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

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

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JABALPUR - 482 007

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FROM THE PEN OF THE EDITOR

J.P. Gupta
Director, JOTRI

Esteemed Readers

The concept of justice is placed on the highest pedestal in our Constitution. The Preamble of our Constitution expresses that the framers of our Constitution gave foremost importance to the principle of justice rather than the principles of liberty, equality and fraternity. It clearly demonstrates the importance of social and economic justice. People approach Judiciary in quest of justice. Despite certain shortcomings, people by and large hold our judicial system in great respect, which is a matter of satisfaction to us. Undoubtedly, we are aware of the great responsibility bestowed on us. It would be worth mentionable here to quote the words of Dr. Cyrus Das about justice and judiciary – *"The Justice is a consumer product and must therefore, meet the test of confidence, reliability, dependability like any other product if it is to survive market scrutiny. It exists for citizenry at whose service only the system of justice must work. Judicial responsibility, accountability and independence are in every sense inseparable. They are, and must be, embodied in the Institution of Judiciary."*

It is evident from our past experience that the institutional responsibility, accountability and independence are inseparable features of Indian Judiciary. Even then, there are serious concerns about the efficacy and ability of justice delivery system to dispense a speedy and affordable justice. Hon'ble the Chief Justice of India has expressed that the credibility of judiciary is at stake due to mounting arrears, delay in disposal and the high cost of litigation.

The delay in the context of justice denotes the time consumed in the disposal of case in excess of acceptable time within which a case ought to be decided by the Court. An expected life span of the case is an inherent part of the system. No one expect a case to be decided overnight. However, difficulty arises when the actual time taken for the disposal of the case, crosses its expected life span and that is, when we say there is delay in dispensation of justice. Delay in disposal of case not only creates disillusionment amongst the litigants but also undermines the very capability of the system to dispense justice in an efficient and effective manner. Long delay also holds the effect of defeating justice in quite a number of cases.

Hon'ble the Chief Justice of India has further expressed that the Courts neither possess a magic wand to ward off the huge pendency nor can they afford to ignore the instances of injustice and illegalities because of the huge arrears of the cases already pending with them. If the Courts start doing that it would be endangering the credibility of the Courts and the tremendous confidence

they enjoy from the common man. It is high time to make a scientific and rational analysis of the factors behind the accumulation of arrears and to devise specific plan to atleast bring them within an expected reasonable time frame.

To come true to the aforesaid expectations of Hon'ble the Chief Justice of India, my humble view is, judicial officers should set a target first regarding monthly disposal of cases keeping in view the list of the oldest cases of all categories and should supervise the number of cases disposed of daily by maintaining a dairy of suitable form with all details. They should also monitor the institution, disposal, pendency and reduction of arrears regularly. They should always be aware of the situation and be well-informed, which is sufficient for their alertness of mind. The only target is to dispose of the cases preidentified and marked as a target and not to achieve the units fixed by Hon'ble the High Court. If one tries to achieve the units fixed by Hon'ble the High Court, he can never excel. But if he constantly goes on disposing the cases as per his own target, then he will be successful in not only reducing the pendency but will also leave behind the target set by units.

Judicial officers should devote maximum hours to judicial work simultaneously discharging their domestic and social obligations. They should utilize all the available time for judicial work without wasting it for less important work. Apart from that, in the Court it should appear that the Judge is professionally honest to his work and well prepared in facts and law regarding the case in hand. Litigants should not suffer from leak of information on the part of judge regarding the facts and law of the case. Regular reading of JOTI Journal will provide great assistance to update the legal knowledge.

This issue of the Journal as usual, contains all useful and relevant material. In Part I, we have included important articles on 'The Vision of Justice of the Constitution of India – Role of Subordinate Judiciary' by Hon'ble Shri Justice D.M. Dharmadhikari, 'Talaq' in Muslim Law by Shri Sashi Mohan Shrivastava and articles relating to bi-monthly training programme. Part II contains notes on important judgments of Supreme Court and Madhya Pradesh High Court. Apart from usual notes, this year we have started including brief notes on cases of recurring importance for covering maximum case law and are marked with asterisk sign to differentiate from usual notes. Part III & IV consist of important Circulars, Notifications, Acts and Rules.

I, on behalf of the Institute, express my sincere gratitude to the authors, who have taken great pains for contributing articles on different subjects for the benefit of Judicial Officers. I hope that the Journal continues to retain its worth and utility to fulfill the requirements of our esteemed judiciary.

Thank you.

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APPOINTMENT OF ADDITIONAL JUDGES IN HIGH COURT OF MADHYA PRADESH

Hon'ble Hon'ble Shri Justice Anang Kumar Patnaik, Chief Justice, High Court of Madhya Pradesh administered the oath of office to Hon'ble Shri Justice Satish Chandra Sharma and Hon'ble Shri Justice Prakash Shrivastava as Additional Judges of High Court of Madhya Pradesh on 18th January, 2008 in a Swearing-in-Ceremony held in the Conference Hall, South Block of High Court at Jabalpur.

Hon'ble Shri Justice Satish Chandra Sharma was appointed as Additional Judge of the High Court of Madhya Pradesh. Was born on 30.11.1961. Passed Bachelor of Science in the year 1981 with distinction in three subjects. Obtained Bachelor of Law in the year 1984 securing first position and three Gold Medals for topping the Faculty. Secured highest percentage of marks in three individual subjects. Also awarded National Merit Scholarship for Post Graduate studies.

Was enrolled as an Advocate on 01.09.1984. Appointed as Additional Central Government Counsel by order dated 28.05.1993. Appointed as Senior Panel Counsel by Government of India on 28.06.2004. Designated as Senior Advocate by the High Court of Madhya Pradesh in 2003. Specialized in Civil and Constitutional Law including service matters.

Was Standing Counsel for High Court of Madhya Pradesh, Lokayukta Organization, Central Bureau of Investigation, M.P. Financial Corporation, Indian Oil Corporation, Rani Durgawati Vishwavidyalaya, Jabalpur, Khadi Gramodyog Commission, Regional Provident Fund Commissioner, M.P. and other reputed Government/Private Undertakings. Also appointed Special Counsel for State of Madhya Pradesh for defending cases before Debts Recovery Tribunal and for M.P. State Electricity Board and Municipal Corporation, Jabalpur. Frequently appeared for M.P. Audyogik Vikas Nigam Limited, Bhopal, beside a large number of Public Sector Undertakings. Took oat as Additional Judge, High Court of Madhya Pradesh on 18th January, 2008

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Hon'ble Shri Justice Prakash Shrivastava was appointed as Additional Judge of the High Court of Madhya Pradesh. Was born on 31.03.1961. Passed Matriculation from Model High School in State Merit in 1978. Obtained B.A. degree from St. Aloysius College (University Merit) and M.A. in Economics in First Class First from RDVV. Obtained LL.B Degree in 1986 at First Class First Class First from RDVV. Was enrolled as an Advocate on the rolls of the State Bar Council of Madhya Pradesh on 02.02.1987. Was a practicing lawyer at the Supreme Court and the High Court of M.P. at Jabalpur since 1987. Completed about 20 years of practice as an Advocate. Belong to a family of lawyers. Is recipient of various medals like Jabalpur Rotary Club Gold Medal for scoring highest marks in M.A. (Economics), Late N.M. Deshpande Memorial Gold Medal for scoring highest marks in M.A. (Economics), Late Nishikant Chouksey Memorial Gold Medal for obtaining highest marks in Statistics in M.A. (Economics) and Shri O.P. Mishra Memorial Gold Medal for scoring highest marks in LL.B. His field of specialization is Tax matters. Was the standing Counsel for the State of Chhattisgarh before Hon'ble Supreme Court from June 2001 to December 2004 and Counsel for Municipal Corporation, Jabalpur, Municipal Corporation, Bilaspur, Regional Rural Bank, Chhattisgarh and M.P. Warehousing Corporation. Took oath as Additional Judge, High Court of Madhya Pradesh on 18th January, 2008.

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TRANSFER OF HON'BLE SHRI JUSTICE DEEPAK VERMA TO KARNATAKA HIGH COURT

Hon'ble Shri Justice Deepak Verma, who occupied the august office of the Judge of the High Court of Madhya Pradesh for more than thirteen years, has been transfored to the High Court of Karnataka as the Administrative Judge. Born on 28th August, 1947. Passed B.A. from St. Aloysius College, Jabalpur in the year 1969. Obtained Law Degree in 1972. His Lordship got enrolled as an Advocate on 9th October, 1972. Practised in the High Court of Madhya Pradesh, Jabalpur and District Court, Jabalpur in Civil, Constitutional, Company and Service matters. Was Government Advocate in the High Court from 1988 to 1990. Appointed as an Additional Judge of the Madhya Pradesh High Curt on 15th December, 1994 and Permanent Judge on 19th July, 1995. Appointed in March 2003 as Commissioner, Bhopal Gas Tragedy Claims, Bhopal. Was Administrative Judge, Indore Bench, High Court of Madhya Pradesh. Was Administrative Judge, Principal Seat of High Court of Madhya Pradesh at Jabalpur since 2005.

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

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NEWLY RECRUITED CIVIL JUDGES CLASS II DURING THE FIRST PHASE INDUCTION TRAINING PROGRAMME (SECOND BATCH 24.12.2007 TO 12.01.2008)

PART - I

THE VISION OF JUSTICE OF THE CONSTITUTION OF INDIA – ROLE OF SUBORDINATE JUDICIARY*

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

HISTORY

The history of India is long period of about 500 years of Mughal rule followed by about 200 years of British rule. The struggle of independence of India was also long for a period of about 100 years. Many Indians sacrificed their lives for attaining freedom.

It is in the above historical background that after Independence, the Constituent Assembly undertook arduous task of drafting Constitution for free India. In the Constitution framing body were included representatives of various regions and sections of society, philosophers, political thinkers, prominent leaders who were actively involved in independence struggle, some non-elected and elected representatives of the people. Universal Declaration of Human Rights had been already made by United Nations on 10th of December, 1948.

Based on the long bitter experience of foreign rules In India and the desire for protection of human freedoms expressed by the world community in the Universal Declaration of Human Rights through the United Nations, the Constitution of India was given a final shape.

CONSTITUTIONAL PHILOSOPHY

In the last period of the Independence struggle, the father of India, Mahatma Gandhi was in the forefront. Departing from past methods of violent protests and agitations against the foreign rule, he resorted to non-violent methods by innovating many non-violent techniques like **disobedience of unjust laws, non-co-operation, individual satyagraha and boycotting of foreign goods.** The Constitution as framed contains its philosophy in its **'Preamble'**, which was drafted last, after all other provisions had been framed. The Preamble of the Constitution contains core philosophy of people of India comprising multi-religious and multi-cultural society. The sovereignty, as declared in the Constitution, vests in the Indian people. They have agreed to form a **'democratic**

*Presented and delivered on 8th December, 2007 in the National Judicial Academy in a Workshop for the Members of Subordinate Judiciary

republic' to which were added, by **amendment** introduced to the **'Preamble'** words **"sovereign, socialist, secular, democratic republic".**

The resolve of people of India, as is contained in the Preamble, is to secure to all its citizens 'social', economic and political **justice, liberty** of thought, expression, belief, faith and worship, **equality** of status and of opportunities, fraternity which assures the **dignity** of the individual and not only **unity** but also **integrity** of the nation.

The Constitution provides for distribution of governance between three important organs of the State i.e. **Legislature, Executive and Judiciary.** The fundamental freedom of speech and expression guaranteed to a citizen has been held by the Supreme Court as including such freedoms to **media,** print, radio or electronic, because the citizens can enjoy freedom of speech and expression effectively only through media.

On the working of the Constitution for a period of 25 years, it was experienced that Fundamental Rights guaranteed to citizens without corresponding Fundamental Duties on them, may not sustain a just democratic order intended to be achieved. Therefore in the Constitution was added **Part IV-A** containing **Fundamental Duties of Citizens.** Amongst other Duties mentioned therein the first and foremost duty is to **'abide by the Constitution and respect its ideals and institutions as also National Flag and National Anthem'**. The second Fundamental Duty relevant for the present purpose is expectation from every citizen **'to cherish and follow the noble ideals which inspired India's national struggle for freedom'.**

The **Preamble** which permeates through all the constitutional provisions, Fundamental Rights contained in Part III, Directive Principles in Part IV and Fundamental Duties in Part IV-A, although addressed to all the authorities and the citizens, binds the **Judiciary** with greater force and greater obligation because **Judiciary** is expected to play the role of a **Watch Dog** on all organs of the State to ensure constitutional governance of the country based on such **democratic order** which adheres to rule of law, social justice and non-violent humane social order.

The Constitution by Article 32 and Article 226 of the Constitution allows every citizen for enforcing his fundamental rights to approach the superior courts i.e. Supreme Court of India and the competent High Court. In providing remedy to citizen against violation of his fundamental rights through the Supreme Court and the High Court, the Constitution makers evince their common intention 'that they gave utmost importance to protection of fundamental rights of citizens

which are in substance, different forms of basic human rights recognized in the **Universal Declaration of Human Rights** to which India is also a party. The conferral of power to protect and enforce fundamental rights on the Supreme Court and the High Courts under Articles 32 and 226 respectively, does not mean that the Judges of the subordinate judiciary have absolutely no role to play In enforcement of the **constitutionally recognized fundamental human rights and freedoms.**

ROLE OF SUBORDINATE JUDICIARY

The union judiciary is constituted under Chapter IV of Part V of the Constitution and High Courts under Chapter V of Part VI. The structure of subordinate courts is provided in Chapter IV of Part VI. To ensure appointment of judges on merit, their independence and integrity, the power of recruitment and control over subordinate judiciary is vested by Article 235 in the High Court.

Article 32 (1) guarantees, as a fundamental right, to every citizen, right to move the Supreme Court for enforcement of any of the fundamental rights mentioned in Part III of the Constitution.

Sub Article (2) of Article 32 empowers the High Court to issue various types of writs for enforcement of fundamental rights of citizens.

Sub Article (3) of Article 32 empowers the Parliament by law to empower any other courts which expression includes **subordinate courts** as well, to exercise powers of writ for enforcement of fundamental rights. Despite suggestions and recommendations from many legal quarters no parliamentary law, as envisaged in sub article (3), has been made. The question that arises is whether in the absence of a Parliamentary law, the subordinate Courts can have any power to enforce fundamental rights conferred on citizens by various Articles in Part III of the Constitution? Sub article (3) is an enabling provision for the Parliament to make a law to confer power to issue writs for enforcement of fundamental rights on subordinate courts. The general power of a court, within its jurisdiction, to enforce constitutionally recognised fundamental rights, in accordance with the procedure laid down by law, does not seem to have been taken away or in any manner restricted by sub article (3).

The fundamental right of every person guaranteed by Article 21 for protection of his **life and personal liberty,** which can be curtailed only in accordance with a constitutionally valid law and procedure, has been expansively interpreted by the Supreme Court to include within its fold all essential human rights declared by the United Nations to which India is a party.

The **right to life** is now held to include right to **'live with human dignity'** in 'healthy environment', 'pollution free water and air', 'primary education to become literate', 'access to medical and legal aid', 'right to shelter', 'means of livelihood', and 'access to medical treatment in Government Hospitals', to 'fair trial', 'speedy trial' and 'right to privacy'. Some of these human freedoms or human rights held to be included in Article 21 and in the Universal Declaration of Human Rights were set out in Part IV as **Directives Principles** or **goals** to be achieved in the course of working of constitution for establishment of a just and good governance.

The Supreme Court by giving a wide definition to word **'life'** in Article 21 has included some of the Directive Principles in it which are found necessary for ensuring **life with human dignity** to citizens and non-citizens. Such declared human rights are now enforceable fundamental rights through the competent courts.

Right to relief and remedy of compensation for violation of fundamental rights is held to be claimed against the public authorities and is **remedy in public law.** Many countries under their common law jurisdiction have started granting compensatory relief for violations of fundamental rights by treating them to be acts of **Constitutional Tort.** If Supreme Court and High Courts, in exercise of its powers under Articles 32 and 226, can grant monetary compensation for Constitutional Tort, why such jurisdiction cannot be allowed to be exercised by **subordinate courts?** Such should be held to be a permissible civil remedy to a suitor. This is a subject which requires elaborate discussion and indepth consideration for evolving a procedure and developing suitable court culture for giving easy access to individual citizens and their groups a remedy for enforcement of fundamental human rights and avoid forcing common man to take recourse to a not easily accessible and expensive remedy through Supreme Court and High Courts.

Fundamental rights of various categories contained in Articles 14 to 30 should be allowed be enforced by **subordinate judiciary** through a civil suit. If a civil suit under Civil Procedure Code can be filed for enforcement of any customary or statutory right why it be denied as a remedy for enforcement of constitutionally recognized human or fundamental rights? On a complaint of violation of fundamental right, relief that can be granted to suitor may be granting him necessary relief against the authorities or individuals arrayed as defendants to the suit and also monetary compensation. The Supreme Court in various cases in its jurisdiction has granted monetary compensation for violation of

fundamental rights. It has been held that such a remedy is available in Public Law against Public Authorities. If such a public law remedy for violation of fundamental or human rights can be granted by the superior courts there is no reason why it should not be allowed to be granted by subordinate courts.

HUMAN RIGHTS COURTS

The Protection of Human Rights Act provides for setting up of Human Rights Courts under Chapter VI.

The provisions contained in Chapter VI of the Act for constitution of Human Rights Courts have not become operational due to legislative defect. The Human Rights Court under Section 30 are to be constituted for 'trial of offences arising out of violation of human rights'. In the State of Madhya Pradesh, all the Session Courts have been notified as Human Rights Courts and all **Public Prosecutors as 'special prosecutors'** for the purposes of this Act. As offences arising out of human rights violations have neither been defined nor provided anywhere in the Act, no subordinate court in the whole of India has been able to function as a Human Rights Court.

The Act provides for constitution of Human Rights Commission with power to investigate complaints into violation of human rights and make recommendations to concerned State and authorities for redressal. The Commission has also power to recommend payment of interim monetary compensation. That can also be said to be a remedy provided under **public law.** When the recommendations of the Commission remain unimplemented or refused to be implemented, neither the Act nor the Constitution prohibits an aggrieved party to approach any Superior Court or subordinate court of competent jurisdiction to seek redressal and relief as recommended by Commission or even additional relief.

The Human Rights Courts, as envisaged under the Act, can **try offences** but such violations of human rights which are not covered by definition of 'offence' under any penal law, remedy should be held to be available to the aggrieved party or the victim of approach by a civil suit in the competent court for grant of requisite relief such as restoration of his normal life and grant of monetary compensation.

DAY TO DAY WORKING OF THE SUBORDINATE COURTS

The constitutional philosophy should inspire the Judges of the subordinate courts in their day to day working. The constitution guarantees fundamental freedoms, as recognized and internationally declared human rights to citizens

and non-citizens described as **Fundamental Rights under Chapter III.** In the course of its functioning, subordinate Judges very often derive knowledge that fundamental rights available to a prisoner or detenue under Articles 20, 21 and 22 are denied. The trial Judges in such situations should not remain mere mute spectators. The Constitution and the existing laws permit the subordinate courts to take cognizance of such human rights violations. It can initiate prosecution by holding a trial itself as permissible in law or alternatively, as provided in the amendment introduced in clause (a) of Section 12 of Protection of Human Rights Act, bring such violation of human right or fundamental right to the notice of the Commission for taking cognizance and recommending requisite relief.

LEGAL SERVICES AUTHORITIY

The Public Interest Litigation filed by citizens and groups of citizens and NGO's on issues affecting general public particularly concerning **law and order, basic facilities** and **environment** are subjects which can better be handled by the Members of the subordinate Judges through the forum of Legal Services Authorities for which they can seek assistance of Human Rights Commissions. These kinds of **diffused rights of class or sections** of society which have a constitutional flavour and appear to be human rights violations must receive attention for redressal by Legal Services Authorities. Apart from activities of creating legal awareness it can hold conciliation, meditation and Lok Adalats Sessions with public authorities and local bodies for providing relief to citizens and thus help them in protecting their human rights which are assured and guaranteed to them by the Constitution.

AMENDMENT MADE TO THE CIVIL PROCEDURE CODE

A new court culture should now develop in subordinate courts to give effect to Section 89 of Code of Civil Procedure. All representative suits filed by group of citizens or sections of society for enforcement of their legal or fundamental rights should be taken up either in the Legal Services Authorities or the available ADR systems like Lok Adalats, Mediation, Conciliation and Arbitration. The Public Interest Litigation are subjects which can now be allowed to be taken up by subordinate judiciary so that they are also geared and equipped to provide effective and easily accessible relief to the individual citizens or group of citizens.

The written Constitution must become a reality for the people.

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TALAQ- TALAQ- TALAQ

Shashi Mohan Shrivastava
Registrar
Bhopal Gas Victims, Bhopal

It is a common impression that in Muslims if the word *Talaq* is pronounced thrice i.e. *Talaq- Talaq- Talaq* then *talaq* takes place and the marriage dissolves with immediate effect but the legal position is not as the impression prevails.

Divorce was introduced in English Law more than 100 years back. Prior to coming into force of the Hindu Marriage Act, 1955, divorce was not known amongst Hindus in India but in Romans, Hebrews, Israilies and others, divorce was recognized. Perhaps Islam is the first religion, which recognized the termination of marriage by way of divorce.

Under the Muslim Law, a marriage is dissolved either by the death of the husband or wife, or by divorce. The husband can dissolve the marriage at his own will. Marriage can be dissolved by mutual consent of husband and wife. Wife can get divorce from her husband but she can not divorce herself without the consent of husband. It is called *Talaq-e-tafweez.* In Muslims, marriage can also be dissolved by judicial process according to the provisions of the 'Dissolution of Muslim Marriage Act, 1939'.

A *talaq* may be effected (i) orally by spoken words or (ii) by a written document called *talaqnama.* The husband may give *talaq* by mere words and no particular form of words is necessary. If, the words are express and well understood, then no proof of the intention is required. In case of ambiguous words, intention must be proved. Even the *talaq* pronounced in absence of wife is valid. A divorce may be pronounced as to come in to effect immediately or it may be made effective from future date. Even it may be effective contingent on the happening of some specified future event. A *talaq*, according to Sunni Law, whether oral or in writing, may be made without witness but according to Shia law two witnesses are necessary for a valid *talaq.*

Divorce was regarded by the Prophet to be the most hateful among all permitted things before the Almighty God because it hurts conjugal happiness and interfered with the proper upbringing of children. The Prophet of Islam is reported to have said 'With Allah, the most detestable of all things permitted is divorce', and towards the end of his life, he practically forbade its exercise by

men without intervention of an arbiter or a judge. The Quran ordains ".....If ye fear a breach between them twain (the husband and the wife) appoint an arbiter from his folk and an arbiter from her folk. If they desire amendment, Allah will make them of one mind ...." *Aquil Ahmad Mohammadon Law (fourteenth edition Page 113).*

The Supreme Court in ***Shamim Ara v. State of U.P., 2002 Cri. L.J. 4726*** (at Page No. 4731 in paras 13 & 14) has approved the views of Mr. Justice Baharul Islaam (later a Judge of the Supreme Court of India) expressed by him in ***Jiauddin Ahmad v. Anwara Begam, (1981) I GLR 358*** and ***Mrs Rukia Khatun vs. Abdul Khalique Laskar, (1981) 1 GLR 375.*** In these two judgments it was observed that though marriage under the Muslim Law is only a civil contract, yet the rights and responsibilities consequent upon it are of such importance to the welfare of humanity, that a high degree of sanctity is attached to it. But in spite of the sacredness of the character of the marriage-tie, Islam recognizes the necessity, in exceptional circumstances, of keeping the way open for its dissolution. Quoting in the judgment several Holy Quranic verses and commentaries thereon by well-recognized scholars of great eminence, the learned judge also expressed disapproval of the statement "the whimsical and capricious divorce by the husband is good in law, though bad in theology" and observed that such a statement is based on the concept that women were chattel belonging to men which the Holy Quran does not brook. The correct law of *talaq*, as ordained by the Holy Quran, is that *talaq* must be for a reasonable cause and preceded by attempts of reconciliation between the husband and the wife by two arbiters one from the wife's family and the other from the husband's, if the attempts fail, *talaq* may be effected.

The legal position, as discussed above, makes it clear that mere pronouncement of word *'talaq'* thrice i.e. *talaq-talaq-talaq* does not dissolve a Muslim marriage unless efforts of reconciliation are made and they prove to be unfruitful. *Talaq* can be pronounced as the last resort to bring the marital relationship to an end.

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QUESTIONNAIRE OF BI-MONTHLY TRAINING PROGRAMME

Following five topics were sent by this Institute for discussion in the bi-monthly district level meeting of August, 2007. The Institute has received articles from various districts. Articles regarding topic no. 1, 2, 3 & 4 respectively, from Khandwa, Shivpuri, Sheopur & Damoh are being included in this issue. As we have not received worth publishing article regarding topic no. 5 it will be sent to other group of districts in future for discussion:

1. State the effect of acknowledgemesnt of liability by borrower on the liability of surety to pay the debt?

   ऋणी द्वारा दायित्व की अभिस्वीकृति किये जाने पर प्रतिभू के ऋण अदायगी के दायित्व पर क्या प्रभाव होगा?

2. Explain the applicability of provisions of Sections 10 and 11 of Code of Civil Procedure, 1908 when there are two Wills in respect of same property and one person files a civil suit and the other person files an application for probate?

   एक ही सम्पति के संबंध में दो इच्छा पत्र होने पर एक व्यक्ति द्वारा सिविल वाद प्रस्तुत करने पर और दूसरे व्यक्ति द्वारा प्रोबेट हेतु आवेदन पत्र प्रस्तुत करने पर धारा 10 और 11 सिविल प्रक्रिया संहिता, 1908 के प्रावधानों की प्रयोज्यता समझाइये?

3. What will be the liability of the Insurance Company towards claim filed by the L.Rs of the deceased under Sections 140, 163-A and 166 of the Motor Vehicles Act, 1988 when the owner of the vehicle meets with an accident due to his own negligence?

   वाहन स्वामी द्वारा स्वयं की उपेक्षा से वाहन की दुर्घटना कारित करने पर उसकी मृत्यु होने पर उसके विधिक प्रतिनिधियों द्वारा प्रस्तुत क्षतिपूर्ति के दावे के संबंध में बीमा कम्पनी का मोटर यान अधिनियम, 1988 की धारा 140, 163–ए एवं 166 के अंतर्गत दायित्व क्या होगा ?

4. Whether the period undergone by Juvenile in conflict with law in observation home or safety home during the enquiry can be set-off by the Juvenile Justice Board if it finds him guilty of any offence and passes an order to keep him in special home or place of safety?

   यदि किशोर न्याय मण्डल द्वारा विधि के विरोध में किशोर को किसी अपराध का दोषी पाये जाने पर उसे किसी अवधि के लिए विशेष गृह या सुरक्षित स्थान में रखे जाने का आदेश दिया जाता है तो क्या उक्त अवधि में से उक्त किशोर द्वारा जॉच के दौरान संप्रेक्षण गृह या सुरक्षित स्थान में रखे जाने की अवधि मुजरा हो सकती है?

5. When the High Court grants anticipatory bail u/s 438 of the Cr.P.C. in the offence triable by the Sessions Court then which may be the competent Court in respect of regular bail applications?

   सत्र न्यायालय द्वारा विचारणीय अपराध में उच्च न्यायालय द्वारा धारा 438 द. प्र. सं. के अन्तर्गत अग्रिम प्रतिभूति आदेश दिये जाने पर नियमित प्रतिभूति आवेदन पत्र के निराकरण हेतु सक्षम न्यायालय कौन होगा?

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ऋणी द्वारा दायित्व की अभिस्वीकृति किये जाने पर प्रतिभू के ऋण अदायगी के दायित्व पर प्रभाव

न्यायिक अधिकारीगण
जिला–खण्डवा

भारतीय संविदा अधिनियम, 1872 की धारा 126 के अनुसार 'प्रत्याभूति की संविदा' किसी अन्य व्यक्ति की चूक की अवस्था में उसकी प्रतिज्ञा का पालन या दायित्व का निर्वहन करने की संविदा है, वह व्यक्ति जो प्रत्याभूति देता है, वह प्रतिभू कहलाता है। वह व्यक्ति जिसकी प्रत्याभूति दी जाती है, मूल ऋणी कहलाता है और वह व्यक्ति जिसे प्रत्याभूति दी जाती है, लेनदार कहलाता है।

परिसीमा अधिनियम, 1963 की धारा 18 यह व्यवस्था देती है कि यदि किसी व्यक्ति द्वारा अपने दायित्व की अभिस्वीकृति कर ली गई हो तो परिसीमा की गणना उस दिनांक से प्रारंभ होगी, जब व्यक्ति के द्वारा लिखित रूप से अभिस्वीकृति की गयी थी। यह प्रावधान परिसीमा की अवधि के प्रयोजन के लिये लिखित में होने वाली अभिस्वीकृति के प्रभाव को दर्शाता है। अभिस्वीकृति मात्र परिसीमा की अवधि का विस्तार करती है।

जहाँ तक प्रतिभू के दायित्व का प्रश्न है, संविदा अधिनियम की धारा 128 के अनुसार प्रतिभू का दायित्व जब तक कि संविदा के द्वारा अन्यथा उपबंधित न हो, मुख्य ऋणी के दायित्व के समविस्तीर्ण होता है। इसकी पुष्टि न्यायदृष्टांत ***महंतसिंह विरूद्ध यू.बा. ई., ए.आई.आर. 1939 प्रि.को. 110*** *में मान. प्रीवी काउन्सिल द्वारा* यह मत व्यक्त किया गया है कि मूल ऋणी के पक्ष में जब तक दायित्व रहता है, प्रतिभू उसी सीमा एवं विस्तार तक दायी होता है।

परंतु कुछ न्याय दृष्टांत ऐसे भी हैं, जो मूल ऋणी की अभिस्वी ऋणीकृति को नवीन संविदा मानते हुए प्रतिभू के दायित्व को विस्तारित होना नहीं मानते हैं तथा प्रतिभू को दायित्वाधीन होना नहीं ठहराते हैं। इस संबंध में न्याय दृष्टांत ***सुवालाल बनाम फजल हुसेन आदि, ए.आई.आर. 1939 नागपुर 31, मोतीलाल विरूद्ध श्री ठाकर कनक भवन बिहारीजी महाराज, 1962 जे.एल.जे. 5, नंदलाल विरूद्ध यूनाइटेड कमर्शियल बैंक एवं अन्य, 1988 एम.पी.जे.आर. शार्ट नोट 9, विमला प्रधान एवं अन्य विरूद्ध यूनाइटेड कमर्शियल बैंक एवं अन्य, 1991 जे.एल.जे. 344*** *तथा* ***ओरिएण्टल बैंक आफ कामर्स मंदसौर विरूद्ध मेसर्स संदीप प्रिंटर्स, 2004 (1) एम.पी.डब्लू.एन. 38*** उल्लेखनीय है।

उक्त संदर्भ में माननीय म.प्र. उच्च न्यायालय का न्याय दृष्टांत ***श्रीमती साराबाई विरूद्ध सेंट्रल बैंक आफ इण्डिया ,1990 (2) म.प्र. वी. नो. 154*** विशेष रूप से उल्लेखनीय है। जिसमें इस विषय पर विचार किया गया हैं कि क्या लेनदार बैंक के पक्ष में मूल देनदार के द्वारा की गई दायित्व की अभिस्वीकृति प्रतिभू को भी आबद्ध करेगी, एवं क्या उसके विरूद्ध करार के खंड–8 को विचार में रखते हुए परिसीमा की अवधि का विस्तार करेगी? इस संबंध में माननीय म.प्र. उच्च न्यायालय ने *न्याय दृष्टांत* ***वंडर जूपिटर चिट्स (प्रा.) लि. बनाम के.पी.मेथ्यू ,ए.आई.आर. 1980 केरल 190*** के सम्बन्ध में यह व्यक्त किया कि यह मामला इस विचार का समर्थन करता है कि परिसीमा अधिनियम की धारा 18 के अंतर्गत ऋण की अभिस्वीकृति अपने आप में प्रतिभू के दायित्व को जीवित रखने के लिए प्रतिभू की संविदा के संबंध में समुचित होगी। उच्च न्यायालय के अनुसार जब तक मूल देनदार का दायित्व जीवित होता है, उसके भाग पर होने वाली कोई चूक

प्रतिभू के संपार्श्विक दायित्व को आकर्षित करेगी, जब तक कि पश्चात्वर्ती परिसीमा अधिनियम की धारा 18 के अलावा परिसीमा अधिनियम के एक या अन्य प्रावधानों पर निर्भरता व्यक्त करते हुए उन्मोचन का अभिवचन करने में समर्थ नहीं होता हो। इस मामले में न्यायालय ने यह पाया था कि संविदा अधिनियम की धारा 133, 134, 135 एवं 137 आकर्षित नहीं होती है, इस कारण प्रतिभू को उन्मोचित नहीं किया जा सकता।

माननीय म.प्र. उच्च न्यायालय का इस प्रकरण में यह मत है कि यद्यपि मूल ऋणी एवं प्रतिभू के दायित्व की प्रकृति सहविस्तारी हो सकती है, परंतु उनकी संविदाएँ पृथक–पृथक होती है, इसलिए उन्हें परिसीमा अधिनियम की धारा 21(2) के आशय के लिए संयुक्त संविदा नहीं समझा जाना चाहिए। यह सुस्थापित है कि परिसीमा विधि अधिकार को निःशेष नहीं करती है, अपितु उपचार को वर्जित करती है। वर्तमान मामले में विवाद वास्तव में विधि के न्यायालय में प्रत्यर्थी बैंक के द्वारा अधिकार के रूप में दायित्व के अस्तित्व से संबंधित नहीं है। ऐसी दशा में न्यायालय यह निष्कर्ष नहीं निकाल सकता कि इस बिंदु पर विरोधाभासी राय है। न्यायिक राय एकमत है कि मुख्य देनदार के द्वारा दायित्व की स्वीकृति जिसका प्रभाव उसके विरूद्ध परिसीमा की अवधि के विस्तार के रूप में होता है, उसका प्रभाव प्रतिभू के विरूद्ध परिसीमा की अवधि के विस्तार के रूप में नहीं होता है।

उक्त न्याय दृष्टांतों के विपरीत **स्टेट बैंक आफ इंडिया विरूद्ध विंध्य टेली लिंक्स, 1993 जे.एल. जे. 240, यूनियन बैंक ऑफ इण्डिया विरूद्ध जीवनलाल, 1993 (2) एम.पी.डब्लू.एन. 127** एवं **रमेश चन्द्र विरूद्ध स्टेट बैंक ऑफ इन्दौर, 2005 (2) एम.पी.वीकली नोट्स नोट 24** में यह मत प्रतिपादित किया गया है कि प्रतिभू का दायित्व संविदा विधि के प्रावधानों के अंतर्गत मूल ऋणी के दायित्व के समविस्तीर्ण होता है और उसके दायित्व को निरस्त नहीं किया जा सकता है । मूल ऋणी द्वारा ऋण के दायित्व की अभिस्वीकृति की जाती है तो वह कोई नवीन संविदा नहीं मानी जावेगी, क्योंकि अभिस्वीकृति में किसी प्रकार का प्रतिफल निहित नहीं था। ऐसी दशा में मूल ऋणी की अभिस्वीकृति के पश्चात् परिसीमा अधिनियम की धारा 18 के अंतर्गत परिसीमा की गणना प्रारंभ हो जावेगी एवं प्रतिभू का दायित्व मूल ऋणी के दायित्व के बराबर होगा।

उपरोक्त वर्णित न्यायदृष्टांतों में एकल पीठों द्वारा प्रतिपादित विधि से मूल ऋणी द्वारा दायित्व की अभिस्वीकृति करने पर प्रतिभू के दायित्व पर पड़ने वाले प्रभाव के संबंध में उत्पन्न भ्रमपूर्ण स्थिति माननीय म.प्र उच्च न्यायालय की खण्डपीठों द्वारा न्यायदृष्टान्त **पंजाब नेशनल बैंक विरूद्ध मेसर्स पेक एंड प्रिंट, 2004 (2) एम.पी. वीकली नोटस नोट 93, पंजाब एंड सिन्ध बैंक विरूद्ध लक्ष्मण सिंह, 2005 (2) एम.पी. वीकली नोट्स नोट 57 एवं ओमप्रकाश** एवं **अन्य विरूद्ध यूको बैंक एवं अन्य, 2005 (4) एम.पी.एच. टी. 118 (खंडपीठ)** में प्रतिपादित न्याय सिद्धान्तों से यह स्पष्ट हो जाता है कि मूल ऋणी द्वारा अपने दायित्व की अभिस्वीकृति किए जाने पर ऐसी अभिस्वीकृति प्रतिभू पर भी आबद्धकारी होगी।

उपरोक्त सम्पूर्ण विवेचना से स्पष्टतः यह निष्कर्ष निकलता है कि परिसीमा अवधि में मूल ऋणी द्वारा दायित्व की अभिस्वीकृति किये जाने पर प्रतिभू के ऋण अदायगी के दायित्व की अवधि का विस्तार हो जाएगा एवं ऐसी अभिस्वीकृति प्रतिभू पर भी आबद्धकारी होगी।

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वाहन स्वामी द्वारा स्वयं की उपेक्षा से वाहन की दुर्घटना कारित करने पर उसकी मृत्यु होने पर उसके विधिक प्रतिनिधियों द्वारा प्रस्तुत क्षतिपूर्ति के दावे के संबंध में बीमा कंपनी का मोटरयान अधिनियम, 1988 की धारा 140, 163–ए एवं 166 के अन्तर्गत दायित्व

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विस्तृत बीमा पॉलिसी के अन्तर्गत मोटरयान दुर्घटना में वाहन स्वामी को आई चोटों अथवा वाहन स्वामी की मृत्यु के संबंध में बीमा कंपनी के दायित्व के संबंध में मोटरयान अधिनियम, 1988 की धारा 147 के प्रावधान अवलोकनीय हैं जो कि निम्नानुसार हैं :–

धारा 147:– पॉलिसियों की अपेक्षाएं तथा दायित्व की सीमाएं :–

(1) इस अध्याय की अपेक्षाओं का अनुपालन करने के लिये बीमा पॉलिसी ऐसी होनी चाहिए जो :–

(क) ऐसे व्यक्ति द्वारा, जो प्राधिकृत बीमाकर्ता है दी गई, और

(ख) पॉलिसी में विनिर्दिष्ट व्यक्ति या वर्ग व्यक्तियों का उपधारा (2) में विनिर्दिष्ट विस्तार तक निम्नलिखित के लिये बीमा करती हैं, अर्थात् :

(I) उस यान का किसी सार्वजनिक स्थान में उपयोग करने से ''किसी व्यक्ति की, जिसके अन्तर्गत यान में ले जाये जाने वाले माल का स्वामी या उसका प्राधिकृत प्रतिनिधि है, मृत्यु या शारीरिक क्षति होने''– अथवा किसी पर–व्यक्ति की किसी सम्पत्ति को नुकसान पहुंचाने के बावत उसके द्वारा उपगत दायित्व,

(II) उस यान का किसी सार्वजनिक स्थान में उपयोग करने से किसी सार्वजनिक सेवा यान के किसी यात्री की मृत्यु या शारीरिक क्षति :

परन्तु कोई पॉलिसी –

(I) उस पॉलिसी द्वारा बीमाकृत किसी व्यक्ति के कर्मचारी की उसके नियोजन से और उसके दौरान हुई मृत्यु के सबंध में अथवा ऐसे कर्मचारी की उसके नियोजन से और उसके दौरान हुई शारीरिक क्षति के संबंध में ऐसे दायित्व को पूरा करने के लिये अपेक्षित नहीं होगी, जो किसी ऐसे कर्मचारी की मृत्यु या उसकी शारीरिक क्षति की बावत कर्मकार प्रतिकर, अधिनियम, 1923 (1923 का 8) के अधीन होने वाले दायित्व से भिन्न है जो :–

(क) यान चलाने में नियोजित है, या

(ख) सार्वजनिक सेवा यान की दशा में, उस यान के कंडक्टर के रूप में, अथवा उस यान पर टिकटों की जांच करने में नियोजित है, या

(ग) माल वाहन की दशा में, उस यान में वहन किया जा रहा है, या

(II) किसी संविदात्मक दायित्व को पूरा करने के लिये अपेक्षित नहीं होगी।

स्पष्टीकरण – शंकाओं को दूर करने के लिये, यह घोषित किया जाता है कि किसी व्यक्ति की मृत्यु या शारीरिक क्षति अथवा पर–व्यक्ति की किसी सम्पत्ति के नुकसान को इस बात के होते हुए भी कि जिस व्यक्ति की मृत्यु हुई है या जिसे क्षति पहुंची है या जिस सम्पत्ति को नुकसान पहुंचा है वह दुर्घटना के समय सार्वजनिक समय स्थान में नहीं था या थी, उस दशा में सार्वजनिक स्थान में यान के उपयोग से हुआ समझा जायेगा जबकि वह कार्य या लोप, जिसके परिणाम स्वरूप दुर्घटना हुई, सार्वजनिक स्थान में हुआ था ।

(2) उपधारा (1) के परन्तुक के अधीन रहते हुए, उपधारा (1) में निर्दिष्ट बीमा पॉलिसी के अन्तर्गत किसी दुर्घटना की बावत उपगत कोई दायित्व निम्नलिखित सीमाओं तक होगा, अर्थात :–

(क) खण्ड (ख) में यथा उपबंधित के सिवाय, उपगत दायित्व की रकम,

(ख) पर–व्यक्ति की किसी सम्पत्ति को हुए नुकसान की बावत, छः हजार रूपये की सीमा:

परन्तु इस अधिनियम के प्रारंभ के ठीक पहले सीमित दायित्व वाली बीमा पॉलिसी जो प्रवृत्त है, ऐसे प्रारंभ के पश्चात् चार मास की अवधि के लिये अथवा ऐसी पॉलिसी की समाप्ति की तारीख तक इनमें से जो भी पूर्वतर हो, प्रभावी बनी रहेगी।

धारा 147 बीमा कंपनी से बीमित वाहन के स्वामी को मोटरयान दुर्घटना में आयी चोटों या उसकी मृत्यु के जोखिम के लिये उत्तरदायित्व की अपेक्षा नहीं करती हैं । न्याय दृष्टांत ***ओरियंटल एश्योंरेस कंपनी लिमिटेड विरूद्ध सुनीता राठी, 1998 ए.सी.जे. 121 (एस.सी.)*** में प्रतिपादित मत के अनुसार बीमा कंपनी का उत्तरदायित्व केवल तृतीय पक्ष की क्षतिपूर्ति अथवा सम्पत्ति के नुकसान की क्षतिपूर्ति के लिये हैं।

इस प्रकार यदि बीमित वाहन के स्वामी का तृतीय पक्ष के लिये कोई उत्तरदायित्व नहीं है तो उसके लिये बीमा कंपनी का भी कोई उत्तरदायित्व नहीं होगा।

न्याय दृष्टाँत ***धनराज विरूद्ध न्यू इंडिया एश्योरेंस कंपनी लिमिटेड एवं अन्य, (2004) 8 एस.सी.सी., 553 तथा ओरियंटल एश्योरेंस कंपनी विरूद्ध झूमा शाह एवं अन्य, 2007 ए.सी.जे. 818*** में प्रतिपादित मत के अनुसार यह स्पष्ट है कि वाहन स्वामी मोटरयान दुर्घटना में कारित हुई चोटें अथवा मृत्यु के संबंध में बीमा कंपनी से प्रतिकर के लिये दावा नहीं कर सकता, जब तक कि बीमा कंपनी द्वारा वाहन स्वामी की व्यक्तिगत उपहतियों अथवा मृत्यु के लिये विशेष बीमा संविदा के द्वारा अतिरिक्त प्रीमियम की राशि नहीं ली गयी

हो और वाहन स्वामी की मृत्यु के उपरांत उसके वैध वारिसों द्वारा प्रतिकर के लिये बीमा कंपनी के विरूद्ध दावा प्रस्तुत करने के संबंध में यह स्थिति स्पष्ट की गयी है कि मृतक वाहन स्वामी के वैध वारिसान भी व्यक्तिगत उपहतियों और मृत्यु के संबंध में विशेष संविदा द्वारा दी गयी अतिरिक्त प्रीमियम की राशि के अभाव में प्रतिकर का दावा नहीं कर सकते।

न्याय दृष्टॉत ***श्रीमती उषा बघेल एवं अन्य विरूद्ध यूनाईटेड इंडिया एश्योरेंस कंपनी लिमिटेड एवं अन्य, आई.एल.आर. (2007) एम.पी. 1141 तथा श्रीमती सुनीता लोखण्डे एवं अन्य विरूद्ध द न्यू इंडिया एश्योरेंस कंपनी लिमिटेड एवं अन्य, आई.एल.आर. (2007) एम.पी. 1145*** में माननीय म.प्र. उच्च न्यायालय जबलपुर की पूर्णपीठ द्वारा यह भी स्पष्ट किया गया है कि यदि वाहन स्वामी द्वारा मोटरयान चलाये जाने पर मोटरयान दुर्घटना में आयी चोटों के परिणाम स्वरूप उसकी मृत्यु हो जाती है तो वाहन स्वामी द्वारा यदि व्यक्तिगत उपहतियों के लिये अथवा मृत्यु के संबध में बीमा संविदा के तहत बीमा कंपनी को अतिरिक्त प्रीमियम की राशि नहीं दी गयी है तो मृतक वाहन के स्वामी के वैध वारिसान बीमा कंपनी के विरूद्ध प्रतिकर का दावा नहीं कर सकते। यदि वाहन स्वामी द्वारा विशेष बीमा संविदा तहत व्यक्तिगत उपहतियों अथवा मृत्यु के लिये अतिरिक्त प्रीमियम की राशि दी गयी है तभी मृतक वाहन स्वामी के वैध वारिसान बीमा कंपनी के विरूद्ध प्रतिकर के लिये मोटरयान अधिनियम, 1988 की धारा 166 के तहत दावा कर सकते हैं और तभी बीमा कंपनी उनके लिये उत्तरदायी हो सकती है। यह भी स्पष्ट किया गया है कि यदि बीमा पॉलिसी के अनुसार वाहन स्वामी द्वारा निजी नुकसान के लिये प्रीमियम की राशि अदा की गयी है तो उसके आधार पर बीमा कंपनी केवल सम्पत्ति के नुकसान के लिये उत्तरदायी होगी और वह वाहन स्वामी की व्यक्तिगत उपहति या मृत्यु के लिये उत्तरदायी नहीं होगी। यदि बीमा पॉलिसी से यह दर्शित होता है कि सम्पत्ति के नुकसान के अलावा व्यक्तिगत उपहति अथवा मृत्यु के संबंध में भी अतिरिक्त प्रीमियम की राशि अदा की गयी है तो बीमा कंपनी सम्पत्ति के नुकसान के साथ वाहन स्वामी की उपहति अथवा मृत्यु के संबंध में भी उत्तरदायी होगी।

न्याय दृष्टॉंत ***ओरियंटल एश्योरेंस कंपनी लिमिटेड विरूद्ध झूमा शाह एवं अन्य, ए.आई.आर. 2007 एस. सी. 1054*** में प्रतिपादित मत के अनुसार यह स्पष्ट किया गया है कि यदि बीमित वाहन के स्वामी की स्वयं की उपेक्षा के कारण दुर्घटना होती है तो ऐसे मामले में मोटरयान अधिनियम, 1988 की धारा 166 के तहत वाहन के स्वामी के उत्तराधिकारियों द्वारा बीमा कंपनी के विरूद्ध प्रतिकर का दावा प्रचलन योग्य नहीं होगा। अतः उक्त न्याय दृष्टांतों में प्रतिपादित मतों के प्रकाश में यह स्पष्ट होता है कि यदि बीमित वाहन के स्वामी द्वारा स्वयं के जोखिम के लिये विशेष संविदा के तहत अतिरिक्त प्रीमियम की राशि अदा की जाती है, तभी बीमा कंपनी मोटरयान दुर्घटना में वाहन स्वामी की मृत्यु के लिये प्रतिकर के संबंध में उत्तरदायी होगी, लेकिन वाहन स्वामी द्वारा स्वयं की उपेक्षा से यदि वाहन की दुर्घटना कारित होती है, तब ऐसी स्थिति में धारा 166 के तहत वाहन स्वामी के विधिक प्रतिनिधियों द्वारा प्रस्तुत क्षतिपूर्ति के दावे के संबंध में बीमा कंपनी उत्तरदायी नहीं होगी।

न्याय दृष्टांत ***मोनोबारा वीवी एवं अन्य विरूद्ध न्यू इंडिया एश्योरेंस कंपनी लिमिटेड, 2005 ए.सी.जे. 1348*** में प्रतिपादित मत के अनुसार यदि मोटरयान अधिनियम के प्रावधानों के अनुसार बीमा कंपनी प्रतिकर के लिये उत्तरदायी नहीं है तो मोटरयान दुर्घटना में किसी व्यक्ति की मृत्यु के परिणाम स्वरूप त्रुटि न होने के सिद्धांत के आधार पर मृतक के वारिसान को प्रतिकर की राशि अदा करने के लिये बीमा कंपनी उत्तरदायी नहीं होगी और आगे मोटरयान की धारा 140, 144 एवं 147 (1) के संबंध में यह भी स्पष्ट किया गया है कि मोटरयान दुर्घटना में बीमित वाहन के स्वामी की मृत्यु होने पर यदि वाहन स्वामी के वारिसान द्वारा बीमा कंपनी के विरूद्ध त्रुटि न होने के सिद्धान्त के आधार पर दावा प्रस्तुत किया जाता है तो बीमा कंपनी उत्तरदायी नहीं होगी। मृतक वाहन स्वामी के वारिसान को अंतरिम प्रतिकर करने के लिये यह प्रमाणित करना होगा कि विशेष संविदा के तहत बीमा कंपनी प्रतिकर के लिये उत्तरदायी है, अर्थात यदि बीमित वाहन के स्वामी द्वारा विशेष बीमा संविदा के तहत यदि व्यक्तिगत उपहति और मृत्यु के संबंध में अतिरिक्त प्रीमियम की राशि अदा की गयी है तभी उसके वारिसान मोटरयान अधिनियम की धारा 140 के तहत त्रुटि न होने के सिद्धान्त के आधार पर बीमा कंपनी के विरूद्ध अंतरिम प्रतिकर की राशि प्राप्त करने के लिये दावा कर सकते हैं और ऐसी स्थिति में ही बीमा कंपनी अंतरिम प्रतिकर के लिये उत्तरदायी होगी।

न्याय दृष्टांत ***न्यू इंडिया एश्योरेंस कंपनी लिमिटेड विरूद्ध सुनील एवं अन्य, 2007 ए.सी.जे. 278*** में माननीय कर्नाटक उच्च न्यायालय बैंगलूर द्वारा न्याय दृष्टांत ***दीपाल गिरीश भाई सोनी विरूद्ध यूनाईटेड इंडिया एश्योरेंस कंपनी लिमिटेड, 2004 ए.सी.जे. 934 (एस.सी.)*** में प्रतिपादित मत का अनुसरण करते हुए यह स्पष्ट किया गया है कि यदि दावेदार की स्वयं की उपेक्षा के कारण दुर्घटना हुई है तो भी मोटरयान अधिनियम 1988 की धारा 163–ए के तहत दावेदार को प्रतिकर दिलवाया जा सकता है और यह स्पष्ट किया गया है कि पीड़ित व्यक्ति की उपेक्षा के कारण हुई दुर्घटना के संबंध में प्रतिकर के लिये धारा 163–ए लागू होती है और यह धारा 166 का अपवाद है।

अतः उक्त न्याय दृष्टांत में प्रतिपादित मत को देखते हुए यह स्पष्ट है कि मोटरयान अधिनियम की धारा 163 –ए के तहत जो दावा प्रस्तुत किया जाता है, उसमें वाहन चालक की उपेक्षा नहीं देखी जाती हैं। तब ऐसी स्थिति में यदि वाहन स्वामी द्वारा स्वयं की उपेक्षा से दुर्घटना कारित हुई है तो मृतक वाहन स्वामी के वैध वारिस धारा 163–ए के तहत बीमा कंपनी के विरूद्ध प्रतिकर का दावा प्रस्तुत कर सकते हैं और बीमा कंपनी उसके लिये उत्तरदायी हो सकती है, लेकिन धारा 163–ए के तहत भी दावा तभी प्रचलन योग्य होगा, जबकि बीमित वाहन के स्वामी द्वारा विशेष संविदा के तहत स्वयं की उपहति के लिये अथवा मृत्यु की जोखिम के लिये अतिरिक्त प्रीमियम की राशि अदा की गयी होगी।

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एक ही सम्पत्ति के संबंध में दो इच्छापत्र होने पर एक व्यक्ति द्वारा सिविल वाद प्रस्तुत करने पर और दूसरे व्यक्ति द्वारा प्रोबेट हेतु आवेदन पत्र प्रस्तुत करने पर धारा 10 और 11 सिविल प्रक्रिया संहिता, 1908 के प्रावधानों की प्रयोज्यता

न्यायिक अधिकारीगण

जिला शिवपुरी

धारा 10 व्यवहार प्रक्रिया संहिता, 1908 में मूल रूप से यह प्रावधान है कि, जहाँ एक ही विवादग्रस्त विषय वस्तु के संबंध में उन्हीं पक्षकारों के मध्य पूर्व से ही सक्षम अधिकारिता वाले न्यायालय में दावा लंबित है तब बाद में प्रस्तुत व्यवहार वाद का विचारण प्रथमतः प्रस्तुत व्यवहारवाद के निराकरण की कार्यवाही तक, रोक दिया जायेगा।

धारा 273 भारतीय उत्तराधिकार अधिनियम,1925 के अनुसार प्रोबेट का निर्णय इच्छापत्र के निष्पादन की वैधता और उसकी सत्यता के लिये प्रोबेट न्यायालय का दिया गया निर्णय अंतिम होता है तथा प्रोबेट न्यायालय का इस संबंध में दिया गया निर्णय व्यक्तिबंधन निर्णय न होकर सर्वबंधन (जजमेंट इन रैम) निर्णय होता है। ऐसा मत माननीय सर्वोच्च न्यायालय द्वारा ***रूक्मणी देवी विरूद्ध नरेन्द्रलाल, ए.आई.आर. 1984 एस.सी. पेज 1866*** में व्यक्त किया गया है। इस कारण से यदि एक व्यक्ति द्वारा दो इच्छापत्र निष्पादित किया जाना बताये जाने पर यदि एक इच्छापत्र के आधार पर प्रोबेट प्राप्त करने हेतु आवेदन प्रस्तुत कर दिया गया है व एक इच्छापत्र के आधार पर व्यवहारवाद प्रस्तुत कर दिया गया हैं तब भी प्रोबेट हेतु आवेदन भले ही बाद में पेश किया गया हो तो भी प्रोबेट हेतु दिया आवेदन धारा 10 व्यवहार प्रक्रिया संहिता के प्रावधान अनुसार उसकी कार्यवाही व्यवहारवाद के चलते नहीं रोकी जा सकती।

जहां तक एक इच्छापत्र के आधार पर प्रस्तुत व्यवहारवाद का प्रश्न है, इस संबंध में माननीय मध्यप्रदेश उच्च न्यायालय के न्यायदृष्टांत ***फूलसिंह व अन्य विरूद्ध श्रीमति कोसाबाई व अन्य, 1999 (1) एम.पी.जे.आर. पेज 352 व बृजेन्द्र सिंह लोधी विरूद्ध राजकुमारी यादव व अन्य, 2005 (4) एम.पी. एल.जे. पेज 160*** के न्याय दृष्टांत में यह मत प्रतिपादित किया गया है कि जहां हिन्दू, बौद्ध, सिख एवं जैन द्वारा वसीयत की जाती है वहां मध्यप्रदेश में व्यवहारवाद लाने के लिये प्रोबेट प्राप्त करना आवश्यक नहीं होता है, वसीयत के आधार पर व्यवहारवाद भी लाया जा सकता है। अतः एक इच्छापत्र के आधार पर प्रस्तुत व्यवहारवाद भी प्रचलन योग्य हैं।

अतः दो वसीयत होने पर एक वसीयत के आधार पर व्यवहारवाद पेश होने पर माननीय उच्च न्यायालय द्वारा यही मत प्रतिपादित किया गया है कि व्यवहारवाद के पक्षकार को प्रोबेट न्यायालय में जाकर उसकी वसीयत वैधानिक व अंतिम है इस बात का निर्धारण कराना आवश्यक नहीं है ।

मान्नीय मध्यप्रदेश उच्च न्यायालय के न्याय दृष्टांत ***रामशंकर विरूद्ध बालकदास, ए.आई.आर. 1992 म.प्र. पेज 224*** के न्याय दृष्टांत में जो यह मत व्यक्त किया गया था कि, दो वसीयत होने पर अंतिम वसीयत कौन सी थी, और कौन सी वसीयत वैध है इसका निराकरण करने का अधिकार प्रोबेट न्यायालय को है इसलिये जो व्यवहारवाद पेश किया गया था उसे वापिस करने का आदेश दिया था उस न्याय दृष्टांत में उपरोक्त प्रतिपादित मत को माननीय म.प्र.उच्च न्यायालय के खंडपीठ ने न्यायदृष्टांत ***फूलसिंह व अन्य विरूद्ध श्रीमती कौसाबाई व अन्य, 1999 (1) एम.पी.जे.आर. पेज 352*** में सही मत होना नहीं माना। और यह सिद्धान्त प्रतिपादित किया कि दो विरोधी वसीयत होने पर भी व्यवहार न्यायालय का सुनवाई क्षेत्राधिकार वहां प्रभावित नहीं होता है जहां कि, हिन्दू द्वारा वसीयत की गयी हो और वह प्रसीडेंसी नगरों के बाहर की सीमा की संपत्ति के संबंध में किया गया हो। अतः धारा 10 व्यवहार प्रक्रिया संहिता के प्रावधानानुसार व्यवहार वाद की कार्यवाही स्थगित नहीं की जा सकती।

परन्तु इस सम्बन्ध में गुजरात उच्च न्यायालय द्वारा ***श्रीमती मुलती बाहुजी विरूद्ध श्रीमती कालिदीं बाहुजी एवं अन्य, ए.आई.आर. 1994 गुजरात पेज 42*** में दिया गया निर्णय अनुकरणीय है जिसके अनुसार जहाँ प्रोबेट मामलों के एंव व्यवहार वाद के पक्षकार समान है तथा सम्पत्ति भी एक ही है वहाँ यद्यपि प्रकरणों को धारा 10 व्यवहार प्रक्रिया संहिता के अधीन एकीकृत करने का प्रावधान नहीं है परन्तु ऐसे मामलों में धारा 151 व्यवहार प्रक्रिया संहिता के प्रावधानों का उपयोग करते हुये उन्हें समेंकित (Consolidate) कर उनका संयुक्त रूप से विचारण किया जाना चाहिये। इस मत की पुष्टि माननीय सर्वोच्च न्यायालय द्वारा भी न्यायिक दृष्टॉत ***निर्मला देवी बनाम अरूण कुमार गुप्ता, (2005) 12 एस.सी.सी. 505*** में करते हुये यह आदेश दिया है कि इच्छापत्र के प्रमाण के प्रश्न पर प्रोबेट प्रकरण के निर्णय का व्यवहार वाद पर प्रत्यक्ष प्रभाव होगा, ऐसी स्थिति में प्रोबेट प्रकरण व्यवहार वाद के साथ संयुक्त (Clubbed) किया जाए।

जहां तक धारा 11 व्यवहार प्रक्रिया संहिता, 1908 के प्रावधान की प्रयोजिता का प्रश्न है इस संबंध में न्याय दृष्टांत ***चिंतामणी व अन्य विरूद्ध चारी बेवा व अन्य, ए.आई.आर. 1962 उड़ीसा पेज 224*** के अनुसार व्यवहार न्यायालय का निर्णय प्रोबेट प्रोसिडिंग में रेस ज्यूडिकेटा का प्रभाव नहीं रखता है तथा धारा 273 भारतीय उत्तराधिकार अधिनियम व धारा 41 साक्ष्य विधान के अनुसार प्रोबेट न्यायालय का दिया गया निर्णय वसीयत की वैधता व सही होने के संबंध में अंतिम निर्णय होता है। माननीय सर्वोच्च न्यायालय के न्यायदृष्टांत ***रूक्मणीदेवी विरूद्ध नरेन्द्रलाल, ए.आई.आर. 1984 एस.सी. 1866*** के अनुसार प्रोबेट न्यायालय का निर्णय सर्वबंधन (जजमेंट इन रैम) होता है। इसी मत की पुनः पुष्टि करते हुये माननीय सर्वोच्च

न्यायालय ने ***क्रिस्टल डेवलपमेंट बनाम श्रीमती आशालता घोष, ए.आई.आर. 2004 एस.सी. 4980*** में ऐसे निर्णय को निश्चयात्मक बताते हुये प्रकट किया है कि प्रोबेट जारी किये जाने का निर्णय सर्वबंधन (जजमेंट इन रैम) होता हैं।

इस संबंध में धारा 216 भारतीय उत्तराधिकार अधिनियम के प्रावधान भी अवलोकनीय है जिसमें यह बताया गया है कि, जहां प्रोबेट प्रदान कर दिया जाये वैसी दशा में उस प्रोबेट को निरस्त किये बिना प्रोबेट न्यायालय के द्वारा दिया गया निर्णय को समाप्त नहीं किया जा सकता तथा प्रोबेट को निरस्त केवल प्रोबेट न्यायालय ही कर सकती है इसलिये भी प्रोबेट न्यायालय का निर्णय वसीयत की वैधता के संबंध में व्यवहार वाद में भी रेस ज्यूडिकेटा का प्रभाव रखेगा।

व्यवहार प्रक्रिया संहिता की धारा 11 के स्पष्टीकरण कमांक 8 में यह बताया गया है कि, कोई विवाद्यक जो सीमित अधिकारिता वाले किसी न्यायालय द्वारा विनिश्चय किया गया है तो वह भी पश्चातवर्ती वाद में पूर्व न्याय के सिद्वान्त के रूप में प्रयोज्य होगा इस कारण से प्रोबेट न्यायालय का निर्णय इच्छापत्र के वैधता और अंतिम इच्छापत्र कौन सा है इस संबंध में पूर्व न्याय का प्रभाव रखेगा।

यहां यह उल्लेख करना भी उचित होगा कि, प्रोबेट न्यायालय वसीयतकर्ता के स्वत्व का निर्धारण नहीं कर सकती इस कारण से प्रोबेट न्यायालय का निर्णय स्वत्व के संबंध में व्यवहारवाद के लिये रेस ज्यूडिकेटा का प्रभाव नहीं रखेगा। ऐसा मत ***श्रीमति हेम नालिनी (मृतक के वैध प्रतिनिधि) विरूद्ध श्रीमति आईसोलिन सरोज वासिनी बोस व अन्य, ए.आई.आर. 1962 एस.सी. पेज 1471 के पैरा 8*** में भी बताया गया हैं।

INSTITUTIONAL SUPPLEMENT

Following case laws and provisions are also relevant on the subject. Please go through them to understand the subject in a broader perspective:

1. ***Thakurain Raj Rani and others v. Dwarkanath Singh and others, AIR 1953 SC 205***

   The question of animus testandi was barred by res judicata but in regard to the question whether the bequest in favour of B could take effect by reason of default in payment, the decision of the Privy Council does not constitute *res judicata.*

2. ***Ishwardeo Narain Singh v. Smt. Kamta Devi and others, AIR 1954 SC 280***

   The Court of Probate is only concerned with the execution of the last will. The question is whether a particular bequest is good or bad is not within the purview of the Probate Court.

3. ***Jerbanoo Rustomji Garda v. Pootlamai Maneeksha Mehta, AIR 1955 Bombay 447***

A decision as to the proof of will given by any civil Court can under no circumstance operate as res judiciata in probate proceedings taken out in the Probate Court. In a civil suit the Court is only concerned with deciding the rights between the parties. The Probate Court the decision entirely different.

4. ***Surinder Kumar and others v. Gian Chand and others, AIR 1957 SC 875***

The judgment of a Probate Court granting probate of a will in favour of the petitioner must be presumed to have been obtained in accordance with the procedure prescribed by law and it is a "judgment in rem".

5. ***In the Goods of Mrs. Lilian Singh, AIR 1943 Calcutta 19***

Applications for letters of administration – Procedure required to be followed as mentioned in Section 141 though proceeding can be treated as a suit for the purpose of Section 10 CPC.

In this context Section 295 of the Indian Succession Act, 1925 is also germane, which is reproduced as under:

295. Procedure in contentious cases.– In any case before the District Judge in which there is contention, the proceedings shall take, as nearly as may be, the form of a regular suit, according to the provisions of the Code of Civil Procedure, 1908 (5 of 1908), in which the petitioner for probate or letters of administration, as the case may be, shall be the plaintiff, and the person who had appeared to oppose the grant shall be the defendant."

6. ***Vijendra (Brijendra) Singh Yadav v. Rajkumari Yadav and others, 2005 (4) MPLJ 160***

Only Probate Court has no jurisdiction to adjudicate upon the validity of a Will. The DB judgment of High Court ***Phool Singh and others v. Smt. Kosa Bai and two others, 1999 (I) MPJR 352*** followed.

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WHETHER THE PERIOD UNDERGONE BY JUVENILE IN CONFLICT WITH LAW IN OBSERVATION HOME OR SAFETY HOME DURING THE ENQUIRY CAN BE SET OFF BY THE JUVENILE JUSTICE BOARD IF IT FINDS HIM GUILTY OF ANY OFFENCE AND PASSES AN ORDER TO KEEP HIM IN SPECIAL HOME OR PLACE OF SAFETY?

Judicial Officers
District Damoh

Section 15 of the Juvenile Justice (Care and Protection of Children) Act, 2000 (hereinafter referred to as 'the said Act') contains guidelines regarding punitive orders which may be passed by the Juvenile Justice Board. Section 15 of the said Act is reproduced as under:

> ***"15. Order that may be passed regarding Juvenile*** – (i) Where a Board is satisfied on inquiry that a juvenile has committed an offence, then not withstanding anything to the contrary contained in any other law for the time being in force, the Board may, if it thinks so fit –
>
> (a) allow the Juvenile to go home after advice or admonition followed appropriate injury against and counselling to the parent or guardian and the Juvenile;
>
> (b) direct the Juvenile to participate in group counselling and similar activities;
>
> (c) order the Juvenile to perform community service;
>
> (d) order to parent of the Juvenile or the Juvenile himself to pay a fine, if he is over 14 years of age and earns money;
>
> (e) direct the Juvenile to be realized on probation of good conduct and placed under the care of any parent, guardian or other fit person, on such parent guardian or other fit person executing a bond, with or without surety, as the Board may require for the good behaviour and well being of the Juvenile for any period not exceeding three years;
>
> (f) direct the Juvenile to be released on probation of good conduct and placed under the care of any fit institution for the good behaviour and well being of the Juvenile for any period not exceeding three years;

(g) make an order directing the juvenile to be sent to a special home for a period of three years;

Provided that Board may, if it is satisfied that having regard to the nature of the offence and the circumstance of the case, it is expedient so to do, for reasons to be recorded, reduce the period of stay to such period as it thinks fit."

Now, the question arises as to whether a juvenile can be denied the benefit of set-off of his period of detention pending an enquiry under the said Act?

It is true that Section 15 and other provisions of said Act, has not provided any specific provision regarding setting off a period of detention undergone by the ***Juvenile in conflict with the law*** during the enquiry.

The statutory provision regarding set-off for period of detention is incorporated in Section 428 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Code'). Section 428 is reproduced as under:

> ***"Section 428. Period of detention undergone by the accused to be set-off against the sentence of imprisonment*** – Where an accused person has, on conviction, been sentenced to imprisonment for a term, not being imprisonment in default of payment of fine, the period of detention, if any, undergone by him during the investigation, inquiry or trial of the same case and before the date of such conviction, shall be set-off against the term of imprisonment imposed on him on such conviction, and the liability of such person to undergo imprisonment on such conviction shall be restricted to the remainder, if any, of the term of imprisonment imposed on him."

Section 428 of the Code permitted the setting off a period of detention undergone by an accused during investigation and trial against the ultimate "sentence of imprisonment". The set off of the period of detention was permissible only, if there was an order of "sentence of imprisonment". The order passed by the Juvenile Justice Board under Section 15 of the said Act, requiring the juvenile to be kept in a ***place of safety*** for a period not exceeding three years did not amount to a sentence of imprisonment and therefore strictly speaking, the provisions of Section 428 of the Code would not be applicable.

As noted in the case of ***State of Maharashtra and others v. Nazakat Ali Mubarak Ali, (2001) 6 SCC 311,*** the ideology enshrined in Section 428 of the Code can be discerned by having a look at the objects and reasons for bringing about the provisions. The object and reasons are as under:

> "The Committee has noted the distressing fact that in many cases accused persons are kept in prison for very long period as undertrial prisoners and in some cases the sentence of imprisonment ultimately awarded is a fraction of period spent in jail as undertrial prisoners. Indeed, there may even be cases where such a person is acquitted. No doubt, sometimes Courts do take into account the period of detention undergone as undertrial prisoners, when passing sentence and occasionally the sentence of imprisonment is restricted to the period already undergone. But this is not always the case so that in many cases the accused person is made to suffer jail life for a period out of all proportion to the gravity of the offence or even to the punishment provided in the statute. The Committee has also noted that a large number of persons in the over crowded jails of today are undertrial prisoners. The new clause seeks to remedy this unsatisfactory state of affairs. ***The new clause provides for the setting-off of the period of detention as an undertrial prisoner against the sentence of imprisonment imposed on him. The committee trusts that the provision contained in the view clause would go a long way to mitigate the evil."***

Reading the above Statement of Objects and Reasons, it becomes clear that the salutary provisions of Section 428 was introduced by the Legislature into the statute book to alleviate the problems faced by persons who underwent long period as undertrial prisoners.

Hon'ble Jharkhand High Court in ***Abhay Kumar Singh v. State of Jharkhand, 2004 Cri.L.J. 4533*** stated that there is no special provision under the said Act for a period of detention exceeding more than three years and where juvenile had already served detention period for more than three years in course of enquiry juvenile be released forthwith from custody.

In ***Sunil Ojha v. State of N.C.T. of Delhi, 2007 Cri.L.J. 3068 (at page 3070)***, Hon'ble High Court laid down that –

> "A juvenile in conflict with the law is kept under detention pending an inquiry under the said Act, he should also be granted the same benefit, while passing an order under Section 15 thereof. Though there is no statutory provision such as Section 428 of the Code, which would be specifically and clearly applicable to the case of juveniles, in my view, principles analogous to the same can be invoked by the Juvenile Justice Board while passing an order under section 15."

Hon'ble High Court further stated that –

> "The Board has ample power, if it is satisfied that having regard to the nature of the offence and the "circumstances of the case", it is expedient to reduce the period of stay in, interalia, a Place of Safety. In my opinion, the principles analogous to those of Section 428 of the Code can be read into the expression "circumstances of the case" to enable the Board to reduce the period of stay that it may direct upon the completion of enquiry.
>
> ....reference may also be made to the provisions of Section 65 of the Act which also indicate that the sentence shall not exceed the maximum period provided under section 15 of the Act, even in respect of those juveniles who were undergoing sentence at the time of introduction of the said Act."

Now, the position regarding our problem is quite clear that the ***"Juvenile in conflict with the law"*** can get the benefit of set-off for a period of detention in Observation Home or Safety Home during the enquiry by the Juvenile Justice Board while passing an order under Section 15 of the said Act.

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विधिक समस्याऐं एवं समाधान

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

क्या निर्धन के रूप में प्रस्तुत दावे को न्याय शुल्क से उन्मुक्ति प्राप्त हैं?

यह एक भ्रान्ति है कि यदि किसी व्यक्ति को व्य.प्र.सं., 1908 आदेश 33 नियम 8 के अनुसार निर्धन के रूप में दावा प्रस्तुत करने की अनुज्ञा न्यायालय ने दी है तो न्याय शुल्क देय नहीं होगी ।

निर्धन के रूप में दावा प्रस्तुत करने में न्याय शुल्क मात्र निलंबित होती हैं । न्याय शुल्क तो देना ही होता हैं।

यदि निर्धन द्वारा प्रस्तुत दावा सफल होता है तो न्यायालय का यह दायित्व है कि वह न्यायालय फीस की सगणना करें और डिक्री में स्पष्ट आदेश दें कि न्याय शुल्क किस पक्षकार द्वारा देय होगा। राज्य सरकार उस व्यक्ति से जिसे डिक्री द्वारा आदिष्ट किया गया न्याय शुल्क वसूल करेगी। यही नहीं वाद की विषय वस्तु पर ऐसी राशि प्रथम भार होगी। (देखिये आदेश 33 नियम 10 व्य.प्र.सं.)

यदि दावा असफल हो जाता है अथवा दावा वापस ले लिया जाता है अथवा निर्धन व्यक्ति के रूप में वाद लाने के लिये दी गयी अनुज्ञा प्रत्याहत कर ली गयी है अथवा दावा आदेश 9 नियम 2, आदेश 9 नियम 4, आदेश 9 नियम 8 व्य.प्र.सं. के अधीन निरस्त किया जाता है अथवा दावा किसी कारण से उपशमित हो जाता है, इन सभी दशाओं में न्यायालय को न्यायशुल्क की सगणना करनी होगी और वादी को अथवा सहवादी को निर्देश देगा कि वह न्याय शुल्क दें। (देखिये आदेश 33 नियम 11, 11–क व्य.प्र.सं.)

इस प्रकार अंकिचन वाद (Indigent Suit) को न्याय शुल्क से छूट प्राप्त नहीं है। न्याय शुल्क तो देना ही होगा यदि दावा सफल होता है तो न्यायालय का विवेकाधिकार है कि वादी अथवा प्रतिवादी किसी को आदेशित कर सकेगी कि न्याय शुल्क दें। यदि दावा असफल होता है या अन्य किसी कारण से खारिज अथवा उपशमित होता है तो न्यायालय वादी को ही आदेशित करेगी कि वह न्याय शुल्क दें। यदि वह नहीं देता तो कलेक्टर उक्त राशि को भूराजस्व के रूप में वसूल सकेगा। (देखिये आदेश 33 नियम 14 व्य.प्र.सं.)

माननीय उच्चतम न्यायालय ने ***आर.वी. देव विरूद्ध मुख्य सचिव, स्टेट आफ केरला, ए.आई.आर. 2007 एस.सी. 2698*** में भी यही मत दिया है कि निर्धन वाद को न्याय शुल्क से उन्मुक्ति नहीं है बल्कि निर्णय तक स्थगित रहता है।

इस प्रकार यह स्पष्ट है कि जब अंकिचन दावा निराकृत होता है तो न्यायालय का यह दायित्व है कि न्याय शुल्क की सगणना करे और दावा सफल होने की दशा निर्धारित करे कि किसे न्याय शुल्क देना है। यदि ऐसा नहीं करता तो राज्य सरकार स्वतः न्याय शुल्क निर्धारित नहीं कर सकती और न ही किसी ऐसे व्यक्ति से वसूल सकती है जिसको न्यायालय ने न्याय शुल्क देने का आदेश नहीं दिया हो।

इसके अतिरिक्त अंकिचन वादी की डिक्री या आदेश की प्रति संबधित कलेक्टर को भेजनी चाहिये ताकि कलेक्टर को यह जानकारी हो सके किससे और कितना न्याय शुल्क वसूल किया जाना है। यहाँ यह भी उल्लेखित किया जाना उचित होगा कि ऐसे मामलों में न्याय शुल्क वसूल किये जाने का कार्य संबंधित कलेक्टर का है।

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क्या आदेश 33 नियम 2 व्य.प्र.सं. के आवेदन के लम्बित रहने के समयावधि में अस्थाई निषेधाज्ञा अन्तर्गत आदेश 39 नियम 1 व 2 व्य.प्र.सं.प्रदान की जा सकती हैं?

सिविल प्रक्रिया संहिता, 1908 के आदेश 39 नियम 1 में अस्थायी व्यादेश के संबंध में निम्न प्रावधान करती हैं :–

वे दशाएँ जिनमें अस्थायी व्यादेश दिया जा सकेगा

जहाँ किसी वाद में शपथपत्र द्वारा या अन्यथा यह साबित कर दिया जाता है कि –

(क) वाद में विवादग्रस्त किसी सम्पत्ति के बारे में यह खतरा है कि वाद का कोई भी पक्षकार उसका दुर्व्ययन करेगा, उसे नुकसान पहुंचाएगा या अन्य संक्रांत करेगा या डिक्री के निष्पादन में उसका सदोष विक्रय कर दिया जाएगा; अथवा

(ख) प्रतिवादी अपने लेनदारों को (कपट वंचित) करने की दृष्टि से अपनी सम्पत्ति को हटाने या व्ययनित करने की धमकी देता है या आशय रखता है;

(ग) प्रतिवादी वादी को वाद में विवादग्रस्त किसी सम्पत्ति से बेकब्ज़ा करने की या वादी को उस सम्पत्ति के संबंध में अन्यथा क्षति पहुंचाने की धमकी देता हैं।

वहाँ न्यायालय ऐसे कार्य को अवरूद्ध करने के लिये आदेश द्वारा अस्थायी व्यादेश दे सकेगा, या सम्पत्ति को दुर्व्ययित किए जाने, नुकसान पहुंचाए जाने, अन्य संक्रांत किए जाने, विक्रय किए जाने, हटाए जाने या व्ययनित किए जाने से (अथवा वादी को वाद में विवादग्रस्त सम्पत्ति से बेकब्जा करने या वादी को उस सम्पत्ति के संबंध में अन्यथा क्षति पहुंचाने से) रोकने और निवारित करने के प्रयोजन से ऐसे अन्य आदेश जो न्यायालय ठीक समझे, तब तक के लिए कर सकेगा जब तक उस वाद का निपटारा न हो जाय या जब तक अतिरिक्त आदेश न दे दिए जाए।

यदि हम उपरोक्त प्रावधान देखें तो स्पष्ट है कि आदेश 39 नियम 1 व्य.प्र.सं. के अधीन न्यायालय तभी कोई आदेश पारित कर सकता जब कि –

(1) उसके समक्ष कोई वाद लम्बित हो और

(2) आदेश 39 (1) (क) (ख) (ग) व्य.प्र.सं. में वर्णित परिस्थितियाँ विद्यमान हो।

अब प्रश्न यह है कि क्या अकिंचन की जांच के लंबित रहते हुये आवेदन को वाद माना जाना चाहिये? आदेश 33 नियम 2 व्य.प्र.सं. यह प्रावधान करता है कि अंकिचन के रूप में वाद लाने की अनुज्ञा के हर आवेदन में वाद पत्र के लिये आवश्यक विष्टियाँ अन्तर्विष्ट होगी। आदेश 33 नियम 5 व्य.प्र.सं. में वे परिस्थितियाँ प्रकट की हैं जिनमें आवेदन नामंजूर किया जायेगा। आदेश 33 नियम 8 व्य.प्र.सं. के प्रावधानों के अनुसार आवेदन स्वीकार होने की दशा में आवेदन पंजीकृत किया जायेगा और उसे वाद पत्र समझा जायेगा। आदेश 33 नियम 15 (क) व्य.प्र.सं. यह प्रावधान करती है कि यदि न्यायालय निर्धन के रूप में वाद प्रस्तुत करने की अनुमति नहीं देता तो न्यायशुल्क दिये जाने के लिये समय अनुज्ञात करेगा।

यदि उपरोक्त प्रावधानों को देखें तो स्पष्ट है कि निर्धन के रूप में दावा प्रस्तुत करने के लिये आवेदन वास्तव में दावा + आवेदन है। आवेदन के निराकरण तक दावे का रजिस्ट्रेशन स्थगित रहता है। वैसे भी यदि कोई दावा उचित न्याय शुल्क या बगैर न्याय शुल्क के प्रस्तुत किया जाता है तो भी न्यायालय आदेश 7 नियम 11 व्य.प्र.सं. के अनुसार उसकी जांच करेगा यदि कम पाता है तो पक्षकार को पूर्ति का आदेश करेगा। इसी के समतुल्य प्रक्रिया आदेश 33 नियम 15 (क) व्य.प्र.सं. में विहित है। आदेश 33 नियम 5 व्य.प्र.सं. में भी यह प्रावधान है कि वाद कारण यदि दर्शित नहीं है तो आवेदन नामंजूर किया जायेगा। ऐसा ही प्रावधान आदेश 7 नियम 11 व्य.प्र.सं. में भी विहित हैं।

माननीय नागपुर उच्च न्यायालय ने ***चुन्नालाल बनाम सामा, ए.आई.आर. 1955 नागपुर 259*** में ऐसा ही मत निर्धारित किया है कि निर्धन के रूप में आवेदन प्रस्तुत दिनांक से दावा प्रस्तुत हो जाता है। ऐसी स्थिति में आदेश 39 नियम 1 व 2 व्य.प्र.सं. के आवेदन पर अकिंचन के रूप में वाद प्रस्तुत करने की अनुमति में आवेदन के लंबित रहते हुये विचार किया जा सकता है। ***दोमा जी बनाम श्रीमती उन्नाबाई, 1967 एम.पी. एल.जे. SN 104*** में माननीय म.प्र. उच्च न्यायालय ने भी ऐसा ही मत निर्धारित किया है कि अकिंचन के रूप में वाद प्रस्तुत करने के आवेदन के लंबित रहने की दशा में भी आदेश 39 नियम 1 व 2 व्य.प्र.सं. का आवेदन पोषणीय हैं।

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नोट– स्तंम्भ **'समस्या एवं समाधान'** के लिये न्यायिक अधिकारी अपनी विधिक समस्याएं संस्थान को भेज सकते हैं। चयनित समस्याओं के समाधान आगामी अंकों में प्रकाशित किये जाएंगे– **संचालक**

PART - II

NOTES ON IMPORTANT JUDGMENTS

*1. **ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Section 12(1)(f) Bonafide requirement for non-residential purposes – Reasonably suitable accommodation – Respondent/Landlord filed suit for eviction on the ground that he requires suit premises for starting business of manufacturing and sale of ready-made garments – Suitability of suit premises challenged by tenant on the ground that suit premises is situated in Transport Nagar – Held, requirement of reasonably suitable accommodation has been engrafted if alternative accommodation is available – As plaintiff not having any alternative accommodation he cannot be non-suited on the ground that accommodation in question is not reasonably suitable for his proposed business – Appeal dismissed.**

Ram Chandra Dixit and another v. Arvind Kumar Jain

Reported in I.L.R. (2007) M.P.1780

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*2. **ACCOMMODATION CONTROL ACT, 1961 (M.P.) – Sections 23-A, 23-J & 12 Widow landlady filed application u/s 23-A before Rent Controlling Authority for eviction of her tenant – During pendency of application she died – Her LRs were impleaded before Rent Controlling Authority – Rent Controlling Authority dismissed the application for eviction holding that LRs do not come within the category of Clause (j) of S. 23 of the Act – Held, the cause of action never survives to the applicants (LRs) for proceedings with the case instituted by their mother (widow) u/s 23-A of the Act – Further held, the applicants (LRs) are having remedy to file a suit for ejectment u/s 12 (1) of the Act.**

Mahesh Chand and others v. Nishar Khan

Reported in 2007 (4) MPHT 522

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*3. **ARBITRATION AND CONCILIATION ACT, 1996 – Sections 34 & 37 CIVIL PROCEDURE CODE, 1908 – Section 11 Explanation (iv) Constructive *Res Judicata* – Agreement took place between parties on 21-11-98 – Respondent was to procure soyabean for appellant – Some dispute arose during the subsistence of contract and same was referred to sole Arbitrator – Dispute was resolved by award dated 25-10-99 – Another dispute was submitted by respondent before sole Arbitrator on 24-6-2002 contending that during subsistence of same contract, he had purchased gunny bags worth Rs. 2,75,000/- for**

packing of soyabean – Appellant raised objection of constructive *res judicata* – Held, gunny bags were purchased by respondent for appellant on 20-11-1998 – Earlier reference was made to sole Arbitrator in the month of March, 1999 – Dispute referred by successive application to arbitrator was in existence, but same was not referred to arbitrator – Procedure provided under Civil Procedure Code is applicable – Successive claim was not entertainable as same was hit by provision of constructive *res judicata* – Appeal allowed.

M.P. State Civil Supplies Corporation Ltd. v. Marain Agarwal

Reported in I.L.R. (2007) M.P. 1785

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*4. ARMS ACT, 1959 – Sections 22 & 37

INDIAN PENAL CODE, 1860 – Sections 97 & 307

(i) Search and Seizure – Search for arms concealed in house of premises for any unlawful purpose would be illegal if Magistrate did not order it – Search to be carried out in accordance with corresponding provisions in Criminal Procedure Code – Act of raiding residences of appellant and other inmates without recording the reason to believe that arms and ammunitions were hidden therein was not justifiable.

(ii) Right of private defence – Even if accused does not plead self-defence, Court can consider such plea if the same could arise from evidence.

(iii) Private Defence – Curfew was clamped in the wake of communal tension – Police Party on wireless message that situation is explosive reached near the house of appellant – Appellant struck on the chest of injured by *gupti* – Defence of appellant was that police party entered in the house misbehaved with ladies, belaboured him and caused damage to his households – Appellant also receiving lacerated wound on parietal region – Held, non-explanation of injuries sustained by appellant entitled him to take plea of private defence – Appellant had no intention to kill injured – Not possible to conclude that right of private defence was exceeded – Appellant was entitled to act in exercise of his right of private defence – Appellant acquitted – Appeal allowed.

Wahid Khan v. State of M.P.

Reported in I.L.R. (2007) M.P. 1808

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5. **BANK GUARANTEE :**

Injunction restraining encashment of, when may be granted –

(i) in case of fraud; and

(ii) irretrievable harm or injury

except these, banks should honour the LOC – Bank guarantee is an independent and separate contract – Dispute between parties is no ground to restrain enforcement.

Nature of evidence of fraud and irretrievable harm – One should satisfy the Court that fraud would vitiate the very foundation of such a bank guarantee and it would be impossible for the guarantor to reimburse himself if it ultimately succeeds.

Himadri Chemicals Industries Ltd. v. Coal Tar Refining Co.

Judgment dated 07.08.2007 passed by the Supreme Court in Civil Appeal No. 3522 of 2007, reported in (2007) 8 SCC 110

Held:

While dealing with an application for the injunction in the course of commercial dealings, and when an unconditional bank guarantee or letter of credit is given or accepted, the beneficiary is entitled to realize such a bank guarantee or a letter of credit in terms thereof irrespective of any pending disputes relating to the terms of the contract. In the matter of invocation of a bank guarantee or a letter of credit, it is not open to the bank to rely upon the terms of the underlying contract between the parties. The bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. Since a bank guarantee or a letter of credit is an independent and a separate contract and is absolute in nature, the existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of bank guarantees or letters of credit.

The courts should be slow in granting an order of injunction to restrain the realization of a bank guarantee or a letter of credit. There are two exceptions for grant of an order of injunction to restrain the enforcement of an unconditional bank guarantee or a letter of credit: (i) fraud of an egregious nature committed in the notice of the bank which would vitiate the very foundation of the guarantee or letter of credit and the beneficiary seeks to take advantage of the situation; and (ii) injustice of the kind which would make it impossible for the guarantor to reimburse himself or would result in irretrievable harm or injustice to one of the parties concerned. Except under these circumstances, the courts should not readily issue injunction to restrain the realization of a bank guarantee or a letter of credit.

So far as the first exception is concerned i.e. of fraud, one has to satisfy the court that the fraud in connection with the bank guarantee or letter of credit would vitiate the very foundation of such a bank guarantee or letter of credit. But the evidence must be clear, both as to the fact of fraud and as to the bank's

knowledge. It would certainly not normally be sufficient that this rests on the uncorroborated statement of the customer, for irreparable damage can be done to a bank's credit in the relatively brief time which must elapse between the granting of such an injunction and an application by the bank to have it discharged. *Svenska Handelsbanken v. Indian Charge Chrome, (1994) 1 SCC 502,* followed.

To avail of the second exception, it has to be decisively established that there exist exceptional circumstances which would make it impossible for the guarantor to reimburse himself if he ultimately succeeds. Clearly, a mere apprehension that the other party will not be able to pay, is not enough.

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6. BENAMI TRANSACTIONS (PROHIBITION) ACT, 1988 – Sections 1, 4 (1) & 4 (2)

(i) Scope and applicability of the Act –

(a) Act has no applicability to suits filed prior to coming into force of the Act.

(b) Theory of Benami Transaction apply to Muslims also.

(ii) Plea of Benami Transaction, burden of proof of – Burden of proof lies on the person who asserts that it is a benami transaction.

(iii) Benami Transaction, test of – Law explained.

Kallu Khan (deceased) through L.Rs Smt. Basiran Bi and others v. Abdul Aziz (Dr.) and others

Reported in (2007) 4 MPLJ 498

Held:

.....it may be seen that section 4 (1) of Benami Transaction (Prohibition) Act, 1988, lays down that no suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the property is held or against any other person shall lie by or on behalf of a person claiming to be the real owner of such property. This section shall be deemed to have been come into force on 19.5.1988. Hon'ble Supreme Court of India in the case of *R. Rajagopal Reddy v. P. Chandrasekharan, 1995 MPLJ (SC) 402 = AIR 1996 SC 238* has held that sub-sections (1) and (2) of section 4 of the Act cannot be treated to be impliedly retrospective so as to cover all the pending litigations in connection with enforcement of such rights or real owners who are parties to benami transactions entered into prior to the coming into operation of the Act and specially section 4 thereof.

The Suit in question was instituted on 4.12.1985 and the property in question was purchased in the name of *Neema Bai* vide registered sale deed dated 3.7.1943. Thus, the suit in question having been filed prior to coming into force of the said Act, the provisions of Benami Transaction (Prohibition) Act, 1988 have no applicability.....

Although, a plea in the written statement has been taken that theory of Benami Transaction is not recognized under Muslim Law, but the same has not been substantiated by the learned counsel for defendants/appellants for obvious reason that nothing could be said in its support. As regards the legal position, I may safely refer to Article 423 of Muslim Law by Faiz Badruddin Tyabji Fourth Edition, which runs as follows:

> "Article 423. The purchase by a Muslim of property in the name of his son or wife or other person, will, unless there are circumstances indicating that a gift was intended, ordinarily be considered to be benami or farzi, and the property to belong to the person who paid the purchase money: but very little evidence might be sufficient to turn the scale."

..... I may conveniently refer to the decision of the Hon'ble Supreme Court of India in the case of Heirs of Vrajlal J. Ganatra vs. Heirs of Parshottan S. Shah, (1996) 4 SCC 490, wherein it has been held that the burden of proof is on the person who asserts that it is a benami transaction.

.....the Courts below ought to have viewed from the angle that it was for the plaintiffs to prove that the grandfather (Chhingu alias Karim Bux) was the true owner of the suit property and that Smt. Neema Bai was, merely, a Benamidar. Since both the parties have adduced evidence with full awareness about the scope of controversy between them, none of the parties may be said to be prejudiced on account of wrong placement of burden of proof. However, the matter is required to be examined from the settled view point that the plaintiffs in the present case having asserted the plea of Benami wre and are required to establish that their grand-father was the real owner of the suit property and his wife Smt. Neema Bai was, merely, a Benamidar.....

Hon'ble Supreme Court in the case of *Jaydayal Poddar (deceased) through L.Rs. and another v. Mst. Bibi Hazra and others, (1974) 1 SCC 3* has held that "though the question whether a particular sale is benami or not, is largely one of fact, and for determining this question, no absolute formula or acid test, uniformly applicable in all situations can be laid down; yet in weighing the probabilities and for gathering the relevant indicia, the Courts are usually guided by these circumstances : (1) the source from which the purchase money came; (2) the nature and possession of the property, after the purchase; (3) motive, if any, forgiving the transaction a benami colour; (4) the position of the parties and the relationship, if any, between the claimant and the alleged benamidar; (5) the custody of the title-deeds after the sale and (6) the conduct of the parties concerned in dealing with property after the sale."

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7. **CIVIL PROCEDURE CODE, 1908 – Section 9**

Jurisdiction of Court – Facts upon which the jurisdiction of Court or Tribunal depends is 'jurisdictional fact' – The existence of a jurisdictional fact is thus condition precedent to the assumption of jurisdiction by a Court or Tribunal – Jurisdictional fact must be tried as preliminary issue.

Carona Ltd. v. Parvathy Swaminathan & Sons

Judgment dated 05.10.2007 passed by the Supreme Court in Civil Appeal No. 2805 of 2005, reported in (2007) 8 SCC 559

Held :

..... the fact or facts upon which the jurisdiction of a Court, a Tribunal or an Authority depends can be said to be a 'jurisdictional fact'. If the jurisdictional fact exists, a Court, Tribunal or Authority has jurisdiction to decide other issues. If such fact does not exist, a Court, Tribunal or Authority cannot act. It is also well settled that a Court or a Tribunal cannot wrongly assume existence of jurisdictional fact and proceed to decide a matter. The underlying principle is that by erroneously assuming existence of a jurisdictional fact, a subordinate Court or an inferior Tribunal cannot confer upon itself jurisdiction which it otherwise does not posses.

In Halsbury's Laws of England, (4th Edn.), Vol.1, para 55, p.61; Reissue, Vol.1(1), para 68, pp.114- 15, it has been stated:

> "Where the jurisdiction of a tribunal is dependent on the existence of a particular state of affairs, that state of affairs may be described as preliminary to, or collateral to the merits of the issue. If, at the inception of an inquiry by an inferior tribunal, a challenge is made to its jurisdiction, the tribunal has to make up its mind whether to act or not and can give a ruling on the preliminary or collateral issue; but that ruling is not conclusive."

The existence of a jurisdictional fact is thus a sine qua non or condition precedent to the assumption of jurisdiction by a Court or Tribunal.

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8. **CIVIL PROCEDURE CODE, 1908 – Section 11**

Res judicata – Ex parte decree – In absence of fraud or collusion, it has a binding effect – An ex parte decree is good and effective as a decree passed after contest.

Saroja v. Chinnusamy (dead) by LRs. and another

Judgment dated 24.08.2007 passed by the Supreme Court in Civil Appeal No.3907 of 2007, reported in (2007) 8 SCC 329

Held :

It is well settled that an ex parte decree is binding as a decree passed after contest on the person against whom such an ex parte decree has been

passed. It is equally well settled that an ex parte decree would be so treated unless the party challenging the ex parte decree satisfies the court that such an ex parte decree has been obtained by fraud. Such being the position, we are unable to hold that Condition No. (iv) was not satisfied and accordingly it cannot be held that the principle of res judicata would not apply in the present case.

In this connection, reference can be made to a decision of Madras High Court in the case of *Arukkani Ammal v. Guruswamy, (1987) 100 LW 707* which was also relied on by the first appellate court. The Madras High Court in that decision observed as follows:

> "It is also difficult to appreciate the view taken by the District Munsif that ex parte decree cannot be considered to be 'full decree on merits'. A decree which is passed ex parte is as good and effective as a decree passed after contest. Before the ex parte decree is passed, the court has to hold that the averments in the plaint and the claim in the suit have been proved. It is, therefore, difficult to endorse the observation made by the Principal District Munsif that such a decree cannot be considered to be a decree passed on merits. It is undoubtedly a decree which is passed without contest; but it is only after the merits of the claim of the plaintiff have been proved to the satisfaction of the trial court, that an occasion to pass an ex parte decree can arise."
>
> (Emphasis supplied)

We are in full agreement with this view of the Madras High Court holding that a decree which is passed ex parte is as good and effective as a decree passed after contest. A similar view has also been expressed by a Division Bench of the Allahabad High Court in the case of *Bramhanand Rai v. Dy. Director of Consolidation, Ghazipur, AIR 1987 All 100.....*

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***9. CIVIL PROCEDURE CODE, 1908 – Section 11 & Order 7 Rule 11**
Question of *res judicata* cannot be decided upon filing certified copy of the judgment in the earlier suit alone – It has to be decided on the basis of the pleadings in the former suit, the issues struck therein and the decision in the suit.
Jantantra Griha Nirman Cooperative Society Ltd. v. State of M.P. and others
Reported in 2007 (4) MPHT 353

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***10. CIVIL PROCEDURE CODE, 1908 – Sections 47 & 11**

Principle of constructive *res judicata* – Applicability – Held, applicable even in execution proceedings.

Lagan Jute Machineries Co. Ltd. v. Candlewood Holdings Ltd. and others

Judgment dated 28.09.2007 passed by the Supreme Court in Civil Appeal No. 5670 of 2000, reported in (2007) 8 SCC 487

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***11. CIVIL PROCEDURE CODE, 1908 – Section 144**

When suit for declaration and possession of the property has been dismissed and during the pendency of suit possession was delivered to receiver – The defendant in ordinary course would be entitled to possession from the receiver – Refusal of restitution held improper.

Rajendra Singh (deceased by L.Rs.) & Ors. v. Prem Mai & Ors.

Reported in AIR 2007 SC 3057

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12. CIVIL PROCEDURE CODE, 1908 – Order 7 Rule 7, Order 2 Rule 2 & Order 20 Rule 12

Suit for possession and injunction – No claim was made for damages/ mesne profits – Neither Trial Court nor Appellate Court can grant such relief under law of equity – Jurisdiction of equity cannot violate express provision of law.

Shiv Kumar Sharma v. Santosh Kumari

Judgment dated 18.09.2007 passed by the Supreme Court in Civil Appeal No. 4341 of 2007, reported in (2007) 8 SCC 600

Held :

In terms of Order II Rule 2 of the Code, all the reliefs which could be claimed in the suit should be prayed for. Order II Rule 3 provides for joinder of causes of action. Order II Rule 4 is an exception thereto. For joining causes of action in respect of matters covered by Clauses (a), (b) and (c) of Order II Rule 4, no leave of the court is required to be taken. Even without taking leave of the court, a prayer in that behalf can be made. A suit for recovery of possession on declaration of one's title and/ or injunction and a suit for mesne profit or damages may involve different cause of action. For a suit for possession, there may be one cause of action; and for claiming a decree for mesne profit, there may be another. In terms of Order II Rule 4 of the Code, however, such causes of action can be joined and therefor no leave of the court is required to be taken. If no leave has been taken, a separate suit may or may not be maintainable but even a suit wherefor a prayer for grant of damages by way of mesne profit or otherwise is claimed, must be instituted within the prescribed period of limitation. Damages cannot be granted without payment of court fee. In a case where damages are

required to be calculated, a fixed court fee is to be paid but on the quantum determined by the court and the balance court fee is to be paid when a final decree is to be prepared.

If the respondent intended to claim damages and/ or mesne profit, in view of Order II Rule 2 of the Code itself, he could have done so, but he chose not to do so. For one reason or the other, he, therefore, had full knowledge about his right. Having omitted to make any claim for damages, in our opinion, the plaintiff cannot be permitted to get the same indirectly.

A suit is ordinarily tried on the issues raised by parties. The plaintiff-respondent did not ask for payment of any damages. No prayer for payment of damages by way of mesne profit or otherwise was also made by the plaintiff. If the plaintiff. If the plaintiff was to ask for a decree, he was required to pay requisite court fees on the amount claimed. In such a situation, having regard to Order 20 Rule 12 of the Code, a preliminary decree was required to be passed. A proceeding for determination of the actual damages was required to be gone into.

In England, the court of equity exercises jurisdiction in equity. The courts of India do not possess any such exclusive jurisdiction. The Courts in India exercise jurisdiction both in equity as well as law but exercise of equity jurisdiction is always subject to the provisions of law. If exercise of equity jurisdiction would violate the express provisions contained in law, the same cannot be done. Equity jurisdiction can be exercised only when no law operates in the field.

A court of law cannot exercise its discretionary jurisdiction dehors the statutory law. Its discretion must be exercised in terms of the existing statute.

In *Shamsu Suhara Beevi v. G. Alex and Anr, (2004) 8 SCC 569,* this Court, while dealing with a matter relating to grant of compensation by the High Court under Section 21 of the Specific Relief Act in addition to the relief of specific performance in the absence of prayer made to that effect either in the plaint or amending the same at any later stage of the proceedings to include the relief of compensation in addition to the relief of specific performance, observed (SCC p. 576, para 11):

> "11. .....Grant of such a relief in the teeth of express provisions of the statute to the contrary is not permissible. On equitable consideration court cannot ignore or overlook the provisions of the statute. Equity must yield to law."

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13. CIVIL PROCEDURE CODE, 1908 – Order 7 Rule 11
Civil Suit for compensation on ground of cruelty and torture under law of torts filed by wife against her husband and his relatives – Husband raised the objection as to maintainability of the suit contending that there is a special law available in the form of Hindu

Marriage Act to cover the subject – Trial Court rejected the objection holding suit as maintainable – Held, existence of Special Law in the form of Hindu Marriage Act does not make such suit non maintainable.

Pawan Jain and others v. Sunita Jain

Reported in 2007 (4) MPHT 323

Held:

The petitioners have assailed legality, propriety and correction of the impugned orders on various grounds. The first contention advanced by the learned counsel for the petitioners is that the civil suit instituted by R is not maintainable under Section 9 of the Code as there is a special law, in the form of the Act, was operating to cover the field. According to him, learned Trial Judge committed serious error of jurisdiction in holding that the suit was maintainable under the uncodified law of torts. To buttress the contention, reliance has been placed on the pronouncements of the Apex Court in *Jitendra Nath Biswas v Empire of India and Ceylone Tea Co., (1989) 3 SCC 582, Pushpagiri Math v. Kopparaju Veerabhadra Rao, (1996) 9 SCC 202 and Dhruv Green Fields Ltd. v. Hukam Singh and others, (2002) 6 SCC 416* and decision of this Court in *Sameeran Roy v. Smt. Leena Roy, AIR 2001 MP 192.*

In *Jitendra Nath Biswas's case* (supra), observing that the relief was available under the Industrial Disputes Act, 1947 only, the Supreme Court proceeded to hold that the jurisdiction of Civil Court was impliedly barred whereas, in *Pushpagiri Math's case* (supra), jurisdiction of Civil Court to declare title of the Inam. Land was held to be excluded by necessary implication due to operation of the Local Act whereby the pre-existing right or interest held by the inamdar or the institution stood extinguished. Although, a similar view was taken in *Dhruv Green Field's case* (supra), yet, it was also explained that the bar against jurisdiction of Civil Court cannot be inferred unless an alternative remedy is provided by the special statute excluding such jurisdiction. However, the Marriage Law applicable to R and P1 has no impact on the rights and liabilities of either of them in respect of any tort committed by him against her or by her against him. For this, reference may be made to the following excerpts available at Pages 35 and 36 of Ratanlal and Dharamlal's Law of Torts 25th Edition, 2006, revitalized by Mr. Justice G.P. Singh, formerly a Chief Justice of this Court:—

> "Marital status of Hindus, Buddhists, Sikhs, Jains and Muslims in India is governed by their personal laws not by the common law. Marriage under these personal laws does not affect the capacity of the parties for suing or for being sued nor does it confer any protection to any of the spouses for any tortuous act committed by one against the other."

Further, as pointed out in *Sameeran Roy's* case (supra), a counter claim for damages for a tort (declaration in that case) is not maintainable under

Sections 23-A and 21 of the Act. As such, in the light of the observation made in *Dhruv Green Field's* case (supra), the Civil Court has jurisdiction to entertain a claim made by any of the parties to a Hindu Marriage for any tortuous act committed by the other party against her/him as no efficacious alternative remedy is available under the Act. Moreover, such a claim is not expressly barred under the Act. This apart, as explained by the learned author, the action for damages under the uncodified law of tort, by each one of the spouses against the other, is maintainable.

In this view of the matter, the objection raised to maintainability of the suit was rightly rejected by the learned Trial Judge as misconceived.

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***14. CIVIL PROCEDURE CODE, 1908 – Order 7 Rule 11**
Rejection of plaint under O. 7 R. 11 of the Code, scope of – When plaint is sought to be rejected on grounds requiring evidence, it cannot be rejected at initial stage.
Union Bank of India v. Ravindra Phanse and others
Reported in 2007 (4) MPLJ 492

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***15. CIVIL PROCEDURE CODE, 1908 – Order 9 Rule 6 (c)**
Substituted service of summons by affixture – Such service was made on the very day of hearing – Held, summons were not duly served and further that it was not possible for the person to come and defend the case in the Court on the same day – Court was bound to postpone the hearing of suit to a future date and to give notice of such adjourned date to the defendant.
Smt. Shardha v. Nafeesa Begum
Reported in 2007 (4) MPHT 405

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***16. CIVIL PROCEDURE CODE, 1908 – Order 13 Rule 2**
Permission to file additional documents – Courts are required to adopt liberal approach in allowing to file documents during trial.
Suresh Patel and another v. Antarsingh Patel and others
Reported in 2007 (4) MPLJ 384

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17. CIVIL PROCEDUE CODE, 1908 – Order 22 Rule 4 (2) & Order 1 Rule 10
Legal representatives of defendant may file additional written statement in case of specific performance of contract if they are co-owners of the property in dispute.
Sumtibai & Ors. v. Paras Finance Co. Regd. Partnership Firm
Reported in AIR 2007 SC 3166

Held:

In the instant case the appellant filed suit for specific performance against 'K'. During the pendency of suit 'K' died and his wife, sons etc. applied to be brought on record as legal representatives. After they were impleaded they filed an application u/O. 22 R. 4(2) read with O.1 R.10 CPC praying inter alia, that they should be permitted to filed additional written statement and also be allowed to take such pleas which are available to them. In the registered sale deed regarding the shop in dispute the sale shown in favour of 'K' and his sons. Hence, the registered sale deed itself shows that the purchaser was not 'K' but also his sons as co-owners. Hence, prima facie, the sons of 'K' are also co-owners of property in dispute. It cannot be said that they have no semblance of title and are mere busybodies or interlopers. Therefore, the legal representatives of 'K' have a right to take defence by way of filing an additional written statement and adduce evidence in the suit. The order rejecting their applications to file an additional written statement would be liable to be set aside. Also merely because some applications have been rejected earlier it does not mean that the legal representatives of 'K' should not be allowed to file an additional written statement.

It cannot be laid down as an absolute proposition that whenever a suit for specific performance is filed by A against B, a third party C can never be impleaded in that suit. If C can show a fair semblance of title or interest he can certainly file an application for impleadment. To take a contrary view would lead to multiplicity of proceedings because then C will have to wait until a decree is passed against B, and then file a suit for cancellation of the decree on the ground that A had no title in the property in dispute. Clearly, such a view cannot be countenanced.

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18. CIVIL PROCEDURE CODE, 1908 – Order 23 Rule 3-A

The bar contained in Rule 3-A will not come in the way of the High Court examining validity of compromise decree under Article 226 of the Constitution of India when fraud or collision is alleged.

The properties of deities, temples and Devaswom Boards or any religious and charitable institutions are to be protected by the person entrusted with the duty of managing and safeguarding the properties – Similarly, it is also the duty of Courts to protect and safeguard the properties from wrongful claims or misappropriations.

A.A. Gopalakrishnan v. Cochin Devaswom Board & Ors

Reported in AIR 2007 SC 3162

Held:

It is further submitted that a decree having been made in terms of the compromise and such decree having attained finality, it cannot be questioned, interfered or set aisde at the instance of a third party in a writ proceeding.

Order 23 Rule 3 of CPC deals with compromise of suits. Rule 3-A provides that no suit shall lie to set aside a decree on the ground that the compromise on which the decree is based was not lawful. We are of the considered view that the bar contained in Rule 3A will not come in the way of the High Court examining the validity of a compromise decree, when allegations of fraud/collusion are made against a statutory authority which entered into such compromise. While, it is true that decrees of civil courts which have attained finality should not be interfered lightly, challenge to such compromise decrees by an aggrieved devotee, who was not a party to the suit, cannot be rejected, where fraud/ collusion on the part of officers of a Statutory Board is made out.

The properties of deities, temples and Devaswom Boards, require to be protected and safeguarded by their Trustees/Archaks/Sebits/employees. Instances are many where persons entrusted with the duty of managing and safeguarding the properties of temples, deities and Devaswom Boards have usurped and misappropriated such properties by setting up false claims of ownership or tenancy or adverse possession. This is possible only when the passive or active collusion of the concerned authorities. Such acts of 'fences eating the crops' should be deal with sternly. The Government, members or trustees of Boards/Trusts, and devotees should be vigilant to prevent any such usurpation or encroachment. It is also the duty of Courts to protect and safeguard the properties of religious and charitable institutions from wrongful claims or misappropriation.

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19. CIVIL PROCEDURE CODE, 1908 – Order 33 Rule 11 & Order 44 Rule 2
Suit or appeal filed by indigent person – Liability to pay court fees is merely deferred.
Suit or appeal is dismissed on merits – Liability to pay court fees does not end in such case.
Circumstances specified in Rule 11 are distinct and different.
R.V. Dev alias R. Vasudevan Nair v. Chief Secretary, Govt. of Kerala & Ors.
Reported in AIR 2007 SC 2698

Held:

Learned counsel appearing on behalf of the appellant in support of this appeal submitted that Order 33 Rule 11 of the Code of Civil Procedure will have no application unless the conditions precedent laid down therefore are satisfied. It was urged that a person despite dismissal of a suit and an appeal filed by him in *forma pauperis* may continue to be an indigent person and the Scheme of the Act will be effected if a direction is issued to recover the amount of court fee from him.

Order XXXIII of the Code of Civil Procedure deals with suits by indigent persons whereas Order XLVI thereof deals with appeals by indigent persons.

When an application is filed by a person said to be indigent, certain factors for considering as to whether he is so within the meaning of the said provision is required to be taken into consideration therefore. A person who is permitted to sue as an indigent person is liable to pay the court fee which would have been paid by him if he was not permitted to sue in that capacity, if he fails in the suit of the trial or even without trial. Payment of court fee as the Scheme suggests is merely deferred. It is not altogether wiped off. Order XXXIII Rule 10 of the Code of Civil Procedure provides for the consequences in regard to the calculation of the amount of court fee as a first charge on the subject-matter of the suit.

For calculation of court fee, there does not exist any distinction between a situation attracting Rule 10 on the one hand and Rule 11 on the other. The court fee is to be calculated on the amount claimed and not on the amount decreed. For the said purpose, what is relevant is the final decision taken by the court in this behalf. Rule 11 directing the pauper plaintiff to pay the court fee can be made in the four different situations:

(i) When the plaintiff failed in the suit.

(ii) Where the plaintiff is dispaupered.

(iii) Where the suit is withdrawn.

(iv) Where the suit is dismissed under the circumstances specified in clause (a) or clause (b)

When, therfor, the plaintiff fails in the suit or plaintiff is dispaupered, the same has nothing to do with dismissal of the suit under the circumstances specified in clauses (a) and (b)

Submission of learned counsel for the appellant that clauses (a) and (b) would attract all the four situations contemplated by Order XXXIII Rule 11 in our opinion is misconceived. Clauses (a) and (b) would be attracted only when the suit is inter alia dismissed by reason of the contingencies contained in clauses (a) and (b). Clauses (a) and (b) will have no bearing and/or relevance, when a suit is dismissed on merit or when the plaintiff is dispaupered.

For the purpose of the construction of the aforementioned provisions, it is necessary to give effect to all the conditions mentioned therein. As in three out of the four contingencies in the Rule, the order has to be passed when the suit comes to an end, it will be a fair construction to hold that clauses (a) and (b) refer to the fourth condition. We fail to see as to how the same can be held to be attracted even in the former case. Each situation as referred to hereinbefore is distinct and different. The word "or" is disjunctive and thus must be given effect to independent of the other cases.

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20. CIVIL PROCEDURE CODE, 1908 – Order 41 Rule 19 & Order 22 Rules 5 & 4

Notice on certain respondents not being re-served properly due to default of appellant – Appeal became abated against two respondents – On application made in that behalf abatement against only one respondent allowed and against other one rejected – Held, High Court is not justified in refusing to restore appeal as a whole.

Ramdas Shivram Sattur v. Rameshchandra Popatlal Shah and others

Judgment dated 20.08.2007 passed by the Supreme Court in Civil Appeal No.3807 of 2007, reported in (2007) 8 SCC 400

Held :

The approach to be adopted when dealing with a situation relating to abatement has been dealt with by this Court in several cases.

In *Ram Sakal Singh v. Monako Devi, (1997) 5 SCC 192* it was observed as follows: (SCC pp. 200-01, para 13)

> "13. Shri Ranjit Kumar, obviously due to mistaken perception of the procedural part, has, instead of seeking transposition of the legal representatives to represent the estate of the deceased Respondents 8 to 15, sought deletion of the names of the deceased. Without there being already on record some persons eligible and entitled in law to represent the estate of the deceased, the deceased defendants/respondents were deleted. The consequence of deletion is that the decree of the courts below as against the deceased becomes final. If the decree is inseparable and the rights of the parties are indivisible between the contesting parties and the deceased, the consequence would be that the suit/appeal stands abated as a whole. But if one of the respondent/respondents or defendant/ defendants is already on record, what needs to be done is an intimation to the court by filing a formal application or memo to transpose the existing defendant/defendants or respondent/respondents as legal representatives of the deceased defendant/defendants or respondent respondents. In view of the mistake committed by the counsel, the court has to consider the effect thereof. On the facts, we think that cause of justice would get advanced if the misconception as to the procedure on the part of the counsel is condoned and if Respondents 8 and 15 instead of being deleted Respondents 9 and 10 are substituted and transposed as the legal representative of the deceased

Respondent 8 and Respondent 16 is transposed as legal representative of Respondent 15.

In *Mithailal Dalsangar Singh and Ors. v. Annabi Devram Kini, (2003) 10 SCC 691*, inter alia, it was observed as follows: (SCC pp. 696-97, paras 8-10)

> "8. Inasmuch as the abatement results in denial of hearing on the merits of the case, the provision of abatement has to be construed strictly. On the other hand, the prayer for setting aside an abatement and the dismissal consequent upon an abatement, have to be considered liberally. A simple prayer for bringing the legal representatives on record without specifically praying for setting aside of an abatement may in substance be construed as a prayer for setting aside the abatement. So also a prayer for setting aside abatement as regards one of the plaintiffs can be construed as a prayer for setting aside the abatement of the suit in its entirety. Abatement of suit for failure to move an application for bringing the legal representatives on record within the prescribed period of limitation is automatic and a specific order dismissing the suit as abated is not called for. Once the suit has abated as a matter of law, though there may not have been passed on record a specific order dismissing the suit as abated, yet the legal representatives proposing to be brought on record or any other applicant proposing to bring the legal representatives of the deceased party on record would seek the setting aside of an abatement. A prayer for bringing the legal representatives on record, if allowed, would have the effect of setting aside the abatement as the relief of setting aside abatement though not asked for in so many words is in effect being actually asked for and is necessarily implied. Too technical or pedantic an approach in such cases is not called for.
>
> 9. The courts have to adopt a justice-oriented approach dictated by the uppermost consideration that ordinarily a litigant ought not to be denied an opportunity of having a lis determined on merits unless he has, by gross negligence, deliberate inaction or something akin to misconduct, disentitled himself from seeking the indulgence of the court. The opinion of the trial Judge allowing a prayer for setting aside abatement and his finding on the question of availability of 'sufficient cause' within the meaning of Sub-rule (2) of Rule 9 of Order 22 and of Section 5 of the Limitation Act, 1963 deserves to be given weight, and once arrived at would not normally be interfered with by superior jurisdiction.

10. In the present case, the learned trial Judge found sufficient cause for condonation of delay in moving the application and such finding having been reasonably arrived at and based on the material available, was not open for interference by the Division Bench. In fact, the Division Bench has not even reversed that finding; rather the Division Bench has proceeded on the reasoning that the suit filed by three plaintiffs having abated in its entirety by reason of the death of one of the plaintiffs, and then the fact that no prayer was made by the two surviving plaintiffs as also by the legal representatives of the deceased plaintiff for setting aside of the abatement in its entirety, the suit could not have been revived. In our opinion, such an approach adopted by the Division Bench verges on too fine a technicality and results in injustice being done. There was no order in writing passed by the court dismissing the entire suit as having abated. The suit has been treated by the Division Bench to have abated in its entirety by operation of law. For a period of ninety days from the date of death of any party the suit remains in a state of suspended animation. And then it abates. The converse would also logically follow. Once the prayer made by the legal representatives of the deceased plaintiff for setting aside the abatement as regards the deceased plaintiff was allowed, and the legal representatives of the deceased plaintiff came on record, the constitution of the suit was rendered good; it revived and the abatement of the suit would be deemed to have been set aside in its entirely even though there was no specific prayer made and no specific order of the court passed in that behalf."

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***21. COMMISSIONER OF OATH RULES, 1976 – Rule 2(b)**
HIGH COURT RULES AND ORDERS – Rule 1 of Chapter III
OATHS ACT, 1969 – Section 3
CIVIL PROCEDURE CODE, 1908 – Section 139
CRIMINAL PROCEDURE CODE, 1974 – Section 297
Oath Commissioner –Whether Oath Commissioner entitled to administer oath and solemn affirmation for the purpose of proceeding in High Court? Oath Commissioner is created under Oaths Act – They can administer oath for filing in judicial proceedings only if they are empowered in this behalf by High Court – High Court has not empowered any person to administer oath for filing affidavits for proceeding before High Court – Rule 2(b) of Rules, 1976 defines Court as only Civil Court

under superintendence of High Court – Oath Commissioner not entitled to administer oath and receive solemn affirmation under Rules, 1976 for the purpose of proceeding in High Court.

Smt. Manju v. Ghanshyam

Reported in I.L.R. (2007) M.P. 1793

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22. **CONSTITUTION OF INDIA – Articles 16 & 39**

Reservation for handicapped persons comes within purview of Clause (1) of Art. 16 of the Constitution and it is horizontal reservation.

Further, reservation on the basis of caste, creed, religion is not the mandate of the Constitutional policy.

The rule that reservation must not exceed 50% does not apply to reservation for handicapped and women.

Mahesh Gupta & Ors. v. Yashwant Kumar Ahirwar & Ors.

Reported in AIR 2007 SC 3136

Held:

The State in terms of Article 16 of the Constitution of India may make two types of reservations vertical and horizontal. Article 16(4) provides for vertical reservation; whereas Clause (1) of Article 16 provides for horizontal reservation.

The State adopted a policy decision for filling up the reserved posts for handicapped persons. A special drive was to be launched therefor. The circular letter was issued only for the said purpose. A bare perusal of the said circular letter dated 29.03.1993 would clearly show that the State had made 3% reservation for blinds and 2% for other physically handicapped persons. Such a reservation falling within Clause (1) of Article 16 of the Constitution has nothing to do with the object and purport sought to be achieved by reason of Clause (4) thereof.

Disability has drawn the attention of the worldwide community. India is a signatory to various International Treaties and Conventions. The State, therefore, took a policy decision to have horizontal reservation with a view to fulfil its constitutional object as also its commitment to the international community. A disabled is a disabled. The question of making any further reservation on the basis of caste, creed or religion ordinarily may not arise. They constitute a special class. The advertisement, however, failed to mention in regard to the reservation for handicapped persons at the outset, but, as noticed hereinbefore, the vacant posts were required to be filled up for two categories of candidates; one for Scheduled Castes and Scheduled Tribe candidates and other for handicapped candidates. Handicapped candidates have not been further classified as belonging to Scheduled Castes, Scheduled Tribes and general category candidates. It is a travesty of justice that despite the State clarified its own position in its order dated 01.01.2004 and stated that the posts were vacant under the handicapped quota but it completely turned turtle and took a diagonally opposite

stand when a contempt petition was filed. In its reply in the said proceedings, reference was made to the aforementioned order dated 01.01.2004 but within a short time, viz., on 04.02.2004 it opined on a presumption that as the word "handicapped" was not mentioned in the heading of advertisement they were meant only for Scheduled Caste and Scheduled Tribe candidates. Rule of Executive Construction was given a complete go bye. Reasonableness and fairness which is the hallmark of Article 14 of the Constitution of India was completely lost sight of. The officers of the State behaved strangely. It prevaricated its stand only because a contempt proceeding was initiated. If the State was eager to accommodate the writ petitioner respondent, it could have done so. It did not take any measure in that behalf. It chose to terminate the services of some of the employees who had already been appointed. Such a course could not have been taken either in law or in equity. The State is expected to have a constitutional vision. It must give effect to the constitutional mandate. Any act done by it should be considered to have been effected in the light of the provisions contained in Part IV of the Constitution of India. The State in terms of the provisions contained in Part IV should have given effect to the principles embodied in Article 39 of the Constitution of India. Whereas a reasonable reservation within the meaning of Article 16 of the Constitution of India should not ordinarily exist, 50%, as has been held by this Court in *Indra Sawhney v. Union of India, AIR 1993 SC 477*, reservation for women or handicapped persons would not come within the purview thereof.

Furthermore, when the decision was taken, the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (for short "the 1995 Act") had come into force. In terms of the 1995 Act, the States were obligated to make reservations for handicapped persons. The State completely lost sight of its commitment both under its own policy decision as also the statutory provision.

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***23. CONSTITUTION OF INDIA – Articles 19 (1) (a) & (b)**
CRIMINAL PROCEDURE CODE, 1973 – Section 151

(i) Protection of certain rights regarding freedom of speech etc. – Petitioners and other agitators were exercising their fundamental right to freedom of speech and expression and to assemble peacefully and without arms – They were shouting slogans demanding land for land and demanding other rehabilitation measures – Nothing in their conduct to show that they had design to commit cognizable offence – They have not done anything giving apprehension that they will disturb public tranquility, public peace or public order – Insistence by S.D.M. to execute personal bonds under section 107 of Cr.P.C. and on refusal sending them to jail was in gross violation of their

fundamental rights – Payment of compensation is one of the way to prevent violation of fundamental right under Article 21 of Constitution by the authorities – State to pay Rs. 10,000 each to petitioner and those who were arrested and detained in jail – Petition allowed.

(ii) **Arrest to prevent commission of cognizable offence – Before resorting to Section 151 of Cr.P.C., it must appear to police officer that person who is sought to be arrested is designing to commit cognizable offence and commission of that cannot be prevented except by such arrest**

Medha Patkar v. State of M.P.

Reported in I.L.R. (2007) M.P. 1618

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

Examination by educational body – Normally, no direction should be given to produce answer papers for inspection by examinee.

The Secretary, West Bengal Council of Higher Secondary Education v. Aryan Das & Ors.

Reported in AIR 2007 SC 3098

Held:

The permissibility of re-assessment in the absence of statutory provision has been dealt with by this Court in several cases. The first of such cases is *Maharashtra State Board of Secondary and Higher Secondary Education and Anr. v. Paritosh Bhupeshkumar Sheth and Ors.* reported in *(1984) 4 SCC 27.* It was observed in the said case that finality has to be the result of public examination and, in the absence of statutory provision, Court cannot direct re-assessment/re-examination of answer scripts.

The courts normally should not direct the production of answer scripts to be inspected by the writ petitioners unless a case is made out to show that either some question has not been evaluated or that the evaluation has been done contrary to the norms fixed by the examining body. For example, in certain cases examining body can provide model answers to the questions. In such cases the examinees satisfy the court that model answer is different from what has been adopted by the Board. Then only the court can ask the production of answer scripts to allow inspection of the answer scripts by the examinee. In *Kanpur University and Ors. v. Samir Gupta and Ors., AIR 1983 SC 1230* it was held as follows:-

> "16. Shri Kacker, who appears on behalf of the University, contended that no challenge should be allowed to be made to the correctness of a key answer unless, on the face of it, it is wrong. We agree that the key answer should be

assumed to be correct unless it is proved to be wrong and that it would not be held to be wrong by an inferential process of reasoning or by a process of rationalization. It must be clearly demonstrated to be wrong, that is to say, it must be such as no reasonable body of men well versed in the particular subject would regard as correct. The contention of the University is falsified in this case by a large number of acknowledged text-books, which are commonly read by students in U.P. Those text books leave no room for doubt that the answer given by the students is correct and the key answer is incorrect.

17. Students who have passed their Intermediate Board Examination are eligible to appear for the entrance Test for admission to the Medical Colleges in U.P. Certain books are prescribed for the Intermediate Board Examination and such knowledge of the subjects as the students have is derived from what is contained in those text-books. Those text books support the case of the students fully. If this were a case of doubt, we would have unquestionably preferred the key answer. But if the matter is beyond the realm of doubt, it would be unfair to penalize the students for not giving an answer which accords with the key answer, that is to say, with an answer which is demonstrated to be wrong".

Same would be a rarity and it can only be done in exceptional cases. The principles set out in *Maharashtra Board' case* (supra) has been followed subsequently in *Pramod Kumar Srivastava v. Chairman Bihar Public Service Commission, Patna and Ors. (2004) 6 SCC 714, Board of Secondary Education v. Pravas Ranjan Panda and Anr., (2004) 13 SCC 714 and President, Board of Secondary Education, Orissa and Anr. v. D. Suvankar and Anr. (2007) 1 SCC 603.*

In view of the settled position in law, the orders of learned Single Judge and the Division Bench cannot be sustained and stand quashed.

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25. CONSUMER PROTECTION ACT, 1986 – Section 2 (1) (g)
MOTOR VEHICLES ACT, 1988 – Sections 147 & 149
Vehicle in question was insured – Licence held by the driver was fake but subsequently it was renewed – Insurance Company refused to indemnify the owner of the vehicle in regard to loss sustained by the vehicle – Owner filed complaint of deficiency of service on the ground of non-payment of damage before the Consumer Forum – Held, licence is fake so Insurance Company is not liable to pay damages of vehicle – In own damage case, principle laid down in

***Swaran Singh's case, (2004) 3 SCC 297* not applicable.**

United India Insurance Co. Ltd. v. Davinder Singh

Judgment dated 12.10.2007 passed by the Supreme Court in Civil Appeal No. 4883 of 2007, reported in (2007) 8 SCC 698

Held :

The Motor Vehicles Act, 1988 ("the Act") was enacted to meet the social obligation in regard to a third party as a result whereof taking a cover of insurance is mandatory. In terms of Sections 147 and 149 of the Act, however, taking of an insurance policy in relation to damages which may be suffered by the owner of the vehicle is not compulsorily insurable. It is, thus, axiomatic that whereas an insurance company may be held to be liable to indemnify the owner for the purpose of meeting the object and purport of the provisions of the Act, the same may not be necessary in a case where an insurance company may refuse to compensate the owner of the vehicle towards his own loss. A distinction must be borne in mind as regards the statutory liability of the insurer vis-à-vis the purport and object sought to be achieved by a beneficient legislation before a forum constituted under the Act and enforcement of a contract qua contract before a Consumer Forum.

The decision in *Swaran Singh case, (2004) 3 SCC 297,* has no application to own damage cases. Once the licence is found to be fake the renewal cannot take away the effect of fake licence. Hence, the forums below committed an error in holding the appellant liable to indemnify the owner of the vehicle in regard to losses sustained by him. For the reasons aforementioned, the impugned judgment cannot be sustained which is set aside accordingly.

Different considerations would arise in a case of this nature, as the Consumer Forum established under the Consumer Protection Act, 1986 was concerned only with a question as to whether there was deficiency of service on the part of the appellant or not. A right on the part of the insurance company not to pay the amount of insurance would depend upon the facts and circumstance of each case. It in certain situations it may be bound to pay the claim made by the third party; if the same is filed before a forum created under the Motor Vehicles Act. But defence may be held to be justified before a different forum where the question raised is required to be considered in a different manner.

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***26. CONTRACT ACT, 1872 – Section 23**

CIVIL PROCEDURE CODE, 1908 – Section 20 (3), Order VII Rule 11

Exclusion of jurisdiction of Court – Respondent submitting tender for supply of goods – Clause 9 of tender containing the term 'All disputes' shall be subject to Satna Court – Dispute arose in respect of supply of goods – Civil Suit filed at Jabalpur – Jurisdiction of Court at Jabalpur challenged – Held, part of cause of action also arose

within territorial jurisdiction of Court at Jabalpur – No clause regarding excluding jurisdiction of Court at Jabalpur and vesting exclusive jurisdiction to Satna Court – Plaintiff had not agreed to give exclusive jurisdiction to Civil Court at Satna – Plaintiff entitled to file suit in the Court at Jabalpur – Revision dismissed.

Registrar, Mahatma Gandhi, Chitrakoot, Gramodaya Vishwavidyalaya, Chitrakoot, Distt. Satna v. M.C. Modi & Company, Jabalpur

Reported in I.L.R. (2007) M.P. 1815

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*27. **COOPERATIVE SOCIETIES ACT, 1960 (M.P.) – Sections 41-A(5), 64 & 82**
COOPERATIVE SOCIETIES RULES, (M.P.) – Rule 66(2)(h)
LAND REVENUE CODE, 1961 (M.P.) – Section 165
Bar of jurisdiction of Court – Auction of land by Bank for recovery of loan amount challenged being void under Rule 66 (2)(h) of Rules – Land could not have been auctioned as plaintiff is member of aboriginal tribe –Application under Order VII Rule 11 C.P.C. for dismissal of suit as barred filed by applicant – Suit dismissed by Trial Court as not maintainable, however, it was remanded back by Appellate Court holding that it involves disputed question of facts – Held, Facts averred in plaint were disputed – If plaint averments are accepted as true, suit could not have been dismissed on preliminary ground – As preliminary issue requires evidence to be recorded it cannot be said that suit was not maintainable – Appeal dismissed.

Narayan Singh v. Surat Singh

Reported in I.L.R. (2007) M.P. 1775

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28. **CRIMINAL PROCEDURE CODE, 1973 – Section 24**
Appointment of Government Pleader – The names of candidates called from the Bar Association and forwarded by District Judge is not 'consultation' within the meaning of S. 24 – Formation of opinion must be shown.

Badri Vishal Gupta v. State of M.P. and Ors.

Reported in 2007 Cr.L.J. 4421 (MP)

Held:

The term 'consultation' used in Section 24 of the Cr. P. C. cannot be equated with consultation of high constitutional functionaries but indubitably signification of the said term cannot be marginalised. The term 'consultation' has to be understood in the context in which it is used. The consultation with the District Judge, as has been held by the Apex Court, is based on certain acceptable norms. The District Judge has to form an opinion with regard to merits,

competence and capability of the concerned lawyers. It must be reflected in the consultative process. In the case at hand, the District Magistrate sent a letter and the District Judge in his turn called for certain names from the Bar Association Begumganj. The letter of the District Judge shows that he has sent the names as has been sent by the Bar Association. The letter is absolutely silent with regard to the formation of opinion. The material must show that there has been consultation. Learned single Judge has drawn an inference that a presumption may be drawn that the Collector had consulted with the District Judge and recommended the names. What has come on record is that the Collector had sent a letter and the District Judge called for the names from the Bar Association and forwarded the names. His opinion, as is perceptible, is absent. A presumption in this regard, as we are disposed to think, cannot be drawn. Mechanically forwarding the names cannot tantamount to consultation. It cannot be said that the District Judge had expressed the opinion with regard to merits of the counsel. A list submitted by the Bar Association sent mechanically by the District Judge cannot be evidenced as application of mind. Therefore, we are of the considered opinion the mandatory provisions as engrafted under Section 24 of the Cr. P. C. has not been complied with.

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29. CRIMINAL PROCEDURE CODE, 1973 – Sections 167, 173, 309 Right to bail u/s 167 (2) proviso – Effect of filing of chargesheet while accused was absconding – Effect of taking cognizance on chargesheet – Effect of pendency of further investigation u/s 173 (8) – Chargesheet, meaning of – Law does not require that filing of chargsheet must await arrest of the accused.

Dinesh Dalmia v. CBI

Judgment dated 18.09.2007 passed by the Supreme Court in Criminal Appeal No. 1249 of 2007, reported in (2007) 8 SCC 770

Held :

A charge sheet is a final report within the meaning of sub-section (2) of Section 173 of the Code. It is filed so as to enable the court concerned to apply its mind as to whether cognizance of the offence thereupon should be taken or not. The report is ordinarily filed in the form prescribed therefor. One of the requirements for submission of a police report is whether any offence appears to have been committed and, if so, by whom. In some cases, the accused having not been arrested, the investigation against him may not be complete. There may not be sufficient material for arriving at a decision that the absconding accused is also a person by whom the offence appears to have been committed. If the investigating officer finds sufficient evidence even against such an accused who had been absconding, in our opinion, law does not require that filing of the charge sheet must await the arrest of the accused.

Indisputably, the power of the investigating officer to make a prayer for making further investigation in terms of sub-section (8) of Section 173 is not

taken away only because a charge sheet under sub-section (2) thereof has been filed. A further investigation is permissible even if order of cognizance of offence has been taken by the Magistrate.

We may notice that a Constitution Bench of this Court in *K. Veeraswami v. Union of India, (1991) 3 SCC 655* stated the law in the following terms:

> "76. ..... As observed by this Court in *Satya Narain Musadi v. State of Bihar, (1980) 3 SCC 152* that the statutory requirement of the report under Section 173(2) would be complied with if the various details prescribed therein are included in the report. This report is an intimation to the magistrate that upon investigation into a cognizable offence the investigating officer has been able to procure sufficient evidence for the Court to inquire into the offence and the necessary information is being sent to the Court. In fact, the report under Section 173(2) purports to be an opinion of the investigating officer that as far as he is concerned he has been able to procure sufficient material for the trial of the accused by the Court. The report is complete if it is accompanied with all the documents and statements of witnesses as required by Section 175(5). Nothing more need be stated in the report of the Investigating Officer. It is also not necessary that all the details of the offence must be stated. The details of the offence are required to be proved to bring home the guilt to the accused at a later stage i.e. in the course of the trial of the case by adducing acceptable evidence."

It is true that ordinarily all documents accompany the charge sheet. But, in this case, some documents could not be filed which were not in the possession of the CBI and the same were with the GEQD. As indicated hereinbefore, the said documents are said to have been filed on 20.01.2006 whereas the appellant was arrested on 12.02.2006. Appellant does not contend that he has been prejudiced by not filing of such documents with the charge sheet. No such plea in fact had been taken. Even if all the documents had not been filed, by reason thereof submission of charge sheet itself does not become vitiated in law. The charge sheet has been acted upon as an order of cognizance had been passed on the basis thereof. Appellant has not questioned the said order taking cognizance of the offence. Validity of the said charge sheet is also not in question.

..... Remand of an accused is contemplated by the Parliament at two stages; pre-cognizance and post-cognizance. Even in the same case depending upon the nature of charge sheet filed by the investigating officer in terms of Section 173 of the Code, a cognizance may be taken as against the person against whom an offence is said to have been made out and against whom no such offence has been made out even when investigation is pending. So long a charge sheet is not

filed within the meaning of sub-section (2) of Section 173 of the Code, investigation remains pending. It, however, does not preclude an investigating officer, as noticed hereinbefore, to carry on further investigation despite filing of a police report, in terms of sub-section (8) of Section 173 of the Code.

It is a well-settled principle of interpretation of statute that it is to be read in its entirety. Construction of a statute should be made in a manner as to give effect to all the provisions thereof. Remand of an accused contemplated by Parliament at two stages; pre-cognizance and post-cognizance. Even in the same case, depending upon the nature of charge-sheet filed by the investigating officer in terms of Section 173 of the Code, a cognizance may be taken as against the person against whom an offence, is said to have been made out and against whom no such offence has been made out even when investigation is pending. So long as charge-sheet is not filed within the meaning of sub-section (2) of Section 173 of the Code, investigation remains pending. It however, does not preclude an investigating officer, as noticed hereinbefore, to carry on further investigation despite filing of a police report, in terms of sub-section (8) of Section 173 of the Code.

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***30. CRIMINAL PROCEDURE CODE, 1973 – Section 174**

Non-mention of minute details in inquest report, effect of – Held, the purpose of holding an inquest is limited to ascertain as to whether a person has committed suicide or has been killed by another or by an animal etc. – Mentioning of the names of assailant (s), use of weapons, name of eye witnesses and details as to how the deceased was assaulted are not at all relevant in inquest proceedings.

Kumersingh and others v. State of Madhya Pradesh

Reported in 2007 (4) MPHT 585

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***31. CRIMINAL PROCEDURE CODE, 1973 – Section 197**

CO-OPERATIVE SOCIETIES ACT, 1961 (M.P.) – Section 87

INDIAN PENAL CODE, 1860 – Sections 420, 467, 468, 471 & 120-B

Manager of District Co-operative Bank Ltd. prosecuted for offences u/ss 420, 467, 468, 471 and 120-B – Being a public servant, accused claimed protection available u/s 197 of Cr.P.C. – Held, for seeking protection u/s 197 Cr.P.C., accused should be a public servant, not removable from his office save by or with the sanction of the Government – Further held, though S.87 of the M.P. Co-operative Societies Act qualifies the petitioner as a public servant, but he is not such public servant who is not removable from his office save by or with the sanction of the Government, therefore, sanction for prosecution u/s 197 of Cr.P.C. is not required.

J.B. Sharma v. State of M.P.

Reported in 2007 (4) MPLJ 331

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32. CRIMINAL PROCEDURE CODE, 1973 – Section 319

Summoning of additional accused – Statement of witness to Investigation Officer u/s 161 CrPC – Cannot be relied upon in recording finding whether any person being the accused could be tried together with the accused – Power under S. 319 is discretionary – If evidence tendered shows that any person not being the accused has committed any offence, he may be summoned though not have been chargesheeted by Investigating Officer or may have been discharged.

Rajindra Singh v. State of U.P. & Anr.

Reported in 2007 Cr.L.J. 4281 (SC)

Held:

The High Court has basically relied upon the statements of six witnesses which had been recorded by the investigating officer under Section 161 Cr.P.C. to record a positive finding that the respondent could not have been present at the scene of commission of the crime as he was present in a meeting of Nagar Nigam at Allahabad. A statement under Section 161 Cr.P.C. is not a substantive piece of evidence. In view of the proviso to Sub-section (1) of Section 162 Cr.P.C., the statement can be used only for the limited purpose of contradicting the maker thereof in the manner laid down in the said proviso. Therefore, the High Court committed a manifest error of law in relying upon wholly inadmissible evidence in recording a finding that Kapil Dev Singh could not have been present at the scene of commission of the crime.

..... It is, therefore, clear that if the evidence tendered in the course of any enquiry or trial shows that any person not being the accused has committed any offence for which he could be tried together with the accused, he can be summoned to face trial even though he may not have been charge sheeted by the investigating agency or may have been discharged at an earlier stage.

Note : Judicial Officers are requested to go through the judgment rendered in *Sohan Lal v. State of Rajasthan, AIR 1990 SC 2158.*

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***33. CRIMINAL PROCEDURE CODE, 1973 – Sections 427 & 482**

Sentences to run concurrently – Applicant convicted u/s 376/511 of I.P.C. and sentenced to 4½ years R.I. – Subsequently convicted u/s 302/34 and sentenced to imprisonment of life – Held, appeals were preferred in both the cases before High Court – No prayer for making the sentences concurrent was made at that time – Separate application under Section 427 of Cr. P.C. not maintainable.

Kamal Singh v. State

Reported in I.L.R. (2007) M.P. 1835

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34. CRIMINAL PROCEDURE CODE, 1973 – Section 428

Period required to be set off against term of imprisonment – Calculation of period – Petitioner was arrested on 25.7.1994 pursuant to three cases pending against him – He was released on bail in first two cases on 22.3.1995 – But he continued to remain in jail pending trial pursuant to third case in which he was released on bail i.e. 19.3.1997 – At the end of trial he was acquitted in second and third cases and was convicted in first case – Whether the period from 22.3.1995 to 19.3.1997 can be made set-off – Held, No.

Salim Nurmohmad Haveliwala v. State of Gujarat

Reported in 2007 Cr.L.J. 4564 (Gujarat)

Held:

..... Admittedly, in the facts of the present case, the petitioner was not sentenced to imprisonment for the offence in respect of which he was in detention from 22-3-1995 to 18-3-1997. He was in detention for the period from 25-7-1994 to 22-3-1995 in connection with the case in which he was convicted and sentenced to imprisonment. Section 428 of the Code clearly provides, that, where an accused person has been convicted and sentenced to imprisonment for a term, the period of detention undergone by him during the investigation, enquiry or trial of the same case, shall be set-off against the term of imprisonment imposed on him on such conviction.

Therefore, in the facts of the present case, not only that the provisions of Section 428 clearly denied the benefit of set-off of the subsequent period but the interpretation put upon the provision by a majority in State of *Maharashtra v. Nazakat Ali Mubark Ali, (2001) 6 SCC 311* the Hon'ble Supreme Court also confirmed the view that it is only the period of detention undergone by the petitioner during the investigation, enquiry or trial of the same case in which he was convicted, which was required to be set-off against his term of imprisonment and no other period of detention undergone pursuant to any other case could be set-off against the term of sentence.

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

Transitory anticipatory bail – Sessions Court as well as the High Court has concurrent jurisdiction – Sessions Court is fully empowered to grant transitory anticipatory bail in suitable cases.

Khushendra Borkar and others v. State of Uttar Pradesh

Reported in 2007 (4) MPHT 416

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*36. CRIMINAL PROCEDURE CODE, 1973 – Section 438

Anticipatory bail to Deputy Superintendent of Police in the offence relating to fake police encounter and disappearance of wife of victim without considering apprehension expressed as to applicant's position to influence, induce or coerce witnesses and need for custodial interrogation – Order granting bail liable to be set aside.

State of Gujarat v. Narendra K. Amin

Reported in AIR 2007 SC 2876

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*37. CRIMINAL PROCEDURE CODE, 1973 – Section 464

INDIAN PENAL CODE, 1860 – Sections 467 & 468

(i) Omission to frame, or absence or error in charge – Charge did not mention particulars and specific dates of each transaction with respect of particular complaint – Held, It did not result in any prejudice nor it occasioned failure of justice to applicant – Conviction recorded by Magistrate cannot be held to be invalid.

(ii) Forgery and making a false document – Applicant induced and deceived several persons to delivery money to him on assurance that he would return them by making it double – On demand, applicant issued cheques which could not encashed – Held, No allegation that cheques were false or fabricated – Signature of applicant on cheques not disputed – It cannot be held that cheques were forged with intent to defraud complainants – Ingredients of making false document not established – Conviction under Ss. 467 & 468 set aside – Appeal allowed in part.

Anil Kumar Gupta v. State of M.P.

Reported in I.L.R. (2007) M.P. 1824

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38. CRIMINAL TRIAL:

EVIDENCE ACT, 1872 – Section 3

INDIAN PENAL CODE, 1860 – Section 376

Appreciation of evidence of prosecutrix – Should not be rejected on minor discrepancies and contradictions – Absence of injuries on private part, neither falsify the case nor evidence of consent – Opinion of doctor that there was no evidence of any sexual intercourse is not sufficient to disbelieve accusation – But at the same time Court should bear in mind that false charges of rape are not uncommon.

Radhu v. State of Madhya Pradesh

Reported in 2007 Cr.L.J. 4704 (SC)

Held:

It is now well settled that a finding of guilt in a case of rape, can be based on the uncorroborated evidence of the prosecutrix. The very nature of offence

makes it difficult to get direct corroborating evidence. The evidence of the prosecutrix should not be rejected on the basis of minor discrepancies and contradictions. If the victim of rape states on oath that she was forcibly subjected to sexual intercourse, her statement will normally be accepted, even if it is uncorroborated, unless the material on record requires drawing of an inference that there was consent or that the entire incident was improbable or imaginary. Even if there is consent, the act will still be a 'rape', if the girl is under 16 years of age. It is also well settled that absence of injuries on the private parts of the victim will not by itself falsify the case of rape, nor construed as evidence of consent. Similarly, the opinion of a doctor that there was no evidence of any sexual intercourse or rape, may not be sufficient to disbelieve the accusation of rape by the victim. Bruises, abrasions and scratches on the victim especially on the forearms, wrists, face, breast, thighs and back are indicative of struggle and will support the allegation of sexual assault. The courts should, at the same time, bear in mind that false charges of rape are not uncommon. There have also been rare instances where a parent has persuaded a gullible or obedient daughter to make a false charge of a rape either to take revenge or extort money or to get rid of financial liability. Whether there was rape or not would depend ultimately on the facts and circumstances of each case.

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39. CRIMINAL TRIAL:
Interested or partisan witnesses – Reliability – Law explained.
Kulesh Mondal v. State of W.B.
Judgment dated 07.09.2007 passed by the Supreme Court in Criminal Appeal No. 1172, reported in (2007) 8 SCC 578

Held :

We may also observe that the ground that the [witnesses being close relatives and consequently being partisan witnesses] should not be relied upon, has no substance. This theory was repelled by this Court as early as in *Dalip Singh and Ors. v. The State of Punjab, AIR 1953 SC 364* in which surprise was expressed over the impression which prevailed in the minds of the Members of the Bar that relatives were not independent witnesses. Speaking through Vivian Bose, J. it was observed: (AIR p. 366, para 25)

> '25. We are unable to agree with the learned Judges of the High Court that the testimony of the two eyewitnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavoured to dispel in *'Rameshwar v. State of Rajasthan'*

AIR 1952 SC 54 at p. 59 We find, however, that it unfortunately still persists, if not in the judgments of the Courts, at any rate in the arguments of counsel."

Again in *Masalti and Ors. v. The State of U.P., AIR 1965 SC 202* this Court observed: (AIR p. 209-210 para 14)

> 14. But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses.... The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard and fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct.'

To the same effect is the decision in *State of Punjab v. Jagir Singh, (1974) 3 SCC 277, Lehna v. State of Haryana, (2002) 3 SCC 76* ..... As observed by this Court in *State of Rajasthan v. Smt. Kalki, (1981) 2 SCC 752* normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and those are always there, however, honest and truthful a witness may be. Material discrepancies are those which are not normal, and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so. These aspects were highlighted in *Krishna Mochi v. State of Bihar, (2002) 6 SCC 81.*

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***40. CRIMINAL TRIAL:**

Related witness – Merely because of the witnesses being related or interested or not injured, their evidence cannot be discarded – Discrepancy in evidence while in state of shock cannot be a ground to throw the whole testimony if same is otherwise corroborated in material particulars by other eyewitnesses and documents produced by prosecution.

Mallanna and others v. State of Karnataka

Judgment dated 18.09.2007 passed by the Supreme Court in Criminal Appeal No. 298 of 2000, reported in (2007) 8 SCC 523

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*41. DAKAITI AUR VYAPHARAN PRABHAVIT KSHETRA ADHINIYAM, 1981 (M.P.) – Sections 6(2), 2(f), 4 & 23
INDIAN PENAL CODE, 1860 – Sections 364-A, 302 & 34
Specified offences, trial of – Offences specified u/s 2(f) are compulsorily be tried by the Special Judge as provided by S. 6 of the Adhiniyam – Trial of such specified offences by the Sessions Judge is without jurisdiction.
Satish and others v. State of M.P.
Reported in 2007 (4) MPLJ 396

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*42. ELECTRICITY ACT, 2003 – Section 151
ELECTRICITY (AMENDMENT) ACT, 2007
Cognizance – Retrospective Effect – Amendment made by Amendment Act, 2007 in respect of investigation of offences and procedure for their trial would operate retrospectively – Investigation conducted by police and cognizance taken by Court on report filed by police cannot be held to be illegal – Revision dismissed.
Fareed Baig v. State of M.P.
Reported in I.L.R. (2007) M.P. 1713

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*43. EVIDENCE ACT, 1872 – Section 3
INDIAN PENAL CODE, 1860 – Section 302
(i) Evidence – Murder trial – 'Independent witnesses' – Evidence of – Incident took place on road – Incident witnessed by independent witnesses cannot be discredited merely because they are chance witnesses.
(ii) Murder – Reaction of witness – Brother of deceased witness the assault on his brother by appellants while he was returning home – Brother immediately lodged F.I.R – Held, every witness reacts in his own way – Merely because brother of deceased did not try to rescue him will not make his statement unreliable.
Lilli @ Surendra Pandey and another v. State
Reported in I.L.R. (2007) M.P. 1698

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*44. EVIDENCE ACT, 1872 – Sections 3 & 45
INDIAN PENAL CODE, 1860 – Sections 302 & 304
(i) Ocular and Medical Evidence – Acquitted persons alleged to have caused injuries by means of sharp edged weapons – 26 injuries were found which were caused by hard and blunt object – This discrepancy creates serious doubt about participation of acquitted accused persons – Trial Court rightly acquitted accused persons who allegedly caused injuries by sharp edged weapons.

(ii) Murder or culpable homicide not amounting to murder – Complainant lodged F.I.R. mentioning that he was informed by witnesses that accused persons have assaulted the deceased and injured – When complainant reached on the spot he saw the deceased and his son lying there – One accused had *farsi* and three had sticks in their hands – Complainant came back and lodged report – Police recorded *dehati nalishi* made by injured – 26 injuries caused by hard and blunt object were found on the body of deceased – Held, 26 injuries on various parts of her body were found – 5 ribs of left side were found fractured – Deceased died due to syncope resulted by excessive haemorrhage and injuries to lungs and lever – Keeping in view the number and nature of injuries found on body of deceased it cannot be said that accused persons had no intention to cause death.

Kanhaiya Lal and others v. State
Reported in I.L.R. (2007) M.P. 1704

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*45 EVIDENCE ACT, 1872 – Section 32
INDIAN PENAL CODE, 1860 – Section 302
Dying declaration – Deceased married with someone else, later on accepted accused to be her husband – Accused used to met out ill treatment to deceased – Accused inflicted injuries on deceased by *baka* while she was returning after answering call of nature – witnesses reached on the spot after hearing her hue and cry – Oral dying declaration made by deceased to witnesses – Deceased taken to police station where she lodged F.I.R.– Dying declaration also recorded by Naib Tahsildar in Hospital – Held, five incised wounds were inflicted on deceased – F.I.R. was lodged promptly within 1½ hours of incident – Naib Tahsildar recorded dying declaration – Doctor certified at the beginning that deceased was in fit state to make statement – Doctor again certified that deceased remained conscious while her statement was recorded – Dying declaration which was recorded with promptitude finds corroboration by medical evidence – Nothing has been brought on record with the help of medical evidence that deceased was not in a position to make dying declaration – No motive attributed to Doctor and Naib Tahsildar that why they would make any wrong statement – Dying declaration reliable – Conviction of appellant u/s 302 of I.P.C. proper – Appeal dismissed.

Latora v. State of M.P.
Reported in I.L.R. (2007) M.P. 1675

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*46. EVIDENCE ACT, 1872 – Section 32(1)

Dying declaration – Deceased assaulted on 16-4-1987 by appellants – Deceased lodged F.I.R. in police station and was thereafter admitted in Hospital – He received 18 injuries and was examined by Doctor at 1 P.M. – Deceased had not gone in shock – Later on shocks started developing resulting in fall of blood pressure and vomiting as recorded in bed head ticket – On 27-4-1987 at 11.15 p.m general condition of deceased was recorded to be satisfactory and was also conscious – Deceased breathed his last on 30-4-1987 – Held, dying declaration is admitted in evidence on the principle that a man will not meet his maker with a lie in his mouth – No material to show that dying declaration was result of product of imagination, tutoring or prompting – It appears to have been made voluntarily – Appellants rightly convicted by Trial Court and High Court – Appeal dismissed.

Dashrath @ Champa v. State of M.P

Reported in I.L.R. (2007) (M.P.) 1488

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*47. EVIDENCE ACT, 1872 – Sections 68 & 90

SUCCESSION ACT, 1925 – Section 63

(i) Proof of Execution of Document – Will executed by testator in presence of witnesses – Attesting witness stating that testator had signed in his presence – Merely because attesting witness does not know the language in which Will was made, the same cannot be disbelieved.

(ii) Presumption as to document thirty years old –Will being 30 years' old document and have come from proper custody – Presumption regarding signature and other part of it could be drawn in favour of beneficiary/defendant.

(iii) Execution of unprivileged Will – No specific proforma or method of attestation is prescribed – Will should be signed by testator in presence of attesting witnesses – Attesting witnesses should sign subsequent to the signature of testator – If such things are found, document could be held to be validly executed.

Goverdhandas (Dead) v. Smt. Gopibai

Reported in I.L.R. (2007) M.P. 1644.

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*48. HIGH COURT RULES AND ORDERS (M.P.) – Section II Chapter I, Rule 14

CONTEMPT OF COURTS ACT, 1971 – Section 10

Advocate found guilty of Contempt of Court and was convicted by the High Court – He did not purge himself of contempt – Held, he cannot be permitted to appear as an Advocate in any Court.

Shyamlal Vyas v. Inderchand Jain and another

Reported in 2007 (4) MPHT 366 (DB)

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***49. HINDU LAW:**

Banaras School of Mitakshara Law, applicability of – Co-owner has a right to alienate his undivided interest in the joint family property – He cannot do so except with the consent of other coparceners.

Baital Singh and others v. Shrilal and others (LRs. of respondent No. 1)

Reported in 2007 (4) MPLJ 477

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50. HINDU MARRIAGE ACT, 1955 – Section 13-B

Period prescribed u/s 13-B (2), nature of – Period prescribed is directory in nature – Application can be decided before expiry of 6 months' period, if situation of a case so warrants.

Smt. Anamika Shrivastava v. Vivek Shrivastava

Reported in 2007 (4) MPHT 374

Held:

.....it is seen that parties are agitating the matter before various forums, proceedings under Section 125 (3) Cr.PC and Section 498-A IPC and various other cases are pending between the parties and both the parties are living separately for more than 3½ years, that being so *prima facie* it seems that marriage has broken down and there is no possibility of reconciliation and parties had applied for dissolution of the marriage by mutual consent, in view of the fact that it is not possible for them to live together and therefore, only question which requires consideration now is as to whether the learned Family Court was right in postponing decision on the application filed under Section 13-B of the Hindu Marriage Act to be decided after six months or application should be taken up for disposal immediately and the period of six month as contemplated under Section 13-B of the Hindu Marriage Act can be waived. This question has been considered by Andhra Pradesh High Court in the case of *Grandhi Venkata Chitti Abbai v. Grandhi Padma Lakshmi, 1999 Matrimonial Law Reporter 324* and also by Gujrat High Court in the case of *Brijlal Chandreshbhai Bhatt v. Chandreshbhai Sahdevbhai Bhatt, 1999 Matrimonial Law Reporter 575* as relied by the learned Counsel for the petitioner it has been held in the aforesaid cases that if no possibility of revival of the marriage is seems them no useful purpose would be served by directing the parties to continue th agony for six more months, it has been held that period of six months can be waived. Apart from the aforesaid judgment relied upon learned counsel for the petitioner the aforesaid principles have been followed in various judgments and the consistent view of various High Courts are that in a given case, discretion can be exercised for dissolution of marriage even before six months if the situation so warrants.

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51. INDIAN PENAL CODE, 1860 – Section 34

Common intention – Where co-accused is named in FIR and he has been acquitted then another accused cannot be held guilty u/s 34 of the code – If deceased was hit by two or more persons, and common intention was not proved, then prosecution must establish the exact nature of the injury caused by each accused.

Noor alias Nooruddin v. State of Karnataka

Reported in 2007 Cr.L.J. 4299 (SC)

Held:

We have noticed hereinbefore that all the accused, other than the appellant, have been acquitted by the learned Trial Judge. The State did not prefer any appeal thereagainst. The prosecution, therefore, cannot say that the appellant had any common intention with any other accused persons who were named in the First Information Report. The matter might be different where a person is said to have formed common intention with other persons. The prosecution may succeed in obtaining a conviction against the appellant for commission of an offence under Section 34 of the Indian Penal Code if the names of the other accused persons and the roles played by them are known.....

.....in *Sukhram S/o Ramratan v. State of M.P., 1989 Supp (1) SCC 214,* the law has been stated in the following terms:

> "10. There is another aspect of the matter which has also escaped the notice of the High Court when it sustained the conviction of the appellant under Section 302 read with Section 34 and Section 436 read with Section 34 IPC while acquitting accused Gokul of those charges. Though the accused Gokul and the appellant were individually charged under Sections 302 and 436 IPC they were convicted only under the alternative charges under Section 302 read with Section 34 and Section 436 read with Section 34 IPC by the Sessions Judge. Consequently, the appellant's convictions can be sustained only if the High Court had sustained the convictions awarded to accused Gokul also. Inasmuch as the High Court has given the benefit of doubt to accused Gokul and acquitted him, it follows that the appellant's convictions for the two substantive offences read with Section 34 IPC cannot be sustained because this is a case where the co-accused is a named person and he has been acquitted and by reason of it the appellant cannot be held to have acted conjointly with anyone in the commission of the offences. This position of law is well settled by this Court and we may only refer to a few decisions in this behalf vide *Prabhu Babaji v. State of Bombay, AIR 1956 SC 51*

Krishna Govind Patil v. State of Maharashtra, AIR 1963 SC 1413 and Baul v. State of U.P., AIR 1968 SC 728.

In *Baul and Anr. v. The State of U.P., AIR 1968 SC 728,* it was held:

"7. No doubt the original prosecution case showed that Sadhai and Ramdeo both hit the deceased on the head with their lathies. One is tempted to divide the two fatal injuries between the two assailants and to hold that one each was caused by them. If there was common intention established in the case the prosecution would not have been required to prove which of the injuries was caused by which assailant. But when common intention is not proved the prosecution must establish the exact nature of the injury caused by each accused and more so in this case when one of the accused has got the benefit of the doubt and has been acquitted. It cannot, therefore, be postulated that Sadhai alone caused all the injuries on the head of the deceased. Once that position arises the doubt remains as to whether the injuries caused by Sadhai were of the character which would bring his case within Section 302. It may be that the effect of the first blow became more prominent because another blow landing immediately after it caused more fractures to the skull than the first blow had caused. These doubts prompt us to give the benefit of doubt to Sadhai. We think that his conviction can be safely rested under Section 325 of the Indian Penal Code, but it is difficult to hold in a case of this type that his guilt amounts to murder simpliciter because he must be held responsible for all the injuries that were caused to the deceased. We convict him instead of Section 302 for an offence under Section 325 of the Indian Penal Code and set aside the sentence of imprisonment for life and instead sentence him to rigorous imprisonment for seven years."

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***52. INDIAN PENAL CODE, 1860 – Sections 34 & 302**
Common Intention – Murder – One accused assaulted the deceased by an axe – Appellant assaulted the deceased by *lathi* – Main cause of death was injury caused by another accused – Held, both accused persons assaulted simultaneously – Both left the spot together after causing injuries – Injury caused by appellant on skull of deceased had resulted in fracture of mandible – It cannot be held that there was no prior consent between both accused persons.
Jham Singh v. State Of M.P.
Reported in I.L.R. (2007) M.P. 1691

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52. INDIAN PENAL CODE, 1860 – Section 84

Plea of unsoundness of mind – Term 'insanity' is used to describe varying degrees of mental disorder – Burden of proof lies upon the accused to prove insanity – Relevant factors to be considered – Behaviour of accused which preceded, attended and followed the crime – Neither character of a crime nor absence of motive for crime is proof of legal sanity.

Bapu alias Gujraj Singh v. State of Rajasthan

Judgment dated 04.06.2006 passed by the Supreme Court in Criminal Appeal No. 1313 of 2006, reported in (2007) 8 SCC 66

Held :

Section 84 lays down the legal test of responsibility in cases of alleged unsoundness of mind. There is no definition of "unsoundness of mind" in the IPC. Courts have, however, mainly treated this expression as equivalent to insanity. But the term "insanity" itself has no precise definition. It is a term used to describe varying degrees of mental disorder. So, every person, who is mentally diseased, is not *ipso facto* exempted from criminal responsibility. A distinction is to be made between legal insanity and medical insanity. A Court is concerned with legal insanity, and not with medical insanity. The burden of proof rests on an accused to prove his insanity, which arises by virtue of Section 105 of the Indian Evidence Act, 1972 (in short the 'Evidence Act') and is not so onerous as that upon the prosecution to prove that the accused committed the act with which he is charged. The burden on the accused is no higher than that resting upon a plaintiff or a defendant in a civil proceeding. (See *Dahyabhai v. State of Gujarat, AIR 1964 SC 1563*). In dealing with cases involving a defence of insanity, distinction must be made between cases, in which insanity is more or less proved and the question is only as to the degree of irresponsibility, and cases, in which insanity is sought to be proved in respect of a person, who for all intents and purposes, appears sane. In all cases, where previous insanity is proved or admitted, certain considerations have to be borne in mind. Mayne summarises them as follows:

> Whether there was deliberation and preparation for the act; whether it was done in a manner which showed a desire to concealment; whether after the crime, the offender showed consciousness of guilt and made efforts to avoid detections whether, after his arrest, he offered false excuses and made false statements. All facts of this sort are material as bearing on the test, which Bramwall, submitted to a jury in such a case : 'Would the prisoner have committed the act if there had been a policeman at his elbow ?' It is to be remembered that these tests are good for cases in which previous insanity is more or less established."

These tests are not always reliable where there is, what Mayne calls, "inferential insanity".

.....The onus of proving unsoundness of mind is on the accused. But where during the investigation previous history of insanity is revealed, it is the duty of an honest investigator to subject the allused to a medical examination and place that evidence before the court and if this is not done, it creates a serious infirmity in the prosecution case and the benefit of doubt has to be given to the accused. The onus, however, has to be discharged by producing evidence as to the conduct of the accused shortly prior to the offence and his conduct at the time or immediately afterwards, also by evidence of his mental condition and other relevant factors. Every person is presumed to know the natural consequences of his act. Similarly every person is also presumed to know the law. The prosecution has not to establish these facts.

.....In coming to that conclusion, the relevant circumstances are to be taken into consideration, it would be dangerous to admit the defence of insanity upon arguments derived merely from the character of the crime. It is only unsoundness of mind which naturally impairs the cognitive faculties of the mind that can form a ground of exemption from criminal responsibility. Stephen in History of the Criminal Law of England, Vol. II, p. 166 has observed that if a person cut off the head of a sleeping man because it would be great fun to see him looking for it when he woke up, would obviously be a case where the perpetrator of the act would be incapable of knowing the physical effects of his act. The law recognizes nothing but incapacity to realise the nature of the act and presumes that where a man's mind or his faculties of ratiocination are sufficiently dim to apprehend what he is doing, he must always be presumed to intend the consequence of the action he takes. Mere absence of motive for a crime, howsoever atrocious it may be, cannot in the absence of plea and proof of legal insanity, bring the case within this section This Court in *Sheralli Walli Mohammed v. State of Maharashtra, (1973) 4 SCC 79* held that: (SCC p. 79)

> "The mere fact that no motive has been proved why the accused murdered his wife and children or the fact that he made no attempt to run away when the door was broken open would not indicate that he was insane or that he did not have necessary mens rea for the commission of the offence."

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***54. INDIAN PENAL CODE, 1860 – Section 302**

Murder – Intention – Dispute arose between parties on throwing mud by son of appellant No. I – On complaint by deceased Munnilal appellants told him that their children would act in that fashion only – Munnilal assaulted by means of axe – Baldeo reached on spot where he too was assaulted – Munnibai was set on fire – Munnilal and Baldeo died on spot whereas Munnibai succumbed to injuries later

on – Trial Court imposed death sentence – High Court convicted appellants holding that free fight between parties had taken place and acquitted other accused persons for offence under Section 302 – Held, no case made out that injuries were inflicted by appellants in their self-defence – Manner in which offences have been committed was gruesome – Not only Munnilal was killed but whosoever came to save was not spared – Not a case where appellants can be absolved of charges of murder – Appeal dismissed.

Moti Lal v. State of M.P.

Reported in I.L.R. (2007) M.P.1741 (SC)

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*55. INDIAN PENAL CODE, 1860 – Sections 302, 304 (II)

Culpable homicide not amounting to murder – Some altercation took place between accused and complainant party in earlier hours of day – While complainant party was going to lodge FIR in the noon, appellants intercepted them and gave axe and *lathi* blows on the person of deceased by means of axe and *lathis* – Deceased sustained several contusions and abrasions on non-vital parts of the body – Three ribs were found fractured – Held, one accused armed with axe but gave axe blow from blunt side of axe on the backside of chest of deceased – Rest of the accused persons gave *lathi* blows on non-vital parts of body of deceased – If intention was to kill then accused shall have used sharp side of axe – Others should have assaulted on vital part of the body of deceased – It can be inferred that appellants were having knowledge that they can cause death of deceased – Offence committed by appellants is not under S. 302 but it falls under Section 304 (II) of I.P.C. – Appellants sentenced to undergo 10 years rigorous imprisonment – Appeal partly allowed.

Veer Singh v. State of M.P.

Reported in I.L.R. (2007) M.P. 1684

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*56. INDIAN PENAL CODE, 1860 – Sections 304(1) & 302, Exception I of Section 300

Murder or culpable homicide not amounting to murder – Altercation took place between deceased and appellant in the noon – Deceased was going on a scooter along with his companions – Scooter was stopped after seeing that appellant is standing – Appellant tried to escape into narrow lane – Appellant was followed by deceased and his companions – Appellant inflicted two blows with big needle on chest of deceased – Held, it appears that deceased and his companions wanted to take revenge of incident which had taken place in earlier hours of day – It was on sudden provocation that accused

inflicted needle blows on chest of deceased – Case falls under Exception (1) of Section 300 – Appellant acquitted under S. 302 of I P.C. but convicted under S.304 (1) I.P.C. – Appellant sentenced for period already undergone.

Babloo v. State of M.P.

Reported in I.L.R. (2007) M.P. 1670

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57. **INDIAN PENAL CODE, 1860 – Section 304-B**
EVIDENCE ACT, 1872 – Section 113-B
When S.304-B IPC and S. 113-B Evidence Act pressed into service ? Expression 'soon before death' is used with idea of proximity test – In such case, there must be proximate and live-link between effect of cruelty based on dowry demand and death.

M. Srinivasulu v. State of A.P.

Reported in AIR 2007 SC 3146

Held:

A conjoint reading of Section 113-B of the Evidence Act and Section 304-B IPC shows that there must be material to show that soon before her death the victim was subjected to cruelty or harassment. Prosecution has to rule out the possibility of a natural or accidental death so as to bring it within the purview of the 'death occurring otherwise than in normal circumstances.' The expression 'soon before' is very relevant where Section 113-B of the Evidence Act and Section 304-B, IPC are pressed into service. Prosecution is obliged to show that soon before the occurrence there was cruelty or harassment and only in that case presumption operates. Evidence in that regard has to be led by prosecution. 'Soon before' is a relative term and it would depend upon circumstances of each case and no straitjacket formula can be laid down as to what would constitute a period soon before the occurrence. It would be hazardous to indicate any fixed period, and that brings in the importance of a proximity test both for the proof of an offence of dowry death as well as for raising a presumption under Section 113-B of the Evidence Act. The expression 'soon before her death' used in the substantive Section 304-B IPC and Section 113-B of the Evidence Act is present with the idea of proximity test. No definite period has been indicated and the expression 'soon before' is not defined. A reference to expression 'soon after' used in Section 114 [illustration (a)] of the Evidence Act is relevant. It lays down that a Court may presume that a man who is in the possession of goods soon after the theft, is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession. The determination of the period which can come within the term 'soon before' is left to be determined by the Courts, depending upon facts and circumstances of each case. Suffice, however, to indicate that the expression 'soon before' would normally imply that the interval should not be much between the concerned

cruelty or harassment and the death in question. There must be existence of a proximate and live-link between the effect of cruelty based on dowry demand and the concerned death. If alleged incident of cruelty is remote in time and has become stale enough not to disturb mental equilibrium of the woman concerned, it would be of no consequence.

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***58. INDIAN PENAL CODE, 1860 – Section 306**

Abatement to commit suicide – Appellant/wife belonging to Upper Caste married to deceased belonging to Scheduled Caste Community – Marriage opposed by family members – Deceased working on the post of Civil Judge – Applicant was in Bhopal for taking coaching when deceased consumed some poisonous substance at Itarsi – Deceased was taken to hospital and applicant was informed – Deceased was treated at Itarsi and Bhopal but could not be saved – Mother of deceased stated that applicant used to quarrel with deceased on trivial matters – Father of deceased stated that deceased had informed him that he had consumed milk containing poison as he had some altercation with his wife – Sister of deceased stated that applicant did not behave with her parents respectfully – Applicant did not like deceased to go to parents house – Relation between applicant and deceased was not cordial – Held, 'instigate' denotes incitement or urging to do some drastic or unadvisable action or to stimulate or incite – Presence of *mens rea* is necessary concomitant of instigation – Nothing on record to show that applicant wanted or intended that her husband should commit suicide – She was married knowing fully well that he belonged to Scheduled Caste – No offence under Section 306 I.P.C. made out – Proceedings of criminal case quashed.

Aarti Arya v. State of M.P.

Reported in I.L.R. (2007) M.P. 1733

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59. INDIAN PENAL CODE, 1860 – Sections 375 & 90

Rape – Consent – Misconception of fact – Representation knowingly made by accused to elicit consent of victim without having intention to marry at the very inception of representation – Vitiate consent – Such act is within purview of S. 375 IPC.

Pradeep Kumar Verma v. State of Bihar & Anr.

Reported in 2007 Cr.L.J. 4333 (SC)

Held:

On the specific question whether the consent obtained on the basis of promise to marry which was not acted upon, could be regarded as consent for the purpose of Section 375 IPC, was dealt with by a Division Bench of the Calcutta

High Court in *Jayanti Rani Panda v. State of WB, 1984 Cr.L.J. 1535.* The relevant passage in this case has been cited in several other decisions. This is one of the cases referred to by this Court in *Uday v. State of Karnataka, (2003) 4 SCC 46* approvingly. Without going into the details of that case, the crux of the case can be discerned from the following summary given at para 7:

> "Here the allegation of the complainant is that the accused used to visit her house and proposed to marry her. She consented to have sexual intercourse with the accused on a belief that the accused would really marry her. But one thing that strikes us is ... why should she keep it a secret from her parents if really she had belief in that promise. Assuming that she had believed the accused when he held out a promise, if he did at all, there is no evidence that at that time the accused had no intention of keeping that promise. It may be that subsequently when the girl conceived the accused might have felt otherwise. But even then the case in the petition of complainant is that the accused did not till then back out. Therefore it cannot be said that till then the accused had no intention of marrying the complainant even if he had held out any promise at all as alleged."

The discussion that follows the above passage is important and is extracted hereunder:

> "The failure to keep the promise at a future uncertain date due to reasons not very clear on the evidence does not always amount to a misconception of fact at the inception of the act itself. In order to come within the meaning of misconception of fact, the fact must have an immediate relevance. The matter would have been different if the consent was obtained by creating a belief that they were already married. In such a case the consent could be said to result from a misconception of fact. But here the fact alleged is a promise to marry we do not know when. If a full-grown girl consents to the act of sexual intercourse on a promise of marriage and continues to indulge in such activity until she becomes pregnant, it is an act of promiscuity on her part and not an act induced by misconception of fact. Section 90 IPC cannot be called in aid in such a case to pardon the act of the girl and fasten criminal liability on the other, unless the court can be assured that from the very inception the accused never really intended to marry her."

The learned Judges referred to the decision of the Chancery Court in *Edgington v. Fitzmaurice, 1885 (29) Ch.D.459* and observed:

> "This decision lays down that a misstatement of the intention of the defendant in doing a particular act may be a misstatement of fact, and if the plaintiff was misled by it, an action of deceit may be founded on it. The particular observation runs to the following effect: There must be a misstatement of an existing fact. Therefore, in order to amount to a misstatement of fact the existing state of things and a misstatement as to that becomes relevant. In the absence of such evidence Section 90 cannot be called in aid in support of the contention that the consent of the complainant was obtained on a misconception of fact."

After referring to the case-law on the subject, it was observed in *Uday's case* (supra):

> "It therefore appears that the consensus of judicial opinion is in favour of the view that the consent given by the prosecutrix to sexual intercourse with a person with whom she is deeply in love on a promise that he would marry her on a later date, cannot be said to be given under a misconception of fact. A false promise is not a fact within the meaning of the Code. We are inclined to agree with this view, but we must add that there is no straitjacket formula for determining whether consent given by the prosecutrix to sexual intercourse is voluntary, or whether it is given under a misconception of fact. In the ultimate analysis, the tests laid down by the courts provide at best guidance to the judicial mind while considering a question of consent, but the court must, in each case, consider the evidence before it and the surrounding circumstances, before reaching a conclusion, because each case has its own peculiar facts which may have a bearing on the question whether the consent was voluntary, or was given under a misconception of fact. It must also weigh the evidence keeping in view the fact that the burden is on the prosecution to prove each and every ingredient of the offence, absence of consent being one of them."

The first two sentences in the above passage need some explanation. While we reiterate that a promise to marry without anything more will not give rise to misconception of fact within the meaning of Section 90, it needs to be clarified that a representation deliberately made by the accused with a view to elicit the assent of the victim without having the intention or inclination to marry

her, will vitiate the consent. If on the facts it is established that at the very inception of the making of promise, the accused did not really entertain the intention of marrying her and the promise to marry held out by him was a mere hoax, the consent ostensibly given by the victim will be of no avail to the accused to exculpate him from the ambit of Section 375 clause second. This is what in fact was stressed by the Division Bench of the Calcutta High Court in the case of *Jayanti Rani Panda's case* (supra) which was approvingly referred to in *Uday's case* (supra). The Calcutta High Court rightly qualified the proposition which it stated earlier by adding the qualification at the end – unless the court can be assured that from the very inception the accused never really intended to marry her. In the next para, the High Court referred to the vintage decision of the Chancery Court which laid down that a misstatement of the intention of the defendant in doing a particular act would tantamount to a misstatement of fact and an action of deceit can be founded on it. This is also the view taken by the Division Bench of the Madras High Court in *N. Jaladu, Re, ILR (1913) 36 Madras 453.* By making the solitary observation that a false promise is not a fact within the meaning of the Code, it cannot be said that this Court has laid down the law differently. The observations following the aforesaid sentence are also equally important. The Court was cautious enough to add a qualification that no straitjacket formula could be evolved for determining whether the consent was given under a misconception of fact. Reading the judgment in *Uday's case* (supra) as a whole, we do not understand the Court laying down a broad proposition that a promise to marry could never amount to a misconception of fact. That is not, in our understanding, the ratio of the decision. In fact, there was a specific finding in that case that initially the accused's intention to marry cannot be ruled out."

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60. INDIAN PENAL CODE, 1860 – Section 376 (2) (f), Proviso
CRIMINAL PROCEDURE CODE, 1973 – Section 28
Imposition of sentence below prescribed minimum on the ground of illiterate and rustic – Not "special reasons."
In case of rape on 10 years old girl, imposition of sentence of only 3½ years imprisonment improper.
Penology – Sentencing system – Considerable facts – Law explained.
State of Karnataka v. Raju
Reported in AIR 2007 SC 3225

Held:

It is to be noted that in sub-section (2) of Section 376, I.P.C. more stringent punishment can be awarded taking into account the special features indicated in the said sub-section. The present case is covered by Section 376(2)(f), IPC i.e. when rape is committed on a woman when she is under 12 years of age. Admittedly, in the case at hand the victim was 10 years of age at the time of commission of offence.

The measure of punishment in a case of rape cannot depend upon the social status of the victim or the accused. It must depend upon the conduct of the accused, the state and age of the sexually assaulted female and the gravity of the criminal act. Crimes of violence upon women need to be severely dealt with. The socio-economic status, religion, race, caste or creed of the accused or the victim are irrelevant considerations in sentencing policy. Protection of society and deterring the criminal is the avowed object of law and that is required to be achieved by imposing an appropriate sentence. The sentencing Courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence. Courts must hear the loud cry for justice by the society in cases of the heinous crime of rape on innocent helpless girls of tender years, as in this case, and respond by imposition of proper sentence. Public abhorrence of the crime needs reflection through imposition of appropriate sentence by the Court. There are no extenuating or mitigating circumstances available on the record which may justify imposition of any sentence less than the prescribed minimum on the respondent. To show mercy in the case of such a heinous crime would be a travesty of justice and the plea for leniency is wholly misplaced.

The legislative mandate to impose a sentence, for the offence of rape on a girl under 12 years of age, for a term which shall not be less than 10 years, but which may extend to life and also to fine reflects the intent of stringency in sentence. The proviso to Section 376(2), IPC, of course, lays down that the court may, for adequate and special reasons to be mentioned in the judgment, impose sentence of imprisonment of either description for a term of less than 10 years. Thus, the normal sentence in a case where rape is committed on a child below 12 years of age, is not less than 10 years' RI, though in exceptional cases "for special and adequate reasons" sentence of less than 10 years' RI can also be awarded. It is a fundamental rule of construction that a proviso must be considered with relation to the principal matter to which it stands as a proviso particularly in such like penal provisions. The courts are obliged to respect the legislative mandate in the matter of awarding of sentence in all such cases. Recourse to the proviso can be had only for "special and adequate reasons" and not in a casual manner. Whether there exist any "special and adequate reasons" would depend upon a variety of factors and the peculiar facts and circumstances of each case. No hard and fast rule can be laid down in that behalf of universal application.

These aspects were highlighted in *Dinesh alias Buddha v. State of Rajasthan, (2006) 3 SCC 771.*

The law regulates social interests, arbitrates conflicting claims and demands. Security of persons and property of the people is an essential function of the State. It could be achieved through instrumentality of criminal law. Undoubtedly, there is a cross cultural conflict where living law must find answer to the new challenges and the courts are required to mould the sentencing

system to meet the challenges. The contagion of lawlessness would undermine social order and lay it in ruins. Protection of society and stamping out criminal proclivity must be the object of law which must be achieved by imposing appropriate sentence. Therefore, law as a corner-stone of the edifice of "order" should meet the challenges confronting the society. Friedman in his "Law in Changing Society" stated that, "State of criminal law continues to be - as it should be - a decisive reflection of social consciousness of society". Therefore, in operating the sentencing system, law should adopt the corrective machinery or the deterrence based on factual matrix. By deft modulation sentencing process be stern where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration.

Therefore, undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under such serious threats. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed etc. This position was illuminatingly stated by this Court in *Sevaka Perumal etc. v. State of Tamil Nadu, (1991) 3 SCC 471.*

The criminal law adheres in general to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct. It ordinarily allows some significant discretion to the Judge in arriving at a sentence in each case, presumably to permit sentences that reflect more subtle considerations of culpability that are raised by the special facts of each case. Judges in essence affirm that punishment ought always to fit the crime; yet in practice sentences are determined largely by other considerations. Sometimes it is the correctional needs of the perpetrator that are offered to justify a sentence. Sometimes the desirability of keeping him out of circulation, and sometimes even the tragic results of his crime. Inevitably these considerations cause a departure from just desert as the basis of punishment and create cases of apparent injustice that are serious and widespread.

Proportion between crime and punishment is a goal respected in principle, and in spite of errant notions, it remains a strong influence in the determination of sentences. The practice of punishing all serious crimes with equal severity is now unknown in civilized societies, but such a radical departure from the principle of proportionality has disappeared from the law only in recent times. Even now for a single grave infraction drastic sentences are imposed. Anything less than a penalty of greatest severity for any serious crime is thought then to be a measure of toleration that is unwarranted and unwise. But in fact, quite apart from those considerations that make punishment unjustifiable when it is out of

proportion to the crime, uniformly disproportionate punishment has some very undesirable practical consequences.

After giving due consideration to the facts and circumstances of each case, for deciding just and appropriate sentence to be awarded for an offence, the aggravating and mitigating factors and circumstances in which a crime has been committed are to be delicately balanced on the basis of really relevant circumstances in a dispassionate manner by the Court. Such act of balancing is indeed a difficult task. It has been very aptly indicated in *Dennis Councle MCGDautha v. State of Callifornia, 402 US 183: 28 L D 2d 711* that no formula of a foolproof nature is possible that would provide a reasonable criterion in determining a just and appropriate punishment in the infinite variety of circumstances that may affect the gravity of the crime. In the absence of any foolproof formula which may provide any basis for reasonable criteria to correctly assess various circumstances germane to the consideration of gravity of crime, the discretionary judgment in the facts of each case, is the only way in which such judgment may be equitably distinguished.

These aspects were highlighted in *Shailesh Jasvantbhai and Anr. v. State of Gujarat and Ors., (2006) 2 SCC 359.*

Considering the legal position and in the absence of any reason which could have been treated as "special and adequate reason" reduction of sentence as done by the High Court is clearly unsustainable. The trial court should have imposed sentence of 10 years in terms of Section 376 (2) (f), IPC. But State has not questioned the sentence as imposed, the sentence as imposed by the trial court is restored. The High Court's order reducing the sentence is set aside.

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61. INDIAN PENAL CODE, 1860 – Section 397
CRIMINAL PROCEDURE CODE, 1973 – Section 154

(i) Essential ingredients of S. 397 IPC – It only envisages the individual liability and not any constructive liability – Word 'offender' used in the Section means the person who used the deadly weapon – The Section requires more than merely being armed.

(ii) Delay in filing FIR/complaint, consequence there of.

Dilawar Singh v. State of Delhi
Reported in 2007 Cr.L.J. 4709 (SC)

Held:

(i) The essential ingredients of Section 397 IPC are as follows:

1. Accused committed robbery.

2. While committing robbery or dacoity (i) accused used deadly weapon (ii) to cause grievous hurt to any person (iii) attempted to cause death or grievous hurt to any person.

3. "Offender" refers to only culprit who actually used deadly weapon. When only one has used the deadly weapon, others cannot be awarded the minimum punishment. It only envisages the individual liability and and not any constructive liability. Section 397 IPC is attracted only against the particular accused who uses the deadly weapon or does any of the acts mentioned in the provision. But other accused are not vicariously liable under that Section for acts of co-accused.

As noted by this Court in *Phool Kumar v. Delhi Administration, AIR 1975 SC 905,* the term "offender" under Section 397, IPC is confined to the offender who uses any deadly weapon. Use of deadly weapon by one offender at the time of committing robbery cannot attract Section 397, IPC for the imposition of minimum punishment on another offender who had not used any deadly weapon. There is distinction between 'uses' as used in Sections 397, IPC and 398, IPC. Section, 397 IPC connotes something more than merely being armed with deadly weapon.

(ii) In criminal trial one of the cardinal principles for the Court is to look for plausible explanation for the delay in lodging the report. Delay sometimes affords opportunity to the complainant to make deliberation upon the complaint and to make embellishment or even make fabrications. Delay defeats the chance of the unsoiled and untarnished version of the case to be presented before the Court at the earliest instance. That is why if there is delay in either coming before the police or before the Court, the Courts always view the allegations with suspicion and look for satisfactory explanation. If no such satisfaction is formed, the delay is treated as fatal to the prosecution case. In *Thulia Kali v. The State of Tamil Nadu, AIR 1973 SC 501,* it was held that the delay in lodging the first information report quite often results in embellishment as a result of afterthought. On account of delay, the report not only gets bereft of the advantage of spontaneity, but also danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of deliberation and consultation. In *Ram Jag and Ors. v. The State of U.P., AIR 1974 SC 606* the position was explained that whether the delay is so long as to throw a cloud of suspicion on the seeds of the prosecution case must depend upon a variety of factors which would vary from case to case. Even a long delay can be condoned if the witnesses have no motive for implicating the accused and/or when plausible explanation is offered for the same. On the other hand, prompt filing of the report is not an unmistakable guarantee of the truthfulness or authenticity of the version of the prosecution.

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***62. (i) INDIAN PENAL CODE, 1860 – Section 500**
Defamation, main ingredients of – Alleged act must be done with the intention that it is to be known by others – Demanding illegal gratification [By seeking about submitting herself (complainant) for fulfilling his lust] in the chamber by public servant – Offence u/s 500 of IPC not made out.

(ii) CRIMINAL PROCEDURE CODE, 1973 – Section 197
Sanction for prosecution, requirement of – Demanding illegal gratification is not an act covered under duties of public servant – Sanction for prosecution is not required.

(iii) JUDGES (PROTECTION) ACT, 1985 – Section 3 (1)
Protection u/s 3 (1) of the Judges (Protection) Act, extent of – SDM allegedly demanded illegal gratification to release a person on bail – Alleged act cannot be termed as if it was done in discharge of official or judicial duty – Protection u/s 3 (1) of the Act is not available.

Prakash Vyas v. Smt. Kamlesh Chauhan
Reported in 2007 (4) MPHT 484

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*63. LAND REVENUE CODE, 1959 (M.P.) – Section 164
Bhumiswami rights in agricultural land, devolution of – Bhumiswami rights devolves on the death of Bhumiswami on his heirs and not during his life time.

Ghanshyam v. Kanhiyalal and others
Reported in 2007 (4) MPLJ 418

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*64. LIMITATION ACT, 1963 – Article 75
Period of limitation to claim compensation for libel is one year – The right to sue for libel accrues from the date of publication of defamatory statement when it is published – Each such publication gives fresh cause of action.

Ram Niwas Gupta v. Dainik Sandhya Prakash and others
Reported in 2007 (4) MPLJ 225 (DB)

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*65. M.P. CIVIL SERVICES (PENSION) RULES, 1976 – Rule 9(4), Clause (b) of Third Proviso
Whether order reducing pension passed after two years from the date of retirement legal? Held, No – Further held, order of reduction in the pension of effecting recovery must be passed within two years from retirement.

B.P. Shrivastava v. State of Madhya Pradesh
Reported in 2007 (4) MPHT 410

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66. MOTOR VEHICLES ACT, 1988 – Section 128
Violation of S. 128 of the Act, effect of – Carrying more than one pillion rider on the motorcycle in contravention of S. 128 of the Act by a driver – Does not always raise a presumption either regarding contributory negligence on the part of motor cyclist or pillion rider

or regarding composite negligence on the part of motor cyclist – It is only when casual connection is established between the accident and the violation of the provision of S.128 of the Act that the question of contributory or of composite negligence can arise.

Devisingh v. Vikramsingh and others
Reported in 2007 (4) MPHT 535 (FB)

Held:

A plain reading of Section 128 of the Act quoted above, would show that sub-section (1) casts a duty on the driver of a two wheeled cycle not to carry more than one person in addition to himself on the motor cycle. Similarly, Rule 123 of the Rules quoted above mentions the safety devices to be provided while manufacturing a motor cycle. These provisions obviously are safety measures for the driver and pillion rider and breach of such safety measures may amount to "negligence" but such negligence will not amount to "contributory negligence" on the part of the pillion rider or "composite negligence" on the part of the driver of the motor cycle, unless such negligence was partly the immediate cause of the accident or damage suffered by the pillion rider as would be clear from the authorities discussed above.

Thus, we are of the considered opinion that if the damage in the accident has not been caused partly on account of violation of Section 128 of the Act by the pillion rider of the motor cycle, the pillion rider is not guilty of contributory negligence. Similarly, if the damage suffered by the pillion rider has not been caused partly on account of violation of Section 128 of the Act by the driver, the pillion rider cannot put up a plea of composite negligence by the driver. In other words, if breach of Section 128 of the Act, does not have a casual connection with the damage caused to the pillion rider, such breach would not amount to contributory negligence on the part of the pillion rider of the motor cycle or composite negligence on the part of the driver of motor cycle.

Accordingly, our answers to the questions referred to us are :—

(1) Violation of Section 128 of the Act, *per se*, by a motor cyclist does not raise a presumption of contributory negligence on his part;

(2) Similarly, violation of Section 128 of the Act *per se* does not amount to contributory negligence on the part of the pillion riders.

(3) A pillion rider cannot put up a plea of composite negligence by the driver of the motor cycle, if the driver only violates Section 128 of the Act.

We also hold that the view taken by the Division Bench of this Court in *Manjo Bee and others v. Sajjad Khan and others, 2000 ACJ 737,* is correct in law and the view taken by the Division Bench in *National Insurance Company Ltd. v. Smt. Usha Tiwari and others, 2007 (I) MANISA 204 (M.P.)* and in *Kanti Devi Sikarwar and others v. Om Prakash and others, 2007 (I) MPWN 88 = 2007 (1) M.P.H.T. 447,* is not correct in law.

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67. MOTOR VEHICLES ACT, 1988 – Sections 145 & 147

Liability of Insurance Company for indemnification, extent of –

(i) Any person other than the insurer and the insured is a third party – However the insurer would not be liable for any bodily injury or death of a third party in an accident unless the liability is fastened on the insurer u/s 147 of the Act or under the terms and conditions of the policy of insurance.

(ii) The insurer is not liable to cover any liability in respect of death or bodily injury of an employee u/s 147 (1) of the Act unless such employee falls in one of the categories mentioned in sub-clauses (a), (b) & (c) of Clause (i) of the proviso to sub-section (i) of S. 147 of the Act and further the insurer is liable only for the liability under the Workmen's Compensation Act, 1923.

Bhav Singh v. Smt. Savirani and others

Reported in 2007 (4) MPHT 460 (FB)

Held:

(i) ..... In a Full Bench judgment delivered by us in *Smt. Sunita Lokhand and others v. The New India Assurance Company Limited and others, ILR (2007) MP 1145,* we have quoted Paragraph 17 of the judgment of the Full Bench in *Jugal Kishore and another v. Ramlesh Devi and others, 2003 (4) MPLJ 546* to hold that the insured who is a party to the insurance is not a third party for the purpose of Chapter XI of the Act, particularly Section 147 thereof. Thus, any person other than the insurer and the insured who are parties to the insurance policy is a 'third party'. The insurer, however, would not be liable for any bodily injury or death of a third party in an accident unless the liability is fastened on the insurer under the provisions of Section 147 of the Act or under the terms and conditions of the policy of insurance. Hence, the mere fact that a passenger is a third party would not fasten liability on the insurer unless such liability arises under Section 147 of the Act or under the terms and conditions of the insurance policy.

This will be clear from the judgment of the Supreme Court in *Pushpabai Purshottam Udeshi v. Ranjit Ginning and Pressing Co., 1977 ACJ 343 (SC),* in which the provisions of Section 95 (a) and 95 (b) (i) of the Motor Vehicles Act, 1939 were considered and it was held by the Supreme Court that the plea that the words 'third party' are wide enough to cover all persons except the insured and the insurer is negatived as the insurance cover is not available to the passengers.....

We are thus of the opinion that the observations of the Full Bench in *Jugal Kishore* (supra), with regard to the meaning of 'third party' in Chapter XI of the Act has to be understood in the manner in which we have explained above.

(ii) Similarly, an employee is a third party inasmuch as he is not a party to the insurance policy. But merely because an employee is a third party, the insurance company would not be liable to compensate in case such employee suffers bodily injury or dies in an accident in which the motor vehicle is involved unless

section 147 of the Act files such liability on the insured or unless the terms and conditions of the contract of insurance liability on the insurer. Section 147 (1) (b) of the Act provides that in order to comply with the requirements of Chapter XI of the Act, a policy of insurance must be a policy which insures the person or classes of persons specified in the policy to the extent specified in sub-section (2) against the liabilities mentioned in clauses (i) and (ii) thereunder. The Proviso to sub-section (1) of Section 147 of the Act, however, states that a policy shall not be required to cover liability other than the liability arising under the Workmen's Compensation Act, 1923 in respect of the death of, or bodily injury to any of the three categories of employees mentioned in sub-clauses (a), (b) and (c) of clause (i) of the proviso to sub-section (1) of Section 147 of the Act. Hence, even if an employee is a passenger or a person travelling in a motor vehicle which is insured as per the requirements of sub-section (1) of section 147 of the Act, the insurer would not be liable to cover any liability in respect of death or bodily injury of such employee unless such employee falls in one of the categories mentioned in sub-clauses (a), (b) and (c) of clause (i) of the Proviso to sub-section (1) of Section 147 of the Act and further in cases where such employees fall under categories mentioned in sub-clauses (a), (b) and (c) of clause (i) of the Proviso to sub-section (1) of Section 147 of the Act, the insurer is liable only for the liability under the Workmen's Compensation Act, 1923.

This position of law has been clarified by Supreme Court in *National Insurance Company Limited v. Prembai Patel, AIR 2005 SC 2337.*

Regarding the Division Bench judgment in *National Insurance Co. Ltd. v. Sarvanlal and others, 2004 (4) M.P.H.T. 404 (DB),* we find that the Division Bench has relied on not only the judgment of the Full Bench in *Jugal Kishore* (supra), but also clause (vii) of Rule 97 of the Motor Vehicles Rules, 1994 (for short 'the Rules of 1994') made by the State of M.P. So far as the judgment of the Full Bench in *Jugal Kishore* (supra) is concerned, we have already clarified the position of law. Regarding clause (7) of Rule 97 of the Rules of 1994, we find that the Rules of 1994 have been made by the State of M.P. under Section 96 of the Act and in particular sub-section (2) (xxxi) which provides that without prejudice to the generality of the foregoing power, rules under Section 96 may be made with respect to the carriage of persons other than the driver in goods carriages. Section 96 is placed in Chapter V of the Act which relates to 'Control of Transport Vehicles'. Sub-section (1) of Section 96 of the Act states that the State Government may make rules for the purpose of carrying into effect the provisions of Chapter V. Hence, Rule 97 of the Rules of 1994 has been made by the State Government to give effect to the provisions of Chapter V of the Act, which, as we have seen, relates to 'control of transport vehicles'. These rules obviously cannot have a bearing in interpreting the provisions of Chapter XI of the Act including Sections 145 and 147 of the Act. As we have indicated above, the liability of the insurer to indemnify the insured in respect of death or bodily injury suffered by a passenger or an employee would be covered by the provision of

Section 147 of the Act or the terms and conditions of the insurance policy. Thus, the decision of the Division Bench in *Sarwan Lal* (supra), in so far as it relies on Rule 97 of the Rules of 1994 to hold the insurer liable for death or bodily injury suffered by the passenger does not lay down the correct law.

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68. MOTOR VEHICLES ACT, 1988 – Section 147

Contributory negligence – Collision between a van and tanker – Resulting in death of driver of van – Tribunal found that driver of tanker was liable for parking the vehicle in the mid-road at night and driver of van was liable for driving the vehicle rashly and negligently and held that both the drivers were equally negligent.

Motor Insurance Policy – Dishonour of cheque – Liability of insurance company – Once the cover note/policy is issued Insurance Company becomes liable to indemnify the third party liability – However, the amount so paid can be recovered from the owner of the vehicle.

Anuradha Kaushik and others v. Varun Ground Water Development Corporation and others

Reported in 2007 ACJ 2877 (DB)

Held:

Since it is a case of third party accident, even in the case of cancellation of the policy on dishonour of cheque the insurance company is liable under statutory liability. The learned Tribunal has already placed reliance on the decisions in the cases of *Oriental Insurance Co. Ltd. v. Inderjit Kaur, 1998 ACJ 123 (SC)* and *New India Assurance Co. Ltd. v. Rula, 2000 ACJ 630 (SC)*, in which the Supreme Court has held that once the cover note/policy is issued, the insurance company becomes liable to indemnify the third party liability. Similar is the case in hand. Therefore, when the right of recovery is given to the insurance company, in the light of the aforesaid decisions, we do not find that the Tribunal has committed any illegality and in the light of the aforesaid right we do not find any merit in the appeal filed by the insurance company, as their rights are already protected. Accordingly, the appeal filed by the insurance company is dismissed .. ,

Since the Tribunal has recorded a positive finding that the driver of the tanker was also liable for parking the vehicle in the mid-road and the driver of Maruti van was also liable for driving the vehicle rashly and negligently, therefore, both are liable and their liability is contributory. In such type of accidents only one party cannot be held to be liable. Thus, we are also of the view that the Tribunal has recorded a positive finding and has rightly apportioned the liability between the parties as 50:50. Considering the aforesaid finding we do not find that any case is made out for reversal of the said finding. Accordingly, the finding recorded by the Tribunal appears to be just and proper and no interference is called for.

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69. MOTOR VEHICLES ACT, 1988 – Section 166

Principles of assessment of quantum in case of fatal accident – Deceased had shown his business income, income from bonds and income of minor son in his income tax return – Whether the entire income of the deceased to be taken into consideration for computing compensation? Held, No.

New India Assurance Co. Ltd. v. Pramila and others

Reported in 2007 ACJ 2840 (DB)

Held:

The manner of arriving at the damages is to ascertain the net income of the deceased available for the support of himself and his dependants and to deduct therefrom such part of his income as the deceased was accustomed to spend upon himself, as regards both self-maintenance and pleasure and to ascertain what part of his net income the deceased was accustomed to spend for the benefit of the dependants. Then that should be capitalized by multiplying it by a figure representing the proper number of years' punchase.

When we apply the aforementioned principle to the facts of this case then it becomes clear that only that income could have been taken as basis which the deceased was actually earning from his business and which due to his death has ceased to earn, resulting in loss to his dependants, i.e., claimants herein. In other words what the deceased was earning from his business alone could be made basis for determining the compensation payable to dependants because it is that sum which is now no longer available to the dependants due to untimely death of deceased. Applying this principle which is discernible from the law laid down by the Supreme Court quoted in ***Gobald Motor Service Ltd. v. R.M.K. Veluswami, 1958-65 ACJ 179 (SC),*** income of Rs. 1,27,346 which was shown by the deceased in his last return (i.e., prior to his death) as income earned from business should have been made basis for calculation. It is this income which has ceased due to his death and becomes a loss to the dependants (claimants). So far as income earned by deceased from interest i.e., Rs. 20,707 was concerned, it may be taxable or non-taxable but the same could not be regarded as loss to the dependants because due to death of the deceased, the amount remained in deposit and at best it would have gone to his nominee. In other words, the interest income was being earned from deposits made in HUDCO/IDBI bonds and, hence, the same was a recurring income to deceased and on his death to any of his nominees, nominated in the bonds. In these circumstances, we do not consider it proper to hold that income earned by deceased from these deposits was also a loss to the dependants. In our considered view, this part of income, i.e., Rs. 20,707 earned as interest, should have been excluded from considering the loss to the dependants. Same is the case in relation to income shown in the third head, i.e., Rs. 84,240. This income was also not a business income of deceased but it was shown to be an income

earned by deceased's minor son out of the capital standing in the name of minor son. It is due to the scheme of the Income Tax Act, the income of minor children is required to be clubbed in the hands of minor's father which in turn obliges the deceased, i.e., father to include in his return for payment of income tax. In no case, it could be regarded as income earned by the deceased from his own business. In other words, the income of minor remains his own income and he had a right to utilise it on his attaining majority it being his own capital. In our opinion, thus, even this amount (Rs. 84,240) could not have been made basis for determining the compensation payable to the dependants because it was not the income of the deceased from his business.

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***70. MOTOR VEHICLES ACT, 1988 – Section 149 (2)**

Fake driving licence – Liability of Insurance Company – Owner had verified the licence and on prima facie scrutiny found it to be correct and there was nothing to show that it was interpolated and not a genuine one – In such circumstances in case of fake licence Insurance Company is not exempted from the liability – *Lal Chand v. Oriental Insurance Co. Ltd., 2006 ACJ 2161 (SC)* followed.

Prahalad Rai v.Shashi Kori and others

Reported 2007 ACJ 2575 (MP) (DB)

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***71. MOTOR VEHICLES ACT, 1988 – Section 149 (2)**

Fake Licence – Liability of Insurance Company – Licence of driver of offending vehicle was not insured by the concerned R.T.O. – Licence was subsequently renewed – No evidence to show that owner had knowledge about it – There was no breach of policy condition by the owner – Insurance Company cannot be exonerated from liability.

Sunita Bai and others v. Rammu Patel and others

Reported in 2007 ACJ 2640 (MP) (DB)

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

Contributory negligence – The accident occurred due to collision between the vehicle in which claimant was travelling and the offending truck – That claimant kept his hand outside the vehicle which ensued in causation of injuries and therefore, he had contributed to the same and the said contributory negligence could be assessed at 25 per cent.

Trilok Chand v. Purshottam and others

Reported in 2007 ACJ 2473 (MP) (DB)

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*73. MOTOR VEHICLES ACT, 1988 – Section 166

Composite negligence – Apportionment of *inter se* liability – No specific evidence led by parties on both sides as to the extent the driver of each truck was responsible for the accident – Both tortfeasors jointly liable to pay compensation.

Goods vehicle – Passenger risk – Liability of insurance company in case of composite negligence – Whether insurance company of truck in which passenger was tavelling is liable? Held, No – *2005 ACJ 721 (SC)* followed.

Lalit v. Abdul Rashid and others

Reported in 2007 ACJ 2771

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*74. MOTOR VEHICLES ACT, 1988 – Section 166

Fatal accident – Deceased a child – Principles of assessment of quantum of compensation – If parents establish that they had a reasonable expectation of pecuniary benefit in case the child had lived, they are entitled to claim prospective loss.

Deceased a boy aged 7, student of second standard – Tribunal allowed Rs. 50,000/- plus Rs. 1,000/- for funeral expenses and Rs. 500/- towards medical expenses – High Court enhanced the award to Rs. 1,52,000/- – Apex Court observed : "This Court in *Lata Wadhwa v. State of Bihar, 2001 ACJ 1735 (SC)* while computing compensation made distinction between deceased children falling within the age group of 5 to 10 years and age group of 10 to 15 years.

In cases of young children of tender age, in view of uncertainties abound, neither their income at the time of death nor the prospects of the future increase in their income nor chances of advancement of their career are capable of proper determination on estimated basis. The reason is that at such an early age, the uncertainties in regard to their academic pursuits, achievements in career and thereafter advancement in life are so many that nothing can be assumed with reasonable certainty. Therefore, neither the income of the deceased child is capable of assessment on estimated basis nor the financial loss suffered by the parents is capable of mathematical computation". Tribunal's award maintained.

Oriental Insurance Co. Ltd. v. Syed Ibrahim and others

Reported in 2007 ACJ 2816 (SC)

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***75. NEGOTIABLE INSTRUMENTS ACT, 1881 – Sections 5, 6, 9 & 138**
'A' filed a private complaint against 'B' who had issued cheque mentioning the word 'self' – Trial Court took cognizance of the offence u/s 138 of the Act – Petitioner contended that cheque was not issued to respondent in his name – Held, the cheque is appearing to be issued for liability of debt and because the words 'or bearer' were not cut – S.138 of the Act applicable.
Babulal Jain v. Kewalchand Jain
Reported in 2007 (4) MPHT 371

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***76. NEGOTIABLE INSTRUMENTS ACT, 1881 – Section 138**
Complaint u/s 138 of the Act was filed without signature of the complainant – He was willing to rectify defect – Held, if mistake could be cured without causing prejudice to opposite party, should be allowed to be rectified.
Smt. Shashi Shrivastava v. Jagdishsingh Kushwah
Reported in 2007 (4) MPHT 480

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77. NEGOTIABLE INSTRUMENTS ACT, 1881 – Sections 138 (b), (c) and 142
Whether it is necessary for the payee or holder in due course of any cheque to mention 15 days time for payment of amount demanded? Held, No – Further held, if complaint is filed before arising of cause of action, Court can keep it pending and take cognizance after arising of cause of action.
Dhirajsingh v. Sardarsingh and another
Reported in 2007 (4) MPHT 362

Held:

.....looking to the substantial question of law involved in this case, this Court feels it just and proper to decide the pure question of law viz., Whether under Section 138 (Proviso – c) of Negotiable Instruments Act, 1881 (hereinafter referred to as 'the Act') it is necessary for the payee or the holder in due course of the cheque is required to mention the period of 15 days for payment of the cheque amount to the drawer in a statutory notice required to be sent by the payee or holder of the cheque as per provision under Section 138 Proviso (b)....

The Supreme Court, in the case of *Narsingh Das Tapadia v. Goverdhanlal, AIR 2000 SC 2946* has held that "filing of complaint before expiry of notice period contemplated by Section 138 (c) would not be sufficient for dismissal of the complaint on the ground that the complaint was filed in a premature stage". In this case, the Supreme Court has discussed and distinguished between taking cognizance and filing of complaint and held that "even if the complaint is filed, before arising of cause of action, the same cannot be dismissed and the Court

can keep the complaint pending and take cognizance after arising of the cause of action". This *ratio decidendi* in the case of *Narsingh Das Tapadia* (supra) is clearly indicating that the complaint can be filed before arising of the cause of action, but cognizance can be taken only after arising of cause of action meaning thereby mentioning of 15 days time in the notice is not necessary, but the drawer of the cheque can make the payment within 15 days of te receipt of the said notice. This view is supported by the view taken by the Madras High Court in the case of *P.V.R.S. Mani Kumar v. Krishna Reddy, (1999) Cri.LJ 2010)* as well as the Supreme Court judgment passed in the case of Central *Bank of India and another v. M/s Saxons Farms and others, 1999 Cri.LJ 4571).* In this case the arguments were advanced on behalf of the accused before the High Court that in the demand notice, as per provision under Section 138 Proviso (b) the intention of filing criminal complaint as per provision under Section 142 of the Act was not mentioned, therefore, the notice did not fulfill the requirement and the complaint was not maintainable. The High Court accepted the arguments and quashed the complaint against which the complainant went up before the Supreme Court and the Supreme Court has held that "in view of the wording mentioned in the notice, the complainant has expressed his intention to take legal action against the accused and he need not mention in clear words what action he was going to take and in addition to filing of criminal complaint under the Act complainant can also expose the accused by; prosecuting him under the Indian Penal Code." This interpretation of the Supreme Court is clearly indicating that in the notice under Section 138 Provisos (b) and (c) the complainant is required to demand the amount and express his intention for prosecution of the accused upon non-payment of amount.

In view of the foregoing discussion, the Court is of the considered view that the view taken by this Court in the case of *Arihant Fertilizers Ltd., Indore v. Rahul Builders, Neemuch and another, 2005(3) MPLJ 444,* that in the notice complainant is duty bound to mention 15 days time for payment of amount demanded and if less time is mentioned in the notice, the complaint is not maintainable, has not laid down the correct law. Therefore, the same is hereby overruled.

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78. PREVENTION OF CORRUPTION ACT, 1988 – Section 7
Bribe – Money handed over to one for passing it to an official concerned – No evidence to show that the person receiving money has knowledge that it is bribe – Explanation offered by the person is also acceptable – In such position person cannot be convicted as conduit.
K. Subba Reddy v. State of A.P.
Judgment dated 28.09.2007 passed by the Supreme Court in Criminal Appeal No. 1309 of 2007, reported in (2007) 8 SCC 246

Held :

There is no material to show about the knowledge of A-2 regarding the money being bribe. He had offered the explanation that the money was to be paid to Subbarayudu. In this connection, reference is made to the evidence of PW-1. He has only stated that A-1 asked him to hand over the money to A-2 if he had gone out for checking of shops.

The appellant (A-2) at the relevant point of time was working as a Home Guard. He was assigned different duties at different places. It is accepted in the cross examination by PW-1 that there is no Sub-treasury at Mydukur and if anybody wants to remit money to the Government, one has to go out to different places. It is also accepted that there is a practice of giving money to some boys working in the shops or some places to remit the money to the Government treasury at different places indicated by the shop owners. It was also accepted that Subbarayudu was a person who used to remit the amount to Government on behalf of shop owners. It is the accepted position that the present appellant had no role to play in the return of the stock register. It is the prosecution case that A-1 had wanted the bribe to be paid for the return of the stock register. Above being the position, the material is not sufficient to hold the appellant guilty. His conviction is accordinglyset aside.

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***79. PREVENTION OF CORRUPTION ACT, 1988 – Sections 17 Second Proviso and 13 (1) (e)**
CRIMINAL PROCEDURE CODE, 1973 – Section 465

(i) Offences punishable under the Prevention of Corruption Act – Property disproportionate to the known sources of income can be investigated by the SP in Special Police Establishment.

(ii) Illegality, if any, committed in the course of investigation does not affect the competence and jurisdiction of the Court to take cognizance and try the offence.

Ramjit Singh v. State of M.P.
Reported in 2007 (4) MPLJ 581

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***80. PREVENTION OF CORRUPTION ACT, 1988 – Section 19**
CRIMINAL PROCEDURE CODE, 1973 – Section 300
Invalid Sanction – Applicant tried for offences punishable under S. 13 (1) (d) r/w/s 13(2) Prevention of Corruption Act – Trial Court acquitted applicant for want of valid sanction – Fresh chargesheet filed – Held, accused acquitted or discharged on the ground of invalid sanction for Prosecution – Filing of new charge sheet not barred by Section 300 Cr.P.C.

Ajay Rai v. State of M. P.
Reported in I.L.R. (2007) M.P. 1821

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*81. **PREVENTION OF FOOD ADULTERATION RULES, 1955–**
Rules 32 (c) (i) & 50
Complaint for the offence punishable u/s 7 (II & III) r/w/s/ 16 (1) (A) (I & II) of the Prevention of Food Adulteration Act, 1954 alleging breach of Rules 32 (c) (i) and 50 of the Prevention of Food Adulteration Rules was filed against petitioner company – Provisions contained in Rule 32 (c) (i) was not applicable at the time of incident but came into force later on – Held, Prosecution for the alleged breach of the Rule is erroneous and amounts to abuse of process of law – Criminal proceedings quashed.

K. Bhattacharya and others v. State of M.P. and others

Reported in 2007 (4) MPLJ 263

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82. **PROTECTION OF HUMAN RIGHTS ACT, 1993 – Section 30**
Violation of human rights, taking cognizance of – Court of Sessions cannot take direct cognizance of any offence unless the case is committed to that Court for trial by competent Magistrate.

Rajendra Dattatray Bapat v. Nagar Palik Nigam, Dewas and another

Reported in 2007 (4) MPHT 358

Held:

I have taken into consideration the contentions raised by the petitioner. It is clear that Protection of Human Rights Act, 1993 does not provide any specific procedure for trial of the offences regarding violation of human rights by someone. Only Specific Court being Court of Session has been designated as Human Rights Court under Section 30 of the Act. A provision for appointment of Special Public Prosecutor has also been incorporated in the Act under Section 31 of the Act.

As no specific procedure has been provided in the Protection of Human Rights Act, 1993, therefore, the general provision of Code of Criminal Procedure, 1973, regarding procedure of trial of case will be applicable. Court of Sessions though, it is required to work as a Special Court under the provisions of this Act remains Court of Sessions and that Court cannot take direct cognizance of any offence, unless the case is committed to that Court for trial by any Competent Magistrate. Therefore, the opinion expressed by learned Sessions Judge appears perfectly according to law. It does not appear that learned Sessions Judge Dewas has committed any irregularity, illegality and impropriety in passing the impugned order of returning the complaint to the complainant for presenting the same before a Competent Court.

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83. PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005 – Section 12 (3)

Filing complaint to Magistrate – Procedure – Merely complaint is not filed in prescribed form is no ground to dismiss complaint – Aggrieved person can file complaint directly to Magistrate – If she wants, may approach the Protection Officer – In emergency, she can take help from the service provider – Complaint cannot be rejected on the ground of verification if affidavit is also filed in support of complaint.

Milan Kumar Singh and Anr. v. State of U.P. and Anr.

Reported in 2007 Cr.L.J. 4742

Held:

..... Learned counsel for the applicants has placed before me a few legal points. According to him, there is no compliance of Rule 6 of the Protection of Women from Domestic Violence Rules, 2006 (hereinafter referred to as the Rules). According to these Rules, the complaint must be filed in Form II given in the Rules. He has argued that without compliance of Rule 6, the complaint cannot be entertained by the Magistrate. Rule 6 of the said Rules is quoted below:

> **Rule 6 : Application to the Magistrate** - (1) Every application of the aggrieved person under Section 12 shall be in Form II or as nearly as possible thereto.
>
> (2) An aggrieved person may seek the assistance of the Protection Officer in preparing her application under sub-rule (1) and forwarding the same to the concerned Magistrate.
>
> (3) In case the aggrieved person is illiterate, the Protection Officer shall read over the application and explain to her the contents thereof.
>
> (4) The affidavit to be filed under sub-section (2) of Section 23 shall be filed in Form III.
>
> (5) The applications under section 12 shall be dealt with and the orders enforced in the same manner laid down under section 125 of the Code of Criminal Procedure, 1973 (2 of 1974).

Section 12(3) of said Act also provides procedure for filing application under sub-section (1) which runs as under :

> **12 (3)** - Every application under sub-section (1) shall be in such form and contain such particulars as may be prescribed or as nearly as possible thereto.

Though, learned counsel for the applicants has given a good reasoning in support of his argument, but I see no force in this contention. The words "as nearly as possible thereto" appeared in Section 12 (3) of the Act and Rule 6 both. This is the social legislation and purpose of the Act is not to create hurdle before the aggrieved person in filing the complaint, but Form has been prescribed in the Rules, only to facilitate filing of complaint so that it may contain all necessary particulars for decision of the case. If any complaint is drafted in such a manner with all necessary particulars and usual information required by prescribed Form are contained therein, that cannot be said to be a bad complaint in the eye of law. The Form prescribed by the Act is nothing else, but proper forum and facility given to the complainant for placing all relevant facts before the court concerned. The Legislature was very much aware of this fact, that is why both in Section 12 and Rule 6, the words "as nearly as possible thereto" have been mentioned. The intention of the Legislature was not at all to reject the complaint for not filing in prescribed Form II.

The next point, which has been vehemently argued by learned counsel for the applicants is that the complaint cannot be filed directly to the Magistrate, but it should be filed before the Protection Officer as defined in Section 2(n) of the Act and on receiving the complaint, the Protection Officer will submit Domestic Incident Report and then the Magistrate will take cognizance of the matter. The power of protection Officer has been given in Section 9 of the Act. The services of service providers as provided in section 2(r) of the Act may also be taken. The duties of service provider has been provided under section 10 of the said Act. But a plain perusal of these provisions clearly show that this argument of learned counsel for the applicant has no legal force that any aggrieved person cannot file complaint directly to the Magistrate concerned. Section 12 of the Act reads as under :

Section 12. Application to Magistrate - (1) An aggrieved person of a Protection Officer or any other person on behalf of the aggrieved person may present an application to the Magistrate seeking one or more reliefs under this Act :

Provided that before passing any order on such application, the Magistrate shall take into consideration any domestic incident report received by him from the Protection Officer or the service provider.

(2) The relief sought for under sub-section (1) may include a relief for issuance of an order for payment of compensation or damages without prejudice to the right of such person to institute a suit for compensation or damages for the injuries caused by the acts of domestic violence committed by the respondent:

Provided that where a decree for any amount as compensation or damages has been passed by any Court in favour of the aggrieved person, the amount, if any, paid or payable in pursuance of the order made by the Magistrate under this Act shall be set off against the amount payable under such decree and the decree shall, notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908), or any other law for the time being in force, be executable for the balance amount, if any, left after such set off.

(3) Every application under sub-section (1) shall be in such form and contain such particulars as may be prescribed or as nearly as possible thereto.

(4) The Magistrate shall fix the first date of hearing, which shall not ordinarily be beyond three days from the date of the application by the court.

(5) The Magistrate shall endeavour to dispose of every application made under sub-section (1) within a period of sixty days from the date of its first hearing.

A plain reading of the Section shows that the aggrieved person can file complaint directly to the Magistrate concerned. This is the choice of the aggrieved person that instead of directly approaching the Magistrate, he or she can approach the Protection Officer and in case of emergency, the service provider and with their help to the Magistrate concerned. The word "or" used in Section 12 of the Act is very material, which provides a choice to the aggrieved person to approach in the aforesaid manner. There is no illegality in directly approaching the Magistrate for taking cognizance in the matter. This is for the Magistrate concerned to take help of Protection Officer and service provider after receiving the complaint provided, he feels it necessary for final disposal of the dispute between the parties. If the parties concerned or Magistrate takes help of the Protection Officer, he will submit a Domestic Incident Report to the Magistrate concerned.

The Form II provides mode of verification of affidavit. Learned counsel for the applicant has contended that since on the bottom of the complaint, no such verification note has been annexed, therefore, also the complaint filed before the Magistrate is bad in law. But this argument has no force because in support of the complaint, the opposite party No. 2 has filed an affidavit swearing contents of the complaint. Therefore, that lacuna is duly filled up. Any law, does not provide for rejection of the complaint only on the basis that it does not contain verification note on the complaint itself. The purpose of the Act is to cause prima facie belief to the authority concerned where the complaint is filed on the basis of affidavit or verification note about contents of application. In the present case also, an affidavit has been filed in support of complaint which is properly verified.

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*84. PUBLIC GAMBLING ACT, 1867 – Sections 3, 4, 5 & 6

Power to enter and authorize police to enter and search – House of applicant was searched after obtaining authorization from City Superintendent of Police – Applicant ran away from the house whereas several persons were found gaming – Playing Cards and money were seized – Applicant convicted by Courts below under Ss. 3 and 4 of Act, 1867 – Held, Authorization Warrant not proved in trial – City Superintendent of Police not examined – Un-exhibited Authorization warrant which is in shows that warrant is a printed proforma – It means non-application of mind by officer – Authorization Warrant has no force in the eye of law – No presumption can be drawn under Section 6 of Act – Applicant acquitted.

Rakesh Rai v. State

Reported in I.L.R. (2007) M.P. 1717

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*85. PUBLIC TRUST ACT, 1951 (M.P) – Section 8

CIVIL PROCEDURE CODE, 1908 – Section 80

(i) In a suit u/s 8 of the M.P. Public Trust Act against finding of the Registrar, notice u/s 80 of CPC is required to be given to the State Government and Registrar of Public Trust

(ii) Suit against finding of the Registrar cannot be dismissed after issuance of a notice u/s 8(2) of M.P. Public Trust Act in case State Government through Registrar chooses not to defend the suit.

(iii) A notice u/s 80 of CPC can be waived by a party protected by S. 80 – Such waiver binds the rest of the parties and party who has himself no right to a notice cannot challenge a suit on the ground of want of notice to the only party entitled to receive it.

Asharam Dixit v. Narayan and others

Reported in 2007 (4) MPLJ 251 (DB)

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*86. SOCIETIES REGISTRIKARAN ADHINIYAM, 1973 (M.P.) – Sections 3 (f) & 33

Govt. aided Society – Question whether State aided Society would mean society which receives or received aid, grant or loan in the current year or would also mean society which had received aid, grant or loan in previous year referred to Full Bench? Respondent Society not being paid any grant-in-aid since 2001 – Govt. superseded governing body of Society and appointed administrator – Writ Petition allowed holding that the society was not a State aided society – Held, State aided society means which not only receives aid, grant or loan for the present but

also has received aid, grant or loan in past and financial interest of Central Govt., State Govt. or statutory body in society subsists – Would not cover Society which has received aid, grant or loan in past but in which Central Govt. or State Govt. or any Statutory Body which had granted aid, grant or loan does not continue to have any financial interest – Reference answered accordingly.

State of Madhya Pradesh v. Chandra Shekhar Azad Shiksha Prasad Samiti, Bhind

Reported in I.L.R. (2007) M.P. 1545

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*87. **SPECIFIC RELIEF ACT, 1963 – Section 16 (c)**

Suit for specific performance of contract decreed by the Trial Court – Appellant (defendant) filed appeal against the judgment and decree – Held, respondent (purchaser) was neither ready and willing to get the sale deed executed nor it appears that he came with clean hands and further he did not comply with the conditions of the agreement – Decree set aside and appellant directed to refund the respondent sum of Rs. 1,00,000/- in lump sum within one month failing which directed further to pay interest @ 15% p.a. on amount to be refunded.

Nirmal Kumar v. Smt. Kanta Devi

Reported in 2007 (4) MPLJ 464

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88. **STAMP ACT, 1899 – Sections 33, 35 & 37**

STAMP RULES, 1942 (M.P.) – Rule 19

Whether the photocopy of instruments bearing stamp of sufficient amount but of improper description could be impounded? Held, No – Law explained.

Hariom Agrawal v. Prakash Chand Malviya

Judgment dated 08.10.2007 passed by the Supreme Court in Civil Appeal No. 4696 of 2007, reported in (2007) 8 SCC 514

Held :

It is clear from the decisions of this Court and a plain reading of Sections 33, 35 and 2(14) of the Act that an instrument which is not duly stamped can be impounded and when the required fee and penalty has been paid for such instrument it can be taken in evidence under Section 35 of the Stamp Act. Sections 33 or 35 are not concerned with any copy of the instrument and party can only be allowed to rely on the document which is an instrument within the meaning of Section 2(14). There is no scope for the inclusion of the copy of the document for the purposes of the Stamp Act. Law is now no doubt well settled that copy of the instrument cannot be validated by impounding and this cannot be admitted as secondary evidence under the Indian Stamp Act, 1899.

Section 37 of the Act would be attracted where although the instrument bears a stamp of sufficient amount but such stamp is of improper description, as in the present case where the proper stamp duty of Re.1/- under the Act has not been paid but a notarized stamp of Rs.4/- was affixed on the document. The sufficient amount of the stamp duty has been paid but the duty paid by means of affixture of notarized stamp is of improper description.

By virtue of Rule 19 of the Madhya Pradesh Stamp Rules, 1942, the Collector of Stamp is authorized to receive the proper stamp duty on an instrument which bears a stamp of proper amount but of improper description, and on payment of the adequate duty chargeable under the Act he would certify by endorsement on the instrument that the instrument is duly stamped. Under the proviso to the Rule, the Collector may pardon the further payment of duty prescribed in this Rule provided the person holding the original instrument moves the Collector within three months of the execution of the instrument for certification by endorsement and the Collector is satisfied that the stamp of improper description was used solely on the account of the difficulty or inconvenience of the holder of the instrument to procure the adequate stamp duty required to be paid on the instrument. But the power under Section 37 and Rule 19, even after framing the rules by the State Government, could only be exercised for a document which is an instrument as described under Section 2(14). By various authorities of this Court, an instrument is held to be an original instrument and does not include a copy thereof. Therefore, Section 37 and Rule 19 would not be applicable where a copy of the document is sought to be produced for impounding or for admission as evidence in a case.

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***89. STATE RE-ORGANIZATION ACT, 2000 (M.P.) – Section 68**

Provisions relating to services in M.P. and Chhatisgarh – Allocation – 8 posts of Joint Registrar and 14 posts of Dy. Registrar, Co-operative Department allotted to State of Chhatisgarh – State of Chhatisgarh informed that only 6 posts of Joint Registrar and 18 posts of Dy. Registrar required – Six officers already given their option for State of Chhatisgarh – Allocation of respondent no. 1 quashed by Learned Single Judge – Held, successor States can agree to number of posts in a cadre to be allotted to a State – If two States have agreed to number of particular posts which will be divided between States, the same cannot be held to be violative of S.68.

Parasnath Singh v. G.C. Kewalremani

Reported in I.L.R. (2007) M.P. 1566

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

Execution of Will, proof of – The Will must be proved in accordance with law as laid down in S. 68 of the Evidence Act r/w/s 63 of the Indian Succession Act – The *onus probandi* lies in every case upon the party propounding a Will and he must satisfy the conscience of the Court that the instrument so propounded is the last Will of a free and capable testator.

Chandrakanta Jaiswal v. Leela Bai and others

Reported in 2007 (4) MPLJ 289

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91. SUCCESSION ACT, 1925 – Sections 283 & 307 (i)

Probate proceedings – Transfer of property during probate proceedings – Transferee is not a necessary party – Citations are necessary to be made only of those who claim through or under the Will or deny or dispute the execution of Will.

Sunil Gupta v. Kiran Girhotra and others

Judgment dated 09.10.2007 passed by the Supreme Court in Civil Appeal No.4729 of 2007, reported in (2007) 8 SCC 506

Held :

A transferee of a property during the pendency of a proceeding is not a necessary party. Citations are necessary to be made to only those who, inter alia, claim through or under the will or deny or dispute the execution thereof.

Citation, as is well-known, should be conspicuously displayed on a notice board. Before purchasing the properties, Amit Pahwa and consequently the appellant had taken a calculated risk. In a situation of this nature, he is not a necessary party. He took the risk of the result of the probate proceedings. His apprehension that Raj Kumar may not take any interest in the litigation cannot by itself a ground for interfering with the impugned judgment. It is speculative in nature.

In *Seth Beni Chand v. Kamla Kunwar, (1976) 4 SCC 554* whereupon reliance has been placed by Mr. Ramachandran, this Court was considering an argument as to whether alienees of properties are entitled to citation in probate proceedings. This Court proceeded on the assumption that *Banwarilal Shrinivas v. Kusum Bai, AIR 1973 MP 69* lays down the correct law. But even therein a distinction was made stating that the alienee was a transferee pendent lite. The said decision, therefore, is an authority for the proposition that no citation need be issued to any person who had no right to the property prior to the commencement of the probate proceedings. This Court in no uncertain term opined that the alienees had no right to be heard in the appeal. The said decision, therefore, runs counter to the submission of Mr. Ramachandran.

We may notice that a Division Bench of the Delhi High Court in *Indian Associates v. Shivendra Bahadur Singh, AIR 2003 Del 292,* opined that the court must be satisfied in regard to the execution of the Will. It is not concerned with any other arrangement. It was held:

> "26. The respondent on the other hand have tried to distinguish the cases relied upon by the appellant by contending that all those were cases where, certain persons were allowed to intervene or were impleaded but all were cases of family members and as such these decisions are no authority for the proposition that a third party purchaser as the appellant-herein, could apply to be made a party in probate proceedings.
>
> 27. During the hearing of the matter, we drew the attention of both the parties to the provisions of Section 307 of the Succession Act, which made the permission of the court to be mandatory for purposes of transfer of property by an administrator. Both the parties were heard on this aspect."

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92. TORTS:

Medical negligence – Family Planning Operation, failure of – Suit for damages filed for monetary burden of bringing up and providing basic and necessary amenities to the unwanted child.

Defence put forth that doctor is qualified and there was no negligence on her part in performing the operation and failure of operation can be for a variety of reasons.

Plaintiff failed to prove the negligence of the doctor by cogent evidence – Trial Court was justified in dismissing the suit.

Shiv Kali Bai v. Dr. Sunanda Choudhary and others

Reported in 2007 ACJ 2607 (MP) (DB)

Held:

It is pertinent to mention here that the appellant admitted in para 19 of her cross-examination that the respondent No. I had performed the operation with full care and caution and under great skill. In the cross-examination suggestion was given to her that she should have kept away from her husband for 6 months, as advised by the respondent No.1 and not having done so, obviously it had to result in a pregnancy and that is how appel1ant had become pregnant. By the time, she was examined by the respondent No.1, it was too late to go for any operation. She had admitted in her cross-examination that neither she got herself examined nor made any enquiries from any of the doctors asking her the reasons for failure of the operation. She has admitted with regard to the undertaking given by her before the operation. For all these reasons, it was submitted that

the plaint of appellant deserves to be allowed and learned trial Judge committed an error in dismissing the same.

The appellant did not produce any expert evidence to prove negligence on the part of respondent No. 1 in performing the tubectomy operation.

Respondents examined Dr. Sunanda Choudhary, DW 1. She has deposed with regard to her qualification and also with regard to operation having been performed for sterilisation on appellant on 17.11.1994 at Khwasa Camp. The said operation was performed in the course of her official duty. Necessary precautions, which were required to be observed, were explained to the appellant. She has deposed that failure of this operation is to the extent of 7-8 per cent. In case of failure of the operation, she would not be liable to pay any damages, as there was no negligence on her part. It could have been for a variety of reasons. She had denied that the failure was on account of her negligence or callousness. She has denied that appellant had come to her soon after her first menstrual cycle was missed. If she had done so, then safely the pregnancy could have been terminated. This would go to show that appellant was not interested in getting the pregnancy terminated. Hence, it would not be called an unwanted child.

The question of medical negligence had cropped up for consideration before the Supreme Court in *State of Haryana v. Santra, 2000 ACJ 1188 (SC)*. The observations of the Supreme Court in para 42 are mentioned herein below:

> "(42) Having regard to the above discussion, we are positively of the view that in a country where the population is increasing by the tick of every second on the clock and the government had taken up the family planning as an important programme, for implementation of which it had created mass awakening for the use of various devices including the sterilisation operation, the doctor as also the State must be held responsible in damages if the sterilisation operation performed by him is a failure on account of his negligence, which is directly responsible for another birth in the family, creating additional economic burden on the person who had chosen to be operated upon for sterilisation."

In the same judgment, negligence has also been considered, which finds place in para 10, reproduced hereinbelow:

> "(10) Negligence is a 'tort'. Every doctor who enters into the medical profession has a duty to act with a reasonable degree of care and skill. This is what is known as 'implied undertaking' by a member of the medical profession that he would use a fair, reasonable and competent degree of

skill. In *Bolam v. Friern Hospital Management Committee, (1957) 2 All ER 118, McNair, J.,* summmed up the law as under:

> 'The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art. In the case of a medical man, negligence means failure to act in accordance with the standards of reasonably competent medical men at the time. There may be one or more perfectly proper standards, and if he conforms with one of these proper standards, then he is not negligent'."

However, the view expressed by the Apex Court in the matter of *Santra* (supra) has been distinguished by a three-Judge Bench of the Supreme Court in *State of Punjab v. Shiv Ram, (2005) 7 SCC.* In the said case, it has been held as under:

> "Merely because a woman after having undergone a sterilisation operation became pregnant and delivered a child, the operating surgeon or his employer cannot be held liable for compensation on account of unwanted pregnancy or unwanted child. The claim in tort in such cases can be sustained only if there was negligence on the part of the surgeon in performing the surgery and not on account of childbirth. The proof of negligence shall have to satisfy *Bolam's test, (1957) 2 All ER, 118, 121 D-F,* set out in Jacob *Mathew's case, 2005 ACJ 1840 (SC)* at page 1850, para 20. Failure due to natural causes would not provide any ground for a claim. It is for the woman who has conceived the child to go or not to go for medical termination of pregnancy. Having gathered the knowledge of conception in spite of having undergone sterilisation operation, if the couple opts for bearing the child, it ceases to be an unwanted child. Compensation for maintenance and upbringing of such a child cannot be claimed. Once the woman misses the menstrual cycle, it is expected of the couple to visit the doctor and seek medical advice. Section 3 (2) read with Explanation II thereto, of the Medical Termination of Pregnancy Act, 1971, provides under the law, a valid and legal ground for the termination of pregnancy. If the woman has suffered an unwanted pregnancy, it can be terminated and this is legal and permissible under the Medical Termination of Pregnancy Act, 1971."

> So also, the surgeon cannot be held liable in contract unless plaintiff alleges and proves that the surgeon had assured 100 per cent exclusion of pregnancy after the surgery and it was only on the basis of such assurance that the plaintiff was persuaded to undergo surgery. Ordinarily a surgeon does not offer such guarantee. Where a doctor contracted to carry out a particular operation on a patient and a particular result was expected, the court would imply into the contract between the doctor and the patient, a term that the operation would be carried out with reasonable care and skill, but would be slow to imply a term or unqualified collateral warranty that the expected result would actually be achieved, since it was probable that no responsible medical man would intend to give such a warranty."

Thus, the effect of *Santra' case,* (supra) has been watered down by a Larger Bench in *Shiv Ram's case* (supra). Accordingly, even if there has been failure of sterilisation operation, it would necessarily not mean that failure has occasioned due to negligence on the part of the doctor. Proof of negligence has to be established by the plaintiff and only thereafter it can be ascertained whether any case for damage has been made out.

Keeping in view the dictum of the Supreme Court, in the latter case of *Shiv Ram* (supra) we have no doubt in our mind that appellant herein has failed absolutely to prove by cogent evidence, the negligence of doctor. On the other hand, evidence on the record would show that appellant and her witnesses have admitted that due care and precaution was taken at the time of performing the operation. Thus, negligence is completely ruled out.

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NOTE : Asterisk (*) denotes brief notes

PART - III

CIRCULARS/NOTIFICATIONS

स्थानान्तर पर घरेलू सामान परिवहन की दरों में संशोधन संबंधी वित्त विभाग, मध्यप्रदेश शासन का परिपत्र

क्रमांक : एफ 4–8/2007/नियम/चार भोपाल, दिनांक 17 दिसम्बर, 2007

प्रति,

शासन के समस्त विभाग
अध्यक्ष, राजस्व मंडल, ग्वालियर
समस्त संभागीय आयुक्त
समस्त विभागाध्यक्ष
समस्त जिलाध्यक्ष
मध्यप्रदेश ।

विषयः– स्थानान्तरण पर घरेलू सामान परिवहन की दरों में संशोधन।

संदर्भः– वित्त विभाग के परिपत्र क्रमांक आर–17–4/96/ब–9/ चार, दिनांक 15–7–96

xxxx

वित्त विभाग के संदर्भित परिपत्र दिनांक 15–7–1996 द्वारा स्थानान्तरण पर निजी सामान के परिवहन की दरें निर्धारित की गई हैं। परिवहन दरों में वृद्धि को दृष्टिगत रखते हुये संदर्भित परिपत्र द्वारा निर्धारित दरें संशोधित कर स्थानान्तरण पर निजी सामान की ढुलाई के लिये अब निम्नानुसार दरें निर्धारित की जाती हैं :–

	वेतन रेंज	रूपये प्रति किलोमीटर
1.	रूपये 8000/– और उससे अधिक	18.00
2.	रूपये 5000/– से रूपये 7999/–	09.00
3.	रूपये 5000/– से कम	06.00

2. यह दरें दिनांक 1–12–2007 से प्रभावशील होंगी ।

मध्यप्रदेश के राज्यपाल के नाम से तथा आदेशानुसार
सचिव
मध्यप्रदेश शासन, वित्त विभाग

●

NOTIFICATION REGARDING AUTHORISATION FOR EXERCISE OF POWERS TO SANCTION PROSECUTION UNDER UNLAWFUL ACTIVITIES (PREVENTION) ACT, 1967

No. S.O. 1004 (E), dated June 21, 2007. *(Published in the Gazette of India, Extraordinary, Part II, Section 3 (ii), No. 744, dated 21st June, 2007.)* – In exercise of the powers conferred by **Section 45(i) of the Unlawful Activities (Prevention) Act, 1967** (37 of 1967), the Central Government hereby authorizes the Secretaries of the State Government and Union Territory's Administrations in charge of the Home Department, to exercise the powers to sanction prosecution in respect of offences punishable under Chapter-III of the said Act triable by a Court in their respective States and Union Territories.

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NOTIFICATION REGARDING AMENDMENT IN THE M.P. JUDICIAL SERVICE PAY REVISION, PENSION AND OTHER RETIREMENT BENEFIT RULES, 2003

Notification F. No. 3(A) 19-2003-XXI-B (I) dated the 12th November, 2007. *(Published in M.P. Rajpatra Part IV (Ga) dated 16-11-07 Page 407)* – In exercise of the powers conferred by the proviso to **Article 309 of the Constitution of India,** the Governor of Madhya Pradesh hereby makes the following **amendments in the Madhya Pradesh Judicial Service Pay Revision, Pension and Other Retirement Benefit Rules, 2003 :–**

AMENDMENT

For Rule 11-K of Sub-Rule (2) (one) shall be substituted, namely –

"(one) The revised pension of the retired Judicial Officer shall not be less than 50% of the minimum of the revised pay of the post held by the Judicial Officer at the time of retirement irrespective of the fact whether he has completed qualifying service or not, as revised from time to time".

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NOTIFICATION REGARDING DATE OF ENFORCEMENT OF CHILD MARRIAGE ACT, 2006

Ministry of Women and Child Development Notification No. S.O. 1850 (E) dated the 30th October, 2007. [Published in the Gazette of India (Extraordinary) Part II Section 3 (ii) dated 30-10-2007 Page 1.]

In exercise of the powers conferred by sub-section (3) of Section 1 of the **Prohibition of Child Marriage Act, 2006 (6 of 2007),** the Central Government hereby appoints the **1st day of November, 2007**, as the date on which the said Act shall come into force.

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NOTIFICATION REGARDING AMENDMENT IN M.P. STAMPS RULES, 1942

Notification No. (40) B-4-13-07-2-V dated the 15th November, 2007. *(Published in M.P. Rajpatra (Asadharan) dated 15-11-2007 Page 1088)*– In exercise of the powers conferred by Section 10, 74 and 75 of the **Stamp Act, 1899 (No. II of 1899),** the State Government, hereby makes the following **amendment in the Madhya Pradesh Stamp Rules, 1942,** namely :–

Amendment

In the said rules, for rule 3, the following rule shall be substituted, namely :–

"**3. Description of Stamps.** – (1) Except as otherwise provided by the Act or by these rules all duties with which any instrument is chargeable shall be indicated on such instrument by means of stamps issued by the State of Madhya Pradesh for the purpose of this Act.

(2) There shall be two kinds of stamps for indicating the payment of duty with which the instruments are chargeable, namely :–

(a) impressed stamps over printed with the word "Madhya Pradesh" and bearing Serial Number;

(b) adhesive stamps overprined with the word "India" in English and word "Bharat" in "Hindi."

2. This notification shall come into force with effect from 1st December, 2007.

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NOTIFICATION REGARDING DATE OF ENFORCEMENT OF STATE EMBLEM OF INDIA (PROHIBITION OF IMPROPER USE) ACT, 2005 (50 OF 2005)

(18) Ministry of Home Affairs Notification No. S.O. 1526 (E) dated the 12th September 2007. [Published in the Gazette of India (Extraordinary) Part II Section 3(ii) dated 12-9-2007 Page 1.]

In exercise of the powers conferred by sub-section (3) of section 1 of the **State Emblem of India (Prohibition of Improper Use) Act, 2005 (50 of 2005),** the Central Government hereby appoints the 12th day of September, 2007, as the date on which the provisions of the said Act shall come into force.

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Concentrate all your thoughts upon the work at hand. The sun's rays do not burn until brought to a focus.

– ALEXANDER GRAHAM BELL

If you dedicate yourself to what you learn, if you practice it sincerely, you will lose all fear.

– USTAD BISMILLAH KHAN

PART - IV

IMPORTANT CENTRAL/STATE ACTS & AMENDMENTS

THE PROHIBITION OF CHILD MARRIAGE ACT, 2006

(Act No. 6 of 2007)

An Act to provide for the prohibition of solemnisation of child marriages and for matters connected therewith or incidental thereto.

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

1. **Short title, extent and commencement.** – (1) This Act may be called the Prohibition of Child Marriage Act, 2006.

(2) It extends to the whole of India except the State of Jammu and Kashmir; and it applies also to all citizens of India without and beyond India.

Provided that nothing contained in this Act shall apply to the renoncants of the Union Territory of Pondicherry.

(3) It shall come into force on such date as the Central Government may by notification in the Official Gazette, appoint; and different dates may be appointed for different States and any reference in any provision to the commencement of this Act shall be construed in relation to any State as a reference to the coming into force of that provision in that State.

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

(a) "child" means a person who, if a male, has not completed twenty-one years of age, and if a female, has not completed eighteen years of age;

(b) "child marriage" means a marriage to which either of the contracting parties is a child;

(c) "contracting party", in relation to a marriage, means either of the parties whose marriage is or is about to be thereby solemnised;

(d) "Child Marriage Prohibition Officer" includes the Child Marriage Prohibition Officer appointed under sub-section (1) of section 16;

(e) "district court" means, in any area for which a Family Court established under section 3 of the Family Courts Act, 1984 (66 of 1984) exists, such Family Court, and in any area for which there is no Family Court but a city civil court exists, that court and in any other area, the principal civil court of original jurisdiction and includes any other civil court which may be specified by the State Government, by notification in the Official Gazette, as having jurisdiction in respect of the matters dealt with in this Act;

(f) "minor" means a person who, under the provisions of the Majority Act, 1875 (9 of 1875) is to be deemed not to have attained his majority.

3. Child marriages to be voidable at the option of contracting party being a child .– (1) Every child marriage, whether solemnised before or after the commencement of this Act, shall be voidable at the option of the contracting party who was a child at the time of the marriage.

Provided that a petition for annulling a child marriage by a decree of nullity may be filed in the district court only by a contracting party to the marriage who was a child at the time of the marriage.

(2) If at the time of filing a petition, the petitioner is a minor, the petition may be filed through his or her guardian or next friend along with the Child Marriage Probhibition Officer.

(3) The petition under this section may be filed at any time but before the child filing the petition completes two years of attaining majority.

(4) While granting a decree of nullity under this section, the district court shall make an order directing both the parties to the marriage and their parents or their guardians to return to the other party, his or her parents or guardian, as the case may be, the money, valuables, ornaments and other gifts received on the occasion of the marriage by them from the other side, or an amount equal to the value of such valuables, ornaments, other gifts and money:

Provided that no order under this section shall be passed unless the concerned parties have been given notices to appear before the district court and show cause why such order should not be passed.

4. Provision for maintenance and residence to female contracting party to child marriage. – (1) While granting a decree under Section 3, the district court may also make an interim or final order directing the male contracting party to the child marriage, and in case the male contracting party to such marriage is a minor, his parent or guardian to pay maintenance to the female contracting party to the marriage until her remarriage.

(2) The quantum of maintenance payable shall be determined by the district court having regard to the needs of the child, the lifestyle enjoyed by such child during her marriage and the means of income of the paying party.

(3) The amount of maintenance may be directed to be paid monthly or in lump sum.

(4) In case the party making the petition under section 3 is the female contracting party, the district court may also make a suitable order as to her residence until her remarriage.

5. Custody and maintenance of children of child marriages. – (1) Where there are children born of the child marriage, the district court shall make an appropriate order for the custody of such children.

(2) While making an order for the custody of a child under this section, the welfare and best interests of the child shall be the paramount consideration to be given by the district court.

(3) An order for custody of a child may also include appropriate directions for giving to the other party access to the child in such a manner as may best serve the interersts of the child, and such other orders as the district court may, in the interest of the child, deem proper.

(4) The district court may also make an appropriate order for providing maintenance to the child by a party to the marriage or their parents or guardians.

6. Legitimacy of children born of child marriages. – Notwithstanding that a child marriage has been annualled by a decree of nullity under section 3, every child begotten or conceived of such marriage before the decree is made, whether born before or after the commencement of this Act, shall be deemed to be a legitimate child for all purposes.

7. Power of district court to modify orders issued under section 4 or section 5. – The district court shall have the power to add to, modify or revoke any order made under section 4 or section 5 and if there is any change in the circumstances at any time during the pendency of the petition and even after the final disposal of the petition.

8. Court to which petition should be made.– For the purpose of grant of reliefs under sections 3,4 and 5, the district court having jurisdiction shall include the district court having jurisdiction over the place where the defendant or the child resides, or where the marriage was solemnised or where the parties last resided together or the petitioner is residing on the date of presentation of the petition.

9. Punishment for male adult marrying a child. – Whoever, being a male adult above eighteen years of age, contracts a child marriage shall be punishable with rigorous imprisonment which may extend to two years or with fine which may extend to one lakh rupees or with both.

10. Punishment for solemnizing a child marriage. – Whoever performs, conducts, directs or abets any child marriage shall be punishable with rigourous imprisonment which may extend to two years and shall be liable to fine which may extend to one lakh rupees unless he proves that he had reasons to believe that the marriage was not a child marriage.

11. Punishment for promoting or permitting solemnization of child marriages. – (1) Where child contracts a child marriage, any person having charge of the child, whether as parent or guardian or any other person or in any other capacity, lawful or unlawful, including any member of an organisation or association of persons who does any act to promote the marriage or permits it to be solemised. or negligently fails to prevent if from being solemnised, including attending or participating in a child marriage, shall be punishable with rigorous imprisonment which may extend to two years and shall also be liable to fine which may extend up to one lakh rupees.

Provided that no woman shall be punishable with imprisonment.

(2) For the purposes of this section, it shall be presumed, unless and until the contrary is proved, that where a minor child has contracted a marriage, the person having charge of such minor child has negligently failed to prevent the marriage from being solemnised.

12. Marriage of a minor child to be void in certain circumstances. – Where a child, being a minor –

(a) is taken or enticed out of the keeping of the lawful guardian; or

(b) by force compelled, or by any deceitful means induced to go from any place: or

(c) is sold for the purpose of marriage; and made to go through a form of marriage or if the minor is married after which the minor is sold or trafficked or used for immoral purposes,

such marriage shall be null and void.

13. Power of Court to issue injunction prohibiting child marriages. – (1) Notwithstanding anything to the contrary contained is this Act, if, on an application of the Child Marriage Prohibition Officer or on receipt of information through a complaint or otherwise from any person, a Judicial Magistrate of the first class or a Metropolitan Magistrate is satisfied that a child marriage in contravention of this Act has been arranged or is about to be solemnised, such Magistrate shall issue an injunction against any person including a member of an organisation or an association of persons prohibiting such marriage.

(2) A complaint under sub-section (1) may be made by any person having personal knowledge or reason to believe, and a non-governmental organisation having reasonable information, relating to the likelihood of taking place of solemnisation of a child marriage or child marriages.

(3) The Court of the Judicial Magistrate of the first class or the Metropolitan Magistrate may also take *suo motu* cognizance on the basis of any reliable report or information.

(4) For the purposes of preventing solemnisation of mass child marriages on certain days such as *Akshaya Trutiya,* the District Magistrate shall be deemed to be the Child Marriage Prohibition Officer with all powers as are conferred on a Child Marriage Prohibition Officer by a under this Act.

(5) The District Magistrate shall alsos have additional power to stop or prevent solemnisation of child marriages and for this purpose, he may take all appropriate measures and use the minimum force required.

(6) No injunction under sub-section (1) shall be issued against any person or member of any organisation or association of persons unless the Court has previously given notice to such person, members of the organisation or association of persons, as the case may be and has offered him or them an opportunity to show cause against the issue of the injunction:

Provided that in the case of any urgency, the Court shall have the power to issue an interim injunction without giving any notice under this section.

(7) An injunction issued under sub-section (1) may be confirmed or vacated after giving notice and hearing the party againt whom the injunction was issued.

(8) The Court may either on its own motion or on the application of any person aggrieved, rescind or alter an injunction issued under sub-section (1).

(9) Where an application is received under sub-section (1), the Court shall afford the applicant an early opportunity of appearing before it either in person or by an advocate and if the Court, after hearing the applicant rejects the application wholly or in part, is shall record in writing its reasons for so doing.

(10) Whoever knowing that an injunction has been issued under sub-section (1) against him disobeys such injunction shall be punishable with imprisonment of either description for a term which may extend to two years or with fine which may extend to one lakh rupees or with both:

Provided that no woman shall be punishable with imprisonment.

14. Child marriages in contravention of injunction orders to be void. – Any child marriage solemnised in contravention of an injunction order issued under section 13, whether interim or final, shall be *void ab initio.*

15. Offences to be cognizable and non-bailable.– Notwithstanding anything contained in the Code of Criminal Procedure, 1973, (2 of 1974) an offence punishable under this Act shall be cognizable and non-bailable.

16. Child Marriage Prohibition Officers. – (1) The State Government shall, by notification in the Official Gazette, appoint for the whole State, or such part thereof as may be specified in that notification, an officer or officers to be known as the Child Marriage Prohibition Officer having jurisdiction over the area or areas specified in the notification.

(2) The State Government may also request a respectable member of the locality with a record of social service or an officer of the Gram Panchayat or Municipality or an officer of the Government or any public sector undertaking or an office bearer of any non-governmental organisation to assist the Child Marriage Prohibition Officer and such member, officer or office bearer, as the case may be, shall be bound to act accordingly.

(3) It shall be the duty of the Child Marriage Prohibition Officer –

(a) to prevent solemnisation of child marriage by taking such action as he may deem fit;

(b) to collect evidence for the effective prosection of persons contravening the provisions of this Act;

(c) to advise either individual cases or counsel the residents of the locality generally not to indulge in promoting helping, aiding or allowing the solemnisation of child marriages;

(d) to create awareness of the evil which results from child marriages;

(e) to sensitrize the community on the issue of child marriages.

(f) to furnish such periodical returns and statistics as the State Government may direct; and

(g) to discharge such other functions and duties as may be assigned to him by the State Government.

(4) The State Government may, by notification in the Official Gazette, subject to such conditions and limitations, invest the Child Marriage Prohibition Officer with such powers of a police officer as may be specified in the notification and the Child Marriage Prohibition Officer shall exercise such powers subject to such conditions and limitations, as may be specified in the notification.

(5) The Child Marriage Prohibition Officer shall have the power to move the Court for an order under sections 4,5 and 13 and along with the child under section 3.

17. Child Marriage Prohibition Officers to be public servants – The Child Marriage Prohibition Officers shall be deemed to be public servants within the meaning of section 21 of the Indian Penal Code.

18. Protection of action taken in good faith. – No suit, prosecution or other legal proceedings shall lie against the Child Marriage Prohibition Officer in respect of anything in good faith done or intended to be done in pursuance of this Act or any rule or order made thereunder.

19. Power of State Government to make rules. – (1) The State Government may, by notification in the Official Gazette, make rules for carrying out the provisions of this Act.

(2) Every rule made under this Act shall, as soon as may be after it is made, be laid before the State Legislature.

20. Amendment of Act No. 25 of 1955. – In the Hindu Marriage Act, 1955, in section 18, for clause (a), the following clause shall be substituted, namely :–

"(a) in the case of contravention of the condition specified in clause (iii) of section 5, with rigorous imprisonment which may extend to two years or with fine which may extend to one lakh rupees, or with both".

21. Repeal and savings. – (1) The Child Marriage Restraint Act, 1929 (19 of 1929) is hereby repealed.

(2) Notwithstanding such repeal, all cases and other proceedings pending or continued under the said Act at the commencement of this Act shall be continued and disposed of in accordance with the provisions of the repealed Act, as if this Act had not been passed.

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MADHYA PRADESH PROHIBITION OF CHILD MARRIAGE RULES, 2007

Notification No. F.-10-48-07-L-2 dated the 26th November, 2007. – *In exercise of the powers conferred by sub-section (1) of Section 19 of the* ***Prohibition of Child Marriage Act, 2006 (No. 6 of 2007),*** *the State Government, hereby makes the following rules, namely :-*

1. Short title and Commencement. – (1) These rules may be called the **Madhya Pradesh Prohibition of Child Marriage Rules, 2007.**

(2) They shall come into force with effect from the date of their publication in the Madhya Pradesh Gazette.

2. Definitions. – In these rules, unless the context otherwise requires, –

(a) "Act" means the Prohibition of Child Marriage Act, 2006 (No. 6 of 2007);

(b) "Child Welfare Committee" means the Committee constituted under section 29 of the Juvenile Justice (Care and Protection of Children) Act, 2000 (56 of 2000);

(c) "Court" means the District Court as defined in clause (c) of Section 2 of the Act;

(d) Words and expressions used in these rules but not defined shall have the same meaning as assigned to them in the Act.

3. (1) (i) According to the provisions of sub-section (1) of section 3 of the Act, decree of nullity may be obtained for annulling child marriage, by filing petition in the court having Jurisdiction over area.

(ii) The Court shall have all powers as assigned to it in Criminal Procedure Code, 1973 (2 of 1974).

(2) Any sum or articles including ornaments ordered to be returned by the court shall be returned in the presence of Presiding Officer of the Court.

(3) Any order for return of any sum or article shall be executable as a decree or order under the Civil Procedure Code, 1908 (No. 5 of 1908).

4. (1) Any order made by the Court under sub-section (1) of Section 4 of the Act for payment of maintenance in lump sump of the female contracting party of the marriage, the amount shall be paid within 30 days from the date of passing order, in the presence of Presiding Officer of the court. If the amount of maintenance is payable monthly the concerned party or guardian shall pay the same to the female contracting party of the marriage by 15th day of each calendar month.

(2) When the male contracting party to the marriage, and where the male contracting party is minor, his guardian fails to comply the order of the court passed under sub-section (1) of Section 4 of the Act, then aggrieved party may file an application for execution in the court. The court may pass an order in accordance with the provisions of Chapter IX of the Code of Criminal Procedure 1973 (2 of 1974).

5. A copy of any order passed by the court under sub-section (1) of Section 5 of the Act shall be sent to the Child Welfare Committee whose duty shall be to ensure from time to time that the child is getting proper care and protection from authorized custodian.

6. In cases where the contracting parties or any of the other parties is minor the court may refer to them to child Welfare Committee for protecting the best interest of the child.

7. An order passed under sub-section (5) of Section 4 shall be executable in the manner provided herein under sub-rule (2) of rule 4.

8. A copy of an order passed under section 7 of the Act shall be given to both the contracting parties and their guardian and also to the Child Marriage Prohibition Officer.

9. (1) Information regarding of likelihood of solemnization of child marriage in any area may be given by any person orally or in writing or by post or by electronic mode to the Child Marriage Prohibition Officer, Police Station or Sarpanch of the Gram Panchayat of the concerned area.

(2) The officials other than the Child Marriage Prohibition Officer, on receiving the information of likelihood of solemnization of child marriage, shall furnish such information to Child Marriage Prohibition Officer alongwith a report.

(3) The District Magistrate may pass an order under sub-section (5) of Section 13 of the Act and direct all or any Police Station to keep vigil at religious and public places and also to take appropriate action to check and prevent the solemnization of child marriages, specially during special occasions when mass child marriages are solemnized.

10. The Child Marriage Prohibition Officer in collaboration with the concerned Government departments under clause (d) and (e) of sub-section (2) of Section 16 of the Act shall organize legal awareness camp in every district with special focus on villagers in remote areas where the incidents of child marriages are common.

[(Published in M.P. Rajpatra (Asadharan) dated 27-11-2007 Pages 1124-1124 (2)]

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THE CODE OF CRIMINAL PROCEDURE (MADHYA PRADESH AMENDMENT) ACT, 2007

NO. 2 OF 2008

(Received the assent of the President on the 14th February, 2008, assent first published in the "Madhya Pradesh Gazette (Extra-ordinary)", dated the 22nd February, 2008)

An Act further to amend the Code of Criminal Procedure, 1973 in its application to the State of Madhya Pradesh.

Be it enacted by the Madhya Pradesh Ligislature in the Fifty eighth Year of the Republic of India as follows :-

1. **Short title** (1) This Act may be called the Code of Criminal Procedure (Madhya Pradesh Amendment) Act, 2007.

2. **Amendment of Central Act No. 2 of 1974 its application to the State of Madhya Pradesh.** The Code of Criminal 1973 (No. 2 of 1974) (hereinafter referred to as the Principal Act), shall in its application to the State of Madhya Pradesh, be amended in the in manner herein after provided.

3. **Amendment of Section 167.** In sub-section (2) of Section 167 of the Principal Act,-

(i) in the proviso, for paragraph (b), the following paragraph shall be substituted, namely :-

"(b)no Magistrate shall authorize detention in any custody under this section unless the accused is produced before him in person for the first time and subsequently every time till such time the accused remains in the custody of police, but the Magistrate may extend further detention in judicial custody on production of accused either in person or through the medium of electronic video linkage;"

(ii) for Explanation II, the following Explanation shall be substituted, namely :-

"Explanation II- It any question arises whether an accused person was produced before the Magistrate as required under paragraph (b), the production of the accused person may be proved by his signature on the order authorizing detention or by the order certified by the Magistrate as to production of the accused person through the medium of electronic video linkage, as the case may be."

4. Amendment of First Schedule

In the First Schedule to the Principal Act, under the the heading "I-Offences under the Indian Penal Code," in column 6 against Section & 317, 318, 326, 363, 363-A, 365, 377, 392, 393, 394, 409, 435, 466, 467, 468, 471, 472, 473, 474, 475, 476, 477 and 477-A, for the words "Magistrate of the First Class" wherever they occur, the words "Court of Sessions" shall be substituted.

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Enjoy the little things, for one day you may look back and realize they were the big things.

– ROBERT BRAULT