to paragraph No. 17 (i) and (iii) which are reproduced here for ready reference:-

Direction No. (i):- In cases where the trial is for an offence punishable with imprisonment for a period not exceeding seven years, whether the accused is in jail or not, the court shall close prosecution evidence on completion of a period of two years from the date of recording the plea of the accused on the charges framed whether prosecution has examined all the witnesses or not, within the said period and the Court can proceed to the next step provided by law for the trial of the case.

Direction No. (iii):- If the offence under trial is punishable with imprisonment for a period exceeding 7 years, whether the accused is in jail or not, the Court shall close prosecution evidence on completion of three years from the date of recording the plea of the accused on the charge framed, whether the prosecution has examined all the witnesses or not within the said period and the court can proceed to the next step provided by law for the trial of the case, **unless for every exceptional reasons to be recorded and in the interest of justice the court considers it necessary to grant further time to the prosecution to adduce evidence beyond the aforesaid time limit.**

The Supreme Court gave first direction/clarification/modification as under:-

"We are inclined to state by way of clarification that the discretion of the Courts in granting further time (exercisable "for very exceptional reasons to be recorded and in the interest of justice" as for Direction No. (iii) above) can be imported in respect of direction No. (i) as well".

According to the C.B.I. a procrastinating accused might take advantage of the said excluding provision "by filing appeal or revision against interim orders and it would indirectly delay the trial without obtaining any stay orders from superior Courts". The Supreme Court gave second direction/clarification/ modification as under:-

"There is no scope for any such apprehension because the judgment has clearly provided that if the inability for completing prosecution evidence was attributable to the conduct of the accused, the Court is not obliged to close the prosecution evidence at all. If the trial gets postponed on account of tendency of any appeal or revision filed against any interim order even though there was no order of stay it is open to the trial court to reckon that period also within the ambit of clause (iv) extracted above".

The third observation made by the Supreme Court in this respect is as under:-

"We may observe that the power of the Court as envisaged in Section 311 of the Code of Criminal Procedure has not been curtailed by this Court. Neither in the decision of the Seven Judge Bench in A.R. Antuley's case nor in Kartar Singh's case such power has been restricted for achieving speedy trial. In other words, even if the prosecution evidence is closed in compliance with the directions contained in the main judgment it is still open to the prosecution to invoke the powers of the Court under Section 311 of the Code. **We make it clear that if evidence of any witness appears to the court to be essential to the just decision of the case it is the duty of the court to summon and examine or recall and re-examine any such person".**

The next point raised by the solicitor General was that due to systemic causes the prosecutor would be disabled from completing evidence in a trial and hence that time must also be permitted to be discounted. The Supreme Court gave direction/clarification/ modification as under:-

"We have noticed that absence of presiding officer in a trial Court (either on account of the physical disability or due to the delay in taking over the charge of the court) is a valid cause which disables the prosecution from adducing evidence. So we are of the view that such time can also be excluded by the court from the period which we have prescribed in the judgment for completing prosecution evidence".

The another contention raised by the Solicitor General pointed out as causing dealy was, when a public prosecutor demits office due to any eventuality there would arise some interval for his successor to take charge. The Solicitor General pleaded that the said interregum should also be excluded from the aforesaid periods. Therefore the Supreme Court gave 4th direction/ clarification/modification as under:-

"Nonetheless, to avoid any possible dislocation of the trial on account of any such eventuality **we make it clear that if the tenure of office of a particular person as public prosecutor expires he shall continue to hold office and function as public prosecutor until his successor takes charge from him.** If the office of a public-prosecutor falls vacant on account of any other reason, a period of 3 months shall be excluded from the periods fixed under direction No. (i) and (iii) for enabling the State Government to appoint a public prosecutor to that office".

The fifth direction in this respect was the same as fourth.

The next contention of the Additional Solicitor General was that unless directions No. (i) and (iii) are made prospective from the date of judgment in Raj Deo Sharma "First} inserted prosecution in many pending cases were jeopardised. He pointed out that on the date of the said judgment the period concerned stood expired in many cases. The Supreme Court therefore gave the sixth direction/clarification/ modification as under:-

"Possibility of miscarriage of justice resulting therefrom must be averted. We are, therefore, inclined to include a rider that an additional period of one year can be claimed by the prosecution in respect of prosecutions which were pending on the date of judgment in the main appeal, and the court concerned would be free to grant such extension if the court considers it necessary in the interest of administration of criminal justice. As we suspended the operation of the judgment from 14-5-1999 till today the said time of suspension will stand excluded from the aforementioned additional period of one year".

In the last the Supreme Court gave directions to all the High Courts as under:-

"We request every High Court to remind the trial Judges through a circular of the need to comply with Section 309 of the Code in letter and spirit. We also request the High Court concerned to take note of the conduct of any particular trial judge who violate the above legislative mandate and to adopt such administrative action against the delinquent judicial officer as the law permits".

The Judicial Officers should mind the importance of the judgment and directions given by the Supreme Court to all the High Court and see that there is no carelessness on their part. These directions are in addition to and without prejudice to the directions issued by the Supreme Court in Common Cause 1st and 2nd judgments and Rajdeo Sharma's (First) judgment.

NOTE : A detailed article may be published in the ensuing issue of J.O.T.I. This work paper was sent to all the District Judges on 06-10-99 for distribution to all the Judicial Officers working under them.

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न्यायिक अधिकारियों से एक निवेदन

व्यवहार न्यायाधीश वर्ग–2 के पद पर चयन की प्रक्रिया अंतिम छोर पर है और निकट भविष्य में परिणाम भी प्राप्त हो जायेंगे। संभवतः एक दिसम्बर को सभी को इस पत्रिका के साथ–साथ परिणाम भी ज्ञात हो जाएंगे। मेरा निवेदन है कि ऐसे उम्मीदवार जो चयनीत हो जायें तथा जिनका आपसे संपर्क हो उन्हें विशेष रूप से आग्रह करें एवं अपने स्तर पर ही निजी रूप से कहें कि सिविल (रूल्स एंड आर्डर्स) और क्रिमनल (रूल्स एंड आर्डर्स) को विस्तार से पढ़ें तथा व्य.प्र.स. के आदेश–4 से लेकर आदेश–18 एवं आदेश 20 का भी गंभीरतापूर्वक अध्ययन कर लें क्योंकि चयन के पश्चात नियुक्ति एवं तत्पश्चात प्रशिक्षण कार्य एवं संस्थानिक प्रशिक्षण कार्य पूर्ण होने में लगभग छः माह का और समय लग जायेगा अतः नियुक्ति के पूर्व का समय वे निरर्थक रूप से बरबाद न करें, ज्ञानार्जन करें एवं कार्य के प्रति लगन एवं रुचि उत्पन्न हो इसके लिए आपका सक्रिय सहयोग भी प्रशंसनीय होगा। न्यायिक अधिकारियों के पर्याप्त मात्रा में स्थान रिक्त होने से जब कभी चयनीत लोगों को नियमित न्यायालयों में पदस्थापित किया जायेगा तो उनकी पृष्ठभूमि मजबूत होगी तो न्यायिक कार्य आसानी से और सुचारूपन से निष्पादित हो सकेगा।

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कर्त्तव्य उपेक्षा : घातक परिणाम

न्यायाधीश चाहे जिस ओहदे का हो, राज्य व राज्य की शक्ति का वह प्रतिनिधित्व करता है। अन्य सेवाओं या नौकरशाही से उनकी भूमिका भिन्न होती है। न्यायिक सेवा न तो महज कोई रोजगार है और न न्यायाधीश केवल सेवक। वे संप्रभु न्यायिक सत्ता का प्रयोग करते हैं। वे भरोसे योग्य व उत्तरदायी सार्वजनिक पद को सम्हालते हैं। अगर कोई न्यायिक अधिकारी न्याय के मानदंड को नीचे गिराता है तो उसके परिणाम विनाशकारी होंगे।

महाराष्ट्र न्यायिक सेवा के एक न्यायिक अधिकारी की सेवा मुक्ति के प्रकरण में सर्वोच्च न्यायालय के निर्णय का एक उद्धरण जिसके द्वारा उसकी सेवाएं समाप्त कर दी गई।

STAR FIRMAMENT

MOTOR VEHICLES ACT, 1988, SECTION 149 (2) : PERMISSION TO DEFEND AN INSURANCE COMPANY:-

M.A. NO. 1993/99

ORDER PASSED BY THE M.P. HIGH COURT AT JABALPUR, MAIN SEAT BY HON'BLE THE CHIEF JUSTICE SHRI A.K. MATHUR AND HON'BLE SHRI JUSTICE A.K. MISHRA.

We have perused the award dated 16-7-1999 passed by the learned Claims Tribunal. For the death of boy aged about 27 years. multiplier of 18 has been applied and a sum of Rs. 2,21,000/- has been awarded as compensation. Still the Insurance Company has filed the appeal, which is not open to them by Virtue of Section 149 (2) of the M.V. Act. **It should also be made clear to all Claims Tribunal that they shall not grant permission to defend case casually without understanding the implication of it.** The Claims Tribunal should very carefully consider the question of the permission and then permit the Insurance Company to raise all the defence, which are obviously not admissible to them under section 149 (2) of the M.V. Act. The amount of compensation in the present case, is not excessive. Hence, there is no merit in this appeal and the same is dismissed

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CRIMINAL PRACTICE:

CR. P.C., ISSUE OF WARRANT OF ARREST : MINISTERIAL SLACKNESS ON THE PART OF COURT: (A REFLECTION OF JOS IN THE MIRROR)

AN ORDER BY HON'BLE JUSTICE SHRI DIPAK MISRA IN M.Cr. C. NO. 5720/99. RAMESH CHAND GUPTA Vs. STATE OF M.P. PASSED ON. SEP., THE 24TH 1999 AT MAIN SEAT.

The Complete Order is reproduced at verbatim from para 1 to 13)

1. How does one react to a situation which permits years to slip by for carrying out of a ministerial act of issuing warrant of arrest, inspite of series of judicial orders, to be executed by the officers-in-charge of a Police Station and further allows memory to wither so that each one at the centre-stage forgets that an accused has to be brought before the Court within a reasonable time to face his trial and treats passing of a year as if it is a day? And how, pray, does one appreciate the attitude of gross negligence which ostracises the vision of vigil and perpetuate the sin of procrastination for a long eighteen years? To put it plainly, it cannot be tolerated.

2. This application seeking privilege of anticipatory bail under section 438 of the Code of Criminal Procedure (hereinafter referred to as 'the Code') would ordinarily have been disposed of without examination and contemplation: probe and deliberation; and study and scrutiny as the learned counsel for the applicant, after tremendous endeavour to convince the

Court, eventually realising the unsoundness of his contentions sought permission to withdraw the application, and in usual course the prayer for withdrawal would have been allowed in open Court and that would have allowed the matter to rest but, alas, that could not be done as the factual matrix exposited a different picture (a picture quite disturbing revealing dents in the criminal adjudication system which cannot be witnessed with philosophical poise or negligent attitude of playing possum or for that matter with apathetic nictitation.) Let it not be understood that. I am not inclined to grant permission for withdrawing the application. The permission I do grant but. (I cannot be oblivious of the facts which have come to the notice of this Court.) Hence, while granting permission to the learned counsel for the applicant seek his remedy as permitted under law I think it is opposite to deal with the other aspects which deserve delineation.

3. The facts in detail:

The applicant was arrayed as an accused in connection with Crime No. 268/81 of Lordganj Police Station, Jabalpur instituted for offences punishable under sections 394 and 307 of the Indian Penal Code. Being apprehensive of arrest in the aforesaid crime the applicant filed an application for grant of anticipatory bail in the Court of Session forming subject-matter of M. Cr. C. No. 409/81 which, eventually, came to be disposed of by the learned Additional Sessions Judge who allowed the same and granted the privilege of anticipatory bail to the applicant by order dated 11-5-81. The charge-sheet was filed on 30-12-81. On that day the co-accused, Munna pandit, was produced in custody. The applicant and another co-accused who had availed the anticipatory bail were not present. The learned Magistrate issued non-bailable warrant of arrest against them. At this juncture, it is necessary to clarify that as I have granted permission to Mr. S.L. Kochar, learned counsel for the applicant, to withdraw the petition, I am refraining myself from commenting on the propriety, validity and legality of the order passed by the learned Magistrate. The mention of the aforesaid fact has only been made to indicate that the learned Magistrate issued warrants of arrest against the present applicant.

4. To continue the narration, a sad one, the learned Magistrate directed for issuance of warrant on 30-12-81 but the same was not issued on that date. The learned Magistrate kept on directing for issuance of non-bailable warrant of arrest against the applicant and eventually, the warrants were issued on 25-2-84 i.e. almost 26 months after the direction was passed by the learned Magistrate. As the warrants were not executed a direction for issue of fresh warrants was given on 9-5-84 As the order sheet shows, the warrants were actually issued on 26-9-86, virtually after two years from the date of issuance of the direction. On 9.1.87 again a fresh non-bailable warrant of arrest was issued. On 30-1-88 as the order-sheet reflects that the record of the case was not received from the Court of Session and the matter was adjourned. The position remained the same till 2-3-90. On 24-5-90 the record was received and a non-bailable

warrant of arrest was directed to be issued. This direction was repeated on 9-8-90, 1-11-90, 3-1-91., 8-3-91, 25-1-91, 16-8-91, 19-11-91, 22-2-92, 28-5-92, and eventually, the warrant was issued on 21-12-92. On 5-1-93 the warrant against Ramesh Chand was received back unserved. On 6-1-93 the learned Magistrate directed for issuance of non-bailable warrant of arrest against Ramesh Chand. On 8-1-93 the warrant against Ramesh Chand was received back and the learned Magistrate committed the case to the Court of Session observing that it was an old pending case. He did not take any action against Ramesh Chand under section 299 of the Cr.P.C. The learned Sessions Judge by order dated 8-7-93 issued a non-bailable warrant of arrest against Ramesh Chand which was actually issued on 10-9-93. As the warrant could not be executed fresh warrants were issued against him. On 25-6-91 the case was split up and the trial continued thereafter. On 31-7-97 the learned trial Judge declared Ramesh Chand as an absconder and a direction was given for issue of permanent non-bailable warrant of arrest against him. There after, the trial continued against the co-accused, Rajpal Singh, and ultimately judgment was pronounced on 27-4-98.

5. This being the chronology of events one feels constrained to make observations. In a way it had become necessary. As has been indicated above the learned Magistrate directed issuance of warrant of arrest on 30-12-81 on the first occasion but the warrants were actaully issued on 25-2-84. Twenty Six months delay for carrying out an order of issuance of warrant is enormous and, in fact, shocking. It is understandable that it may not be possible on the part of a learned Magistrate to verify on the next date whether the warrants as an actual fact have been issued or not, but it is inconceivable that a learned Magistrate would go on passing orders in a mechanical and a routine manner directing issuance of non-bailable warrant of arrest without taking pains to find out why the same has not been issued. No amount of explanation would justify the delay. Orders are passed so that they are executed. An order passed by the competent Court of law has to be respected by the Court itself as well as by the others who are bound by such order. It is unfortunate that the learned Magistrate did not take pains to verify whether the non-bailable warrant of arrest issued against the accused persons were, in fact, issued or not, Similar situation occurred between 5-8-85 to 26-9-86 and 29-7-87 to 22-12-92. The delay caused on this count is unpardonable. After exhibiting such leisureliness and sluggishness from December, 1981 to January 1993 the learned Magistrate thought it appropriate to commit the matter to the Court of Session after 11 years. A 'Yuga', was spent in an exercise of futility.

6. At this juncture, it is appropriate on my part to state that initially I was thinking for directing an enquiry for the delay in execution of the warrant of arrest and to do so I had sought the suggestions of the learned Advocate General. The S.P. Jabalpur was also directed to remain present. The learned Advocate General appearing for the State suggested inquiry may

be directed to be conducted by the I.G. Police as for as the laches on the part of police is concerned. However, after going through the entire record with the assistance of the learned counsel for the parties, I thought not to dig into the past as it is unredeemable but to pave the path for future, as far as practicable, so that the justice does not become an accidentality in the hands of joss-uncertain, prolonged and unpredictable.

7. Three aspects emerge from uncurtaining of the present case, namely the duty of the Magistrate when he passes a direction for issue of non-bailable warrant of arrest; the duty of Police while failing to execute such a warrant of arrest; and action to be taken by the Magistrate or the learned trial Judge at that stage to arrive at the conclusion that it is difficult to procure the attendance of such an accused as he has absconded. Each compartment is as important as the other.

8. As far as the first part is concerned when a Magistrate or any competent Court issues a non-bailable warrant of arrest it is obligatory on his part to supervise that the warrant, so directed to be issued, has actually been issued. If it is not issued by the adjourned date he should call for an explanation from the concerned clerk as to why the direction has not been complied with. Considering the facts and circumstances of the case he may extend the time for issuance of non-bailable warrant of arrest but it should not become a routine matter to issue such direction without caring to scrutinise whether it has been as an actual fact issued or not. The supervision at this juncture has to be scrupulously done. If the learned Magistrate is not satisfied with the explanation offered by the concerned clerk he may take appropriate action as he may deem it fit. The investigating agency or the concerned Police Officer after receiving the non-bailable warrant of arrest should take expeditious steps to execute the warrant. If, for some reason or the other, the warrant is not executed within stipulated time proper information should be given to the competent Court and, thereafter, the Court may issue a fresh non-bailable warrant of arrest. If, in spite of best efforts, the serving officer is not able to execute the warrant of arrest he must through the Public Prosecutor file an application for taking action under section 82 and 83 of the Code against the absconding accused. On such a petition being filed the Court shall deal with the same in accordance with the law. In this context, I may profitably refer to the regulations 789 and 790 of M.P. Police Regulations which read as under:-

> **"789. Absconded Offenders.-** In all important cases in which the accused persons has absconded and cannot be found, an application should be made to the magistrate having jurisdiction for warrant of arrest. On the return of the warrant unexecuted, application can be made to the Court for the issue a proclamation under section 87, (Now Section 82,) Criminal Procedure Code with a view to the adoption of the procedure in regard to proclaimed offenders laid down in Section 88, (Now Sections 83 to 85) of the said Code. The application

should be supported by evidence of the accused's having absconded or being in concealment. A photograph and descriptive roll of a proclaimed offender should be published in the Criminal Intelligence Gazette.

790. Action under Section 512, Cr.P.C.- In all serious cases, as murder, dacoity, highway robbery, or heave burglary in which the accused is known and has absconded and there is no immediate prospect of his arrest, the investigating officer should apply to a Magistrate, competent to try or commit for trial such accused to record in his absence the evidence of important witnesses, in the case (Section 512, (Now section 299) Criminal Procedure Code). Before this can be done, formal evidence will have to be tendered that the accused has absconded or is evading arrest, and that there is no immediate prospect of his capture, and the best proof of this is the proclamation under Section 87, (Now Section 82) Criminal Procedure Code, referred to in the proceding regulation. These depositions will be admissible as evidence on the arrest of the accused, if the deponent. is dead or incapable of giving evidence or cannot be found without delay, expense or inconvenience."

I may state here that while proceeding under the provisions of sections, 82 and 83 of the Code the Magistrate may take steps under section 299 of the Code as both the proceedings can be taken simultaneously.

9. If no steps are taken by the Police to apprehend the accused within a reasonable time the Court shall call for the Investigation Officer or the Officer-in-charge and after proceeding in accordance with law take steps against the absconding accused. The Court shall also take steps under section 299 of the Cr.P.C. within a reasonable time and try the matter or commit the same to the appropriate Court, as the case warrants.

10. I have observed that the three stages are to be completed within a reasonable period. Reasonable period would depend upon the facts of each case, but efforts should be made by the learned Magistrate as well as by the Investigating Agency that prompt steps are taken for expeditions trial. In any case it should not consume such time that will shock the conscience. It is not to be forgotten that sometimes some accused persons remain in custody and years roll by because of the absence of the co-accused. This is not a healthy situation.

Another aspect here deserves mention. It is noticed that in the instant case the Magistrate issued summons to the serving officer but he remained absent for which a bailable warrant of arrest was issued. The Courts command has to be respected. The majesty of law has to be given tcp priority. The mandate of the Court has to be obeyed. If the investigating officer or the officer-in charge is unable to remain present for some reason or the other he must intimate the Public Prosecutor or the Assistant. Public Prosecutor to bring in to the notice of the Court. If they work in harmony the interest of public at large is protected, there is collective

good and esteem and the glory of the institution is kept high. In this context, it becomes requisite to direct that the Super-intendent of Police shall do a periodical survey to find out how many non-bailable warrants of arrest are pending for execution at various Police Stations within his area and the reasons for their non-execution. He also must see whether proper steps are taken to declare the accused as absconder when a warrant of arrest has not been executed for long.

11. I would be failing in my duty if I do not sound a word of caution to the trial Magistrates and trial Judges who are the incharge of the trial. As has been indicated above the learned Magistrate has three duties to perform: (i) to see that warrants are issued as an actual fact in quite promptitude; (ii) if the warrants are not executed proper steps to be taken to declare that accused a proclaimed offender and (iii) to proceed to pass appropriate orders under section 299 of the Code as required under the law. It should be the bounden duty of the learned District Judge of the concerned District to look into these aspects and take corrective measures.

12. I may hasten to add that no human institution is perfect. Errors do occur, but to allow errors to recur is not a part of heroism. One is required to caution oneself and make endeavours to rectify the errors. Attempt to rectify oneself is a step towards judicial discipline and divine glory. My humble attempt here is not to blame anyone but to analyse facts of the present case which is really an eye opener. I am conscious, the mistake has occurred at every level. It is better to own and accept the mistakes. It should be borne in mind that mistake can be corrected if genuine attempts are made. To avoid such repetition I think it apposite that the present order should be circulated to all the District Judges of the State so that they bring it to the notice of the concerned Magistrates as early as possible and it is accordingly ordered. The purpose behind this is that they do not commit the said folly and the matter do not get unnecessarily prolonged. Everyone should remember that procrastionation is anathema to justice, collective good and constitutional conscience. **Let the doctrine of slackness be buried and doctrine of alertness prevail.** A copy of this order be sent to the Director General of Police of the State, who shall, in turn, circulate the same amongst all the Superintendents of Police of the State who, in their turn, bring it to the notice of the Station House Officers/ Town Inspectors as the case may be. It is directed that Director General of Police shall complete the aforesaid exercise within a period of two months form the date of receipt of the order and shall file an affidavit through a competent Officer that the order has been duly complied with.

13. I have already indicated at the begining that the learned counsel for the applicant made a prayer for withdrawal of the case. The prefatory note indicated that the matter required deliberation. The aspects which I have dealt with are not really concerned with the prayer for grant of anticipatory bail made by the applicant. Accordingly, the application is permitted to be withdrawn. For the sake of clarity I may repeat at the cost of repetition I have not expressed any opinion with regard to the merits of the case and

it is open to the applicant, if he seeks, to challenge the order passed by the learned Magistrate in a competent proceeding in accordance with law.

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P.F.A. ACT, SECTION 16 AND Rr. 7, 8 AND 14: SAMPLE IN POLYTHENE CONTAINER BY ITSELF DOES NOT VIOLATE Rr. 14 AND 7
CR. A. NO. 929/OF 1988
STATE OF MADHYA PRADESH Vs. GANESH PRASAD AND OTHER

A Judgment by Hon'ble Shri Justice S.S. Saraf of M.P. High Court at Jabalpur Main Seat.

Appeal against judgment and order passed by the Judicial Magistrate, Ist Class, Janjgir in Cr. C. No. 321 of 1982.

The accused respondent No. 1 was carrying on a sweet-meats shop wherein he was preparing and selling 'Jalebi', 'Bhajia' etc. The Food Inspector purchased 600 gms of 'Maida' and as per rules packed in three dry and clean polythene bags. The bags were securely fastened, labelled and sealed as per rules. The report of public analyst revealed that the sample of 'Maida' was adulterated. The accused No. 1 alleged that it was purchased from the accused No. 2. the trial Court acquitted the accused persons holding that the prosecution failed to establish that the said 'Maida' was purchased by accused/respondent No. 1 from the accused/respondent No. 2 and therefore the accused/respondent No. 2 was not responsible for the alleged adulteration. The Learned Trial Magistrate further held that the prosecution failed to fulfil the requirement of Section 7 (3) of the Act which provides that the report of public analyst should be sent to the Local Health Authority within 45 days from the date of receipt of the sample.

Aggrieved by the impugned judgment and order. the appellant/State has filed the present appeal. The learned Panel Lawyer appearing for the appellant/State challenged the finding of the learned Trial Magistrate that the non receipt of the report of the Public Analyst, Bhopal by the Local Health Authority, Bilaspur within the stipulated period of 45 days is fatal to the prosecution, and urged that the same is unsustainable in law. The learned counsel for the accused/respondent No. 1 fairly conceded that the finding as above of the learned Trial Magistrate is indeed unsustainable. He, however, urged that the accused/respondents were not liable to be prosecuted and convicted as the provisions of Rule 14 of the Rules have been violated. None appeared for the accused/respondent No. 2

The findings, judgment and order of acquittal against the accused No. 2 was maintained by the High Court as there was no iota of evidence on record that the impugned "Maida" was sold by accused No. 2 to accused No.1

P.F.A. ACT, R. 7 (3):- RULE 7 (3) OF THE ACT IS NOT MANDATORY.

Paragraphs 6 to 19 of the judgment are reproduced:-

6. The second finding of the learned Trial Magistrate that the accused/respondents are not liable to be prosecuted and convicted for non-compliance of the provisions of Section 7 (3) of the Act, is indded unsustainable in law. The counsel for the accused/respondent no. 1 has rightly conceded that this finding and consequent acquittal of the accused/respondents on that basis of such finding was not proper.

7. The learned Magistrate has observed that by not sending the report of the Public Analyst within the stipulated period of 45 days, the prosecution has violated the provisions of Section 7 (3) of the Act. It appears that the learned Magistrate by mistake quoted section 7 (3) of the Act. Indeed it should have been Rule 7 (3) of the Rules. The Supreme Court in ***P.V.Usman Vs. Food Inspector Pelicheri Municipality*** **1994 S.C.C. (Criminal) 187** has held that the provisions prescribing period of 45 days under Rule 7 (3) are not mandatory and fatal unless accused established that prejudice was caused to him on account of such delay. The provisions are directory and hence non-compliance thereof shall not vitiate the prosecution unless it takes away the right of the accused under Section 13 (2) of the Act. In view of the above pronouncement of the Apex Court, the finding of learned Magistrate that the trial has been vitiated for non-compliance of the Provisions of Rule 7 (3) of the Rules cannot be sustained.

8. The learned Counsel for the accused/respondent No. 1, placing reliance on ***State of punjab Vs. Raman kumar (1988 (1) prevention of Food Adulteration Cases page 9)*** has vehemently contended that the sample of 'Maida' was sent for analysis to the public Analyst, Bhopal in a polythene bag while it was mandatory as per provisions of rule 14 of the Rules that it should have been sent either in bottle or in jar or in any other suitable container. He has further contended that the polythene bag is not a suitable container and therefore the accused/ respondent No. 1 was not liable to be convicted as the mandatory requirement was not complied with.

9. To properly appreciate the contention as above of the learned counsel for the respondent no. 1, it will be useful to quote Rule 14 of the Rules alleged to have been violated, reads:-

"Rule 14- Manner of sending samples for analysis

> Samples of food for the purpose of analysis shall be taken in clean dry bottles or jars or in other suitable containers which shall be closed sufficiently tight to prevent leakage, evaporation, or in the case of dry substance, entrance of moisture and shall be carefully sealed."

10. In the instant case, the sample was not taken in bottle or in a jar but, as noticed earlier, was taken in polythene bag. The question that, therefore, arises for consideration is as to whether the polythene bag could be treated as suitable container, within Rule 14 of the Rules. It is clear that polythene bags are of varied qualities and it could not be as a general rule laid down that the polythene bags would not constitute or cannot be treated as suitable container.

11. It may be noticed that the Andhra Pradesh High Court while dealing with the similar question in ***Food Inspector, Bhimavaram Municipality vs. K. Venkateswarulu*** (1994) Criminal Law Journal 414 has observed that the only requirement of Rule 14 is that the sample shall be sent in clean dry bottles or in clean dry jars or other suitable clean dry containers and therefore, apart from bottles and jars other suitable containers are also within the comprehension of Rule 14. It has further ruled that there is nothing in Rule 14 which precludes a plastic container to be considered as a suitable container. The relevant passage of the said judgment reads :-

> "Counsel submitted that it is easy to tamper with a polythene bag. This may perhaps be true. But, it shall rather be part of the defence of the accused during the course of trial to plead that either the container was not suitable, or that it was not closed sufficiently tight, or it had not been carefully sealed so as to prevent tampering with the sample. We have carefully perused the judgment. We have also examined the evidence which was led before the trial Court. No Such defence was raised during the course of trial. The mere possibility of tampering with containers. is not confined only to plastic containers. It may equally apply to bottles and jars. If the prosecution should fail in all cases where there is a distant possibility of tampering with the container, it may not be possible to sustain any proceeding under the prevention of Food Adulteration Act. We are, therefore, not persuaded to accede to this submission urged by the respondent."

12. I find myself in respectful agreement with the above proposition. It is not unknown that the polythene bags are water-proof and if properly closed, could prevent leakage, evaporation and entrance of moisture. It is also manifest that even liquid and semi-liquid substances can be properly packed in polythene bags as they continue to remain air-tight so long as they remain closed. Therefore, in my considered view, it cannot be laid as a universal rule that polythene bags would not constitute proper containers as is provided under Rule 14 of the Rules. It is a question of fact to be decided in each case whether polythene bag was closed sufficiently tight to prevent leakage, evaporation and entrance of moisture. It is, therefore, clear that besides the bottles and jars, polythene bags can also be suitable containers and could, thus, fulfil the requirement of Rule 14 of the Rules unless they are shown to be unsuitable. on careful consideration of spirit and language of Rule 14 of the Rules would disclose the intent of the legislature to secure the sample taken in a manner that ensures the preservation of the samples in the same condition in which it was taken. Thus, the language of Rule 14 clearly indicates that the necessary requirements to consider a container as suitable container are as under:-

(i) The container should be clean and dry;

(ii) it should be suitable as a container;

(iii) it should be closed sufficiently tight to prevent leakage or evaporation;

(iv) in case of dry substance, it should also be closed sufficiently tight to prevent entrance of moisture; and

(v) it should be carefully sealed.

Suitable polythene bag clearly can fulfil the criteria as above. Consequently, there appears to be no cogent or plausible reason as to why the polythene bag should not be treated as suitable container as is provided under Rule 14 of the Rules as also the view taken by the Andhra Pradesh High Court in the case of ***Food Inspector, Bhimavaram Municipality Vs. K. Venkateswarulu*** (Supra). Thus merely because the sample was taken in polythene container by itself does not violate Rule 14 of the Rules and therefore the trial is not vitiated. It cannot, therefore, be laid down as an invariable rule that the prosecution shall always be vitiated if the sample is taken in polythene bag.

13. The learned counsel for the respondent no. 1 has placed reliance, as pointed earlier, on the observation made by the Punjab and Haryana High Court in the case of ***State of Punjab vs. Raman Kumar*** (Supra) wherein a view was taken that a polythene container or a wrapper of strong thick paper cannot conform to the definition of container as given in Rule 14 of the Rules. It has, further, been observed in the above context that polythene bags have got a chance of being pierced, they are more susceptible of moisture, rodents, pests and even can burst when a little pressure is applied to them and that they cannot be closed tightly to prevent leakage etc. However, the criticism as above can also be levelled against bottles or jars referred in Rule 14 of the Rules. It is pertinent to note in the above context that Rule 14 of the Rules does not specify the material of the bottles or jars in which the sample could be taken. Therefore, a bottle or jar made substantially of same material as that of the polythene bag could be used as the bottles or jars in which the sample could be legally taken under Rule 14. It does not, therefore, stand to reason that the polythene bag as a general rule cannot constitute a suitable container.

14. For the aforementioned reasons, with due respect, I am unable to subscribe to the above reasoning of the punjab and Haryana High Court. I am, as pointed out earlier, in respectful agreement with the view taken by the Andhra Pradesh High Court in the case of ***Food Inspector, Bhimavaram Municipality Vs. K. Venkateswarulu*** (Supra) and accordingly held that it cannot be laid down as a general rule that polythene bag cannot constitute a suitable container.

15. In the instant case, it is evident from the statement of Food Inspector, A. Pasha (PW-1) that the sample was taken in polythene bag and legal formalities of securing the sample by securely tying the polythene bag and sealing the same were duly undertaken. There is no challenge to the

above statement. Thus, it appears that the sample was taken in a suitable container, hence the contention of the learned counsel for the respondent No. 1 raised for the first time that since the sample was taken in polythene bag which was not a suitable container conforming to the requirement of Rule 14 of the Rules, cannot be accepted.

16. It has next to be considered as to whether the appellant had kept the seized Maida for sale etc. as is the requirement of Section 7 or Section 10 of the Act. In the above context, it is evident from the statement of Food Inspector, A. Pasha (PW-1) that the respondent No. 1 is a small shop-keeper who prepares sweet-meats including 'Jalebi'. It is also evident from the statement of A. Pasha (PW-1) that the 'Maida', the sample of which was taken by him was kept in a closed bag which was admittedly opened by him and sample therefrom was taken. The respondent No. 1 has stated that he purchased the 'Maida' and brought it to the shop for preparation of Jalebi. It would, thus, emerge from the above material on record that though the appellant was in possession of the 'Maida' of which sample was taken but the 'Maida' was not kept by the respondent No. 1 for sale. In fact, it appears to have been kept for preparing Jalebi, therefore the possession and custody of the 'Maida' by the respondent No. 1 by itself would not constitute breach of section 7 of the Act. In the case of ***Municipal Corporation of Delhi vs. Laxman Narain Tandon & others*** **AIR 1976 S.C. 621.** the Apex Court has ruled that the storing expression etc. must be for 'sale in order to make it an offence. Storage simpliciter would not an offence. If an article of food is not intended for sale and is in the possession of a person who does not fulfil the character of a seller, conveyer, deliverer, consignee, manufacturer or storer for sale such as is referred to in sub-Section 1 (a) and (2) of Section 10 of the Act, the Food Inspector will not be competent, under the law, to take a sample and on such sample being found adulterated to validly launch the prosecution thereon.

17. Similarly, in ***State of Maharashtra vs. Munshi kumar Arora*** **(1979) (1) F.A.C. 288,** the Bombay High Court has also ruled that storing an adulterated article of food for purposes other than for sale would not constitute an offence under Section 16 (1) (a) of the Act.

18. Thus the ratio of above cases is that the article of food of which sample is taken should have been kept for sale by the accused. This does not appear to be seen in this case as noticed above. Therefore, the respondent No.1 cannot be held guilty of offence under Section 7 read with section 16 of the Act.

19. In view of above, I do not consider proper it to interfere in the finding of acquittal recorded by the learned Trial Court, though for different reasons which were given by the learned Trial Court. The appeal is, therefore, dismissed.

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I.P.C. SECTION 325 : "AND SHALL ALSO LIABLE TO FINE" MEANING OF : (OBITER) (1999) 7 SCC 409 ZUNJARRAO VS. UNION OF INDIA

Paragraphs 37 and 38 of the judgment are reproduced :-

Penalty to be imposed has to be commensurate with the gravity of the offence and the extent of the evasion. In the present case, penalty could have been justified. The appellant was, however of the view that imposition of penalty was not mandatory. He could have formed such a view. Under Section 325 of the Indian Penal Code, a person found guilty "Shall be punished with imprisonment of either description for a term which may extend to seven years, and shall alsobe liable to fine." Section 63 IPC provided that where no sum is expressed to which a fine may extend, the amount of fine to which the offender is liable is unlimited, but shall not be excessive. A Single Judge of the Patan High Court in ***Tetar Gope v. Ganauri Gope AIR 1968 Pat 287*** took the view that the expression "shall also be liable to fine" in Section 325 IPC does not mean that a sentence of fine must be imposed in every case of conviction in that section. He said :

> "Such an expression has been used in the Penal Code only in connection with those offences where the legislature has provided that a sentence of imprisonment is compulsory. In regard to such offences, the legislature has left a discretion in the Court to impose also a sentence of fine in appropriate cases in addition to the imposition of a sentence of imprisonment which alone is obligatory."

38. We do not think that the view expressed by the Patna High Court is correct as it would appear from the language of the Section that sentences of both inprosonment and fine are imperative. It is the extent of fine which has been left to the discretion of the Court. In ***Rajasthan Pharmaceutical Laboratory v. State of Karnataka (1981) 1 SCC 645*** this Court has taken the view that improsonment and fine both are imperative when the expression "shall also be liable to fine" was used under Section 34 of the Drugs and Cosmetics Act, 1940. In that case, this Court was considering Section 27 of the Drugs and Cosmetics Act, 1940, which enumerates the penalties for illegal manufacture, sale, etc., of drugs and is as under :

> "27. Whoever himself or by any other person on his behalf manufactures for sale, sells, stocks or exhibits for sale or distributes -
>
> (a) any drug
>
> (i) ★ ★ ★
>
> (ii) without a valid licence as required under clause (c) of Section 18,
>
> shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to ten years and shall also be liable to fine:
>
> Provided that the court may, for any special reasons to be recorded in writing, impose a sentence of imprisonment of less than one year;
>
> ★ ★ ★ "

NOTE : Please refer to 'JOTI JOURNAL' Vol. II part V, October 1996 at pages 10 to 17 Article on "And shall also be liable to fine."

TIT-BITS

1. **EVIDENCE ACT, SECTION 32 AND I.P.C., SECTIONS 107, 306 AND 498 A: APPRECIATION OF EVIDENCE**
1999 (1) VIDHI BHASVAR 257
RADHESHYAM Vs. STATE OF M.P.

Dying declaration not showing any cruel treatment by accused cannot be relied on. Cruel treatment not proved to have been spoken by the victim also not sufficient for conviction. If there is no positive evidence of abetment or instigation conviction cannot be recorded on suspicion only.

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2. **I.P.C., SECTIONS 375 FOURTHLY AND 376 AND CHEATING, SECTION 417 IPC : BAD FAITH AND CHEATING :-**
1999 (1) VIBHA 262
BITNARAM Vs. STATE OF M.P.

Merely making of false representation not sufficient. Knowledge of accused to such false representation is also has to be proved. Prosecutrix an adult lady, frequent intercourse for years does not amount to cheating. ***Hari vs. State, 1990 CrLJ 650 and Jayanti vs. State, 1984 CrLJ 1535*** relied on.

The accused promised the victim complainant Chandro Bai to marry and from which later he resiled not keeping the promise and going back on it may be an act of bad faith but would not amount to offence of cheating. Please refer to paragraph 9 of the judgment.

Prosecutrix having love affair with the accused for last many years become pregnant clause IV of Section 375 is not attracted. No offence under Section 376 is made out. Clause IV of Section 375 runs as under:

> "With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married."

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3. **I.P.C. SECTION 363:-**
1999 (1) VIBHA 270
VIJAY KUMAR Vs. STATE

Accused taking away minor girl without consent of her guardian. Even if she was a consenting party offence is made out. ***S. Varadarajan vs. State of Madras, AIR 1965 SC 942*** distinguished.

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4. **Cr. P.C., SECTION 195 (1) (b) (ii) :-**
1999 (1) VIBHA 291
RANJEET SINGH Vs. STATE OF M.P.

The alleged forged document was filed in revenue Court. Court in which the document was filed did not file any complaint. The dispute was pending in civil court in respect of the same document, though Court did not held the document to be forged. Unless the appellate Courts finds the document to be

forged and decides to take cognizance, the bar under this section applies. AIR 1979 SC 437, AIR 1983 SC 1053 and (1988) 2 SCC 498 discussed.

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5. CR.P.C. SECTION 125 (1) and (3) AND MUSLIM WOMEN (PROTECTION OF RIGHTS ON DIVORCE) ACT, SECTION 3:-
1999 (2) M.P.L.J. 64
JULEKHA BI Vs. MOHAMMAD FAZAL

Order for maintenance in favour of Muslim wife was passed. Subsequently the wife was divorced by the husband. The divorced wife is not entitled to get maintenance from her husband after the period of iddat.

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6. CR. P.C., SECTION 154 : F.I.R. WHEN CONSTITUTED
1999 (2) M.P.L.J. 103
RADHESHYAM Vs. STATE OF M.P.

First Information, of the incident given first in time is sufficient to call it the first information report. For a report to be first information, it is not necessary that every details of the incident should be mentioned in it for the true import of the F.I.R. is that it is that information which moves the police to investigate the matter.

Part of the paragraph 8 and paragraph 18 of the judgment are reproduced:-

Suresh started for police station for lodging information. But since there was hardly any apprehension of death of Bonder, it could happen that the source of information of Suresh might not have been considered so material by the police officer, while recording the Sanha report. The Sanha reports are not detailed reports. They are only substancees of the events. The Supreme Court has recognised that it is neither customary nor necessary to mention every minute details in the F.I.R. the judgment cited as ***State of U.P. vs. Ballabh Das, AIR 1985 SC 1384*** may be referred in this respect. In this case, the F.I.R. did not mention that there was assault with Lathi, although the evidence led and the medical evidence showed that assault had been made with lathi. Their Lordships said that mere fact that the assault by lathi was not mentioned in the F.I.R. would not be sufficient to discard this important fact. One pronouncement of kerala High Court also appears pertinent on this question. This is ***Asan Tharayil Baby vs. State of Kerala, 1981 Cri.L.J. 1165 (1168).*** In this case, dying declaration was made to the brother of the deceased. That brother did not mention about the declaration in his statement to the police. But at the inquest, he had said that his brother told him that he was stabbed by the accused. The court said that a non-mention of the declaration in his statement to police can only be taken as omission. It was found that the evidence with regard to dying declaration did not suffer from an infirmity.

Considering all the aspects revealed in the evidence, it becomes clear that the evidence of witnesses Imrat, Phulia Bai, Resham Bai and Suresh is fully believable as truthful that the deceased told them that he was attacked and hit by these two accused-appellants. This statement of the deceased

does not have intrinsic or circumstantial, informity in it, nor there is any cause to doubt it. On the other hand, these accused had motive to attack him due to inimical feeling resulting from litigation. The dying declaration was instantaneous and the natural conduct of the deceased. It is sufficiently clear and truthful to base the conviction of the accused persons. So I find no legal infirmity in the trial Court judgment of conviction, being based on this dying declaration.

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7. I.P.C. SECTIONS 494, 495 AND SECTION 198 (1) PROVISO (C) CR. P.C. AS AMENDED BY S. 198 OF THE ACT:-
1999 (2) M.P.L.J. 88
DINESH KUMAR Vs. RASIK BIHARI

Proviso (c) to sub-section (1) of section 198 of the Code of Criminal Procedure as amended by Act No. 45 of 1978 provides that where the person aggrieved by the offence punishable under section 494 or section 495, Indian Penal Code is the wife, complaint may be made on her behalf of her father, mother, brother, sister, son or daughter or by her father's or mother's brother or sister or with the leave of the court by any person related to her by blood, marriage or adoption. By the Amending Act, the father is empowered to file complaint on behalf of his married daughter. The words used are "complaint may be filed on her behalf by her father". Therefore, any complaint made by the father shall be deemed to be proper unless it is established by the defence that the complaint was without consent of the aggrieved party i.e. the wife. The consent is to be inferred from the facts of each case; consent may be express or implied. Where the aggrieved party i.e. the wife had entered into witness box in support of the complaint filed by her father and her evidence was recorded under section 202 it disclosed the implied consent on her part.

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8. MOTOR VEHICLES ACT, SECTION 168 : VALID DRIVING LICENCE
1999 (2) M.P.L.J. 75
CHHOTE KHAN Vs. RAJESHKUMAR

Deceased who was driving a vehicle was not holding a valid driving licence at the time of driving the vehicle in question. Neither the employer nor the insurance company can be compelled to pay compensation to legal heirs of deceased in such a case.

Paragraph 2 of the judgment is reproduced:

When a deceased had himself endangered his safety and life by inviting unnecessary calamity, by unnecessary adventure, by engaging in driving of that vehicle, when he was not having valid licence, neither the employer nor the insurance company can be asked to pay compensation to the heirs-claimants of such deceased. It is expected that every citizen should behave in such way which would not endanger his safety or life. Public authorities or persons who have committed no wrong, cannot be compelled to pay compensation to legal heirs-claimants of such reckless and adventurous person.

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9. T.P. ACT, SECTIONS 105 AND 107, EASEMENTS ACT, SECTION 52 AND CONSTRUCTION OF DEEDS AND DOCUMENTS: EASEMENT OR LICENCE: CONSTRUCTION OF DOCUMENTS:-
(1999) 4 SCC 545
DELTA INTERNATIONAL LTD. Vs. SHYAM SUNDAR GANERIWALLA AND ANOTHER

The intention of the parties is the meaning of the words they used. Where terms of the agreement are vague or having double meaning one which is lawful should be preferred. Capability and background of the parties to understand the terms is to be considered when the parties were capable of understanding their rights fully, expressly agreed that the document should be construed one way, no inference should be drawn so as to construe it in a different way. If some camouflage is alleged or is apparent the intention has to be gathered from the terms of the agreement between the parties and if the terms are not clear also from the surrounding circumstances and conduct of the parties.

The word 'Demised Premises' should be construed in the context of all the terms of the document. Where tenant himself having no right, title or interest to create sub tenancy, hands over possession of the property to a third person, such person cannot claim to be a sub-tenant. Where terms of agreement between the tenant and a third party showing that the property was given by the former to the latter expressly on 'leave and licence' basis, that in case consent was obtained by the tenant from landlord, sub-lease would be executed and that in case sub- lease granted, the licensee would be required to purchase equipment, fittings, fixtures etc. at a stipulated price within one year. Having regard to the terms of the agreements as a whole and circumstances, held, the agreement was of leave and licence and not of lease.

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10. SERVICE LAW: COMPULSORY RETIREMENT : FACTORS TO BE CONSIDERED BY THE HIGH COURT:-
(1999) 4 SCC 579
HIGH COURT OF PUNJAB & HARYANA Vs. ISHWAR CHAND JAIN

The precis of ACRs which was prepared by Registry of High Court for placing before Full Court is not accurate. Respondent was shown as "C-Below Average" for the year 1984-85. However, the fact is that inspecting Judge graded respondent as "B-Good" but Full Court downgraded it to "C-Below average" and the Supreme Court while earlier considering respondent's termination which took place in 1986, held that modified grading was not sustainable in law because modification was done without any supporting material. Effect of the Supreme Court judgment was that "B-Good" grading stood restored. Many of the Judges of the Full Court, while considering respondent's compulsory retirement, would certainly have been misled about grading for the year 1984-85. Another fact to be noted is that the Full Court recorded ACR for the year 1991-92 in its meeting held on 22.9.1995. Respondent was graded as "C-Integrity doubtful". While making this assessment, the Full Court relied

on Inspecting Judge's report on 25-2-1992 wherein the Inspecting Judge assessed respondent as of "Integrity doubtful" and also gave a separate note regarding several complaints against him. There is no material forthcoming as to why inspection report of February 1992 came to be considered by the Full Court in September 1995 and why there could be no inspection from that year till holding of the Full Court meeting. Inspection note gives an impression as if inspection was done before preparing the report but inspection was conducted only in March 1992. The Inspecting Judge in his note dated 25-2-1992, did not give particulars of the complaints whether they were in writing or oral, and whether the complaints related to respondent's judicial work. When there were many complaints from the Members of the Bar, at least some of the cases in which respondent was found to have acted improperly could have been mentioned in the report. The inspection note is certainly flawed and could not have been formed the basis for the Full Court to categorise respondent as "C" grade officer with doubtful integrity, It has also come to notice that the Inspecting Judge took charge of the district in which respondent was posted on 21.11.1991 and within three months, i.e. 25.2.1992, he gave his inspection report. This is certainly not satisfactory. ACR for the year 1991-92 is, therefore, to be kept aside. If precis not satisfactory. ACR for the year 1991-92 is, therefore, to be kept aside. If precis of the ACRs is considered in the light of this finding, there are only four ACRs, i.e., ACRs for the years 1983-84 (B-Average/Satisfactory), 1984-85 (B-Good), 1988-89 (B-Satisfactory) and 1989-90 B (Good), On the basis of these ACRs, it is difficult to hold that the recommendations of the High Court (on administrative side) could be justified under clause (C) of third principle laid down in **Baikuntha Nath Das case (1992) 2 SCC 299.**

Respondent was retired while under suspension. The High Court on its administrative side decided to keep disciplinary proceedings against respondent pending for the purpose of imposing a cut on his retrial benefits, An obvious conclusion is that action of the High Court was based on the allegation of misconduct, which was the subject-matter of enquiry and which appears to be the basis for recording adverse remarks by the High Court in ACR for the year 1991-92, There is therefore substance in respondent's argument that the High Court found a short cut to remove him from service when the order of retirement was based on the charges of misconduct, the subject-matter of enquiry. The impugned order of compulsory retirement, though innocuously worded, is in fact an order of respondent's removal from service and cannot be sustained.

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11. Cr.P.C. SECTION 161, 162, 91, 172 AND 207 : USE OF SECTION 91 Cr.P.C. WITH SECTIONS 161 AND 162 Cr. P.C.:-
(1099) 4 SCC 621
STATE OF KERALA Vs. BABU AND OTHERS

The words used in sub-section (2) of Section 172, more particularly "police diaries of a case under enquiry or trial in such court", indicate it is only that police diary in which the investigating officer concerned had made entries of

his investigation and which pertains to the case being tried by the court alone can be sent for. Sub-section (3) of Section 172 further imposes restrictions in the manner in which such diaries can be used by the court. It also specifically bars the right of an accused or his agent to call for such diaries. Thus, on a plain language of this section, it is clear that this section cannot be used for the purpose of summoning a case diary which does not pertain to the investigation of the case which is being tried by the court. Section 172 is specifically meant for the contingencies when the court finds it necessary to look into the case diary for the purpose of finding an aid in the trial or for the purpose of assisting the police officer to refresh his memory. Therefore, Section 172 does not contemplate summoning of the case diary for the purpose of assisting the accused to have a look at the previous statements of the witness for using it for his benefit, as contemplated in Section 162 of the Code.

There can be no quarrel with regard to the fact that there is no prohibition in the Criminal Procedure Code against any court from looking into diary of a countercase or from using the diary of a counter-case in the trial of another case. But this does not mean that the right of the court to summon the case diary of another case is derived from Section 172 of the Code or by the application of the principles of Section 172 because ex facie Section 172 of the Code does not help the accused in making use of a case diary. Section 172 relates to summoning of the case diary of a case which is under enquiry or trial only.

The very object of enactment of Section 161 of the Code and Section 145 of the Evidence Act is to create a right in the accused to make use of the previous statements of the witnesses for the purpose of contradiction and for impeaching the merit of the witness. This right has not been taken away by Section 172 of the Code and there is no prohibition in regard to this right of the accused either under the Code or under the Evidence Act. But the question for consideration is, how does the accused exercise this right with reference to a previous statement of a witness made in another case which is recorded by the investigating officer in that case under the provisions of Section 161 of the Code? This right certainly does not flow under Section 172 of the Code nor is the accused entitled to these previous statements under Section 207 of the Code, But this does not mean that the accused is denied of his limited benefit of using the said previous statements recorded during the course of another investigation. The answer to this question lies in Section 91 (1) of the Code.

The language of Section 91 is much wider than the language of Section 172 and by no stretch of imagination it could be contended that the case diary maintained under Section 172 of the Code is not a document as contemplated under Section 91 (1) of the Code. If that be so and if the court comes to the conclusion that the production of such a document is necessary or desirable then the court is entitled to summon the case diary of another case under Section 91 of the Code dehors the provisions of Section 172 of the Code for the purpose of using the statements made in the said diary for contradicting a witness. When a case diary is summoned under Section 91 (1) of the Code then the restrictions imposed under sub-sections (2) and (3) of Section 172 would not apply to the use of such case diary. But while using a previous

statement recorded in the said case diary, the court should bear in mind the restrictions imposed under Section 162 of the Code and Section 145 of the Evidence Act because what is sought to be used from the case diary so produced are the previous statements recorded under Section 161 of the Code.

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12. EVIDENCE ACT, SECTIONS 61 AND 63: PRIOR JUDGMENT AS SECONDARY EVIDENCE:-
(1999) 4 SCC 663
R.E.M.S. ABDUL HAMEED Vs. GOVINDARAJU

Secondary evidence about a grant of land made in 1862. In absence of actual document, evidence gathered from observations in absence of actual document, evidence gathered from observations in ***Karumbavira Vanniar vs. Govindaswami Vanniar, 1977 MLW 741*** as earlier decision about the same land but on a different question and between different parties which case was also fought in connection with the same lands, as part of the estate of the Raja of Thanjavur, though between different parties and on a different question. The Supreme Court held that in the present case, the grant itself is not on the record which would have been the primary evidence to test the appellant's case through the provision of Section 2 (11). The parties reinclined to the collateral evidence and that too what is recorded in the case of ***Karumbavira Vanniar vs. Govindaswami Vanniar, 1977 MLW 741,*** which is also of Thanjavur estate which also refers to the aforesaid two distinct sets of areas, namely, Mela and Kizha. The only question which arises is, whether either on the evidence led and the collateral evidence gathered from the aforesaid decision, could it be said on the facts of this case that the grant as an inam of the disputed area was expressed **only in terms of acreages or cawnies or other local equivalent.**

The finding recorded in ***Karumbavir Vanniar vs. Govindaswami Vanniar, 1977 MLW 741*** is that the area Mela and Kizha were parts of villages Rajagiri and Papanasam respectively and once they are part of the village the area would be covered within the definition of Section 2 (11) of Act 26 of 1963, Act 30 of 1963 clearly, while defining the meaning "minor inam" under section 2 (9) excludes from its ambit by virtue of sub-clause (b) of this very section what is covered by Section 2 (9) of Act 26 of 1963, "a new inam estate". Since the aforesaid two bits of land are admittedly a part of the village and "part village inam estate" is defined under such Section 2 (11), thus the area in question being part of two villages it would be a new inam estate within the meaning of Section 2 (9) of Act 26 of 1963 and thus it cannot be excluded by virtue of clause (b) Explanation I of Section 2 (11) and thus it cannot be minor inam under Act 30 of 1963.

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13. CR.P.C., SECTIONS 239, 240, 227, 190 (1), 156 (3), AND CHAPTER XXXVI SECTIONS 467 AND 473 CONSTRUCTION OF I.P.C., SECTION 498-A AND 406, BELATED COMPLAINT:-
(1999) 4 SCC 690
ARUN VYAS Vs. ANITA VYAS

The question of discharge was challenged. The Magistrate ordered investigation by the police. Police after investigation submitted the charge-sheet. Thereunder the Magistrate taking cognizance of the offence and fixed the case for discharge of. In the absence of explanation for the delay, the Magistrate rightly discharged the accused for the offence under S. 406 IPC. However, in respect of offence under S. 498-A IPC, the provisions of S. 473 Cr. P.C. should have been liberally construed. The magistrate not having adverted to the question whether on the facts and circumstances of the case it was necessary in the interest of justice to take cognizance of the offence, his order of acquittal of the accused in respect of offence under S. 498-A IPC was held unsustainable.

The judgment is reproduced at verbatim from paragraphs 2 to 6, from paragraph 8 to 10 and from paragraph 12 to 17 to understand and appreciate the provisions in future in a given case.

2. This appeal is from the judgment and order of the High Court of Rajasthan at Jodhpur in SB Crl. Revision No. 316 of 1996 dated 17.3.1998 setting aside the order of discharge passed in favour of the appellants by the Additional Chief Judicial Magistrate, Jodhpur on 23-4-1996.

3. The facts giving rise to this appeal may briefly be noted here:

Appellant 1 married the respondent in accordance with Hindu rites on 20.5.1986. They were blessed with a girl on 2-1-1988. The respondent, in the complaint filed before the Court on 18-10-1995, alleged that she was beaten up by her husband, mother-in-law and sisters-in-law as her parents failed to satisfy the demand of dowry and ultimately she was pushed out of the house on 13-10-1988. The complaint was filed against the appellants under Sections 498-A, 406 IPC read with Section 6 of the Dowry Prohibition Act, 1961 before the Additional Chief Judicial Magistrate, Jodhpur under Section 190 (1) Cr.PC, who ordered investigation by police. The police investigated the complaint under Section 156(3) Cr.P.C. and submitted charge sheet (final report) under section 498-A IPC on 22-12-1995. On that report the learned Magistrate took cognizance of the offence under Section 498-A as well as Section 406 IPC and issued summons to the appellants. The case was posted on 23-4-1996 for framing charges. On that day it was submitted on behalf of the accused that the complaint was barred by limitation and that referring the case for investigation to the police itself was bad, therefore, no charges could be framed against the accused. The plea of the appellants found favour with the learned Magistrate who discharged the appellants by his order dated 23.4.1996. The respondent challenged the validity of that order of the learned Magistrate before the High Court of Rajasthan in SB Crl. No. 316 of 1996. On 17.3.1998, the High Court set aside the order of the learned Magistrate and directed him to proceed with the case from the stage where he had discharged the accused and decide the same in accordance with law. It is that order of the High Court which is the subject-matter of this appeal.

4. Mr. Adarsh Goel, learned Senior Counsel appearing for the appellant contended that the High Court has committed illegality in holding that there was no delay in filing the complaint and in observing that even if there was a delay in view of Section 468 Cr.PC the learned magistrate should not have overlooked the provisions of Section 473 CrPC. He argued that no provision in the CrPC provides that after taking cognizance, the learned Magistrate could not have discharged the appellants and that the reasons given by the High Court in setting aside the order of the learned Magistrate are erroneous in law.

5. Mr. Pallav Shishodia, learned counsel appearing for the respondent submitted that the respondent was subjected to cruelty and harassed with the demand of dowry and she was sent out of the matrimonial home, therefore, the High Court was justified in setting aside the order of the learned Magistrate who did not take note of Section 473 Cr.PC and directing him to proceed with the case.

6. On these above submissions, two questions arise for consideration, namely:

   (i) whether the learned Magistrate can discharge an accused after taking cognizance of an offence by him but before the trial of the case; and

   (ii) whether learned Magistrate was right in discharging the appellants on the grounds that the complaint was barred by limitation under Section 468 Cr.PC.

8. Section 239 has to be read along with Section 240 Cr.PC. If the Magistrate finds that there is prima facie evidence or the material against the accused in support of the charge (allegations) he may frame the charge in accordance with Section 240 Cr.PC. But if he finds that the charge (the allegations or imputations) made against the accused do not make out a prima facie case and do not furnish the basis for framing the charge, it will be a case of the charge being groundless, so he has no option but to discharge the accused. Where the Magistrate finds that taking cognizance of the offend itself was contrary to any provision of law, like Section 468 Cr.PC the complaint being barred by limitation, so he cannot frame the charge, he has to discharge the accused. Indeed in a case where the Magistrate takes cognizance of an offence without taking note of Section 468 Cr.PC, the most appropriate stage at which the accused can plead for his discharge is the stage of framing the charge. He need not wait till completion of the trial. The Magistrate will be committing no illegality in considering that question and discharging the accused at the stage of framing the charge if the facts so justify.

Point (ii)

9. The new Code of Criminal Procedure contains Chapter XXXVI, (Sections 467 to 473) which deals with limitation for taking cognizance of certain offences. Section 467 defines the period of limitation for the purposes of that chapter, to mean the period specified in Section 468 for taking cogni-

zance of an offence. Bar to taking cognizance on the expiry of the period of limitation and extension of the period of limitation, are dealt in by Sections 468 and 473 respectively. The point of commencement of the period of limitation in the case of a continuing offence is embodied in Section 472 and in the case other than a continuing offence is contained in Section 469. The provisions for exclusion of time in computing the period of limitation are incorporated in Sections 470 and 471.

10. It may be noted here that the object of having Chapter XXXVI in the Cr.PC is to protect persons from prosecution based on stale grievances and complaints which may turn out to be vexatious. The reason for engrafting the rule of limitation is that due to a long lapse of time necessary evidence will be lost and persons prosecuted will be placed in a defenceless position. It will cause great mental anguish and hardship to them and may even result in miscarriage of justice. At the same time it is necessary to ensure that due to delays on the part of the investigating and prosecuting agencies and the application of rules of limitation the criminal justice system is not rendered toothless and ineffective and the perpetrators of crime are not placed in an advantageous position. Parliament obviously taking note of various aspects, classified offences into two categories, having regard to the gravity of offences, on the basis of the punishment prescribed for them. Grave offences for which the punishment prescribed is imprisonment for a term exceeding three years are not brought within the ambit of Chapter XXXVI. The period of limitation is prescribed only for offences for which the punishment specified is imprisonment for a term not exceeding three years and even in such cases a wide discretion is given to the court in the matter of taking cognizance of an offence after the expiry of the period of limitation. Section 473 provides that if any court is satisfied on the facts and in the circumstances of the case that the delay has been properly explained or that it is necessary so to do in the interests of justice, it may take cognizance of an offence after the expiry of the period of limitation. This section opens with a non obstante clause and gives overriding effect to it over all the other provisions of Chapter XXXVI.

12. A perusal of the provision extracted above shows that sub-section (1) of Section 468 enjoins that no court shall take cognizance of an offence of the categories specified in sub-section (2), after the expiry of the period of limitation mentioned therein. This rule is, however, subject to the other provisions of the Code. Sub-section (2) Specifies the period of limitation of six months, if the offence is punishable with fine only; of one year, if the offence is punishable with imprisonment for a term not exceeding one year and of three years, if the offence is punishable with imprisonment for a term exceeding one year but not exceeding three years. Sub-section (3) which is inserted by Act 45 of 1978, deals with a situation where the offences are tried together and directs that for the purposes of that section the period of limitation shall be determined with reference to the offence which is punishable with the more severe punishment or, as the case may be the most severe punishment.

13. The essence of the offence in Section 498-A is cruelty as defined in the explanation appended to that section. It is a continuing offence and on each occasion on which the respondent was subjected to cruelty, she would have a new starting point of limitation. The last act of cruelty was committed against the respondent, within the meaning of the explanation, on 13-10-1988 when, on the allegation made by the respondent in the complaint to the Additional Chief Judicial Magistrate, she was forced to leave the matrimonial home. Having regard to the provisions of Sections 469 and 472 the period of limitation commenced for the offences under Sections 406 and 498-A from 13.10.1988 and ended on 12.10.1991. But the charge-sheet was filed on 22.12.1995. therefore, it was clearly barred by limitation under Section 468 (2) (C) Cr.PC.

14. It may be noted here that Section 473 Cr.PC which extends the period of limitation is in two parts. The first part contains a non obstante clause and gives overriding effect to that section over Sections 468 to 472. The second part has two limbs. The first limb confers power on every competent court to take cognizance of an offence after the period of limitation if it is satisfied on the facts and in the circumstances of the case that the delay has been properly explained and the second limb empowers such a court to take cognizance of an offence if it is satisfied on the facts and in the circumstances of the case that it is necessary so to do in the interests of justice. It is true that the expression "in the interest of justice" in Section 473 cannot be interpreted to mean in the interest of prosecution. What the court has to see is "interest of justice". The interest of justice demands that the court should protect the oppressed and punish the oppressor/offender. In complaints under Section 498-A the wife will invariably be oppressed, having been subjected to cruelty by the husband and the in-laws. It is, therefore, appropriate for the courts, in case of delayed complaints, to cruelty if on the facts and in the circumstances of the case it is necessary so applying the rule of limitation will give an unfair advantage to him or result in miscarriage of justice, the court may take cognizance of an offence after the expiry of the period of limitation in the interests of justice. This is only illustrative, not exhaustive.

15. Any finding recorded by a Magistrate holding the complaint to be bared by limitation without considering the provisions of Section 473 Cr.PC will be a deficient and defective finding, vulnerable to challenge by the aggrieved party. In this case the complaint was clearly barred by limitation and no explanation was offered for the inordinate delay; this is what the learned Magistrate took note of and concluded that the complaint was barred by limitation. This is correct insofar as the offence under Section 406 is concerned. Therefore, in regard to Section 406 the order of the learned Magistrate discharging the appellants cannot be faulted with. But regarding offence under Section 498-A the learned Magistrate did not advert to the second limb of the second part in Section 473 Cr.PC referred to above. The order of the learned Magistrate on this aspect was unsustainable so the High Court has committed no illegality in setting aside that part of the order of the learned Magistrate.

16. In ***Vanka Radhamanohari v. Vanka Venkata Reddy*** (1993) 3 SCC. 4 the wife who was subjected to cruelty left the matrimonial home in 1985. In 1990 she filed the complaint alleging cruelty and maltreatment against the husband and mother-in-law and further stating that the husband had remarried. The Magistrate took cognizance of offences under Sections 498-A and 494 IPC. On the petition of the husband under Section 482 Cr.PC, the High Court quashed the complaint. This Court, on appeal from the judgment of the High Court, held that the High Court erred in quashing the complaint as Section 468 Cr.PC could not be applied to the offence under Section 494 IPC (for it is punishable with imprisonment for a term which may extend to 7 years) and even in respect of offence under Section 498-A, the attention of the High Court was not drawn to Section 473 CrPC. While setting aside the impugned order of the High Court this Court observed. (SCC pp. 8-9, para 7)

> "As such, courts while considering the question of limitation for an offence under Section 498-A i.e. subjecting a woman to cruelty by her husband or the relative of her husband, should judge that question, in the light of Section 473 of the Code, which requires the court, not only to examine as to whether the delay has been properly explained, but as to whether 'it is necessary to do so in the interests of justice'."

17. For the reasons stated above the High Court was not correct insofar as the order of the Magistrate relates to Section 406 IPC. But in regard to the offence under Section 498-A IPC no exception can be taken to the impugned order under appeal as the learned Magistrate did not take note of Section 473 CrPC while ordering discharge of the appellants. Now the learned Magistrate shall consider the question of limitation taking note of Section 473 Cr.PC in the Light of the observations made hereinabove. Accordingly, the appeal is allowed in part.

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14. PRECEDENT:-
(1999) 4 SCC 697
N.S. GIRI Vs. CORPORATION OF CITY OF MANGALORE

Relevance of quorum on binding effect of precedent. Held, a decision by the Constitution Bench and a decision by a Bench of more strength cannot be overlooked to treat a later decision by a Bench of lesser strength as of a binding authority; more so, when attention of the Judges deciding the latter case was not invited to earlier decisions available. Constitution of India, Art. 141.

The abovesaid decision does support the proposition canvassed by the learned counsel for the appellant that an industrial settlement would operate even by overriding a statutory provision to the contrary. However, suffice it to observe that the Constitution Bench decision in ***New Maneck Chowk Spg. and Wvg. Co. Ltd, AIR 1961 SC 867*** and also the decision of this Court in ***Hindustan Times Ltd. AIR 1963 SC 1332*** which is a four-Judge Bench decision, were not placed before the learned Judges deciding ***LIC of India case,***

(1981) 1 SCC 315. A decision by the Constitution Bench and a decision by a Bench of more strength cannot be overlooked to treat a later decision by a Bench of lesser strength as of a binding authority; more so, when the attention of the Judges deciding the latter case was not invited to the earlier decisions available. Respectfully following the earlier two decisions referred to herein above., we are of the opinion that the award dated 11.1.1969 under Section 10-A of the ID Act appointing the age of retirement 58, contrary to the provisions of the statutory rules appointing the age of retirement at 55, cannot be upheld and given effect to by issuing a writ for its implementation. In any case, the award stood superseded by the subsequent statutory rules of 1974 which too appointed the age of retirement at 55 and there is nothing wrong in the appellant having been asked to superannuated at the age of 55 consistently with the service rules as applicable on that day.

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15. SPECIFIC RELIEF ACT, SECTIONS 28 AND 16 : DECREE TO ENFORCE THE CONTRACT FOR SALE:-
(1999) 4 SCC 702
V.S. PALANICHAMY CHETTIAR FIRM Vs. C. ALAGAPPAN

The respondent obtained a decree for Specific performance against the appellant. As per the decree and judgment of the trial Court the respondent was directed to deposit the balance of amount of consideration within the specified time and a further direction to the appellant was given to execute the sale deed. The respondent decree-holder filed an application after long period of 5 years after passing the decree. The High Court took 3 years to decide the appeal from the original judgment and decree. The Executing Court dismissed the application on the ground of applicants' failure to deposit the balance amount within the time stipulated in the decree. Application under Section 28 of the Specific Relief Act can be made to the Execution Court for extension of time. It can be made where the trial court and the executing court are the same. The vendor judgment debtor can also file such an application for the rescission of the contract or for opposing the execution of the decree on the ground of default on vendee decree holder to deposit the balance consideration within the period stipulated in the decree. Although limitation period for filing a suit for specific performance, although not strictly applicable, held is a factor to be taken into account for the said purpose. Art. 54 Limitation Act was referred to.

Where the trial court and the executing court are the same, the executing court can entertain the application for extension of time for payment of the balance amount, though the application is to be treated as one filed in the main suit. On the same analogy, the vendor judgment-debtor also can by an application under Section 28 of the Specific Relief Act, seek rescission of the contract of sale or take up this plea in defence to bar the execution of the decree. ***Ramankutty Guptan vs. Avara, (1994) 2 SCC 642*** followed.

Provisions to grant specific performance of an agreement are quite stringent. Equitable considerations come into play. The Court has to see all the

attendant circumstances including if the vendee has conducted himself in a reasonable manner under the contract of sale. Therefore, the court cannot as a matter of course, allow extension of time for making payment of balance amount of consideration in terms of a decree after 5 years of passing of the decree by the trial court and 3 years of its confirmation by the appellate court. It is not the case of the respondent decree-holders that on account of any fault on the part of the vendor judgment-debtor, the amount could not be deposited as per the decree. Therefore, granting time at this stage would be going beyond the period of limitation prescribed for filing of the suit for specific performance of the agreement though the provisions of Article 54 of the Limitation Act may not be strictly applicable. It is nevertheless an important circumstance to be considered by the court. That apart, no explanation whatsoever was given by the respondent decree-holders as to why they did not pay the balance amount of consideration as per the decree or did not make an application under Section 28 of the Specific Relief Act seeking extension of time for making payment. Equity demands that discretion be not exercised in favour of the respondent decree-holders and no extension of time by granted to them to comply with the decree.

In view of the decision of this Court in **Ramankutty Guptan Case** when the trial court and the executing court are the same, the executing court can entertain the application for extension of time though the application is to be treated as one filed in the main suit. On the same analogy, the vendor judgment-debtor can also seek rescission of the contract of sale or take up this plea in defence to bar the execution of the decree. One of the grounds on which the trial court dismissed the execution application was that the decree-holder did not pay the balance of consideration as per the sale agreement and also did not pay within the time stipulated by the Court in the decree. The High Court could have certainly gone into this question when applications for extension of time were filed before it. However, on the objection by the judgment-debtor, it chose to send back the matter to the executing court for decision on these applications, which was perhaps, in the circumstances, not the correct procedure to adopt. But then, at the same time, the High Court put shackles on the discretion of the executing court by observing that the vendor might have felt that after the appeal filed by the vendor judgment-holder against the decree for specific performance was disposed of, they can even then deposit the amount at the time of seeking the execution of the sale deed.

The agreement of sale was entered into as far back on 16.2.1980, about 19 years ago. No explanation is forthcoming as to why the balance amount of consideration could not be deposited within the time granted by the Court and why no application was made under Section 28 of the Act seeking extension of time of this period. Under Article 54 of the Limitation Act, 3 years' period is prescribed for filing the suit for specific performance of a contract of sale from the date of the agreement or when the cause of action arises. Merely because a suit is filed within the prescribed period of limitation does not absolve the vendee-plaintiff from showing as to whether he was ready and willing to perform his part of the agreement and if there was non-performance, was that on

account of any obstacle put by vendor or otherwise. Provisions to grant specific performance of an agreement are quite stringent. Equitable considerations come into play. The court has to see all the attendant circumstances including if the vendee has conducted himself in a reasonable manner under the contract of sale. That being the position of law for filing the suit for specific performance, can the court, as a matter of course, allow extension of time for making payment of balance amount of consideration in terms of a decree after 5 years of passing of the decree by the trial court and 3 years of its confirmation by the appellate court ? It is not the case of the respondent decree-holders that on account of any fault on the part of the vendor judgment-debtor, the amount could not be deposited as per the decree. That being the position, if now time is granted, that would be going beyond the period of limitation prescribed for filing of the suit for specific performance of the agreement though this provision may not be strictly applicable. It is nevertheless an important circumstance to be considered by the Court. That apart, no explanation whatsoever is coming from the respondent decree-holders as to why they did not pay the balance amount of consideration as per the decree except what the High Court itself thought fit to comment which is certainly not borne out from the record. Equity demands that discretion be not exercised in favour of the respondent decree-holders and no extension of time be granted to them to comply with the decree.

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16. RECOVERY OF DEBTS DUE TO BANKS AND FINANCIAL INSTITUTIONS ACT, 1993, SECTIONS 19 (6) AND 22 (1) AND (2) : POWER TO GRANT INJUNCTION BY THE TRIBUNAL, WHAT POWERS ARE TO BE EXERCISED:-
(1999) 4 SCC 710
INDUSTRIAL CREDIT AND INVESTMENT CORPN.OF INDIA LTD. Vs. GRAPCO INDUSTRIES LTD.

The Tribunal has jurisdiction to pass an ex-parte interim order. Power to grant interim order under Section 19 (6) inheres power to grant ex parte interim order. But ex-parte order should be granted only for a short period. It should not be a stereo type order as matter of course. It should be a reasoned order. Tribunal must put the applicant on terms while passing the ex-parte order and in case that order is found to be not justified and causing harm to defendant, Tribunal must compensate the defendant.

C.P.C. Applicability to Tribunal:- The Tribunal constituted under the Act has jurisdiction to grant an ad interim ex-parte order of injunction or stay against the defendant on an application filed by the bank or financial institution for recovery of debt as defined under clause (g) of Section 2 of the Act. **When Section 22 of the Act says that the Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, it does not mean that it will not have jurisdiction to exercise powers of a court as contained in the code of Civil Procedure. Rather, the Tribunal can travel beyond the Code of Civil Procedure and the only fetter that is put on its powers is to**

observe the principles of natural justice. Meaning has to be given to Section 22 of the Act as here the Tribunal is exercising powers of a civil court while trying a money suit. Further, when power is given to the Tribunal to make an interim order by way of an injunction or a stay, it inheres in it the power to grant that order even ex perte, if it is so in the interest of justice and as per the requirements as spelt out in the judgment of the Supreme Court in ***Morgan Stanley Mutual Fund vs. Kartik Das, (1994) 4 SCC 225.***

NOTE:- Judicial Officers should understand the principle underlying in the judgment. The same principle is also applicable for an order under 39 Rule 1-2 C.P.C. A separate Article is also being given in the magazine to understand how an order is to be passed.

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17. SERVICE LAW : PAY SCALE : DIFFERENTIAL TREATMENT IN GRANT OF PAY BETWEEN DIRECT RECRUIT AND PROMOTEE:-
(1999) 4 SCC 756
KAMALAKAR Vs. UNION OF INDIA

The plea was rejected that only direct recruit appellant and not promotee appellatns were entitled to higher pay scale. It was held that birthmark of direct recruit or promotee lost significance after the appellant came over to a single cadre.

The Supreme Court in the present case recognised that appellants were entitled to the same relief as already granted to ***Data Processing Assistants*** in ***Charaprakash Madhavrao Dadwa case,(1998) 8 SCC 154.*** The respondents however contended that direct recruits amongst the appellants were entitled to the relief but not the promotees. Rejecting this contention the Supreme Court held that once direct recruits and promotees are in one cadre, the distinction between them disappears, at any rate so far as equal treatment in the same cadre for payment of pay scale given is concerned. The birthmarks have no relevance in this connection. If any distinction is made on the question of their right to the post of Data Processing Assistants they were holding and to its scale which were matters common to all of them before the impugned order of the Government of India was passed on 2-7-1990 then any distinction between Data Processing Assistants who were direct recruits and those who were promotees, is not permissible.

Paragraph 12 of the judgment is reproduced here:-

We have considered the limited issue. We are of the view that all these appellants should get the same relief as the appellants in the civil appeal which arose out of Special Leave Petition No. 16646 of 1995. Once they were all in one cadre, the distinction between direct recruits and promotees disappears at any rate so far as equal treatment in the same cadre for payment of the pay scale given is concerned.The birthmarks have no relevance in this connection. If any distinction is made on the question of their right to the post of Data Processing Assistants they were holding and to its scale which were matters common to all of them before the impugned order of the Government

of India was passed on 2.7.1990. then any distinction between Data Processing Assistants who were direct recruits and those who were promotees, is not permissible. We, therefore, reject the respondents contention. We have examined the record and the common points arising in this case and those in civil appeal which arose out of Special Leave Petition No. 16646 of 1995 and we are unable of find any lawful distinction between the appellants and those in the other appeal which has been allowed.

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18. WORDS AND PHRASES -"PRODUCE" "ARTICLE" : USE OF DICTIONARY WHEN PERMISSIBLE:-
(1999) 3 SCC 632
COMMISSIONER OF INCOME TAX, BANGALORE Vs. VENKATESWARA HATCHERIES

It was held neither the word "produce" nor the word "article" has been defined in the Act. Therefore, it may be permissible to refer to a dictionary. But where the dictionary gives divergent or more than one meaning of a word it would not be safe to construe the said word according to the suggested dictionary meaning. In such a situation, the word has to be construed in the context of the provisions of the Act having regard to the legislative history of the provisions of the Act and the scheme of the Act. It is a settled principle of Interpretation that the meaning of the words occurring in the provisions of the Act must take their colour from the context in which they are so used.

INTERPRETATION OF STATUTES:- ***Same word in different provisions of same Statute*:-** Construction of same word same meaning held may not apply within different provisions of the same statute. Please refer to ***Shamrao Vishnu Parulekar vs. Distt. Magistrate, Thane, AIR 1957 SC 23 : 1956 SCR 644*** relied on. **Maxwell : Interpretation of Statutes, Edn. 10, p. 522, Craies Statute Law, Edn. 5 p. 159** referred to.

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19. C.P.C. SECTION 47 AND OR, 21 R. 15:- JOINT DECREE IN FAVOUR OF JOINT FAMILY : EXECUTION OF :-
(1999) 3 SCC 644
JAGDISH DUTT Vs. DHARAM PAL

Decree passed in favour of joint family to be treated as a decree in favour of all members of the joint family. Where decree is for possession of immovable property and one of the coparceners transfers or assigns his interest therein in favour of the judgment debtor, the decree is extinguished to the extent of the transferor's interest. Only the remaining part of the decree may then be executed.

It was held when a decree is passed in favour of a joint family the same has to be treated as a decree in favour of all the members of the joint family in which event it becomes a joint decree. Where a joint decree for actual possession of immovable property is passed and one of the coparceners assings or transfers his interest in the subject matter of the decree in favour of the judgment-debtor, the decree gets extinguished to the extent of the interest so

assigned and execution could lie only to the extent of remaining part of the decree. In case where the interest of the coparceners is undefined, indeterminate and cannot be specifically stated to be in respect of any one portion of the property, a decree cannot be given effect to before ascertaining the rights of the parties by an appropriate decree in a partition suit. It is no doubt true that the purchaser of the undivided interest of a coparcener in an immovable property cannot claim to be in joint possession of that property with all the other coparceners. However, in case where he is already in possession of the property, unless the rights are appropriately ascertained, he cannot be deprived of the possession thereof for a joint decree-holder can seek for execution of a decree in the whole and not in part of the property. A joint decree can be executed as a whole since it is not divisible and it can be executed in part only where the shares of the decree-holders are defined or those shares can be predicted or the share is not in dispute. Otherwise the executing court cannot find out the shares of the decree- holders and dispute between joint decree-holder is foreign to the provisions of Section 47 CPC, Order 21 Rule 15 CPC enables a joint decree-holder to execute a decree in its entirety but if whole of the decree cannot be executed, this provision cannot be of any avail.

TRANSFER OF PROPERTY ACT, SECTION 111 (d):-

A person who is in possession of property if he is not a lessee then the provisions of Section 111 (d) of the T.P. Act not applicable. In this case it was said that the person was a tresspasser, therefore, the principle of this section is not applicable on such a lessee.

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20. SERVICE LAW : DEPARTMENTAL ENQUIRY : SIMULTANEOUS CONTINUANCE OF DEPARTMENTAL PROCEEDINGS WITH CRIMINAL PROCEEDINGS:-
(1999) 3 SCC 679
CAPT. M. PAUL ANTHONY Vs. BHARAT GOLD MINES LTD.

While in a departmental proceedings the standard of proof is one of preponderance of probabilities, in a criminal case, the charge has to be proved by the prosecution beyond reasonable doubt. In the present case both the proceedings were based on the same set of facts which were sought to be proof by the same witnesses viz. police and panches and the court had already acquitted the appellant by rejecting the prosecution story. Therefore, held that findings recorded against appellant in an ex parte disciplinary enquiry could not be sustained.

Paragraph 22 of the judgment is reproduced for consideration of the principle when the proceedings are to be stayed and when not be be stayed;

The conclusions which are deducible from various decisions of this Court referred to above are:

(i) Departmental proceedings and proceedings in a criminal case can proceed simultaneously as there is no bar in their being conducted simultaneously, though seperately.

(ii) If the departmental proceedings and the criminal case are based on identical and similar set of facts and the charge in the criminal case against the delinquent employee is of a grave nature which involves complicated questions of law and fact, it would be desirable to stay the departmental proceedings till the conclusion of the criminal case.

(iii) Whether the nature of a charge in a criminal case is grave and whether complicated question of fact and law are involved in that case, will depend upon the nature of offence, the nature of the case launched against the employee on the basis of evidence and material collected against him during investigation or as reflected in the charge-sheet.

(iv) The factors mentioned at (ii) and (iii) above cannot be considered in isolation to stay the departmental proceedings but due regard has to be given to the fact that the departmental proceedings cannot be unduly delayed.

(v) If the criminal case does not proceed or its disposal is being unduly delayed, the departmental proceedings, even if they were stayed on account of the pendency of the criminal case, can be resumed and proceeded with so as to conclude them at an early date, so that if the employee is found not guilty his honour may be vindicated and in case he is found guilty, the administration may get rid of him at the earliest.

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21. MUSLIM LAW OF INHERITENCE : CHILDREN OF PREDECEASED SON:-
(1999) 3 SCC 733
MOHD. AMIRULLAH KHAN Vs. MOHD. HAKUMULLAH KHAN

Permissive occupation even for decades by children of predeceased son of deceased, held, would not convert into a legal right to remain in their grand father's property. To prevent undue harassment to such occupants. The Supreme Court moulded the relief in such a way that though plaintiffs/appellants being children of the deceased were heirs to the exclusion of defendants/ respondents and thus owners of the disputed property, but defendant 2, granddaughter of deceased, should not be ousted from the property during her lifetime.

Paragraph 1,2,3 and 7 of the judgment are reproduced here:

The appellants filed a suit for declaration and possession in respect of Municipal House No. 1995 situated at Mohalla Hatai of Paithan District, Aurangabad. There was also a prayer for perpetual injunction restraining Respondents 1 and2 from interfering in the possession of the appellant-plaintiffs.

Briefly stated the averment in the plaint was that the father of the plaintiffs, Abdullah Khan, had three wives. The plaintiffs are the sons and daughters from the third wife. Abdullah Khan had bought the two adjacent houses in the name of plaintiff 1 and his brother one Nazifulla Khan. Nazifulla khan died when Abdullah Khan was still alive. It was alleged in the plaint that thereafter

Amirullah Khan, Plaintiff 1, became the sole owner. It was further the case of the plaintiffs that Defendant 1 was a son from the second wife of Abdullah Khan and Defendant 2 was the daughter of the plaintiff's deceased brother. The said brother who was father of Defendant 2 had died at the time when Abdullah Khan was still alive and the son from the second wife Lutfulla Khan, father of Defendant 1, had also died earlier than Abdullah Khan. According to the plaintiffs, their mother brought to the house defendants 1 and 2 and looked after them and permitted them to reside in the house in question.

The mother of the plaintiffs died in 1955. Plaintiff 1 was not at Paithan at that time. In 1961, he got to know that the defendants were trying to assert themselves as owners of a part of the said house which had been renumbered as 1995, the original number being 166. The plaintiffs thereupon filed a revision petition before the State Government contending that the property should be renumbered to 166 instead of 1995. It was also prayed that the plaintiffs should be shown as owners and the defendants as occupiers. The State Government agreed to this contention and the name of Plaintiff 1 was shown as the owner of the premises in question. It is thereafter that in 1968 the suit was filed. In the written statement, the main contention which had been taken by the defendants was that Plaintiff 1 was only a benamidar of Abdullah Khan and he was not owner of the same by virtue of the sale deed in his favour. The defendants further claimed that they had been residing in that house since 1927 and they had a right to remain in possession thereof.

The High Court had also held that the defendants were in possession for a long time and that they had acquiesced to the said possession. This itself is stated to have created a right to possess the property in favour of the defendants and to that extent the defendants could resist the suit for ejectment. We are unable to agree with this conclusion. The court below had found that it is the plaintiffs' mother who had permitted the defendants to reside with her as members of the family. This permissive occupation by the defendants could not in law convert into giving them any legal right to remain in the said property. The High Court had not found that by adverse possession, they had become the owners of the property. Even though the defendants do not acquire any right in the property, but considering the fact that the said defendants had been residing in the premises in question since 1927, it will be appropriate for this Court to mould the relief in such a way that undue hardship is not caused to them. We would like to make it clear that the High Court while hearing the second appeal ought not have reappreciated the evidence and reversed the findings of fact arrived at by the lower appellate court.

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22. CR.P.C., SECTION 319 : POWER TO PROCEED AGAINST OTHER PERSON:-
1999 (2) M.P.L.J. S.N. 18
KAMALABAI Vs. STATE OF M.P.

The accused sold a piece of land consisting of two plots to 'X' by a registered sale deed on 12-10-1973, Later, on 28-11-1975 the accused sold a plot

to 'Y' which was allegedly part of the same land. 'Y' sold the said plot further to 'Z', on 9-11-1977, who raised construction on it. The initial purchaser 'X' felt aggrieved and therefore lodged a complaint alleging cheating involved in the conduct of the accused. 'Y' was cited as one of witnesses by prosecution. When evidence was being recorded, the accused filed an application under section 319, Criminal Procedure Code for summoning 'Y' as co-accused and on concession by the A.P.P. that was accepted by the Magistrate. The Additional Sessions Judge also confirmed the order of the Magistrate in revision.

It was held that the order of summoning 'Y' as co-accused was an abuse of the process of the Court of Magistrate as it amounted to negative the availability of evidence itself. The sale by accused to 'X' was under title while the sale by accused to 'Y' at least in respect of part of the property was allegedly in respect of the area already sold to 'X' So it was 'Y' who was cheated and if the name of 'Y' is removed from the list of witnesses and transferred as accused, it will amount to obliterating vital evidence. A purchaser who is being cheated can hardly be called an accused. The prosecution has duty to act carefully and not to side with one party or the other. The concerned prosecutor had sided with one party. This conduct deserved condemnation. The orders of the Magistrate and Additional Sessions Judge set aside.

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23. CR.P.C., SECTIONS 245 (1), (2) AND 482 : DISCHARGE OF ACCUSED:-
1999 (2) M.P.L.J. 293
BHAGMAL Vs. BHAIYALAL

The complainant preventing trial to proceed by not bringing his evidence and not appearing himself. Magistrate in the circumstances closed the proceedings and discharged the accused. The said order is covered by Section 245 (2) Cr. P.C. and fresh complaint filed was an abuse of the process of the Court.

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24. REGISTRATION ACT, SECTION 77 AND SPECIFIC RELIEF ACT, SECTION 10 : SPECIFIC PERFORMANCE OF A CONTRACT SALE DEED EXECUTED BUT NOT REGISTERED, APPLICABILITY OF SECTION 77 REGISTRATION ACT:-
1999 (2) M.P.L.J. 302 (S.C.)
KALAVAKURTI VENKATA SUBBAIAH Vs. BALA GURAPPAGARI GURUVI REDDY

The vendor having executed the sale deed did not get the sale deed registered thereafter. The vendee therefore filed suit for specific performance seeking a direction to register the sale deed and for injunction or possession of the immovable property. The trial Court held that the plaintiff has to avail the remedy under section 77 of the Registration Act and dismissed the suit. The first appellate Court allowed the appeal, decreed the suit and held that the relief in so far as the decree for specific performance of the later half of the document could be granted and that section 77 of the Registration Act will not come in the way. Second appeal was dismissed and also the review petition

was also dismissed. The appeal came before the Supreme Court.

The Supreme Court held that several steps have to be taken before a suit under section 77 of the Registration Act could be filed and they are : (a) document has to be presented for registration within the time prescribed by sections 23-26 of the Act ; (b) document has to be presented by a person authorised to do so under section 32 of the Act; (c) the Sub-Registrar has refused to register the document presented to him for registration; (d) appeal or application against such refusal has been made under sections 72 and 73 of the Act within 30 days of the order of the Sub-Registrar; (e) the Sub-Registrar has refused to register under section 76 of the Act; and (f) suit is filed within 30 days of the order of the Sub-Registrar. The analysis of the provisions of section 77 indicates that it would apply only if a matter is pertaining to registration of a document and not for a comprehensive suit as in the present case where the relief prayed for was directing the defendant to register the sale deed dated July 2, 1979 in favour of the plaintiff in respect of the plaint schedule property and if he so failed to get a registration in favour of the plaintiff, for permanent injunction or in the alternative for delivery of possession of the plaint schedule mentioned property. The document had not been presented by the respondent to the Sub-Registrar at all for registration although the sale deed was stated to have been executed by the appellant as he refused to co-operate with him in that regard. Therefore, various stages contemplated under section 77 of the Act had not arisen in the present case at all. In such a case when the vendor declines to appear before the Sub-Registrar, the situation contemplated under section 77 of the Act would not arise. It is only on presentation of a document the other circumstances would arise. Under section 49 of the Registration Act the sale deed could be received in evidence to prove the agreement between the parties though it may not itself constitute a contract to transfer the property. Such an agreement to see the immovable property in suit could be specifically enforced under the provisions of the Specific Relief Act. The First Appellate Court and the High Court were justified in upholding the claim of the plaintiff.

Manicka Gounder vs. Elumalai Gounder, 1956-2- M.L.J. 536, Ramachandra Naidu and another vs. Kamaiah Naidu, AIR 1969 Mad, 618, Veeran Ambalam vs. Vellaiammal AIR 1960 Mad. 244, Ellammal vs. Rangaswamy Koundar and others, 95 LW 546, Mathai vs. Joseph. 1970 Ker 261 and Veerappa Naidu vs. Venkaiah, AIR 1961 AP 534 referred.

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25. ARBITRATION ACT, SCH. 1, PARA 3 AND SECTIONS 28 AND 33 : DATE OF ENTERING UPON REFERENCE AND TIME OF MAKING AWARD

1999 (2) M.P.L.J. 319

PUSHPENDRA MOTILAL SINGH Vs. COMMERCIAL AUTOMOBILES, JBP

Ex parte award. Date of entering upon reference is the date on which defendant was proceeded ex parte. The Court has jurisdiction to extend time even after expiry of period and also after award has been given.

ARBITRATION ACT, SECTIONS 39 AND 74 : AWARD RECTIFICATION BY HIGH COURT :

Arbitrator awarded compensation and damages ignoring statutory provisions of section 74. Error of law apparent on the face of award. Award rectified by High Court in exercise of its power under section 39.

CONTRACT ACT, SECTION 74 : HIRE PURCHASE AGREEMENT:-

Hire purchase agreement. Penal stipulation cannot be enforced. Rate of interest to be allowed by way of compensation is a matter in the discretion of Court.

Paragraphs 13, 14 and 15 of the judgment are reproduced:-

Section 74 of the Contract Act provides that when a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for. The Explanation to this section further provides that a stipulation for increased interest from the date of default may be a stipulation by way of penalty.

The Supreme Court held in ***Fatehchand Vs. Balkishan. AIR 1963 SC1405,*** that the Court refuses to enforce a stipulation in the contract which is IN-TERROREM. The Court awards to the aggrieved party only reasonable compensation. The Court has jurisdiction to award such compensation as is deemed reasonable having regard to all the circumstances of the case. Again in ***K.P. Subbaramma Sastri vs. K.S. Raghavan, AIR 1987 SC 1257*** it has been observed that the question whether a particular stipulation in a contractual agreement is in the nature of a penalty has to be determined by the Court against the background to various relevant factors, such as the character of the transaction and its special nature, if any, the relative situation of the parties, the rights and obligations accruing from such a transaction under the general law and the intention of the parties in incorporating in the contract the particular stipulation which is contended to be penal in nature. If on such a comprehensive consideration; the Court finds that the real purpose for which the stipulation was incorporated in the contract was that by reason of its burdensome or oppressive character it may operate in-terrorem over the promiser so as to drive him to fulfil the contract then the provision will be held to be one by way of penalty.

A penal stipulation cannot be enforced. The essence of liquidated damages is a genuine pre-estimate of damage which is agreed upon while the essence of a penalty is a stipulation IN TERROREM of the offending party. The distinction has been abolished in India and the Court awards 'reasonable compensation' not exceeding the stipulation. The Court knocks down the agreement which is unconscionable and extravagant.

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26. PREVENTION OF CORRUPTION ACT, SECTIONS 5 & 6 READ WITH SECTION 197 Cr. P.C. : SANCTION FOR PROSECUTION:-
1999 (2) M.P.L.J. 326
VISHWANATH Vs. STATE OF M.P.

Sanction to prosecute. Carbon copy of sanction prepared along with the original order and signed simultaneously by the Authority competent to grant sanction and not original order produced. Concerned L.D.C. in the Home Department who was examined had brought the office copy with him which was in accordance with copy as filed. Objection regarding sanction negatived.

The carbon copy of order of sanction granted under Prevention of Corruption Act was not only placed on record in the case, but the same was having the signature of the sanctioning authority on the endorsement thereof. The signatures had been duly proved. The order clearly appeared to have passed after considering the facts relating to the grant of sanction as detailed in the sanction-order itself. In the circumstances, it was clear from the order as well as from the statement of the L.D.C. in the Home Department that sanction was granted by the competent authority after due consideration of facts. Moreover, as copy of order of sanction placed on record had been endorsed by Special Secretary in the usual course of discharge of his official duties; hence the sanction accorded as above, shall have to be treated as proper sanction. Objection regarding sanction rejected.

NOTE:- This ruling was published at verbatim in Vol. IV Part IV, December 1998 issue at page 27.

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27. LIMITATION ACT., ART. 113, PRAYER FOR INJUNCTION:-
1999 (2) M.P.L.J. 332
JAGDISH TIWARI Vs. STATE OF M.P.

In Sarguja Forest Division, an auction notice was issued on 27-8-1983 in respect of 3020 Khair trees. The plaintiff gave his bid in this auction but he was not informed about the so called acceptance of his bid at any point of time. He could not know whether his bid had been accepted or not. By communication dated 25-6-1984, the plaintiff informed the defendant that he did not receive any communication regarding acceptance of his bid, hence it was requested that the auction may be cancelled and the Khair trees may be re-auctioned. No reply to this communication dated 25-6-1984 was received by the plaintiff. Thereafter, the defendant No. 3 vide communication dated 1-2-1985 informed the plaintiff that the State had suffered loss in the sum of Rs. 1,36,989.90 p. and therefore, the plaintiff was directed to deposit the same and in the event of his failure to deposit the amount, it would be recovered from the plaintiff as a revenue recovery. This communication was received by the plaintiff on 27-6-1986. Suit was filed on 21-10-1987 praying for declaration that no concluded contract had come into existence between the parties as the plaintiff never received any communication with regard to acceptance of his bid and the defendants be restrained from recovering the amount in question as per

the communication dated 11-2-85 whereby a sum of Rs. 1,36,989.90p. was demanded by issuing permanent injunction. It was also prayed by the plaintiff that sum of Rs. 5,000.00 deposited by him as earnest money be refunded to the plaintiff with interest at the rate of 18% per annum. The trial Court held that the suit was governed by Article 58 and it was barred by time.

It was held that Article 113 of the Limitation Act was applicable. So long as the threat persists, there is continuing cause of action to the plaintiff. In the present case, after communication dated 8-2-1984, another communication by way of reminder was sent to the plaintiff on 11-2-1985. Hence, it was open for the plaintiff to file the suit after receiving the second notice on 11-2-1985. The suit was filed on 21-10-1987 and if the period of limitation was counted from the date of second reminder giving cause of action i.e. 11-2-1985, then the present suit was within limitation. The suit filed by the plaintiff was within limitation as the second reminder dated 11-2-1985 gave a fresh threat to the plaintiff for recovery of the amount. ***Mohanlal vs. State of M.P. 1979 MPLJ 801*** relied on.

COURT FEES ACT, SECTION 7 (iv) (c):-

Ad-valorem court fee. Suit by plaintiff in substance to avoid liability of recovery of Rs. 1,36,989.00 as a result of re-auction of the trees in respect of the auction at which plaintiff had offered bid and paid Rs. 5,000 as earnest, Ad-valorem court fee payable.

Coming to the question of court fee, the plaintiff has prayed that the auction which was held on 27-8-1983 for auctioning 3020 Khair trees may be declared as illegal as no concluded contract had come into existence. Consequently, it is prayed that recovery in pursuance of the so called illegal auction should be injuncted against the State. A perusal of both the prayers would show that though the consequential relief arising out of the first relief has not been specifically made but if both the prayers are read together, then it transpires that the plaintiff had sought a declaration that the auction which had been held on 27-8-1983 wherein his bid was accepted, would be declared illegal and as a result thereof, the recovery raised by the defendants in the sum of Rs. 1,36,989.90 may be injuncted from being made from the plaintiff meaning thereby that the recovery of the said sum should not be effected against the plaintiff. In this connection, learned counsel for the State has invited our attention to a decision in the case of ***Badrilal Bholaram Vs. State of M.P. and another 1963 MPLJ 717*** wherein their Lordships have observed:

> "Where the relief sought itself has a real money value which can be objectively ascertained, that value is the value of the relief and any other value ascribed to it will be arbitrary and unreasonable. Where the plaintiff is sought to be made liable either under a decree or a deed for a specified amount and he seeks to avoid that liability, the value of the relief is the extent of the loss, to which but for the suit he would be subjected and from which he wants to be relieved."

In the present case, as mentioned above, the suit is filed by the plaintiff for declaration and injunction. The injunction is a consequential relief. In sub-

stance, the plaintiff wants to avoid the liability of recovery of Rs. 1,36,989.90 and therefore the court fees has to be advalorem and he has to pay the court fees accordingly.

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28. GUARDIANS AND WARDS ACT, SECTIONS 7 AND 10 : MATTER OF CUSTODY UNDER GUARDIANS AND WARDS ACT DECIDED BY AGREEMENT : FRESH APPLICATION FOR CUSTODY IS NOT HIT BY THE PRINCIPLE OF RES JUDICATA:-
1999 (2) M.P.L.J. 341
REHANA Vs. NAIMUDDIN

Paragraphs 2,5 and 6 of the judgment are reproduced:-

An application under sections 7 and 10 of Guardians and Wards Act was filed by the petitioner-mother for custody of her minor daughter Ku. Huda, now aged about 4 years. The application was opposed on the ground that earlier by order dated 31-3-1997 in Guardians and Wards Case No. 36/96, the matter of custody of the minor daughter stands already decided and concluded. Therefore, the earlier order would operate as RES JUDICATA and the matter cannot be reagitated before the trial Court. The submission as above found favour with the trial Court and by the impugned order, the petition filed by the petitioner-wife under sections 7 and 10 of the Guardians and Wards Act was dismissed, as not maintainable.

It is noticed that the order of the previous case No. 36/96 between the parties was passed on the basis of agreement between the parties. Hence as laid down in ***Pulavarthi Venkata Subba Rao Vs. Valluri Jagannadha Rao, 1967 SC 591*** the same was not a decision on merits by the Court; hence would not operate as RES JUDICATA and thus would not operate as bar to the consideration of this application for custody of the child, under Guardians and Wards Act. Reference in the above connection may also be made to ***Baldevdas Shivlal and another vs. Filmistan Distributors (India) Pvt. Ltd. and others, AIR 1970 SC 406.*** Moreover, there is substantial change in the circumstances of the parties as has been averred in the application, which requires the same to be considered on merits.

It may further be pointed out that while hearing and deciding the matter of custody of child paramount consideration before the Court always is the ultimate welfare of the minor. No other consideration possibly could prevail with the Court, and nothing could prohibit a Court from consideration of the matter if need be, even if it is for the second or third time. The technical principle of RES JUDICATA would not be operative more so, if substantial change in circumstances is averred and found prima facie justified. If such is the case, the subsequent application for custody of the minor cannot be thrown out at the threshold holding it to be not maintainable. The circumstances in the instant case as averred by the petitioner in her petition and as contended by her learned counsel PRIMA FACIE justify reconsideration of her petition on metits.

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29. I.P.C. SECTIONS 306 AND 498 A: CRUELTY UNDER PENAL CODE:- 1999 (2) M.P.L.J. 355
BALRAM Vs. STATE OF M.P.

Paragraph 6 of the judgment is reproduced:-

On a careful consideration of the evidence of the two witnesses mentioned above it is found that deceased kalanbai was not getting proper food and clothing because her husband was very poor. The word "cruelty" has been defined in the Explanation to section 498-A, Indian Penal Code. Clause (a) of this Explanation provides that 'cruelty' means any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide. In ***State of West Bengal vs. Orilal, AIR 1994 SC 1418*** it has been held by the Supreme Court that the Court should be extremely cereful in assessing the facts and circumstances of each case and the evidence adduced in the trial for the purpose of finding whether the cruelty meted out to the victim had in fact induced her to end the life by committing suicide. If it transpires to the Court that a victim committing suicide was hyper sensitive to ordinary petulance, discord and differences in domestic life quite common to the society to which the vicitm belonged and such petulance, discord and differences were not expected to induce a similarly circumstanced individual in a given society to commit suicide, the conscience of the Court should not be satisfied for basing a finding that the accused charged of abetting the offence of suicide should be found guilty. In the present case the alleged cruelty was not of such a nature which could ordinarily drive a woman to commit suicide. The cause of the quarrel, as discussed above, was the poverty of appellant Balaram. He was not able to provide proper food and clothing to his wife. That cannot be equated with cruelty. Even if the evidence of Rajaram (P.W.2) is believed on the point that his sister was given a slap by her mother-in-law two years ago, that could not be the reason for commission of suicide by her when there had been a compromise between the appellants and the deceased and no such incident was repeated. It is not proved that the appellants abetted the commission of suicide by Kalanbai or treated her with cruelty.

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30. ARMS ACT, SECTION 25 (1) (A), 39 AND Cr.P.C., SECTION 465:- 1999 (2) M.P.L.J. 374 SOLE EVIDENCE OF POLICE OFFICER
VINOD Vs. STATE OF M.P.

While referring to ***Sam Prakash Vs. State of Delhi, AIR 1974 SC 986 and Anil Vs. State of Maharashtra, AIR 1996 SC 2943*** the Supreme Court held as under:-

Paragraphs 12 to 14 of the judgment are reproduced:-

The principle which is deducible from the decisions of the Supreme Court on the point in issue is that legally conviction can be based on the sole testimony of the police officer who conducted the search and seizure. That cannot be disbelieved on the ground that no independent witness was examined to

prove the search or that witness turns hostile in the Court. In other words if the evidence of the police officer is reliable, inspires confidence and is of sterling character, the same can form the basis for conviction. In case the evidence is not fully reliable or is of doubtful character, it would be difficult to base conviction on his evidence. Much depends upon the intrinsic worth of the evidence of the police officer. Here also the salutary principle that evidence is to be weighed and not counted and the quality of the evidence is more important than the quantity assumes significance. Therefore, if the testimony of the police officer is of unimpeachable character and he is honest and truthful that can be accepted without any corroboration by the independent witness. This will essentially be a question of fact in each case whether the evidence of such an officer passes through this test or not. It is well known that **"there is no such thing as a judicial precedent on facts."**

The evidence of Virendra Pratap Singh (P.W. 8) Sub-Inspector of Police tested in light of the principles laid down above, does not appear to be of such a character on which implicit reliance can be placed. It is cryptic and imprecise. It is not cogent and convincing. In examination-in-chief he does not say where he found appellant Vinod Kumar Shukla and where he took him in custody. He does not tell whether the two witnesses who had signed on the seizure memo were actually present when the country made pistol and the cartridge are said to have been recovered from the possession of the appellant. In cross examination he has stated that the appellant was found near the bridge of Karkeli railway station. In this connection it is to be seen that the appellant was also charged in this case for the offence punishable under section 395 Indian Penal Code for committing dacoity with other persons but he has been acquitted of that charge. Therefore, it is difficult to uphold the conviction based on the solitary testomony of Virendra Pratap Singh (P.W. 8). The recovery of the Katta and the cartridge from the possession of the appellant is not free from doubt.

So far as the question of sanction for prosecution under section 39 of the Arms Act is concerned, the order dated 14-9-1993 Ex. P-8 of District Magistrate, Shahdol fulfils the requirement of law. That is a speaking order. That has been passed after perusal of the case diary and the material available therein. The learned counsel for the appellant has cited the decision of this Court in ***Raju Dubey vs. State of M.P. 1998 (1) JLJ 236,*** but that is distinguishable on facts. There can be no quarrel with the proposition that the sanction must be accorded by the authority concerned by application of mind on the basis of material collected during the investigation. In ***State of Orissa Vs. Mratunjay, AIR 1998 SC 715,*** it has been held by the Supreme Court that the condition precedent for reversal of conviction in appeal on the grund of want of proper sanction is that whether it has "occasioned a failure of justice" Section 465 cures an error or irregularity in any sanction for the prosecution unless that has occasioned failure of justice.

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31. DRUGS AND COSMETICS ACT, SECTIONS 25, 18 (a) (i) AND DRUGS AND COSMETICS RULES, Rr, 4,6 AND 46 : SALE OF DRUGS BELOW PRESCRIBED STANDARD: CONVICTION OF ACCUSED:-
1999 (2) M.P.L.J. 378
VISHAL Vs. STATE OF M.P.

There is no evidence on record to show that the mandatory provisions of Rules 4,6 and 46 followed and complied with. The report of Government analyst is full of infirmities. It was not brought to notice of accused in detail so as to enable him to offer his explantion in that context. Prosecution failed to provi guilt.

Paragraphs 12, 22, 23 and part of paragraph 18 are reproduced:-

The provisions of section 25 are mandatory in nature and that is a very important right which has been conferred on complainant, accused as well as the trial Court. None of them are dependent on others and none of them eclipsed by other provisions contemplate that every person who is concerned with trial either complainant or the accused or the Court, should make necessary efforts in this context for the purpose of finding out the truth in the interest of justice. Thus, the provisions of section 25 are mandatory in nature and they cannot be ignored, dealt with in casual approach or forgotten.

This rule is mandatory because Rule 46 has also cast a duty on Government's analyst that he shall compare the seals on the packet or (or on portion of sample or container) with the specimen impression received separately and shall note the condition of the seals on the packet or on portion of sample or container. It is also his duty that after the test or analysis has been completed, he shall forthwith supply to the Inspector a report in triplicate in Form 13 of the result of the tests or analysis, together with FULL PROTOCOLS of the tests or analysis applied.

SANCTION FOR PROSECUTION -NOT NECESSARY :

Shri Bagdia further submitted that the sanction in this case is not a valid one because it is in printed form and it shows no application of mind. Shri Verma, Dy. D.A. submitted that after examination of provisions of the Act, the defect in sanction to the prosecution is not to be viewed so seriously and it does not make a trial invalid. I uphold the submission of Shri Verma and hold that no sanction to the prosecution is necessary in the cases which are the offences under provisions of the Act. But if given, it should not be in cyclostyled form and without mentioning of reasonable facts of the case.

The Courts below have not noticed these glaring legal defects in the prosecution which takes out the credibility, acceptability of the report of government's analyst holding that the samples of drug sent to him were substandard as indicated by provisions of the Act. The prosecution is always shouldered with the burden of proving that the accused is guilty beyond reasonable doubt in every prosecution. Therefore, in this prosecution also it was obliged to prove it beyond reasonable doubt in every prosecution. Therefore in this prosecution also it was obliged to prove it beyond reasonable doubt

that the drug manufactured by the petitioners are sub-standard and were not consistent with the standard indicated by the provisions of the Act and the conditions of the licence granted to them by the Licencing Authority under the provisions of the Act. Thus, the courts below should have held that in the present prosecution the prosecution was unable to prove the guilt of the accused-petitioners beyond reasonable doubt and, therefore, they should have been acquitted. In view of this the judgments and orders passed by the Courts below have to be set aside as improper, incorrect and illegal. In the result the petition needs to be allowed and the petitioners need to be acquitted.

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32. MOTOR VEHICLES ACT, 1988, SECTION 104, PROVISO AND M.P. MOTOR VEHICLES RULES, 1994, R. 72 (3) (D) : TEMPORARY PERMIT BY A DRIVER OPERATOR, NON-PRODUCTION OF CLEARANCE CERTIFICATE: IT HAS NO APPLICATIONS:-
1999 (2) M.P.L.J. 388
PANDIT RAM PRASAD Vs. STATE TARNSPORT APPELLATE TRIBUNAL

Temporary stage carriage permit to State Transport Undertaking on notified route. Non-production of clearnce certificate in respect of tax liability would render its application as nonentertainable and would be 'no application for permit' as envisaged under proviso to section 104.

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33. T.P. ACT, SECTION 106 : PLEA OF NOTICE : STAGE AT WHICH IT IS TO BE RAISED- WAIVER OF:-
1999 (2) M.P.L.J. 392
VINOD KUMAR NEMA Vs. PARSHWANATH DIGAMBER JAIN MANDIR TRUST

In a suit for ejectment of tenant by Public Trust governed by M.P. Public Trusts Act, 1951 the trial Court had ordered eviction. Decree for eviction as passed was confirmed by the First Appellate Court. In second appeal by the defendant it was contended that no decree for eviction or possession could have been passed without notice under section 106 of the Transfer of Property Act. Admittedly. there was no defence plea that no notice under section 106, Transfer of Property Act was issued by plaintiff to defendant. Such plea was not taken even before the first Appellate Court.

It was held that such a plea cannot be taken at the stage of Second Appeal for the first time. A plea of issuing notice under section 106. Transfer of Property Act could be waived by the tenant, if not taken. Such plea is deemed to have been waived. It is always a question of fact whether notice under section 106, Transfer of Property Act was required or was given in a particular case. Unless issue is raised in defence, no evidence is required to be led on such an issue. The assertion that this is a legal objection and can be raised at any stage of appeal is unacceptable.

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34. LAND ACQUISITION ACT, SECTIONS 23 (1), 29 and 54 AND COURT FEES ACT, SECTION 8 and Sch. II, Art. 11 : MODALITY FOR DETERMINATION OF COMPENSATION:-
1999 (2) M.P.L.J. 393
STATE OF M.P. Vs. M/S AHAD BROTHERS

It is well settled that the compensation under the Land Acquisition Act has to be determined by the reference court, keeping in view the price which a willing vendor might reasonably expect to obtain from a willing purchaser on the date of notification published under section 4 (1) of the Act. Court is not expected to be influenced by the future or latter development in the locality or neighbourhood and is not expected to be influenced by the obtaining situation on the date of grant of compensation. What is relevant is fixation of market value of the land under section 23 (1) of the Act is the prevailing price as on the date of notification under section 4 (1) of the Act. Price on the basis of square yard at Rs. 2/- per square yard as just price. ***AIR 1996 SC 3478*** referred.

It is well settled in law that while determining the quantum of compensation for a big chunk of land the transactions wherein small parcel of land are sold are not to be relied upon. **Judicial notice can be taken of the fact that there is constant rise in the market value of the land,** which are suitable for homestead and industrial purposes. Potential value and the possibility of the increase of the value of the land in the vicinity have to be taken into consideration. While determining the quantum of compensation the Court is required to consider all the relevant circumstances and call to his aid the experience. ***AIR 1997 SC 2552 and (1995) 5 SCC 422*** referred.

Claimants not owners of land and had lease-hold interest in acquired land. Lessee is entitled to compensation in respect of his right. 30% of the quantum as determined granted as compensation in respect of lessee's interest. ***AIR 1997 SC 2669, (1994) 5 SCC 239, AIR 1968 SC 1045 and (1994) 3 SCC 860*** referred.

CROSS-OBJECTION-COURT FEE

Cross-objection by claimant for fixing price of land at Rs. 5 per sq. ft. Rupees 20 court fee paid. Article 11 of Schedule II not applicable. Ad Valorem Court fee under section 8 payable. No court fee on differential valuation paid. Cross-objection as filed by claimants in the circumstances not entertainable. ***1993 MPLJ 536 and AIR 1995 SC 1828*** referred.

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35. M.P. ACCOMMODATION CONTROL ACT, SECTIONS 18 (3) AND 12 (1) (h): RIGHT OF FREE ENTRY WHEN LAPSES : RIGHT OF RE-ENTRY:-
1999 (2) VIDHI BHASVAR 152
PRATAP SINGH Vs. SHARADCHAND

Delivery of possession by tenant on specified date is condition precedent. If the tenant does not give possession as specified by the Courts, he cannot again ask for the right of re-entry. The provisions of Sections 18 (3) have to be construed strictly.

C.P.C. Order 17 R. 3 and Order 17 R. 2:-

Suit adjourned on the last date at the instance of the party. Default committed by such party even on adjourned date. Both parties present. Provisions attracted. ***Ramarao vs. Shantibai, 1977 JLJ 147 (FB)*** relied on.

Paragraph 3 of the judgment is reproduced:-

It is argued on behalf of the appellants that the conditions precedent for invoking the provision of Order 17 Rule 3 CPC were not present and therefore that step could not be taken. Reliance is placed on the Full Bench decision of this Court in ***Ramarao Vs. Shantibai (1977 JLJ 147=1977 MPLJ 354)***. Order 17 Rule 3 CPC as amended in 1976 reads: "Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default, (a) if the parties are present, proceed to decide the suit forthwith; or (b) if the parties, or any of them is, absent proceed under Rule 2". Thus in order to attract Order 17 Rule 3 CPC three conditions must be satisfied, (i) that the suit must have been adjourned at the instance of a party to carry out any of the things set out in the rule, (ii) that there must be default by that party in carrying it out and (iii) the parties must be present either personally or through counsel at the adjourned hearing.

CIVIL PRACTICE:-

Litigation between the landlord and tenant must come to end quickly. ***Prabhakaran vs. State of Tamilnadu, AIR 1987 2117*** followed. ***Kailashchand vs. Vinod, 1993 MPLJ 1965*** relied on.

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36. CIVIL SERVANT : DEPARTMENTAL ENQUIRY, FAVOURABLE REPORT TO A DELINQUENT: DISCIPLINARY OFFICER DISAGREEING WITH : PROCEDURE TO BE FOLLOWED:-
1999 (2) VIBHA 163
R.R. GABHANE Vs. STATE OF M.P. AND OTHERS

Reasons for such disagreement should be supplied to the delinquent officer.

Paragraph 3 of the judgment is reproduced:-

In this case the Enquiry Officer's report was in favour of the appellant delinquent officer. He had exonerated the appellant on the charges. The copy of this report was not communicated to the appellant. A show-cause notice was given proposing to dismiss him from service for those charges, without indicating in any manner that the Enquiry Officer had found the charges not proved. The Enquiry Officer's report was also not supplied to the appellant. The Enquiry Officer's report came to light only when it was filed along with the counter-affidavit in the writ petition. THIS WAS NOT A FAIR THING TO DO. We are not going into the question whether it was obligatory upon the disciplinary authority to communicate the reasons for his disagreement with the findings of

the Enquiry Officer to the delinquent officer or not. In view of the above conduct which PRIMA FACIE looks to us unfair, we think it appropriate to interfere in the matter. The judgment of the Division Bench of the High Court is set aside and the order of the learned Single Judge is restored ONLY TO THE EXTENT the said order remits the matter to the disciplinary authority to continue the proceedings from the stage of the second show-cause notice.

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37. Cr.P.C., SECTIONS 161 AND 311 : PROSECUTION WITNESSES CAN BE PRODUCED AS DEFENCE WITNESSES:-
1999 (2) VIBHA 189
IKRAR AHMED Vs. STATE

The witness was interrogated under Section 161 but not examined by prosecution. He may be examined as a defence witness. Such opportunity cannot be denied by any lame excuse.

CRIMINAL PRACTICE : No accused can be punished without following process of law. It includes all opportunities and amenities as provided by law.

Paragraph 7 of the judgment is reproduced:-

If a witness has been interrograted during the course of investigation and if his evidence is material to the cause of judging the innocence or guilt of the accused, even though the prosecution decides to drop him or not examine him as a prosecution witness, accused is entitled to examine him as a defence witness. Such opportunity cannot be denied to the accused by putting lame excuses. This attitude stands depricated. It is nothing but denial of justice impliedly by clandestine way. It is hoped that this attitude should be abandoned as early as possible and the concerned **Police Department who has been entrusted with the duty of serving of notice or summons, shall stand to the demand of time.** The Courts are not expected to give importance to such lame and unreasonable excuses which would be resulting in denial of justice to a person who has been indicated as an accused in criminal trial. Courts have to keep in mind that none can be punished without following due process of law. Due process of law include all opportunities and amenities to the person aggrieved as provided by law.

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38. CR.P.C. SECTION 243 AND 311:-
1999 (2) VIBHA 142
B. BHUSAN Vs. STATE OF M.P.

The witness was duly cross-examined for two days who came from Bombay. The accused cannot be recalled as a witness as of right. Sufficient opportunity given to cross-examine which was duly availed of. **Witness cannot be recalled because of non availability of senior counsel. Delay in filing an application for recalling of a witness depends upon facts of each case.** In some cases mere delay may not be a ground to dismiss an application under Section 311. ***Sitoba vs. State, 1957 MPLJ Short Note 52, State vs. Chandrakant, 1964 MPLJ Short Note 213, Peer Mohammed vs. State, 1960***

MPLJ Short Note 113 distinguished and *Gurmeet kaur vs. State of M.P. 1997 (II) MPJR 218* discussed.

Paragraphs 7 and 8 of the judgment are reproduced:-

Reference may be made here to the case cited by the petitioner. The **1957 MPLJ Short Note 52 case (Sitoba vs. State)** and **1964 MPLJ Short Note 213 (State vs. Chandrakant)** are only short notes. Full facts are not reported. However, this much is clear from the report that in both these cases, the High Court found it as a fact that full opportunity for cross-examination was not given to the accused on the facts of those cases. The **1960 MPLJ Short Note 113 (Peer Mohammed vs. State)** case relied on is again only short note. But even this short note shows that the counsel engaged for the day, had not been fully instructed by the counsel, and that the application for recalling the witness was promptly made by the accused before he entered on his defence. Such is not the case here. The counsel appearing for the accused did not say that he had to take further instructions. In fact, he represented him through the lengthy chief-examination which continued on the next day too. He had ample opportunity to seek instruction, and in fact, want of instruction was not given as a ground for adjournment.

In **1997 (II) MPJR 218 (Gurmeet kaur vs. State of M.P.)** (supra) the principle was reiterated that mere delay was not a ground to reject the application under section 311 Cr.P.C. This is obvious from the wording of the section itself. But the High Court left the question of recalling the witness open to the decision of the trial Court giving reasons in detail about the decision. There is no quarrel with the principles elaborated in this case. But its application would depends on the facts. And in the case before us we feel that the trial Court did not go wrong in deciding the matter as it did.

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39. Cr.P.C., SECTIONS 320, NON COMPOUNDABLE OFFENCE APPLICATION FOR COMPOUNDING : MITIGATING CIRCUMSTANCES:-
1999 (2) VIBHA 192
RADHESHYAM Vs. STATE OF M.P.

Offence under Section 326 IPC compounded inspite of it being non-compoundable. Accused persons found to be old or of old age. It is a mitigating circumstance. 5 years jail sentence reduced to undergone sentence of 4 months and 1-½ month is sufficient. Fine of Rs. 2,500/- on each accused imposed was to be imposed which was ordered to be paid to victim of offence.

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40. Cr.P.C., SECTIONS 200, 202, 203 AND 204: COMPLAINT BY A DIVISIONAL FOREST OFFICER IN VARIOUS OFFENCES:-
1999 (2) VIBHA 141 (SC)
STATE OF M.P. Vs. HARSH GUPTA

Complaint by a Divisional Forest Officer under various offences was filed. Presumption under Section 69 of the Forest Act cannot be rebutted without evidence. The complaint cannot be rejected on preliminary stage. The nature

of offence ascertainable after evidence. Hence it cannot be rejected before recording evidence.

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41. C.P.C., Or. 22 Rr. 3 and 5 READ WITH HINDU ADOPTIONS AND MAINTENANCE ACT:-
1999 (2) VIBHA 136 (SC)
DEU (Mst.) Vs. LAXMI NARAYAN

Adoption was by registered deed of adoption. It can be challenged by independent proceedings. But in a suit for partition by widow against her step sons, widow adopting by registered adoption deed another son such adopted son can be substituted on the death of plaintiff (widow). Validity of the adoption cannot be examined in that suit.

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42. LIMITATION ACT, SECTION 5:-
1999 (2) VIBHA 182
CHIMANLAL CHOPADA Vs. ASHOK KUMAR SINGHAL

Application was filed under section 5 of the Limitation Act with medical certificates. Name of the patient, illness and treatment was not clear. Relevant affidavits not filed. The application was rightly rejected. Discretion exercised by trial Court in respect of condonation of delay should not be interfered by High Court in revision. ***Bala Krishnan vs. Krishna Murthy, AIR 1998 SCW 3139*** followed. In the present case the Court found that the facts and circumstances brought on the record clearly indicate that the explanation furnished by the appellant smacks of mala fides and was in fact a part of dilatory strategy. The facts and circumstances indicated in the objection filed by the plaintiffs which was duly supported by an affidavit and the fact that the appellant had no courage to lead the oral evidence in support of his claim and submit himself to the cross-examination inspite of full opportunity afforded to him for leading the oral evidence and further the fact that the assertions made in the counter-affidavit by the landlord had not been denied or contraverted by filing any rejoinder-affidavit including the fact that the son of the appellant was a "VIDHI VYAVASAYEE" practising at Gwalior constituted enough material to warrant the conclusion as reached by the first appellate court.

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43. MOTOR VEHICLES ACT, 1988, SECTION 171 : INTEREST ON AMOUNT OF COMPENSATION : DISCRETION OF TRIBUNAL:-
1999 (2) VIBHA 180
BHAYLA Vs. ABDUL KAYUM

Interest on amount of compensation cannot be claimed as a right or from a particular date. It is the discretion of the Tribunal to award it from any date, i.e. from date of application or award. In no case it can be awarded for period prior to application for claim.

Paragraph 4 of the judgment is reproduced:-

A perusal of the provision shows that award of simple interest falls in the discretion of the Tribunal. It may or may not award it. If it does, it lies in its discretion to award it from a particular date and at a reasonable rate. The tribunal is not bound to award it in all events and circumstances which is evident from the word "May" occurring in the provision. It is a different matter that it cannot award interest from the date earlier than the date of claim application. But that would not imply that it was bound to award it from the date of claim petition. Nor is any right vested in the claimant to claim it from a particular date. It would all depend on facts and circumstances of the case leading to exercise of sound judicial discretion by the Tribunal. Therefore, it becomes fallacious to contend that appellants had a right to claim it from the date of claim petition or tribunal was bound to award it from that date. The correct position in law is that interest cannot be claimed by the claimants in motor accident claims as of right from a particular date and that the Tribunal is under no obligation to award it from the desired date. The matter falls in the discretion of Tribunal to be exercised judicially in accordance with recognised principles.

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44. I.P.C. SECTION 306, CRUELTY MEANING OF:-
1999 (2) VIBHA 138
TEJ SINGH Vs. STATE

Wife residing with parents just before incident. Husband cannot be said to have abetted the suicide. Prior beating by husband cannot be presumed to have caused abetment for the offence. ***Basant Kumar Vs. State, 1991 JLJ 175 and Chanchal Kumari vs. Union Territory, AIR 1986 SC 752*** relied on.

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45. I.P.C. SECTIONS 326 AND 307:-
1999 (2) VIBHA 159
HAZARI Vs. STATE

No intention to cause death proved. Incident started on grazing of cattle. Injury not on vital part but dangerous to life. Offence falls under Section 326. ***Sarju Prasad vs. State of Bihar, AIR 1965 SC 843 and Kanhaiya Lal vs. State of M.P., 1985 MPWN 336*** relied on.

Paragraphs 11 and 12 of the judgment are reproduced:-

So far as individual act of appellant Bhavuti is concerned, the learned counsel of the appellants has argued on the strength of ***Sarju Prasad vs. State of Bihar (AIR 1965 SC 843)*** and ***Kanhaiya Lal vs. State of M.P. (1985 MPWN 336)*** that looking to the nature of injury of kalla, It is not proved that the appellant intended to kill him. In order to bring the offence home to accused, the prosecution must establish that his intention was one of the three kinds mentioned under section 300 IPC. State of mind of the accused has to be deduced from surrounding circumstances and motive would be a relevant circumstance. Evidence against this appellant is not sufficient with certainty as to existence of requisite intention of knowledge of the accused. He, therefore, can be convicted only under section 324 IPC.

It is true that the injury of kalla was not on any vital part of the body and the circumstances under which it was caused seems to be a sudden assault over driving out of the cattle from the field of the complainant. Patwari, Sangram Singh (PW 10) who prepared spot map (Ex-p-12) has admitted that the incident took place on the road some 4-5 furlongs away from the field. It means that the appellants might have resisted driving away of their cattle by complainant on the ground that they were not grazing in the field of complainant's side. It cannot be imagined that the assault caused by appellants Bhavuti on Kalla was premeditated. However, as indicated by medical report, the injury of kalla was dangerous to life and it certainly falls under section 326 of IPC.

NOTE : Please note the following statement for understanding the provision of Section 307.

शरीर के विरुद्ध अपराध

हम–आप धारा 302, 304 (भाग 1–2) धारा 307, 308 भा. द.वि. के अंतर्गत निर्णय लिखते हैं लेकिन मूल मुद्दे पर ध्यान नहीं देते हैं। शरीर से संबंधित अपराधों के लिए मूल सिद्धांत धारा 299–300, धारा 39, धारा 321–322 महत्वपूर्ण हैं। आरोप निर्मित करने में भी इन तत्वों का समावेश होता है यथा स्वेच्छयः या जानते हुए जैसा। ऐसा क्यों होता है कक्षा में बताते रहे हैं। धारा 307 भा.द.वि. के अंतर्गत अपराध का गठन होने के लिए आवश्यक तत्व हैं वो इस प्रकार :– यदि मनःस्थिति बाबत आधार प्रगट नहीं है तब आरोपी के कृत्य के ही आधार पर उसके आशय या ज्ञान को ज्ञात करना होता है और तब उसके कृत्य का स्वाभाविक परिणाम ही उसके आशय का प्रतीक होता है। प्रत्येक कार्य जो विधि द्वारा वर्जित है अपराध है फिर चाहे उसके पीछे मनःस्थिति रही हो या नहीं रही हो। अच्छे पुस्तक एवं कुछ दृष्टांतों को पढ़ने से ज्ञात होगा। एकदम नया दृष्टांत ***1999 (2) विधि भास्वर 159 हजारी विरुद्ध राज्य*** देखो धारा 302 भा.द.वि. के अंतर्गत सजा देने के पूर्व धारा 300 के चारों भागों व स्पष्टीकरण व अपवाद का जो भी लागू होता हो खुलासा निर्णय में हो।

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46. I.P.C., SECTION 363 : AGE:-
1999 (2) VIBHA 169
SHYAM SINGH Vs. STATE OF M.P.

Radiological examination. Two years margin can be given. ***Jayamala vs. Home Secretary. AIR 1982 SC 1297*** followed.

Prosecutrix below 18 years of age studied up to 7th class herself went with the accused out of her grandfather's guardian ship also marrying him with caste custom. No offence is made out. ***Varada Rajan vs. State, AIR 1965 SC 942*** followed.

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47. M.P. ACCOMMODATION CONTROL ACT, 1961, SECTIONS 39 (2) 1st PROVISO : VACANT PORTION:-
1999 (2) VIBHA 132 (SC)
STATE Vs. YUSUF KHAN

Proceedings under Section 39 finding on need of landlord has to be given. Collector cannot examine who is the family member of the landlord. Order of the High Court affirmed.

Paragraph 3 of the judgment is reproduced:-

In view of the aforesaid proviso, it is open to the Collector if satisfied after due inquiry to permit the landlord to occupy the premises which has fallen vacant. In the present case, the claim of the respondent to occupy the premises in question was rejected by the collector on the ground that the widowed sister daughter of the widowed sister have not been included in the definition of "members of the family" we are not able to appreciate as to how the Collector was required to consider as to whether the widowed sister and the daughter of the widowed sister shall be deemed to be members of the family of the respondent for the purpose of exercise of the power under the first proviso to sub-section (2) of section 30. Under the said proviso, the Collector has to examine whether the need of the landlord is genuine. The finding has to be recorded by the Collector on due inquiry about the need of the landlord. Although the order of the Collector has not been brought on record but from the High Court order, it appears that the Collector had not recorded the finding in respect of the need of the respondent for the premises on the ground that he had become invalid and crippled and because of that he wanted to occupy the premises in question along with his widowed sister and daughter of the widowed sister. The matter would have been different if he had claimed the premises in question for his widowed sister and widow's daughter, In this background, the order of the Collector had rightly been set aside by the High Court and the said order of the High Court does not require any interference by this Court. Accordingly the appeal is dismissed. No costs.

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48. M.P. ACCOMMODATION CONTROL ACT, SECTION 12 (1) : CONTRACT FOR FIXED TERM OF TENANCY : SUIT BEFORE EXPIRY OF THE TERM:- CAN BE FILED.
1999 (2) JLJ 185
SHANTI DEVI AGRAWAL (SMT) Vs. P.N.B., RAIGARH

Fixed term tenancy. Eviction suit can be filed even before term of tenancy is expired. The provision contains non-obstante clause. No fixed term contract is binding. ***Sunder Das vs. Kamla Devi 1982 MPWN 455 and 1985 MPWN 314*** overruled. ***Panjumal Daulatram vs. Sakhi Gopal Thakurdin Agrawal, 1979 JLJ 230= 1977 MPLJ 762*** confirmed. ***Shrilakshmi Venkateshwara Enterprises Ltd. vs. Syeda Vajhiunnissa Begum & others, (1994) 2 SCC 671*** followed.

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49. ARBITRATION ACT, 1940, SECTIONS 30 (C), 16 (1) (C) AND 17 : FINAL BILL ACCEPTED WITHOUT PROTEST:-
1999 (2) JLJ 205
NANAK CHAND SHRIRAM SOHANI (M/S.) Vs. UNION OF INDIA

Final bill accepted without protest or objection. Receipt given not alleged be under coersion or misrepresentations. No clause otherwise contained in agreement. Contract came to an end so the arbitration clause and therefore the arbitrator has no jurisdiction to pass any award. ***AIR 1998 SC 1172, AIR 1991 SC 945*** and ***AIR 1995 SC 2423*** distinguished. ***AIR 1990 Bombay 45, AIR 1990 SC 1426, AIR 1955 SC 468*** and ***1989 JLJ 511*** relied on.

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50. CIVIL COURTS ACT, 1958 (M.P.) SECTIONS 15 AND 7 (2) THE PRINCIPAL CIVIL COURT: COURT OF ADDITIONAL DISTRICT JUDGE:-
1999 (2) JLJ 228
YASMIN KHAN (Dr.) Vs. SAMI ULLAH KHAN

District Court is a principal Court of original jurisdiction of any district. Court of Additional District Judge is distinct from Court of District Judge. It drives powers from distribution memo prepared by District Judge. Under Section 15 of the Civil Courts Act, distribution memo is prepared and it has force of law.

NOTE : Please refer to 1990 JLJ 152, Civil Courts Act, 1958 M.P. Section 3 (4), 6 (c), 13 and 15 (1), Civil Courts (Amendment and Validation) Act, 1980 M.P. Section 7 (2). Additional Judge to the Court of District Judge exercise all jurisdiction of District Judge including jurisdiction of Principal Civil Court of the District. ***Dharmashila Bai vs. Ram Dayal, 1961 JLJ 466, Lakshman Singh vs. Keshar Bai, 1965 JLJ 710*** and ***Ganjgir Chela Vs. Russel Singh*** relied on. ***Venkataramanna Devaru vs. State of Mysore,*** **AIR 1958 SC 255 (268)** referred.

Please also refer to Section 2 (9) Civil Procedure Code which defines "District and District Court". It means the local limits of the jurisdiction of a principal Civil Court of original jurisdiction (hereinafter called a district Court) and includes the local limits of the ordinary original civil jurisdiction of a High Court. Please also refer to Section 3 (17) General Clauses Act, 1897 where the word "District Judge" has been defined. It means the Judge of a principal Civil Court of original jurisdiction, but shall not include a High Court in the exercise of its ordinary or extraordinary original civil jurisdiction. In ***Kuldeep Singh Vs. the State of Punjab, AIR 1956 391,*** it was held that the question whether an Additional District Judge or an Additional Judge is Judge of the District Court and where and how far he can exercise the powers of the District Judge will depend upon the Civil Courts Acts in force in different states.

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51. C.P.C., Or. 5 AND Or. 7 R. 11:-
1999 (2) JLJ 193
SATISH SAGAR Vs. MANAGING DIRECTOR, M.P.I. C.D.C.

Order 5 is first stage of the suit, after service the defendant may file reply

or may file an application under Or. 7 R. 11. Under Order 8 Rule 11, Order 5 R. 6 and Or. 7 R. 1 defendant appeared after service. Adjournment granted for filing written statement. Such adjourned date is not for hearing of the case.

Order 14 Rule 1: Suit is posted for hearing after issues are framed and not before.

Order 9 Rule 8 : Suit is not heard before framing of issues. No suit can be dismissed in default of appearance before that stage.

The whole judgment is reproduced at verbatim to understand the law:-

ORDER

1. The revision is directed against the order dated 14-2-95 passed in Misc. Appeal No. 83/94 which arose out of the order dated 8-10-92 passed on an application under Order 9 Rule 9 CPC.

2. The plaintiff filed a suit for declaration and injunction wherein the trial Court fixed 29-8-92 as the date for filing the written statement on which date no written statement was filed by the defendant but on that date, the plaintiff could not appear in Court as on account of some family property fued at his native place in Punjab, he proceeded to that place and could not contact his counsel to appear in the case. The case was dismissed for default of appearance of the plaintiff, on 29-8-92, and the plaintiff on his coming back, came to know about the order on 17-6-93 when he contacted his counsel and the counsel told him that he could not attend the case because of his remaining busy in some other cases which has resulted in dismissal of the suit itself. For setting aside the order of dismissal of the suit and restoration of the suit, an application was moved under Order 9 Rule 9 CPC, which was rejected by the trial Court, where against an appeal was preferred which also met the same fate and as such, the present revision is directed.

3. Learned counsel for the applicant submitted firstly that the suit was filed by the plaintiff which was dismissed for default. Therefore there was no question of either avoidance or negligence on the part of the plaintiff for either pursuing the suit or not remaining vigilant in the suit. Secondly, so far as his statement of going to his native place was concerned, the same was not rebutted on oath and also the statement of the counsel that at the relevant time when the case was called, he was busy in some other Court which was not rebutted by way of an affidavit and denial and therefore no adverse inference should have been drawn by the Court below. Thirdly, the learned counsel for the applicant submitted that the dismissal of the suit itself was bad in law in view of the provisions of Order 9 Rule 8 CPC.

4. So far as the first two submissions are concerned, they relate to the factor pertaining to the fact and it is not necessary to dilate on them as those facts are not rebutted by the learned counsel for the other side. But so far as the question of non-applicability of the provisions of Rule 8 of Order 9 is concerned, the same requires consideration. Rule 8 of Order 9 CPC is as extracted below:-

"Where the defendant appears and the plaintiff does not appear when the suit is called on for **hearing**, the Court shall make an order that the suit be dismissed unless the defendant admits the claim, or part thereof, in which case the Court shall pass a decree against the defendant upon such admission, and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.

It provides for dismissal of the suit when called on for hearing, on the ground that the defendant appears but the plaintiff does not appear.

5. The question is as to what is the procedure followed after the institution of the suit and prior to the stage when the case is called on for hearing. The first stage provided under Order 5 is issuance of summons for making appearance and to answer the allegation made in the plaint on the date specified in the summons and counter claim, if any, to be filed in the written statement or an objection can also be filed, if available to him under the provisions of Order 7 Rule 11 CPC.

6. Here in the present case, the service was effected and the defendant appeared but the time was allowed for filing the written statement and for that purpose, the case posted on 29-8-92.

After the written statement is filed, then the stage of filing of the documents comes, as well as the stage for framing of the issues and after framing of the issues, the case is posted for hearing.

7. In the present case, in fact, the case was not posted for hearing and the date 29-8-92 was not the date of hearing.

In view of the above, the order sought to be revised is illegal and without jurisdiction and deserves to be set aside.

8. In view of the above, the revision is allowed. The impugned order dated 14-2-95 is set aside as well as the order dated 29.8.92 dismissing the suit for default in appearance. The suit is restored to its original number.

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52. CIVIL PRACTICE : QUESTION OF COURT FEES:-
1999 (2) JLJ 218
MOHD. JAMEEL KHAN Vs. MITTHU LAL

Averment of plaint has to be seen. Plaintiff cannot be allowed to mould the facts, circumstance and the real intention. ***Court fees Act, 1870, Section 7 (iv) (c) Sch. II Art. 17:*** Plaintiff bound to avoid agreement, decree or liability imposed. He has to get such decree or liability etc. set aside. Court fees has to be paid under S. 7 (iv) (c). Plaintiff when not so bound he can pay court-fees under Art. 17 of Sch. II. ***Santosh Chandra vs. Gyansunder Bai, 1970 JLJ 290 (F.B.) Rupia vs. Bhatu, AIR 1944 pat 17 (FB)*** relied on. ***Shamsher singh vs. Rajendra Prased, AIR 1973 SC 2384*** followed. Where as **1982 JLJ SN 72** and **1982 MPWN 174** dissented from.

Paragraphs 6,7 and 8 of the judgment are reproduced:-

There cannot be any denial of the principle of law that while considering the question of payment of court fee, the allegations contained in the plaint have to be seen. It may, however, be mentioned that the plaintiff cannot be permitted to mould the facts, circumstances, the real intention. If we go through the averments made in the plaint, it transpires that the intention of the plaintiff is something different than what has been claimed. The Court cannot over look it. I have already quoted above the facts alleged by the plaintiff in detail. It may be mentioned here in brief that the allegations made in the plaint are that the plaintiff stated that he was taken in the office of the Registrar by defendant No.1 and he had confidence in him. He had taken his thumb impression on the stamp papers on the pretext that it was a document of Mukhtarnama, but the defendants 1 to 8 got fictitious sale-deeds executed fraudulently. The sale deeds were void and inoperative as they were obtained by fraud and misrepresentation. Section 19 of the Indian Contract Act shows.

> "When consent to an agreement is caused by corercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused".

Thus under this Section, if the consent to an agreement is obtained by coercion or by practising fraud or misrepresentation, the documents can be avoided by the person whose consent was so obtained. In the present case, as pointed out above, the averments shows that the plaintiff was taken into the office of the Registrar and his thumb impressions were obtained on some typed papers on the pretext that it was a Mukhtarnama. Thus to my mind, it has to be taken that according to the averments made in the plaint, the contract, i.e. sale-deeds in question are a voidable documents and can be ignored only on the option of the party on whom fraud was practised or mis-representation was made. The Full Bench Decision of this Court relied upon by the learned counsel for the petitioners mentioned above, i.e. the case of Santosh Chandra (supra) shows that:-

> "Where it is necessary for a plaintiff to avoid an agreement or a decree or a liability imposed, it is necessary for him to avoid that and unless he seeks the relief of having that decree, agreement, document or liability set aside, he is not entitled to a declaration simpliciter. In such case, the question of court-fees has to be determined under Section 7 (iv) (c) of the Act."
>
> It was further held in this case:
>
> "if the plaintiff is not bound by that decree or agreement or liability and if he is not required to have it set aside, he can claim to pay court-fees under any of the sub-clauses of Articles 17, schedule II of the court-fees Act."

There is an earlier decision of Full Bench of Patna High Court on same lines reported in **AIR (31) 1944 Patna 17.** Their Lordships held that: "a suit though case in the form of a declaratory relief only, out in substance alming at setting aside a deed formally executed by S. 7 (iv) (c) and not by Sch. 2, Art. 17 (iii). In that case, the plaintiff alleged that the she was in possession of the

properties in question, holding a widow's estate after her husbands death. The defendants had brought her to Patna on false pretexts and fraudulently got her affix her thumb mark to two documents and to admit execution of the same without letting her know the contents there of and that the recitals in the documents. The court-fee paid was for a declaration only. After taking into consideration the entire facts and law, the lordships specifically ruled that provision of S. 7 (iv) (c) were applicable and not Sch. 2, Art. 17 (iii) of the Court -fees Act. Consequently, it was held that court-fee ad valorem was required to be paid. Thus, in view of the Full Bench decision of this Court as well as above Full Bench decision of the Patna High Court, there remains no doubt that in case where the plaintiff sought a declaratory relief only, but in substance aimed at setting aside sale deeds, court-fee has to be paid in accordance with law governed by Section 7(iv)(c).

Before concluding, I must also mention the authorities relied upon by the learned counsel for the contesting respordent.Both the authorities i.e. **1982 MPWN 174** ***(Pramod kumar v. Bhind Central Co-op. Bank)*** and **1982 JLJ SN 72** ***(Durg Singh v. Ramkali)*** are decisions of the learned Single Judge of this Court. In view of the law laid down in aforementioned full Bench decision of this Court as well as of the Patna High Court, I am of the view that the decisions of the learned Single Judge of this Court cannot help the learned counsel for the contesting respondent. I may, however, clarify the position in another way that a contract or other transaction induced or tainted by fraud is, not caid, but only voidable at the option of the party defrauded. Until it is avoided, the transaction is valid, so that third parties without notice of the fraud may in the meantime acquire rights and interests in the matter which they may enforce against the party defrauded. It is aso useful to metion the provision of Section 47 of the Registration Act, 1908 under which a registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made and not from the time of its registration. Once a document is registered, as required under the law, it becomes operative. There is no doubt that the allegation is that the document in question were registered on mis-representation. Consequently, it has to be got cancelled and mere declaration of the right cannot be effective.

The learned counsel for the respondent No. 1 urged that as the petitioners' impressions were taken by practising fraud and on the basis of misrepresentation, he cannot be taken to be a party to the document. He can, therefore, seek mere declaration and cancellation of sale- deed was not required I have given my anxious consideration to this contention. I have already said above that third parties without notice of the alleged fraud can acquire rights and interest in the property and get it enforced against the person defrauded It cannot under the circumstances be taken that he was not a party to the document. Thus, to my mind unless the document is got cancelled by a decree of Court, it remains a valid document. In this view of the matter, the relief of declaration cannot be sufficient. The plaintiff has to ask for a consequential relief of cancellation of sale-deed in order to avoid it. Consequently, I conclude that as a consequential relief of cancellation of sale-deeds

is necessary on the facts of the present case, the plaintiff is required to pay ad valorem Court-fee on the value of the sale-deeds under Section 7 (iv)(c) of the Court-fees Act as laid down in the aforesaid Full Bench decision of this Court. The suit has also to be valued accordingly.

Note:- Please refer to **1987 (2) MPWN 33**, ***Ashok kumar vs. Hari Shankar.*** Amendment application to avoid payment of advalorem court fees was also to be rightly rejected. Please go through this ruling.

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53. EVIDENCE ACT, SECTIONS 45 AND 60 : APPRECIATION OF EVIDENCE:-
1999 (2) JLJ 171
MOHAN SINGH Vs. STATE OF M.P.

Efforts should be made to find out the truth for which courts are created. Mere variance of prosecution story with medical evidence should not lead to conclusion to reject prosecution story in all cases. Credibility and trustworthiness of eye witnesses could not be impeached in long cross-examination. Finding corroboration from other evidence (required). Pellets injury, fired from roof top to downwards, injury would be oval in shape. Journey of pellets would be down-words. **Taylor's principles and practice of Medical Jurisprudence, 12th Edition 297** and **Modi's Textbook of Medical Jurisprudence and Toxicology, 21st Edn. 264** relied on.

Shape of pelettes injury, size, direction of injury matching with the version of eye-witnesses, blackening may not always be from close firing alone. Referring to ***Karnel Singh Singh vs. State, AIR 1971 SC 2119,*** the Supreme Court held that the witnesses are trustworthy in more cases of one shot in consistence between the opinion of the expert and eye witnesses relating to distance of firing carries to weight.

I.P.C. SECTION 3, COMMON INTENTION : It does not amount to common intention when words "mar sale ko" used **at lastly** not sufficient to attract common intention in the sequence of events not matured. Exhortation is not sufficient to punish. Such accused is entitled to benefit of doubt.

Cr.P.C, SECTION 154 : F.I.R. BY AN EYE WITNESS:-

If the F.I.R. is not by eye witness then details cannot be expected from him.

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54. EVIDENCE ACT, SECTIONS 50 AND 113-A, AND INTERPRETATION OF STATUTES:-
1999 (2) JLJ 195
BALARAM Vs. STATE OF M.P.

The presumption of marriage has not availiable under Section 113 A of evidence act in respect of a woman who was a mere concubine, prostitute or a casual visitor. The presumption cannot be drawn if woman was engaged in illicit affairs. None of them can claim any relationship based on marriage. Period of seven years can be reckoned from date of marriage. Such marriage

may not be strictly in accordance with personal law. Some kind of marriage ceremony is sufficient if she treats the accused as her husband Direct evidence of marriage between victim and accused is not always necessary. On such proof presumption under S. 113-A may be drawn. **AIR 1988 SC 644** and **AIR 1966 SC 614** distinguished.

NOTE : Please refer to **JOTI JOURNAL' Vol. V Part I, February 1999 at page 11** where the whole text is reported.

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55. MOTOR VEHICLES ACT, 1988 SECTION 140 : CLAIM BASED ON NO FAULT LIABILITY:-
1999 (2) JLJ 231
SHAMINA BEGUM Vs. RAJENDRA WAGHMARE

Claim based on no fault liability. Not liable to be defeated even if victim was himself negligent. No negligence of anyone is to be seen for awarding compensation in this head. The accident should arise out of use of Motor vehicle and should result in death or permanent disablement. Claim should be made against the owner and the insurer. While ascertaining number of injuries under Section 140 of M.V. Act, 1988 panchanama, FIR and post-mortem report filed should be used in case of doubt. Further information from police or medical officers may be collected by Tribunal under the Rules.

Note:- For ready reference the concerning Rules 226 and 227 are quoted as under:-

Rule No 226 and 227 of M.P. Motor Vehicles Rules. 1994

226. Obtaining of information and documents necessary for compensation under Section 40. The Claims Tribunal Shall obtain whatever information and documents which may be found necessary from the police, medical and other authorities and proceed to award the claim whether the parties who were given notice appear or not, on the appointed date.

227. Judgment and award of compensation under section 140.- (1) The claims Tribunal shall proceed to award the claim of compensation under section 140 on the basis of-

(a) Application and Statement of the parties;

(b) Accident Information Report in Form 54 of the Central Rules or Certificate regarding ownership and insurance particulars of the vehicle involved in the accident. obtained from the Registering Authority;

(c) First Information Report;

(d) **Post Mortem Report or Death certificate or injury Report in Form M.P.M.V.F. 76 (Comp. B) by the Medical Officer** who has examined the victim.'

(e) Any other information or documents obtained by the Tribunal under rule 226.

(2) The Claims Tribunal in passing orders shall make an award of com-

pensation in respect of the death or permanent disablement to be paid by the insurer or owner of the vehicle involved in the accident,within a period of thirty days.

(3) The Claims Tribunal shall as far as possible, dispose of the application for compensation within forty five days from the date of receipt of such application.

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56. I.P.C., SECTION 302 AND 304:-
1999 (2) JLJ 214
RAMLAL Vs. STATE OF M.P.

One blow on head with sufficient force. Stick used also significant as weapon of assault. One deceased dying instantaneously. Another deceased suffering three head fractures.

Paragraphs 10 and 11 of the judgment are reproduced:-

Learned counsel for the appellant Shri Verma submitted that the appellant has committed an offence punishable under S. 304 and not under S. 302 IPC, because if the prosecution evidence is to be believed, the appellant had given one blow each to each deceased. We do not accept this argument because blow or blows cannot be only the criteria for the purpose of judging the nature of the offence committed by the accused. ***Acts non facit reum, nisi mens sit rea*** has to be kept in mind. The act simplicitor has not to be viewed only, but the intention behind it has to be given due importance. The intention has to be gathered from the surrounding circumstances and the way in which the blow or blows has/have been given by the accused become pertinent. In this case though appellant gave one blow each to each deceased, the blow was with all force. Even single blow was sufficient to cause depressed skull fracture of each of the deceased. Not only that, it caused the injury to the brain also and there was collection of the blood in the skull cavity. Anantram died instantaneously. Deceased Ramprasad sustained three head fractures. The stick which was used by appellant was also sufficiently significant as weapon of the assault. The injuries caused by each blow speak by itself of the force. Therefore, one single blow was sufficient to cause death of each of the deceased by itself.

It is pertinent to note that after assaulting Ramprasad the appellant did not stop, but assaulted Anantram when he intervened. Learned counsel Shri Verma submitted that the said act was committed by the appellant on account of provocation given by Ram Prasad. he called it as grave and sudden provocation. We do not accept that. It was not grave and sudden provocation at all. On the country it is spelled out the motive for assaulting both Ramprased and Anantram. That spelled out the motive for assaulting Ramprasad. When Anantram came for rescuing his father, the appellant Ramlal gave him a blow on the head which resulted in his death instantaneously. The appellant had sufficient time and opportunity to pick up the portion of the body for purpose of assault. He picked up the head of both Ramprasad and Anantram as target for striking the blows. The fractures caused by each blow tell about the force in

which each blow was given. It speaks of nothing also but intention to cause such bodily injuries to each of them which would in the ordinary course of nature cause death of human being. The offence which has been committed by the appellant is murder and not culpable homicide not amounting to murder.

CRIMINAL TRIAL: WITNESS: BEHAVIOUR IN THE COURT:-

A witness coming to the Court becomes bewildered by Court's atmosphere. He is susceptible to commit mistake on minor counts.

Registration Act, 1908, Section 47:- Registered document cancelled off. When required registered document operation from the time of its execution and from its registration. Document alleged to have been got executed and register on mis-representation, has to be got cancelled. Mere declaration of right is not sufficient.

NOTE : Judicial Officers are requested to go through Section 31 (2) of the Specific Relief Act to know how to pass a decree for cancellation of a sale deed or other document and how the Registrar of a Documents is to be intimated regarding cancellation of a document, so that the record of the Registrar is kept up to date because Section 3 of the Transfer of Property Act presupposes something about the Notice. Therefore, the definition of notice should also be read to know the consequences if the record in the office of the Registrar of Documents is not kept up-to-date.

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57. REQUISITIONING AND ACQUISITION OF IMMOVABLE PROPERTY ACT, 1952, SECTION 8 (1) (B) AND SECTION 23, 6 (1) (1A), 7, 8 AND 8 (2) (iv):-
1999 (2) JLJ 188
UNION OF INDIA Vs. SHRI G.C. SANGHI

With reference to the above sections requisition of property made under State Act compensation fixed by arbitrator under State Act not agreed. Appointment of arbitrator under Section 8 (1) (B) is valid as requisition made under State Act validated under S. 23. Owner of building can claim different rate of compensation for different period. Property released from requisition. Government is bound to return possession within the prescribed period. If returned thereafter, Government rightly held liable to pay mesne profits. The building if requisitioned for 38 years, damages caused by normal wear and tear, the owner is not entitled to any compensation in this head.

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58. VISHWAVIDHYALAYA ADHINIYAM, 1973, SECTION 52:-
1999 (2) JLJ 238
NARENDRA KUMAR GOURAHA (PROF.) Vs. STATE OF M.P.

Action under section 52 is not legislative but purely a statutory act. It is subject to judicial review. Scope of jurisdiction is to see whether the action is relevant and not tainted with malafide.

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59. C.P.C., Or. 6 Rr. 2 AND 5; DISTINCTION BETWEEN "MATERIAL FACTS" AND "PARTICULARS":-
1999 (2) JLJ 209
JAGDISH PRASAD Vs. MUNICIPAL CORPORATION

Distinction must be made between omission to state **"material facts"** and omission to give **"full particulars."**

Paragraph 12 of the judgment is reproduced:-

A distinction must be made between omission to state material facts and omission to give full particulars. If material facts are omitted, a party should not be allowed to raise a contention on a particular point even, if some materials are available in the evidence. If on the other hand material facts have been pleaded but full particulars have not been given the Court may permit the points to be raised on the basis of the evidence unless the opposite party is thereby materially prejudiced. The first obviously relate to a question of jurisdiction and the second to one of procedure.

NOTE: please refer to JOTI JOURNAL Vol V Part V, October 1999 in relation to the words "Material Facts" and "Material particulars". ***V.S. Acchutanandan vs. P.J. Francis,*** **(1999) 3 SCC 737, Tit-bit No. 74 page 428.**

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60. CONSTITUTION OF INDIA, ARTICLE 136 : INFERENCE IN CRIMINAL MATTERS:-
(1999) 5 SCC 694
GIAN SINGH Vs. STATE OF RAJASTHAN

Avoidance of irreparable suffering to accused. Appellant accused father-in-law of the victim, was a foreigner (British) citizen whose passport had been impounded. The High Court refused to quash appellant's application under Section 498 A of I.P.C. The Supreme Court in order to avoid irreparable suffering to him directions issued to ACJM to return passport to appellant on his executing a bond for a sum of Rs. 3 lakhs with two solvent sureties to the satisfaction of the said court. Appellant also permitted to appear through counsel except on days when his presence indispensable.

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61. CONSUMER PROTECTION ACT, 1986, SECTION 17, 21, and 11 : DIFFERENT TYPE OF RELIEF ONE IN CIVIL COURT AND THE OTHER IN CONSUMER FORUM:-
(1999) 5 SCC 696
SATPAL MOHINDRA Vs. SURINDRA TIMBER STORES

Jurisdiction of consumer disputes redressal agencies is not ousted by pendency of civil suit. Suit (in certain cases) complainant seeking compensation for alleged deficiency of service by use of substandard material in the manufacture of the goods supplied, dismissed by the District forum. The complanant's appeal dismissed in limine by State Commission on the ground of pendency of a civil suit, which was subsequent to the filing of the said complaint. The opposite party has filed to claim price of the goods supplied by

it. The complainant's revision petition was dismissed by the National Commission on the same ground. Since the civil suit was filed during the pendency of the proceedings before the Consumer Forum for a different type of relief, the same, held could not oust the jurisdiction of the Consumer Forum. Hence the State Commission erred in dismissing the complainant's appeal without recording any findings on merits. The matter was remanded to the State Commission for disposal on merits.

C.P.C., SECTION 12 :

Suit filed during the pendency of proceedings before the Consumer Forum for a different relief. It was held that it could not oust the jurisdiction of the Consumer Forum.

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62. I.P.C., SECTION 302: DEATH SENTENCE:-
(1999) 5 SCC 702
SUNIL BABAN PINGALE Vs. STATE OF MAHARASHTRA

Accused with a pre-plan reaching the house of his father-in-law in the midnight armed with a sword and killing his mother-in-law and sister-in law and also causing injuries to his wife and father-in law. Absence of mitigating circumstances. The Supreme Court held that we do not find any mitigating circumstances from which the Court would be justified in taking the view that this is not one of the rarest of the rare cases. On the other hand, the manner in which the appellant had come with a prior plan to finish the entire family and for no justiable reason would indicate that the penalty of death is the only appropriate sentence that can be awarded against the appellant.

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63. C.P.C., SECTION 114 & Or. 47 R. 1 EXPLANATION: REVIEW WHEN PERMISSIBLE
(1999) 5 SCC 703
SHANTI DEVI Vs. STATE OF HARYANA

That a judgment sought to be reviewed was overruled in another case. Question is whether review is permissible. That a judgment sought to be reviewed is overruled in another case subsequently is no ground for reviewing the said judgment. The provisions of explanation to Or. 47 R. 1 are applicable by analogy and clearly rule out this type of review proceedings. It is held that review was not permissible.

We have gone through the review petition and the grounds urged therein. The contention that the judgment sought to be reviewed was overruled in another case subsequently is no ground for reviewing the said decision. Explanation to Order XLVII Rule 1 of the Code of Civil Procedure Clearly rules out such type of review proceedings. Explanation to Order XLVII Rule 1 reads as under:

> "The fact that the decision on a question of law on which the judgment of the court is based has been reversed or modified by the subsequent decision of a superior court in any other case, shall not be a ground for review of such judgment."

The same provisions by analogy usefully apply to the present proceedings.

Hence, even on merits the review petition is liable to fail.

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64. MUNICIPALITIES:- THE BUILDING BYE LAWS:-
(1999) 5 SCC 704
R. SATYANARAYANA Vs. SHANTHA (SMT.)

Where commercial building constructed in residential area, which subsequently converted to commercial zone, the question whether the bye-laws were violated or not must be adjusted with respect to the time when the building was constructed. The building by-laws applicable would be the by laws existing at the time when the plans of the building were sanctioned by the Municipal Corporation.

Paragraph 4 of the judgment is reproduced:-

There is merit in this submission of Mr. Bhat. There were two illegalities which were alleged by Respondent.1. One illegality, namely, the nature of the user, has been cured in a sense that the zoning regulations themselves have been altered and what was previously a residential zone in which the building exists has now been converted into a commercial zone. As far as the construction of the building is concerned, we are of the opinion that whether the bye-laws were violated or not has to be adjudged with respect to the time when the building was constructed. We would, therefore, modify the direction of the High Court wherein it had required the Commissioner to examine the building with relation to the new building bye-laws which came into operation in 1984. We direct that the building of the appellant would be examined in the light of the building bye-laws existing at the time when the plans of the building were sanctioned by the Corporation. If there is any violation of the building bye-laws, the Corporation shall take action in accordance with law.

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65. I.P.C. SECTIONS 302/34: APPRECIATION OF EVIDENCE:- CONTRADICTIONS AND OMISSIONS:-
(1999) 5 SCC 718
SURJIT SINGH Vs. STATE

Evidence of PW 1, Sajjan Singh was that a hand grenade was thrown by the accused which had exploded. Statement of IO that he did not find any evidence to show that any bomb had exploded there and hence there was no question of seizing parts of a bomb from that place PW 1 also stating that some window panes were broken as a result of firing and the police had seized the same. IO denying this also. It was held that these two inconsistencies are not of such a nature as would render the evidence of PW 1 unacceptable. Evidence of other eyewitnesses also found reliable. All the accused known to the eyewitnesses since long and therefore there arises no question of mistaken identity.

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66. CR. P.C., SECTION 438, ANTICIPATORY BAIL: VIOLATION OF FERA:-
(1999) 5 SCC 720
ENFORCEMENT OFFICER, TED, BOMBAY Vs. BHER CHANDTIKAJI BORA

Court not justified in granting anticipatory bail unless the accused alleges and establishes that he is being unnecessarily harassed by the investigating agency.

Paragraph 2 of the judgment is reproduced:-

The Enforcement Directorate is in appeal before us against the order of the learned Single Judge of the Bombay High Court granting anticipatory bail to the respondent invoking jurisdiction under Section 438 of Cr.P.C. From a bare reading of the impugned order it appears that the learned Single Judge is of the view that because the respondent was available for interrogation and the prosecution did not avail of the opportunity there should not be any justification for not granting the anticipatory bail sought for. We have no hesitation to hold that the learned Judge has misread the decision of this Court referred to in the impugned order. The criteria and questions to be considered for exercising power under Section 438 of Cr.P.C. has been recently dealt with in ***Dukhishyam Benupani, Asstt Director, Enforcement Directorate (Fera) vs. Arun Kumar Bajoria, (1998) 1 SCC 52 : 1998 SCC (Cri) 261.*** The white collar criminal like the respondent against whom the allegation is that he has violated the provisions of the Foreign Exchange Regulation Act is a menace to the society and therefore unless he alleges and establishes in the materials that he is being unnecessarily harassed by the investigating agency, the Court would not be justified in invoking jurisdiction under Section 438 Cr.P.C. and granting anticipatory bail. In the facts and circumstances of the present case, in our considered opinion, the High Court was wholly unjustified in invoking jurisdiction under Section 438 and granting anticipatory bail to the respondent. We, therefore, set aside the impugned order of the High Court. The appeal is accordingly allowed.

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67. RENT CONTROL AND EVICTION : BOMBAY RENTS, HOTEL AND LODGING HOUSE RATES CONTROL ACT, 1947, SECTION 13: LICENCE: RENT:-
(1999) 5 SCC 721
SUHAS YESHWANT CHOPDE Vs. SACHHIDANAND

Mere use of the word 'rent' is not conclusive and does not convert a licence agreement into a lease. It was found that the High Court erred in dismissing the landlord's suit for possession and mesne profits after giving undue importance to the word 'rent' in the agreement and in some receipts.

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68. CONSTITUTION OF INDIA, ARTS. 144 AND 126 : JUDICIAL DISCIPLINE:-
(1999) 5 SCC 733
UNION OF INDIA Vs. JAISWAL COAL CO. LTD.

Where an auction was being under orders of Supreme Court and connected matter concerning auction of a house was pending in Supreme Court, held, High Court has no jurisdiction to entertain a writ petition in respect of the same subject matter.

Paragraph 4 of the judgment is reproduced:-

We are rather concerned to note that Writ Petition No. 823 of 1999 (Krishan Kumar Tiwari vs. Civil Judge (S.D.) Mohanlalganj) has been entertained by the Lucknow Bench of the Allahabad High Court. That writ petition is directed against the auction- sale of House No. 546-547, Sector E, Hind Nagar, Kanpur Road, Lucknow and seeks an order to the effect that the auction-sale be not confirmed. The learned Single Judge of the High Court has noticed, in the interim order made on 30-3-1999, that auction was being conducted under orders of this Court and that the matter concerning auction of the house was pending in this Court. How then a writ petition could be entertained in the High Court is not understandable. Judicial discipline required the High Court not to entertain any such petition, when the proceedings were pending in this Court in respect of the subject-matter of the case. The parties should have been asked to approach this Court, if so advised. The High Court had no jurisdiction to entertain the writ petition in the fact situation. We need say nothing further on this aspect except to record our displeasure. This order shall be brought to the notice of the High Court.

NOTE : Judicial Officers are requested to go through the provisions of section 393 Cr.P.C. For this an example is being given to understand the matter. A case was pending before the Magistrate under Sections 25 and 27 of the Arms Act. The accused was acquitted under Section 25 of the Act but he was convicted for an offence under Section 27 of the Act and sentenced to undergo imprisonment for 6 months. The State Government preferred an appeal before the High Court for enhancement of the sentence where as the accused preferred an appeal against the conviction before the Sessions Judge. The High Court and the Sessions Judge were well aware of this fact. Therefore, the question is whether the Sessions Judge could have disposed of the appeal pending before it when the same subject matter was pending before the High Court. The above cited judgment of the Supreme Court may also be read in this perspective.

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69. PRACTICE AND PROCEDURE : PARTIES PRESENCE OF:-
(1999) 5 SCC 735
PEOPLE UNITED FOR BETTER LIVING, CALCUTTA Vs. DIMPLE VINCOM PVT. LTD.

High Court passed orders regarding certain issue with reference to protection of wetlands at the instance of the public interest petitioner. It was held that such petitioner must be heard when later other parties appear before the court seeking to make changes as regards the subject- matter of the earlier orders.

Paragraph 4 of the judgment is reproduced:-

The main grievance of the appellants appears to be that although at their instance the Calcutta High Court had earlier passed orders relating to the same wetlands as in ***People united for Better Living in Calcutta vs. State of W.B., AIR 1993 Cal 215*** and there after, yet they were not made parties to the present writ petition which according to them seeks to make changes in the same wetlands. The first respondent, however, contended that the appellants were heard by the High Court before passing the above order. From the record, it is not clear whether the appellants had in fact, been served with a notice or they had by themselves appeared before the High Court, whether they had filed any affidavit or made any submissions. In view thereof, and in view of the fact that two earlier decisions of the High Court had been obtained at the instance of the appellants, the matter is remanded to the Bench of the Calcutta High Court dealing with environmental issues to consider the submissions of the appellants and thereafter to make a fresh suitable order, either affirming or modifying the existing order or rejecting the petition. Liberty to the appellants to file an affidavit before the High Court if they have not done so. If any affidavit is so filed, the first respondent and/or other parties will be at liberty to file affidavits in reply. The matter may be considered expeditiously.

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70. I.P.C. SECTIONS 415 AND 420 CHEATING:-
(1999) 5 SCC 740
SHRI BHAGWAN Vs. STATE OF A.P.

Complainant giving money to the appellant but not getting the desired result. Held it can be presumed that the accused has committed offence of cheating: Such presumption is rebuttable.

It was held that the accused claimed to possess occult faculties and attracted a number of devotees. He represented to have divine healing powers through his touched, particularly of chronic diseases. The complainant approached him for healing his 15 year old daughter who is congenitally a dumb child. The appellant assured the complainant that the little girl would be cured of her impairment through his divine powers. He demanded a sum of Rs. 1 lakh as consideration to be paid in instalments. The complainant paid the amount and waited eagerly for improvement of the child but could not get the desired result. The complainant lodged a complaint with the police for cheating. The appellant moved the High Court for quashing the proceedings but failed. Dismissing the appeal by special leave, the Supreme held that if somebody offers his prayers to God for healing the sick, there cannot normally be any element of fraud. But if he represents to another that he has divine powers and either directly or indirectly makes that other person believe that he has such divine powers, it is inducement referred to in Section 415 IPC. Anybody who responds to such inducement pursuant to it and gives the inducer money or any other article and does not get the desired result is a victim of the fraudulent representation. The court can in such a situation presume that the offence of cheating falling within the ambit of Section 420 IPC has been com-

mitted. It is for the accused, in such a situation, to rebut the presumption.

Cr.P.C., SECTION 173 (8) : POWER OF THE COURT TO DIRECT THE POLICE TO CONDUCT FURTHER INVESTIGATION:-

Court not obliged to hear the accused before making such direction.

Power of the police to conduct further investigation, after laying final report, is recognised under Section 173 (8) Cr.P.C. Even after the court took cognizance of any offence on the strength of the police first submitted, it is open to the police to conduct further investigation.

In such a situation the power of the court to direct the police to conduct further investigation cannot have any inhibition. There is nothing in Section 173 (8) to suggest that the court is obliged to hear the accused before any such direction is made. Casting of any such obligation on the court would only result in encumbering the court with the burden of searching for all the potential accused to be afforded with the opportunity of being heard. As the law does not require it the magistrate cannot be burdened with such obligation.

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71. SERVICE LAW: DEPARTMENTAL ENQUIRY : STANDARD OF PROOF:-
(1999) 5 SCC 762
BANK OF INDIA Vs. DEGALA SURYANARAYANA

Strict rules of evidence are not applicable to departmental enquiry. It is sufficient to establish the charge by evidence, albeit not by mere conjecture or surmises, acting upon which reasonably and objectively. A reasonable man could uphold the charge. However, recording of reasons and basing of the different finding on evidence on record is necessary.

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72. GUJARAT PREVENTION OF ANTI-SOCIAL ACTIVITIES ACT, 1985, SECTION 2 (c) : PREVENTIVE DETENTION : WORDS AND PHRASES: THE EXPRESSION "HABITUAL" "HABITUALLY" MEANING OF :-
(1999) 5 SCC 613
AMANULLA KHAN Vs. STATE OF GUJARAT

Section 2 (c) of the Act expresses the word "Dangerous person". Referring to Section 2 (c) the Supreme Court held that dangerous person should be habitual offender. The word 'habitual' implies repeated, persistent or continuous activities. A single isolated incident for which criminal case was registered against him would not be sufficient to hold him a dangerous person. The expression 'habitually' would obviously mean repeatedly or persistently. It implies the threat of continuity of the activities and, therefore, an isolated act would not justify an inference of habitual commission of the activity. Therefore, the question that requires adjudication is whether the satisfaction of the detaining authority in the present case is based upon the isolated incident for which the criminal case was registered or there are incidents more than one which indicate a repeated and persistent activity of the detenu.

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73. CONSTITUTION OF INDIA, ARTICLE 144 : THE COURTS ARE BOUND TO COMPLY WITH THE DIRECTION OF THE SUPREME COURT:- (1999) 5 SCC 622

BHARAT BUILDERS PVT. LTD. Vs. PARIJAT FLAT OWNERS COOP. HOUSING SOCIETY LTD.

Judicial Authority asked to bypass technical limitation in aid of Supreme Court. It was held that the Authority is bound to comply with such directions of the Supreme Court. The Supreme Court directed the Division Bench of the High Court to reconsider in review jurisdiction whether a certain admission was as regards a sale of, or an agreement to sell a flat and whether the..... Supreme Court stating in order that "regardless of the technical limitations of the review petition, these questions shall be addressed". High Court declined and hold that it was not permissible for it to go into a fresh issue which was not raised in the trial court or appellate court. It was held that Art. 144 of the Constitution of India requires all authorities, civil and judicial, in India to act in aid of Supreme Court. It was imperative for the Supreme Court to have decided the question it was required to decide by Supreme Court's Order.

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74. CR.P.C., SECTIONS 229, 241, 368, 399 and 401 : PLEA BARGAINING:- (1999) 5 SCC 649

KRIPAL SINGH Vs. STATE OF HARYANA

Neither the trial Court nor the High Court has the jurisdiction to bypass on the basis of a plea-bargaining the minimum sentence prescribed by law.

The whole text of the judgment is reproduced:-

The learned counsel contended that the petitioner was sentenced to the period already undergone by the trial court on an understanding that the Court would pass such a sentence. Learned counsel submits that the practice of plea-bargaining was adopted in the trial court for that purpose and therefore it was not open to the trial court to enhance the sentence to rigorous imprisonment for 7 years.

1. Learned counsel in support of the said contention invited our attention to the decision of this Court in ***Thippaswamy v. State of Karnataka. (1983) 1 SCC 194*** That is a case where the conviction was passed under Section 304-A IPC and the trial court awarded a fine sentence of Rs. 1000/- which on appeal by the State was enhanced to rigorous imprisonment for one year by the High Court. This Court pointed out that in a case where there was plea-bargain it was not open to the High Court to unilaterally enhance the sentence and if the High Court felt that the sentence awarded by the trial court was disproportionately law the course which should have been adopted was to remit the case back to the trial court for fresh trial.
2. But in this case the situation is different. The offence found against the appellant is under Section 392 of the Indian Penal Code for which the maximum punishment imposable is 14 years and perhaps on the facts of

this case the maximum punishment is imprisonment for 10 years. But Section 392 IPC has to be read with Section 397 in certain cases as the section bridles the powers of the court regarding the extent of sentence. The court cannot award a sentence less than 7 years of imprisonment when in a particular case Section 397 is to be read along with Section 392 of the Indian Penal Code.

3. The petitioner would have succeeded in his plea-bargain by getting the minimum sentence prescribed by law and that is what the High Court has granted. Neither the trial court nor the High Court has jurisdiction to by-pass the minimum limit prescribed by law on the premise that a plea-bargain was adopted by the accused. We are unable to agree with the learned counsel that the accused would have thought that the Court would give him punishment even less than what is prescribed by law as the minimum.

4. For the aforesaid reasons we dismiss this SLP.

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75. N.D.P.S. ACT, SECTION 60 (3) THE MEANING OF THE WORD 'OWNER':- (1999) 5 SCC 670
GNAGA HIRE PURCHASE PRIVATE LTD. Vs. STATE OF PUNJAB

The very purpose for engrafting sub-section (3) of Section 60 of the NDPS Act is to have it as a deterrent measure to check the offences under the Act in question which have been found to be dangerous to the entire society. In the absence of any definition of "owner" in the NDPS Act, it would be reasonable to construe that the expression "owner" must be held to mean the "registered owner" of the vehicle in whose name the vehicle stands registered under the provisions of the Motor Vehicles Act.

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76. CR.P.C. SECTION 125 (3) : NON-COMPLIANCE WITH THE ORDER OF MAGISTRATE TO MAKE PAYMENT OF MAINTENANCE : EFFECT:- (1999) 5 SCC 672
SHAHADA KHATOON Vs. AMJAD ALI

Section 125 (3) of Cr.P.C. circumscribes the power of the Magistrate to impose imprisonment for a term which may extend to one month or until the payment if sooner made.

The short question that arises for consideration is whether the learned Single Judge of the Patna High Court correctly interpreted sub- section (3) of Section 125 of the Cr.P.C. by directing that Magistrate can only sentence for a period of one month or until payment, if sooner made. The learned counsel for the appellants contends that the liability of the husband arising out of an order passed under Section 125 to make payment of maintenance is a **continuing one** and on account of non-payment there has been a breach of the order and therefore the Magistrate would be entitled to impose sentence on such a person continuing him in custody until payment is made. We are unable to accept this contention of the learned counsel for the appellants. The language

of sub- section (3) of Section 125 is quite clear and it circumscribes the power of the Magistrate to impose imprisonment for a term which may extend to one month or until the payment, if sooner made. This power of the Magistrate cannot be enlarged and therefore the only remedy would be after expiry of one month. For breach or non compliance with the order of the Magistrate the wife can approach the Magistrate again for similar relief. By no stretch of imagination can Magistrate be permitted to impose sentence for more than one month. In that view of the matter the High Court was fully justified in passing the impugned order and we see no infirmity in the said order to be interfered with by this Court. The appeal accordingly fails and is dismissed.

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77. HINDU ADOPTIONS AND MAINTENANCE ACT, 1956, SECTION 16 : PRESUMPTION UNDER & SERVICE LAW: APPOINTMENT : COMPASSIONATE APPOINTMENT : DENIAL OF:-
(1999) 5 SCC 673
CHAIRMAN, BIHAR RAJYA VIDYUT BOARD Vs. CHHATHU RAM

Paragraphs 4,5 and 6 of the judgment are reproduced:-

4. The respondent claimed that he was the adopted son on the basis of a deed of adoption dated 28-2-1989. It is said to have been executed seven months before the deceased died. In the impugned judgment, the High Court appears to have proceeded on the basis of a presumption relating to the validity of the adoption deed under Section 16 of the Hindu Adoptions and Maintenance Act, 1956. Under Section 16 of the Act, if any document registered under any law for the time being in force is produced before any court purporting to record the adoption has been made in compliance with the provisions of this Act unless and until it is disproved. In the present case, the deed of adoption is not signed by any person giving the child in adoption. The copy which is produced before us does not indicate that this is a registered deed of adoption. Therefore, no presumption under Section 16 could have been drawn relating to the validity of the adoption. There are no facts on record showing whether on the date of adoption, the respondent was under the age of 15 years. There are also no facts on record to show whether the husband of the deceased was alive on the date of the adoption. If so, the adoption would have had to be made by the husband with the consent of the deceased. In the absence of any material, we are, therefore, not pronouncing on the validity or otherwise of the adoption. Therefore, the basis on which the High Court has proceeded cannot be sustained and the appellants cannot be faulted for not acting on the basis of the adoption deed. Secondly, by a standing order dated 21-4-1993 the appellants had withdrawn the benefits, if any, under the scheme for appointment on the compassionate grounds in the case of an adopted son.

5. The appellants have also contended that looking to the fact that the respondent was adopted only on 28-2-1989, and the alleged adoptive mother died on 6-9-1989, it could not be said that the respondent was wholly

dependent on his mother at the time of her death. Looking to all the facts and circumstances, the Single Judge of the High Court has rightly held that the respondent was not eligible for appointment on compassionate grounds. The High Court ought not to have set aside the order of the Single Judge. We, therefore, allow the appeal, set aside the judgment of the High Court and restore the judgment of the Single Judge.

6. Learned counsel for the appellants states that the legal dues of late Bansrajia Devi have been paid by them to the respondent not on the basis of his being an adopted son but on the basis of his being a nominee and upon his producing a succession certificate. In view thereof, there is no question of the appellants' recovering any dues so paid to the respondent.

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78. JUDICIARY : (LEGAL WEAR) : THE REASONS FOR PRESCRIBING DRESS (BLACK JACKET AND BANDS) : [HERE I HAVE USED THE WORD "LEGAL WEAR" AS USED IN AUSTRALIAN LAW JOURNAL:-]
(1999) 5 SCC 675
STATE OF RAJASTHAN Vs. RAJASTHAN JUDICIAL OFFICERS' ASSOCIATION

A Judicial Officer is undoubtedly required to dress in the manner prescribed by relevant rules of each State in order to maintain dignity of his office. The reason why a black jacket and bands are prescribed for a judicial officer is quite different from the reason why a uniform is prescribed for peons, chaprasis, police constable and so on. The latter have no mix with the public and a uniform identifies them as belonging to a specified group of persons who have authority or duty to act in a certain way or perform certain services. A judicial officer presides over a court and is quite identifiable by reason of the position the occupies in the court. Never the less, in order that there may be certain amount of decorum and dignity associated with this office, he is expected to dress respectably in the manner specified. Bands and gowns are an insignia of his office, This itself, however, is not sufficient for the High Court to direct payment of dress allowance to the judicial officer or to specify the amount which the State Government should pay.

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79. ARBITRATION AND CONCILIATION ACT, 1996 : POWER OF ARBITRATOR TO ORDER WINDING UP OF A COMPANY:-
(1999) 5 SCC 688
HARYANA TELECOM LTD. Vs. STERLITE INDUSTRIES (INDIA) LTD.

Only such disutes or matters which an arbitrator is competent or empowered decide can be referred to arbitration. An arbitrator not withstanding any agreement between the parties would have no jurisdiction to order winding up of a company since power is conferred on Court by the Companies Act.

●

80. ARBITRATION ACT, 1940, SECTION 8 (2), LIMITATION COMMENCEMENT OF & LIMITATION ACT, ARTICLE 137 :-
(1999) 5 SCC 697
MORENA MANDAL S.S.K. LTD. Vs. NEW INDIA ASSURANCE CO. LTD.

The limitation to file an application under Section 8 (2) of the Act begins only on the expiry of the statutory period of notice. Application filed within 3 years of that date was held within limitation

NOTE : Please refer to '**JOTI JOURNAL**' Vol. V Part V, October 1999 issue at page 449 Tit-bit No. 105 ***Utkal Commercial Corporation Vs. Central Coal Fields Ltd.***

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81. ARBITRATION AND CONCILIATION ACT, 1996, SECTION 11 & SIKH INDUSTRIAL COMPANY (SPECIAL PROVISIONS) ACT, 1985, SECTION 22:-
(1999) 5 SCC 734
AGRO COUNTERTRADE PTE : LTD. Vs. PUNJAB IRON & STEEL CO. LTD.

The respondent company claimed that it had been declared a sick industrial company under the S.I.C. (S.P.) Act, 1985 and the scheme for the company is being framed under section 22 of the said Act and thus arbitrator should not be appointed. It was held that the present proceedings for appointment of an arbitrator under S. 11 had a very narrow scope and were not covered by S. 22 of the Sick Industrial Company Act.

The whole text of the judgment is reproduced:-

1. Objection is overruled in view of the directions given by Hon'ble the Chief Justice of India.
2. This is an application under Section 11 of the Arbitration and Conciliation Act, 1996 for the appointment of an arbitrator. The application is made under the "Appointment of Arbitrators" by Hon'ble the Chief Justice of India Scheme, 1996", framed pursuant to Section 11.
3. In the present case, under Sections 11 (5) and (6), the Chief Justice or any person designated by him to take necessary measures is required to appoint an arbitrator as provided therein. It is not disputed by either side that the requirements of these sub-sections are complied with in the present case. It is, However contended by learned counsel for the respondent that since the respondent Company has been declared as a sick industrial company under the Sick Industrial Companies (Special Provisions) Act, 1985, and a scheme for the said Company has also been framed under the said Act, an arbitrator should not be appointed. The provisions of Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 have been shown to me. The present proceedings, however, for the appointment of an arbitrator under Section 11 of the Arbitration and Conciliation Act, 1996 have a very narrow scope and the same are not covered by Section 22 of the Sick Industrial Companies (Special Provisions)

Act, 1985. If however, the respondents desire that the arbitration proceedings should not be proceeded with, it is open to them to take appropriate legal steps in that connection under the provisions of the Arbitration and Conciliation Act, 1996 and in accordance with law.

4. In the premises, by consent of both parties, Justice S. Ranganathan, retired Judge of the Supreme Court of India is appointed as sole arbitrator, as prayed for in the arbitration petition.

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82. PREVENTION OF CORRUPTION ACT, SECTION 6:-
(1999) 5 SCC 690
STATE OF KERALA Vs. V. PADMANABHAN NAIR

An accused facing prosecution for offences under the PC Act cannot claim any immunity on the ground of want of sanction, if he ceased to be a public servant on the date when the court took cognizance of the said offences.

Cr.P.C., SECTION 197 : SANCTION FOR PROSECUTION, OFFENCES UNDER SECTIONS 406 READ WITH SECTION 120-B IPC:-

Sanction under Section 197 is not necessary.

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83. J & K PUBLIC SERVANTS PREVENTION OF CORRUPTION ACT, 1975, SECTIONS 6, 5 (2) AND 5 (3) :-
(1999) 5 SCC 738
STATE OF J&K Vs. CHARAN DASS PURI

The previous sanction for prosecution was held to be not required when the accused public servant had already retired by the time the court was called upon to take cognizance of the offence.

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84. NEGOTIABLE INSTRUMENTS ACT, SECTIONS 138 AND 142 : DISHONOUR OF CHEQUE, NOTICE TO HIM SHOULD BE ISSUED:-
(1999) 5 SCC 693
BILAKCHAND Vs. A. CHINNASWAMI

Paragraphs 2 to 5 of the judgment are reproduced:-

2. Six cheques were issued in favour of the appellant herein. The cheques were signed by A. Chinnaswami. Managing Director of Shakti Spinners Ltd. When the cheques were present for payment they were dishonoured on the ground that "sufficient funds were not available and exceed arrangement". A notice was then sent by the appellant which the respondent refused to accept. This was followed by a complaint under Section 138 read with Section 142 of the Negotiable Instruments Act, 1881 in the Court of the Judicial Magistrate, 1st Class, Chopda, District Jalgaon, Maharashtra. On the complaint being filed, a process was issued against the accused.

3. The respondent moved an application before the Magistrate asking him to recall the process. Having failed in attempt, a petition under Section

482 CrPC was filed in the High Court. The High Court by the impugned judgment came to the conclusion that notice under Section 138 was sent by the appellant herein to A. Chinnaswami at his office address but this could not mean that the notice was sent to the Company itself. On this ground alone, the High Court allowed the petition and quashed the complaint which was filed.

4. In our opinion, the High Court erred in quashing the complaint. It is evident that proceedings were initiated by the appellant against A. Chinnaswami who happened to be the Managing Director of Shakti Spinners Ltd. The cheques in question which were dishonoured were signed by him. The process was issued by the Judicial Magistrate in his name. We see no infirmity in the notice issued under Section 138 addressed to A. Chinnaswami, who was signatory of the said cheques. The High Court, in our opinion, clearly feel in error in allowing the petition under Section 482 CrPC and in quashing the complaint and setting aside the proceedings pending before the Judicial Magistrate.

5. For the aforesaid reasons, these appeals are allowed and the order of the High Court is set aside. The Judicial Magistrate will now proceed to decide SCCs Nos. 155 and 156 of 1995 in accordance with law as expeditiously as possible.

●

85. M.P. ACCOMMODATION CONTROL ACT, SECTION 12 (1) (F) : PLEAD AND PROVE THE NATURE OF THE NEED:-
1999 (2) VIDHI BHASVAR
SHANKARLAL Vs. BABULAL

Landlord has to plead and prove whether he wants to continue his business or start new business. If new business is to be started the nature of business is to be disclosed. If a landlord is not sure about of type business requirement is not bonafide.

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86. C.P.C. ORDER 7 RULE 11 AND S. 96 : REJECTION OF PLAINT DECREE SHOULD BE DRAWN:-
1999 (2) VIBHA 207
NAMMOO DEVANGAN Vs. SEETARAM

If the order is passed rejecting the plaint under 0.7 R. 11 it is a decree and a decree should be drawn up which is appealable under S. 96 of CPC. ***Vishesh Kumar Vs. Shanti Prasad. AIR 1980 SC 892*** distinguished.

C.P.C. SECTION 96:-

"Any Court exercising original jurisdiction means any Court which is passing decree would be deemed to be exercising original jurisdiction.

BENAMI TRANSACTIONS (PROHIBITION) ACT. 1988, SECTION 4:-

Suit filed before enforcement of provision under not affected. ***Mithilesh Kumari and another vs. Prem Behari Khare AIR 1989 SC 1247*** is **over**

ruled by ***R. Raj Gopal Reddy vs. Padmini Chandrasekharan, (1995) 2 SCC 630.***

NOTE : Judicial Officers are requested to go through Rules and Orders (Civil) Rule No. 177 which is reproduced here and are also requested to refer to ***Jai Narayan Vs. Smt. Kumud. 1999 (1)*** **Vibha 210, and JOTI JOURNAL Vol. V, August 1999 page 289.**

Rule No. 177:- A decre shall be drawn up in case of dismissal under Order XLI, rule 11 (1), Civil Procedure Code. No decree shall be drawn up in case of rejection of plaint and determination of any question falling within section 47 or section 144 or in case of any adjudication from which an appeal lies as an appeal from an order or any order of dismissal for default. But in such cases a schedule of costs shall be drawn up just below the order passed and the names of the parties by whom costs are to be paid and received shall also be stated and signed by the Judge.

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87. ISSUE REGARDING ADMISSIBILITY OF DOCUMENT.
O 14 R. 5 C.P.C.
1981 (1) M.P.W.N. 249 BALKRISHNA Vs. VISHAMBHAR

This revision has been preferred by the defendants against refusal of the trial Court to frame and issue regarding insufficiency of stamps on suit promissory notes.

Held : The plaintiff has field this suit for recovery of Rs. 90,527.50/- on the strength of two promissary notes executed by defendant No. 2 on 1-4-77. The defendants pleaded that both promissory notes are not properly stamped and are inadmissible in evidence. The trial Court did not frame any issue on this question. So the defendants moved an application under Order 14, rule 5 CPC for framing an additional issue on this question. This has been disallowed by the trial Court observing that when the document will be tendered in evidence, this question can be decided. It is the view of this Court that whether the document is properly stamped or not has to be decided as a preliminary issue as once it is exhibited, it would not be open to challenge in appeal or revision. This question does not require any evidence to be recorded. Under Order 13, R. 3 the Court at any stage can reject inadmissible documents.

Accordingly, the revision in allowed, the oder of the trial Court is set aside and it is directed to frame a preliminary issue regarding insufficiency of stamps on the promissory note and their admissibility in evidence. Revision allowed.

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88. ISSUE REGARDING ADMISSIBILITY OF DOCUMENT O. 14 R. 5 C.P.C.
1981 (1) M.P.W.N. 268
RADHESHYAM VS. BANSANTILAL

The petition for revision of an order whereby the lower Court dismissed the petitioner's (defendant) application for framing certain additional issues.

It was held that : I am not satisfied that the issue which the petitioner

wanted to be framed as additional issues were at all necessary. The main grievance of the petitioner's counsel is that the lower Court should have framed an additional issue at least on the point of admissibility of the document styled as memorandum of acknowledgment of partition. Rule 145 (h) of the Civil Court Rules reads as follows :

> "No question regarding admissibility of evidence shall be made the subject of an issue"

That is a complete answer to the said contention. I am further not satisfied that the inpugned order, if allowed to stand, will occasion a failure of justice or cause any irreparable injury to the petitioner. As regards the question whether the said document is sufficienty stamped or not the lower Court is at liberty to decide that point if an occasion for deciding it comes up before admitting the document in evidence. Revision dismissed.

●

89. C.P.C. SECTION 24 AND O.3 Rr. 2 AND 4: A PERSON HAVING NO POWER OF ATTORNEY CANNOT ACT FOR ANY PARTY:-
1999 (2) VIBHA 218
NAND RAM Vs. MAHILA RAMKALI DEVI

A person having no power of attorney cannot act for any party. Advocate having no power cannot plead in the case. Application for transfer of case threatening alleged by opponent without mentioning date, time and place. Allegations or visiting presiding officer's residence not usual and also inconsistent case cannot be transferred. A reasonable apprehension should be shown from existing circumstances and events which may debar fair justice and impartial trial.

In the present case the Court found the application being a vexatious application for causing delay allegations against judge concerned also improved. The application was rejected with cost of Rs. 1,000/-

NOTE : Judicial Officers are requested to go through JOTI JOURNAL Vol. V Part I, February 1999 at page 20 Civil Revision No. 2329/99, ***Mahaveer Vs. Meghraj.***

●

90. C.P.C. O. 21 Rr. AND 22-A r/w SECTION 50:- PROVISION TO NOTICE:
1999 (2) VIBHA 254
SHAKUNTALABAI Vs. DENA BANK

Provision to notice legal representative of the deceased judgment-debtor has been incorporated to save interest of legal representatives upon whom the estate of deceased has devolved. The judgment debtor dying before full satisfaction of decree. His legal representative should be noticed in case the decree-holder wants to execute the decree.

NOTE : Judicial Officers are requested to go through the provisions of Section 146 of the CPC regarding proceedings by or against representatives.

●

91. C.P.C. SECTION 141 AND O. 1 R. 10 : EXPLANATION TO :
1999 (2) VIBHA 230
CHANDUBAI Vs. GRAM PANCHAYAT

Section 141 has excluded the direct application of the provision to Writ Petitions under Art. 226 of the Constitution yet principles are still applicable to the proceedings under Art. 226 of the Constitution. The object of joining the parties is to enable the court to decide all questions between parties and third party finally.

●

92. Cr. P.C. SECTIONS 197, 397, 401 AND 436 SANCTION FOR PROSECUTION WHEN REQUIRED:-
1999 (2) VIBHA 211
DEEP CHAND Vs. STATE

In a bailable offence police officer should first offer bail. Arrest can be made when no bail is furnished. If arrest is resisted reasonable force can be used.

The accused of a bailable offence was beaten along with his family members and the accused was dislocated. No sanction is needed to prosecute such police officer. Other policemen not taking part in beating. Sanction for their prosecution is necessary.

REVISIONAL COURT : JURISDICTION TO TAKE FRESH DOCUMENTS :

The revisional Court has jurisdiction to take fresh documents on record in the interest of justice.

NOTE : Judicial Officers are requested to read Section 46 Cr.P.C.

●

93. Cr.P.C. SECTION 321 : WITHDRAWAL OF PROSECUTION: DUTY OF THE COURT:-
1999 (2) VIBHA 236
MAHENDRA Vs. STATE

The prosecution applied for withdrawal of prosecution. It is the duty of the Court to consider the interest of administration of justice and public interest for social, economic and political purposes also. Judicial discretion is exercised in disposing of the application. ***State of Punjab Vs. Union of India and others. AIR 1987 SC 188*** and ***Shoe Nandan Paswan Vs. State of Bihar and other, AIR 1987 SC 877*** discussed. ***Rajendra Kumar Jain Vs. State through Special Police Establishment and others, AIR 1980 SC 1510*** and ***V.S. Achutanandan Vs. R. Balakrishna Pillai, AIR 1995 SC 436*** refered to.

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94. EVIDENCE ACT, SECTION 101, BURDEN OF PROOF, LEGAL MAXIM, RES IPSA LOQUITUR AND TORT:-
1999 (2) VIBHA 248
MPEB Vs. BHAJAN GOND

Person dying of electrocution in open field by naked wire. The maxim

applies in such cases. ***Manohar Lal Shobha Ram Gupta and others Vs. Madhya Pradesh Electricity Board, 1975 JLJ 806*** relied on. The Burden is on the Electricity Board to prove that it was not negligent.

In the present case the Electricity Board did not put guarding on high tension line. The Board was liable to pay damages.

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95. MOTOR VEHICLES ACT, 1939 SECTION 110 B AND MOTOR VEHICLES ACT, 1988, SECTION 168 : COMPENSATION:-
1999 (2) VIBHA 198
RAJENDRA Vs. BISHAMBER NATH

A student of 8th class suffering serious injuries. His kidney was removed. Amount of compensation should not be below than one lakh.

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96. MONEY LENDERS ACT, 1934, SECTION 3, PARTNERSHIP ACT, 1932, SECTION 68 AND STAMPS ACT,1899. SECTION 2 (22):-
1999 (2) VIBHA 199
BASANT KUMAR RATHORE Vs. SMT. SHANTI BAI

Moneylenders Act, 1934 Section 3:- Accounts were maintained and proved. Provisions of Act complied with.

Paragraph 8 of the judgment is reproduced:-

We have carefully perused the judgment of the trial Judge. The learned counsel for the parties have taken us through the evidence on record. As far as the contention that the plaintiff had not complied with the provisions of the Money Lenders Act we find that the defendant No. 1 firm was sending the accounts. The copies of the accounts have been brought on record as Ex. P-3, P-4, and P-8, The postal receipts have also been brought on record. The entries in the accounts-book have also been brought on record as Ex. P-26A. On the basis of these documents the Court below has come to hold that the plaintiff had complied with the provisions of the Money Lenders Act. On close scrutiny of the said reasonings we do not find any fault with the same.

PARTNERSHIP ACT, SECTION 68 : Copies of entries in the register of Registrar of Firms proved. Firm proved to be a partnership firm.

NOTE : Judicial Officers are requested to refer to provisions of Section 69 of the Act also. The mode of proving the firm is registered is to obtain the certified copies of the extracts of entries from the Registrar of Firms and for every case one certified copy is to be used. It is not proper to use copy of the certified copy of the extracts. The routine practice is to accept a photocopy of the certified copy. In fact a party has to pay stamp duty to obtain certified copies from the Registrar of Firms. Therefore, it will be a loss of revenue to the Government if the Judicial Officers are not aware of the fact. Therefore they are requested to go through the provisions of S. 69.

STAMPS ACT, SECTION 2 (22) :- PROMISSORY NOTE, PRESUMPTION OF :

Executant not entering in witness box to delay his signatures. Transaction also proved by plaintiff. Execution rightly held proved.

NOTE : Please refer to Sections 101 and 102 Evidence Act and Section 118 N. I. Act regarding presumption

INTEREST : Promissory note itself containing term of interest. No reason to deny interest.

●

97. CR.P.C., SECTION 164 :- STATEMENT OF WITNESSES UNDER SHOULD NOT BE RECORDED AT THE INSTANCE OF AN INDIVIDUAL:- AIR 1999 SC 2565

JOGENDRA NAHAK Vs. STATE OF ORISSA

Section 164 (1) Cannot be interpreted as empowering a Magistrate to record the statement of a person unsponsored by the investigating agency. The fact that there may be instances when the investigating officer would be disinclined to record statements of willing witnesses and therefore such witnesses must have a remedy to have their version regarding a case put on record, is no answer to the question whether any intending witness can straightway approach a Magistrate for recording his statement under Section 164 of the Code. Even for such witnesses provisions are available in law, e.g. the accused can cite them as defence witnesses during trial or the Court can be requested to summon them under Section 311 of the Code. When such remedies are available to witnesses (who may be sidelined by the investigating officers) there is no special reason why the Magistrate should be burdened with the additional task of recording the statements of all and sundry who may knock at the door of the Court with a request to record their statement under Section 164 of the Code. On the other hand, if door is opened to such persons to get in and if the Magistrate are put under the obligation to record their statements, then too many persons sponsored by culprits might throng before the portals of the Magistrate Courts for the purpose of creating record in advance for the purpose of helping the culprits.

Paragraphs 22, 23 and 24 of the judgment are reproduced :-

If a Magistrate has power to record statement of any person under Section 164 of the Code, even without the investigating officer moving for it, then there is no good reason to limit the power to exceptional cases. We are unable to draw up a dividing line between witnesses whose statements are liable to be recorded by the magistrate on being approached for that purpose and those not to be recorded. The contention that there may be instances when the investigating officer would be disinclined to record statements of willing witnesses and therefore such witnesses must have a remedy to have their version regarding a case put on record, is no answer to the question whether any intending witness can straightway approach a magistrate for recording his statements under Section 164 of the Code. Even for such witnesses provisions are available in law, e.g. the accused can cite them as defence witnesses during trial or the Court can be requested to summon them under

Section 311 of the Code. When such remedies are available to witnesses (who may be sidelined by the investigating officers) we do not find any special reason why the magistrate should be burdened with the additional task of recording the statements of all and sundry who may knock at the door of the Court with a request to record their statements under Section 164 of the Code.

On the other hand, if door is opened to such persons to get in and if the magistrates are put under the obligation to record their statements, then too many persons sponsored by culprits might throng before the portals of the magistrate Courts for the purpose of creating record in advance for the purpose of helping the culprits. In the present case, one of the arguments advanced by accused for grant of bail to them was based on the statements of the four appellants recorded by the magistrate under Section 164 of the Code. It is not part of the investigation to open up such a vista nor can such step be deemed necessary for the administration of justice.

Thus, on consideration of various aspects, we are disinclined to interpret Section 164 (1) of the Code as empowering a magistrate to record the statement of a person sponsored by the investigating agency. The High Court has rightly disallowed the statements of the four appellants to remain on record in this case. Of course, the said course will be without prejudice to their evidence being adduced during trial, if any of the parties requires it.

(Please refer to Vol. Noll. Pt. VI- 1996 J.O.T.I. (Dec. 1996) Page 29).

●

न्यायिक अधिकारी गणों हेतु यूनिफार्म (विधिक पोशाक) (The Legal Wear) मध्यप्रदेश राजपत्र भाग 4 (ग) अंतिम नियम दि. 29 अक्टूबर 1999. पृष्ठ 599 पर प्रकाशित सिविल न्यायालय नियम 1961 में संशोधनः-

उच्च न्यायालय, मध्यप्रदेश, जबलपुर

जबलपुर, दिनांक 16 अक्टूबर 1999

क्र. ए–3220–चार–14-2-64 भाग– चार, मध्यप्रदेश सिविल न्यायालय अधिनियम, 1958 (अधिनियम क्रमांक 19 सन् 1958) की धारा 23 के साथ पठित भारत के संविधान के अनुच्छेद 227 द्वारा प्रदत्त शक्तियों को प्रयोग में लाते हुए, मध्यप्रदेश उच्च न्यायालय, मध्यप्रदेश के राज्यपाल के पूर्व अनुमोदन से, एतद् द्वारा मध्यप्रदेश सिविल न्यायालय नियम, 1961 में निम्नलिखित और संशोधन करते हैं, अर्थातः–

संशोधन

उक्त नियमों में, अध्याय उन्तीस के पश्चात् निम्नलिखित अध्याय अंतः स्थापित किया जाए, अर्थात्:–

"अध्याय-तीस"

594, न्यायिक अधिकारियों के लिए यूनिफॉर्म

1. उच्च न्यायिक सेवा के सदस्य सफेद कमीज (शर्ट) सफेद बैंड, कालाकोट, सफेद धारियोंवाला या स्लेटी पतलून (ट्राउजर) तथा गाउन पहनेंगे,

2. निम्न न्यायिक सेवा के सदस्य सफेद कमीज (शर्ट), सफेद बैंड, कालाकोट तथा सफेद धारियोंवाला या स्लेटी पतलून (ट्राउजर) पहनेंगे।

3. उच्च न्यायिक सेवा की महिला न्यायाधीश सादी सफेद साड़ी, सफेद ब्लाउज, कालाकोट, सफेद बैंड तथा गाउन और निम्न न्यायिक सेवा की महिला न्यायाधीश गाउन को छोड़कर वैसी ही यूनिफार्म पहनेंगी।

No. A-3220-IV- 14-2-64- IV- In exercise of the powers conferred by Article 227 of the Constitution of India, read with Section 23 of the Madhya Pradesh Civil Courts Act, 1958 (Act No. 19 of 1958), the High Court of Madhya Pradesh, with the previous approval of the Governor of Madhya Pradesh, hereby makes the following further amendment in the Madhya Pradesh Civil Courts Rules, 1961, namely:-

AMENDMENT

In the said rules after Chapter XXIX the following Chapter shall be inserted, namely:-

CHAPTER-XXX

594 Uniform for Judicial Officers

1. **The members of the Higher Judicial Service shall wear White Shirt, White Band, Black Coat, White Striped or Grey Trousers and Gown.**

2. **The member of the Lower Judicial Service shall wear White Shirt, White Band, Black Coat and White Striped or Grey Trousers,**

3. **The Lady Judge of Higher Judicial Service shall wear plain White Saree, White Blouse, Black Coat, White Band and Gown and the Lady Judges of Lower Judicial Service shall wear the same uniform except Gown.**

माननीय मुख्य न्यायाधिपति महोदय के आदेशानुसार,
एडीशनल रजिस्ट्रार,

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उच्च नयायालय मध्य प्रदेश, जबलपुर द्वारा निर्गमित ज्ञापन क्र. बी/4719/तीन-18-155/99 (इन्दौर), जबलपुर दिनांक 14-10-99 जो समस्त जिला एवं सत्र न्यायाधीश एवं विशेष न्यायाधीशों को ज्ञापित किया गया।

विषय : तृतीय एवं चतुर्थ श्रेणी कर्मचारियों की भर्ती/नियुक्ति।

यथा निर्देश, उच्च न्यायालय, जबलपुर के ज्ञापन क्रमांक ए/9870/तीन–19–21/57 भाग–4, दिनांक 31–10–91 एवं ज्ञापन क्रमांक सी/3447/तीन–19–21/57 भाग–4 (ई)

दिनांक 28–8–92 द्वारा प्रसारित निर्देश वापिस लिये जाकर निम्नानुसार निर्देश प्रसारित किए जाते हैं :

(अ) स्थापना पर किसी भी प्रकार की 89 दिवस या अन्य लघु अवधि की नियुक्तियां न की जाये, यदि लघु अवधि की नियुक्तियां अति आवश्यक हों तो उन नियुक्तियों का औचित्य दर्शाते हुए उक्त लघु अवधि की नियुक्तियों के लिए रजिस्ट्री से अनुमति प्राप्त की जाये।

(ब) स्थापना पर तृतीय एवं चतुर्थ श्रेणी के रिक्त पदों पर अथवा नव–निर्मित पदों पर नियुक्तियां करने के पूर्व स्थापना पर कार्यरत कनिष्ठ कर्मचारियों की पदोन्नति/ नियुक्ति के सम्बन्ध में सर्वप्रथम विचार किया जाये और जब सक्षम कर्मचारी उपलब्ध न हो तब सीधी भर्ती से उक्त पदों की पूर्ति की जावे।

(स) स्थापना पर नविनिर्मित पदों अथवा रिक्त पदों की पूर्ति करने के पूर्व (विभागीय पदोन्नति द्वारा रिक्त पदों की पूर्ति को छोड़कर) उक्त पदों की पूर्ति के लिए रजिस्ट्री से अनुमति प्राप्त की जाये तथा अनुमति प्राप्त होने के पश्चात ही उक्त पदों की पूर्ति शासन/उच्च न्यायालय द्वारा नियुक्तियों के संबंध में दिये गये आदेशों/निर्देशों का पालन करते हुए निर्धारित प्रक्रिया अपना कर की जाये।

(द) चयनित उम्मीदवारों के नियुक्ति आदेश जारी करने के पूर्व चयनित उम्मीदवारों की सूची रजिस्ट्री को अनुमोदनार्थ प्रेषित की जाये, अनुमोदन के पश्चात ही नियुक्ति आदेश जारी किया जाये।

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THE COURT FEES (MADHYA PRADESH) AMENDMENT ACT, 1999 NO. 15 OF 1999 DATE OF APPLICATION

Published in M.P. Rajptra (Asadharan) dated 01st November 1999.

फा. क्र. 16-1-97–इक्कीस–ब (दो) न्यायालय फीस (मध्यप्रदेश संशोधन) अधिनियम, 1999 (क्रमांक 15 सन् 1999) की धारा 1 की उपधारा (2) द्वारा प्रदत्त शक्तियों को प्रयोग में लाते हुए, राज्य सरकार, एतद् द्वारा, 1 नवम्बर 1999 को, उस तारीख के रूप में नियत करती है जिसको उक्त अधिनियम प्रवृत्त होगा।

F.No. 16-1-97-XXI-B (II) - In exercise of the powers conferred by sub-section (2) of Section 1 of the Court Fees (Madhya Pradesh Amendment) Act, 1999, (No. 15 of 1999), the State Government hereby appoint the 1st day of November, 1999 as the date on which the said Act shall come into face.

(Please refer to J.O.T.I. Journal Vol. V Part IV August 1999 Page 332)