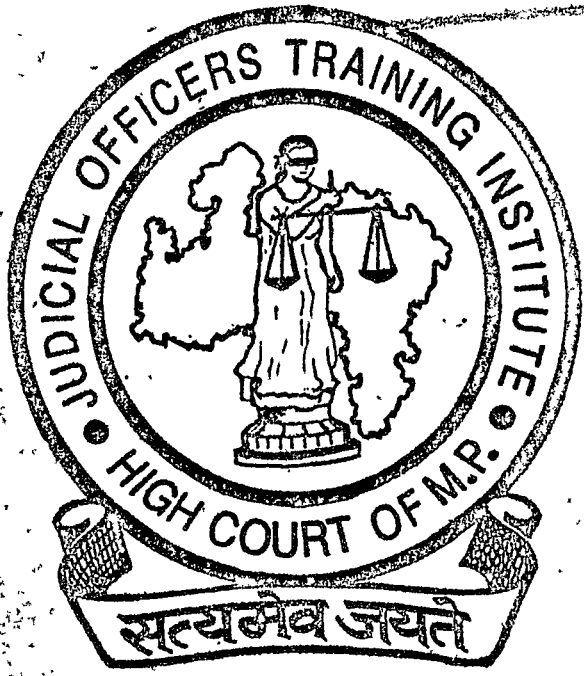
VOL. VI PART-I FEBRUARY 2000 (BI-MONTHLY)

14 copy



JOTI JOURNAL

न्यायिक अधिकारी प्रशिक्षण संस्थान

उच्च न्यायालय जबलपुर 482007

JUDICIAL OFFICERS' TRAINING INSTITUTE

HIGH COURT OF MADHYA PRADESH

JABALPUR-482 007

FERVENT

FAREWELL AND WELCOME

Hon'ble the Chief Justice of M.P. High Court **Shri A.K. Mathur** was transferred to Calcutta High Court where he resumed the charge of the office on 22nd December, 1999.

Hon'ble the Administrative Judge of M.P. High Court **Shri D.P.S. Chauhan** was appointed as the Acting Chief Justice of M.P. High Court who resumed the charge of the office on 22nd December 1999.

Hon'ble **Justice Shri D.M. Dharmadhikari** of M.P. High Court was appointed as the Chief Justice of Gujarat High Court who resumed the charge of the office on 25th January, 2000.

विकल्प हमारा अपना है

भ्रातुगण! किसी समस्या का निदान करने हेतु मैं माननीय न्यायाधिपति महोदय श्रीमान आर.एस. गर्ग साहेब के विश्रामकक्ष में बैठा था। विधि संबंधी मुद्दे पर चिंतन हो रहा था। विचार विमर्श चल रहा था। कुछ बातें मैंने सतही रूप से कह दी होगी मैं अपनी शैली से समस्या का निदान बता रहा था। माननीय महोदय उस समस्या पर सिद्धांतिक चिंतन की भी अपेक्षा कर रहे थे। आपस में चिंतन का तालमेल नहीं जम पा रहा था क्योंकि समस्या के संबंध में मैं अपनी बात पर जोर दे रहा था तो श्रीमान मेरे तर्क के लिए आधार पूछ रहे थे। मुझे लगा कि कहीं न कहीं मैं गलती पर हूं। मेरे आत्म विश्वास में व निर्धार में कमी है। सोच रहा था कि मैं क्यों कर के ठीक से चिंतन नहीं कर पा रहा हूं, कहां कमी है तथा क्या कारण है कि मैं अपने आप को दृढ़ प्रतिज्ञ होकर कठोरता पूर्वक निर्धार कर के काम न करूं। श्रीमान इस भावना को पहचान गए। श्रीमान ने पुस्तकें खोली व संदर्भ भी बताए ऐसा लगा कि समस्या का निदान कल्पनाओं से मात्र नहीं होता है अपितु उसके लिए चाहिए अध्ययन, पठन, वाचन व संदर्भ ढूंढने की क्षमता तथा सबसे महत्वपूर्ण बात इच्छाशक्ति का होना। उस समय एक प्रसंग उन्होंने वर्णित किया। मार्गदर्शन प्रद था। प्रसन्नता हुई खुशी हुई। खुशी को मिल बांट कर जब तक अनुभव नहीं किया जाता संतुष्टि नहीं होती। इसलिए मुझे मनतोष प्राप्त हो इसी स्वार्थ से आपको बात बता रहा हूं।

एक टेकड़ी टीला (छोटी पहाड़ी) थी। एक बीज हवा के झोंके के साथ उड़कर आया व पहाड़ी से टकराया व जमीन पर गिर पड़ा। पहाड़ी को हंसी आई। कहने लगी नन्हां सा जीव मेरी बराबरी करने आया है। ऐसे ही गिर पड़ोगे। बीज क्या बोलता। पहाड़ी की ऊँचाई, उसका विस्तार लिए रूप, सूर्य के प्रकाश को रोकने की शक्ति हवा की दिशा बदलने की क्षमता व हर दृष्टि से उसकी बलिष्ठता के सामने बीज मौन रहा। बीज ने मन में ही कुछ सोचा व मौन धारण किया। मौन से सशक्त उत्तर संभवत कुछ नहीं हो सकता है। टी. कार्ले का एक सुभाषित याद आया। उसमें कहा था कि Silence is more eloquent than words अर्थात मौन धारण करने वाला बोलने वाले से अधिक वाक्पटु, सुवक्ता होता है। बीज मन में ही कह रहा था,

हम तो दुश्मन को भी
शाइस्ता सजा देते हैं।
वार करते नहीं
नजरों से गिरा देते हैं।।

संभव है बीज में दृढ़ प्रतिज्ञता होगी, वीरव्रतता होगी संकल्प शीलता अथवा सुप्रतिज्ञता होगी जो उसे न बोलने हेतु प्रेरित कर रही होगी। बीज जमीन पर गिर गया। पहाड़ी को लगा उसने बीज को धूल चटवा दी है। वह उपहास करते हंस पड़ी। कुछ ही दिनों में बीज मिट्टी में समा गया। तीनों ही ऋतुओं को सहन करते बीज से कोपलें आई व समय के साथ वह विशाल वृक्ष के रूप में खड़ा हो गया। एक दिन आख़िर थकहार कर वृक्ष से पहाड़ी ने पूछ ही लिया की तुम एक बीज के रूप में आए जमीन में समा गएं इतने बड़े हो गए आखिर क्या बात है कि मैं तो अनादिकाल से यहां हूं मैं भी धूप पानी वर्षा सहन कर रही हूं जो तुम सहन कर रहे हो फिर भी मेरा क्षरण हो रहा है व तुम सुदृढ़ता पूर्वक मजबूती से खड़े हो। इतने सालों बाद वृक्ष ने मौन तोड़ा और कहा कि मैंने मेरे अस्तित्व को मिटा दिया था जमीन में समा गया था जमीन के साथ तादात्म्य स्थापित किया व अपने आप को जमीन से जोड़कर अपनी जड़ें जमीन मजबूत की हैं लेकिन तुम? ऊँची जरूर हो, बड़ी जरूर हो लेकिन तुम्हारा आधार जमीन नहीं है। तुम जमीन से जुड़ी नहीं हो। तुम्हारी चट्टाने कटती जाएँगी तो नई पैदा नहीं होगी लेकिन मेरी शाखाएं कटने पर भी नई उत्पन्न होगी। मेरा आधार जमीन है।

संत ज्ञानेश्वर ने अपने ग्रंथ "ज्ञानेश्वरी" में गीता के अध्याय 9 श्लोक 18 पर भाष्य करते कहा कि –

बीज शाखा तें प्रसवे।
भगते रुखपण (वृक्षत्व) बीजीं समावे।
तैसे संकल्पे होय आधवें।
पाठी (पुनः) संकल्पीं मिळें।।

अर्थात यदि संकल्प है निर्धार है तो बीज जमीन में समा जाने के पश्चात पुनः वृक्ष बनकर ही खड़ा होगा व पुनः बीज का निर्माण होगा। प्रश्न केवल प्रतिबद्धता, सुप्रतिज्ञता का है।

कुछ दिन पूर्व जॅक कॅन फिल्ड एवं मार्क व्हिक्टर हॅन्सन् लिखित "चिकन सूप फॉर द सोल" नामक पुस्तक पढ़ने को मिली उसमें भी दो बीजों का आपसी संभाषण प्रस्तुत हुआ है वह भी देखने योग्य है। साभार प्रस्तुत कर रहा हूं। दो बीज जमीन पर पड़े हुए थे। प्रथम बीज ने कहा कि वह बढ़ना चाहता है। मैं अपनी जड़ें जमीन की गहराई, तक पहुंचाना चाहता हूं व अपनी जड़ें मजबूत करना चाहता हूं। अपने बीज को जमीन के माध्यम से अंकुरित कर उपर उठाना चाहता हूं। मैं अपनी कलियों को खिलाकर पताकाओं जैसा लहराना चाहता हूं व बताना चाहूंगा कि देखो वसंत (बसंत) आ गया है बसन्तोत्सव मनाना है। मुझे सूर्य की कोमल गरमाहट अनुभव करना है तथा मेरे हरे

भरे पत्तों पर सुबह सुबह के ओस के मोतियों को सजाना संवारना है व नहाना है। मुझे प्रकृति के साथ जुड़ना है।

दूसरे बीज ने प्रथम बीज को कहा मुझे शंका है, भय है कि जमीन के अंदर समाकर अंधेरा कैसा सहन करुंगा जमीन में मेरे नाजुक अंकुर कहीं टूट न जावें। कहीं ऐसा न हो कि मैं अपनी कली को खिलाऊंगी तो कहीं कीट उसे नष्ट न कर दें, तथा यदि मेरे वृक्ष पर बहार आएगी तो लोग मेरे फूलों को नोंच न डालें। नहीं—नहीं मुझे इन्तजार करना होगा सही व सुरक्षित समय का। प्रथम बीज ने कहा नहीं मुझें तो अभी और इसी समय जमीन में मिलकर मिट जाना होगा कहीं देर न हो जावे व प्रथम बीज जमीन में मिट गया।

दूसरा बीज सही और सुरक्षित समय की राह देखता रहा। इतने में एक पंछी उधर से आया तथा बीज को देखकर उसे चुग गया।

दोस्तों, पिछले छह वर्ष से कक्षाओं में पढ़ने बढ़ने की कवायद चल रही है। पता नहीं हम किस बात की राह देख रहे हैं। जमीन से जुड़ने का चिंतन क्यों विकसित नहीं हो पा रहा है निश्चय में कहां कभी आ रही है, हिम्मत क्यों नहीं जुटा पा रहे हैं, मनसा वाचा कर्मणा का क्यों अभाव है, अपनी क्षमता का चिंतन क्यों नहीं है, ऐसा कौन सा अंधेरा है कि जिसका हमें भय है। हम क्यों व किस कारण से दिग्भ्रमित है, दुविधा में है या कि कौनसा अंतर्द्वंद्व है जो हमें अपनी कर्मभूमि में समाजाने से रोक रहा है। किस मोह में फंसे है जो हमें अपने लक्ष्य की ओर अग्रसर होने से वंचित कर रहा है एवं रोक रहा है। हमें विचार करना होगा। जो कटु अनुभव कक्षाओं में आया है वह मुख्यतः पठन (Reading) पाठन (अध्ययन) न करने का आया है। जो पढ़ाओ ठीक उसके विपरीत करने का निर्धार प्रतिलक्षित होता है। पत्र पत्रिकाएं उपलब्ध है लेकिन उसका उपयोग कब होगा यह प्रश्न है। यदि पठन—पाठन नहीं है तो विचार शक्ति (रीझनिंग पॉवर) नहीं बढ़ेगी तो बहुआयामी चिंतन नहीं होगा। अंदाज के घोड़े संभवता दौड़ते ही नहीं, चलते भी नहीं है। वहीं अपने बचपन के काठ के घोड़े पर हिलने डुलने से कुछ होना जाना नहीं है। हमें शीघ्रताशीघ्र अनिश्चय की भावना से उबरना होगा। अन्यथा पता नहीं हम सही एवं सुरक्षित समय, शुभ मुहूर्त, शुभ घड़ी देखते रह जाएं व काल के मुंह में समा जाय।

पुरुषोत्तम विष्णु नामजोशी

THOSE WHO REFUSE TO RISK AND GROW, GET SWALLOWED UP BY LIFE.

THE PRESENT IS A PRODUCT OF THE PAST, BUT IT IS ALSO THE SEED FOR THE FUTURE.

न्यायधर्म

दिसम्बर 1999 की पत्रिका के प्रकाशन पश्चात इस संस्था द्वारा व्यवहार न्यायाधीश वर्ग–2, 1997 बॅच के विभिन्न सत्र आहूत किए थे। प्रथम सत्र 03–12–99 से 10–12–99 तक का द्वितीय सत्र 03–01–2000 से 10–01–2000 तक का एवं तृतीय सत्र 17–01–2000 से 24–01–2000 तक का आहूत किया। सभी सत्रों में माननीय कार्यवाहक मुख्य न्यायाधिपति एवं मुख्य संरक्षक न्यायिक अधिकारी प्रशिक्षण संस्थान माननीय डी.पी.एस. चौहान महोदय ने संबोधित किया। समापन समारोह पर माननीय न्यायाधिपति श्रीमान डी.एम् धर्माधिकारी महोदय जो कि कार्यपालक अध्यक्ष विधिक सेवा प्राधिकरण है ने भी संबोधित किया।

श्रीमान डी.पी.एस. चौहान साहेब ने अपने चिरपरिचित शैली में सहज एवं बोधगम्य भाषा प्रवाह में अनेक बातें बताई जो मील के पत्थर के रूप में सिद्ध हो सकती है। माननीय महोदय ने बताया कि व्यवहार न्यायाधीश के रूप में कोई व्यक्ति सेवा में प्रवेश करता है तो न्यायिक प्रक्रिया के संबंध में पूर्ण चित्रण, कल्पना नहीं होती है। समय के साथ वह स्थिति स्पष्ट गोचर होने लगती है व तब ही न्यायिक अधिकारी के रूप में मानसिक विकास होना प्रारंभ होता है। प्रशिक्षण का महत्व भी इसी कारण है यह बात अभिव्यक्त करते हुए माननीय कार्यवाहक न्यायाधिपति महोदय श्रीमान चौहान साहेब ने यह भी व्यक्त किया कि व्यतीत समय में हमने क्या समझा, क्या जाना, उन्नति करने हेतु क्या कदम उठाए कितने आगे बढ़े इस सब बातों का मूल्यांकन होता है। न्यायिक अधिकारी के रूप में जीवन यापन कैसे करना है इस विषय पर यह चिंतन प्रस्तुत हुआ कि न्यायिक अधिकारी न्याय के दूत हैं, अपनी बुद्धि व विवेक से काम करना है तथा अन्याय नहीं करना है। भारतीय संविधान के अनुच्छेद 14 की ओर ध्यान आकृष्ट करते हुए श्रीमान ने बताया कि उक्त अनुच्छेद एक पंक्ति का भर है लेकिन उस पंक्ति में न्याय का सागर भरा है। किसी भी न्यायालय के निर्णय इसी अनुच्छेद के आधार पर होते हैं। उसी प्रकार अनुच्छेद 21 की ओर भी ध्यान आकृष्ट करके माननीय श्रीमान चौहान साहेब ने व्यक्त किया कि यह अनुच्छेद भी दो पंक्तियों भर नहीं है लेकिन आकाश जैसा विस्तार किया है। इस प्रकार अनुच्छेद 14–21 आसमान एवं समुद्र जैसा विस्तार लिया होकर प्रत्येक नागरिक को सुरक्षा कवच प्रदान करता है। अतः एक न्यायाधीश का कर्तव्य है कि वह प्रकरणों के निराकरण में उक्त अनुच्छेदों के मनोभाव, आशय व उद्देश्य को ध्यान रखकर न्याय करना है। संविधान के महत्व एवं व्याख्या के विषय में श्रीमान चौहान साहेब ने यह बताया कि वह इतना गूढ़ है कि उसे समझने में व व्यवहारिक रूप देने में समय लगेगा। संविधान की गरिमा कायम रखते हुए काम करनें हेतु भी आवाहन किया।

चिंतन को गति देते हुए माननीय कार्यवाहक मुख्य न्यायाधिपति श्रीमान डी.पी.एस. चौहान महोदय ने यह भी बताया कि न्याय एक धर्म है व न्यायाधीश धर्मावलंबी है। मानव विवेक में कुछ कमी होती है, परिपक्वता समय के साथ बढ़ती है अतः समय के साथ विवेक शक्ति भी विकसित होगी। जैसे जैसे विवेक शक्ति बढ़ेगी न्यायिक अधिकारी पाएगा कि समस्याओं को न बढ़ने दे तथा न्यून करने का प्रयत्न करे। ईश्वर ने न्यायाधीश के पद पर बैठाया है तो उसकी कृपा मानों तथा न्यायाधीश के रूप में अपने आप को तैयार करो। श्रीमान महोदय ने एक सटीक बात जो कही वह यह कि सबसे बड़ी समस्या त्याग की है। भौतिक सुखसुविधाओं के साथ जैसे ही व्यक्ति जुड़ता है विवेक शक्ति खोता जाता है व न्यायिक विवेक से दूर होता जाता है। 'पंच तंत्र' की कथाएं पढ़कर व्यवहारिक ज्ञान बढ़ाने की भी सलाह दी और कहा कि कबीर के दोहों में भी ज्ञान भरा पड़ा है। ज्ञान का सागर सब दूर है लेकिन भौतिक सुख सुविधाओं की लालसा के कारण व्यक्ति उससे वंचित हो जाता हैं। न्याय प्रक्रिया में न्यायाधीश या वकील को सम्बोधित करते हुए विद्वान शब्द का प्रयोग होता रहता है इसका यह अर्थ नहीं है कि वह वास्तव में विद्वान हो ही लेकिन वह ज्ञान बढ़ाने की सतत् प्रक्रिया में रहता है इसलिए उसे ऐसा सम्बोधित किया जाता है माननीय कार्यवाहक मुख्य न्यायाधिपति महोदय ने विभिन्न सत्र खंडों में इस बात पर भी जोर दिया कि न्यायाधिक को कर्म के प्रति जिज्ञासा हो, समर्पण हो, समाज का कल्याण हो ऐसा आशय भी उसका हो। न्यायाधीशों एवं न्याय प्रक्रिया के प्रति समाज की जो आस्था व श्रद्धा है व तब ही अक्षुण्य बनी रहेगी जब न्यायाधीश स्वयं को न्याय के प्रति समर्पित कर देगा। ऐसा तब ही होगा जब विधि का गहन अध्ययन होगा, अधिकाधिक कार्य निराकृत करके कार्य अनुभव होगा। जब ज्ञान बढ़ेगा तो विवेक बढ़ेगा एवं विवेक बढ़ेगा तो समर्पण हो सकेगा।

माननीय महोदय ने अपनी व्यथा वक्त करते हुए कहा कि हमें जितना पढ़ना है उतना पढ़ते नहीं है तथा इतना अधिक लिखते है (दीर्घसूत्र) की उसे भी कोई नहीं पढ़ता है।

विधि शास्त्र के सिद्धांतों को प्रतिपादित करते हुए माननीय कार्यवाहक मुख्य न्यायाधिपति, श्रीमान चौहान साहेब ने यह भी कहा कि प्रिव्ही काउंसिल के निर्णय सारगर्भित व सार संक्षिप्त हुआ करते थे। विषय से संबंधित विधि का चिंतन होता था। लेकिन अब पद्धति ऐसी हो गई है कि किसी निर्णय में हम ऐसी ऐसी बातें लिख देते हैं कि वह तत्वज्ञान ज्यादा एवं विधि सिद्धांत कम होता है व इस कारण सहमति असहमति की समस्या उत्पन्न हो जाती है व न्याय दान में भी विलंब होता है।

भाषा के संबंध में माननीय महोदय ने कहा कि भाषा का ज्ञान होना चाहिए तथा उसका प्रयोग भी अच्छे से होना चाहिए तथा लगे कि निर्णय की भाषा एक कुशल

न्यायाधीश की है, विद्वान न्यायाधीश की है। निर्णयों से ज्ञात होना चाहिए कि निर्णय लिखने वाला व्यक्ति ज्ञाता है। आपका अनुभव, आचरण, व्यवहार व चिंतन व योग्यता आपकी भाषा से ही ज्ञात होगी।

व्यवहार न्यायाधीश वर्ग–2 के न्यायिक अधिकारियों के तृतीय प्रशिक्षण सत्र में माननीय कार्यवाहक मुख्य न्यायाधिपति श्रीमान डी.पी.एस चौहान महोदय ने दिनांक 18–2–2000 को प्रबोधन वर्ग में न्यायिक अधिकारीगणों हेतु प्रबंधन विषय पर एवं नीतिशास्त्र पर विचार व्यक्त किए। सूत्रबद्ध रूप से एवं धारा प्रवाह में अपनी अभिव्यक्ति को निरूपित करते कहा कि प्रशिक्षण शिविरों का आयोजन इसी लिए होता है कि कार्य प्रणाली में सुधार हो सके तथा दक्षता बढ़ सके। प्रशिक्षण सत्रों में चिकित्सा विधि शास्त्र के संबंध में आयोजित होने वाले व्याख्यान सत्रों के संबंध में अभिव्यक्ति को आगे बढ़ाते हुए कहा गया कि यह विषय न्यायिक अधिकारीगणों हेतु अत्यंत महत्वपूर्ण है। चिकित्सा विधि शास्त्र के माध्यम से अपराधिक प्रकरणों के निराकरण में निष्कर्ष निकालने में सुविधा प्राप्त होती है। शास्त्र शुद्ध रूप से निष्कर्ष निकाले जा सकते हैं। माननीय कार्यवाहक मुख्य न्यायाधिपति महोदय श्रीमान डी.पी. एस. चौहान महोदय ने अपने स्वयं के अनुभवों के विषय में बताया कि खाने के बिस्किट की केमिस्ट्री भी सुलभ नहीं होती है। कौन सा रसायन किस प्रकार से प्रतिक्रिया करेगा एवं वह प्रतिक्रिया कब कैसी कम ज्यादा होगी इसका अध्ययन चूंकि उन्हें था इसलिए उन्हें प्रकरण निराकरण में अत्यंत सुविधा हुई। अतः ज्ञान का अभाव एक बात है व अज्ञानता के साथ न्यायपीठ पर बैठकर न्यायदान करना हास्यास्पद होगा। विधि प्रक्रिया को नई दिशा देने की आवश्यकता वर्तमान परिवर्तित समाज में होने की बात कहते हुए माननीय महोदय ने यह भी कहा कि नई दिशा तब ही दी जा सकती है जब हमारे पास विधि प्रक्रिया की कल्पना, परिकल्पना कल्पकंता, द्विग् विन्यास हो। यह गुण तब ही आ सकेगा जब सतत् रूप से कार्य किया जावेगा जिससे यह ज्ञात होगा कि किसी समस्या का निदान करने हेतु हमारे पास अनुभव है या नहीं। कार्य करते रहने से बहुआयामी दृष्टिकोण विकसित हो सकेगा। माननीय चौहान साहेब ने न्यायिक प्रबंधन पर भी धारा प्रवाह में इस प्रकार विचार व्यक्त किए कि कक्षा में बैठे प्रशिक्षु आश्चर्य चकित हो गए। सुलभ व ग्रहणशील रूप से सूत्रबद्ध रूप से विचार व्यक्त करते हुए (1) पद की प्रतिष्ठा (2) कर्मचारी वृन्द (3) न्यायाधीश का व्यवहार, (4) न्यायालयीन कार्यवाही (5) परिवार प्रबंधन, (6) ईमानदारी (7) स्वाभिमान, जैसे प्रबंधीय मुद्दों पर भी अपने विचार व्यक्त किए। उक्त मुद्दों पर पृथक से विधिवत लेख लिखकर प्रस्तुत किया जाएगा।

संस्था के द्वितीय सत्र प्रारंभ होने के पूर्व अवधि में ही श्रीमान डी.पी.एस. चौहान महोदय के कार्यवाहक मुख्य न्यायाधिपति के नियुक्ति के आदेश आने के कारण संस्था

को यह गौरव भी प्राप्त हुआ कि उनका हार्दिक स्वागत संस्था म किया जा सके। संस्था के वे पदेन मुख्य संरक्षक भी है। संस्था की ओर से मैंने, महिला प्रशिक्षु सुश्री सत्यभामा जायसवाल एवं पुरुष प्रशिक्षु श्री रमेशचंद्र चौरसिया ने स्वागत किया।

माननीय न्यायाधिपति महोदय श्रीमान डी.एम. धर्माधिकारी महोदय की नियुक्ति मुख्य न्यायाधिपति गुजरात उच्च न्यायालय में हो जाने के कारण समापन समारोह में पधारने हेतु आमंत्रित किया था लेकिन अत्याधिक कार्य व्यस्तता के कारण श्रीमान धर्माधिकारी साहेब संस्था में नहीं आ पाए लेकिन उन्होंने संस्था के उत्कर्ष हेतु हार्दिक शुभकामनाएं व्यक्त करते सभी को शुभाशीर्वाद प्रेषित किए हैं।

इसके पूर्व अन्य पूर्व सत्रों में विभिन्न समापन समारोह में माननीय न्यायाधिपति श्रीमान डी.एम. धर्माधिकारी साहेब ने दो विषयों पर प्रकाश डाला प्रथम लोक न्यायालय एवं न्यायिक अधिकारीगणों के द्वारा सतत् रूप से अध्ययन प्रक्रिया जारी रखने के संबंध में। विचारों का आदान–प्रदान कुछ लिखकर कुछ पढ़कर आगे बढ़ने का सोच विकसित करने की अपेक्षा श्रीमान महोदय ने की। आपने यह भी कहा कि हर व्यक्ति के चिंतन में, सोच में, विचारों में भिन्नता तो होगी लेकिन उसका आचार विचार व व्यवहार कैसा है इसके पीछे उसके संस्कार क्या रहे हैं यह मुद्दा महत्वपूर्ण होगा। अनुभवी व्यक्ति से अनुभव प्राप्त करने वाला व्यक्ति भी अनुभवी होता है अतः अनुभवी व्यक्ति से सतत् रूप से अनुभव प्राप्त करना व व्यवहार में लाना भी प्रशिक्षण का अंग हो सकता है। चूंकि तरुण न्यायाधीश ही आने वाले कल को ध्यान रखेंगे व उन्हें ही वह सम्हालना है अतः उनका दायित्व अधिक है। कल जो गलतियां हमारे से हुई हैं उन्हें आज आप समझो व आने वाले कल में आप गलती न करो।

न्याय प्रक्रिया में प्रकरणों के शीघ्र निराकरण के संबंध में लोक न्यायालयों की भूमिका तथा सतत् एवं निरंतर लोक न्यायालय एवं विधि साक्षरता एवं अभिज्ञा आंदोलन जैसे महत्वपूर्ण एवं चिंतन शील विषय पर भी माननीय न्यायाधिपति श्रीमान डी.एम. धर्माधिकारी साहेब ने अपने विचार व्यक्त किए और कहा कि लोक न्यायालयों के माध्यम से प्रकरणों का निर्णय एक औपचारिकता नहीं है कि राजीनामा योग्य प्रकरण जिसमें पूर्व में ही राजीनामा हो चुका है अथवा होने की लगभग संभावनाओं को मात्र निर्धारित तिथि पर रखना है अपितु न्यायालयों को स्वयं को देखना है कि प्रकरणों में जो भी विवाद व विषाद पक्षकारों के बीच में है उसे किस सीमा तक न्यून किया जा सकता है। अब विवादों के संबंध में पक्ष विपक्ष के विवादों में वह दर्शक नहीं बनेगा अपितु वह विवादों में समझाने का प्रयत्न करेगा। तथा पक्षकारों को इस बात से सहमत करेगा कि विवाद न्यूनं हो इसे ॲड्वेंव्हरसरी सिस्टिम ऑफ जस्टिस विरुद्ध पार्टिसिपेटरी सिस्टिम ऑफ जस्टिस के नाम से जाना जाता है। समाज को पहचानने के लिए न्यायालय की चौखट से बाहर जाकर भी अध्ययन होना चाहिए इसीलिए एक

योजना विधिक साक्षरता एवं अभिज्ञा शिविर की भी प्रारंभ की गई है जिसमें समाज के व्यक्ति व न्याय दान से जुड़े व्यक्तियों के बीच वैचारिक धरातल पर विधिक समस्याओं के प्रति अध्ययन हो सकेगा व प्रकरणों के निराकरण में गति को बढ़ाना संभव होगा। माननीय न्यायाधिपति महोदय ने इस बात को भी गंभीरतापूर्वक ध्यान रखने हेतु कहा कि सामान्य जन के साथ इतने निकट भी न आएं कि स्वयं को समस्याओं के कठघरें में खड़ा होना पड़े। एक महत्वपूर्ण बात माननीय न्यायाधिपति श्रीमान डी.एम. धर्माधिकारी साहेब ने व्यक्त की कि **सही न्याय देना ही पर्याप्त नहीं है अपितु पक्षकारों को अपना पक्ष प्रस्तुत करने हेतु उचित एवं सही अवसर दिया या नहीं यह भी महत्वपूर्ण है।**

विभिन्न सत्रों में माननीय कार्यवाहक मुख्य न्यायाधिपति श्रीमान् डी.पी. एस. चौहान महोदय एवं माननीय न्यायाधिपति श्रीमान् डी.एम. धर्माधिकारी महोदय के अतिरिक्त सतर्कता रजिस्ट्रार, श्री सुगंधी लाल जैन, विशेष न्यायाधीश उज्जैन श्री एन्. के. गुप्ता, एडिशनल रजिस्टार श्री टी.के. झा एवं श्री सी.व्ही. सिरपुरकर, अति. जिला न्यायाधीश श्री शिवनारायण खरे, चिकित्सा प्राध्यापक डॉ. शाकल्ले, पूर्व लेखा अधिकारी श्री पी.के. तिवारी ने भी विभिन्न विषयों पर व्याख्यान दिए। माननीय धर्माधिकारी महोदय ने इस अवसर पर जो संदेश दिया उसे यहां प्रकाशित किया जा रहा है।

सन्देश

नई शताब्दी के प्रवेश के शुभ अवसर पर विधिक सेवा कार्यक्रम से जुड़े सभी व्यक्तियों को मेरी हार्दिक शुभ कामनाएं।

आशा है, आगामी वर्षों में, न्याय दिलाने के लिए एवं अन्याय रोकने के लिए सकारात्मक प्रयत्न सफल होकर सामान्य जन को न्याय प्राप्ति की संतुष्टि होगी।

विधिक सेवा कार्य में नई शताब्दी पर हमारा नारा है:–

"अन्याय रोकें, न्याय दिलाएं"

"PREVENT INJUSTICE-PROMOTE JUSTICE"

न्यायमूर्ति डी. एम. धर्माधिकारी
कार्यपालक अध्यक्ष,
म.प्र. राज्य विधिक सेवा प्राधिकरण
जबलपुर

ADVICE ON JUDICIAL WRITING

JOTTINGS BY HON'BLE JUSTICE SHRI D.M. DHARMADHIKARI

विधिक चिंतन

माननीय न्यायाधिपति महोदय श्रीमान डी. एम. धर्माधिकारी जो कि विधि शास्त्री, न्यायशास्त्री तो है ही एक शैक्षिक चिंतक, विद्योचित व्यक्तित्व के धनी व्यक्ति भी है। सतत् रूप से वाचन एवं मनन की उनकी रुचि सर्वज्ञात है। आप ने विभिन्न विधि साहित्य से उद्धरण तैयार कर इस संस्था को भेजे है। संस्था इसके लिए आभारी है। समय–समय पर उक्त उद्धरण प्रकाशित किए जाएंगे। आशा की जाना चाहिए कि हम–आपको इस संबंध में गंभीरता पूर्वक अध्ययन चिंतन करना चाहिए ताकि विधि प्रावधानों को सक्षमतापूर्वक लागू करने में सहायता मिल सके।

EDITED BY HIS LORDSHIP FROM AUSTRALIAN LAW JOURNAL OCTOBER 1999. COURTERY : AUSTRALIAN LAW JOURNAL AND OTHER LEGAL LITURATURE.

ADVICE ON JUDICIAL WRITING

1. Have the courage to select only the essential facts and discuss solely the real issues.
2. Reduce citations and shorten the quotations.
3. Avoid repitition.
4. Revise constantly before release.
5. There is no such thing as good writing. There is only good re-writing. The objects of re-writing the Author suggests should be-
   (i) Expunge superfluous details and repitition.
   (ii) Remove unnecessary emphasis.
   (iii) Eliminate creases, verbiage, redundancies and gramatical errors.
   (iv) Tighten the text.
   (v) Delete jarring and otherwise prejudicial expressions.
   (vi) Verify puntuations and spellings.
   (vii) Judges are not exempted from the demands for plain speech.

FROM AUSTRALIAN LAW JOURNAL, OCTOBER 1999
JUDGMENT WRITING : ARE THERE NEEDS FOR CHANGE ?

THE HON. JOHN DOYLE

In brief, he explains that the reasons for writing judgments are these. First, to explain to the parties how and why the result was reached. It is particularly important that the losing party should understand why that party lost, secondly, the judgment should expose the judge's reasoning, on matters of fact and law so that if there is an appeal the appellate court can examine the soundness of the judgment. A third purpose that he identifies in an aspect of the process of justice It is to expose a defect in the law or in its administration.

A fourth purpose, which is closely related, is to expose any error or deficiency in the area of public administration. This will arise only in certain types of cases. A fifth purpose is to expose individual wrongdoing, when that is strictly necessary to decide the issues in the case. A sixth purpose is to expose the administration of justice to the public gaze, an essential attribute of our system of justice...

I believe that we should try to write more economical and simpler judgments, keeping more to the essential point of issue. We should support moves that would avoid the need for the lengthy elaboration of reasons. The object here is to conserve our time, so that it can be spent on the cases that really need it. I think that we should try to keep the law simple.

To achieve these ends, I offer these suggestions. None of them are new.

First of all, we should take steps to grapple with excessive reporting and citation of authorities. In some American Jurisdictions there is a practice of specifying that a judgment, when published, may not be cited without leave of the Court. I think that we should consider this. This practice, of course, requires an act of exquisite self-discipline. I doubt whether any of my judgments deserve not to be cited without leave of the Court, but firmly believe that other judges produce a good number of such judgments. But even I am prepared to surrender to such a system..... But against that we have to set the significant saving of time that would occur if we were more self-disciplined in this respect. That time could be used to advance the production of other judgments, In that respect, justice will be well-served. There is also the point that the law is more certain, if there are less judgments on the point. Sir Frank Kitto castigates this point of view, as pandering to laziness, I accept that at the level of the High Court, as an ultimate court of appeal, my point may have less force. But I believe that even there it is a valid point of view. Most of the problems that I have just referred to will be addressed if we conscientiously consider the draft judgment in which we are invited to concur. As long as we address the temptation of the easy concurrence, there should be no problems...

First of all she said :

"The most striking aspect of judgments for me is the speaking position of the writer. Writers of fiction gain authority through narrative seduction and virtuoso linguistic performances; through beauty, shock, skill or, for the popular genres, satisfying and enriching expectation and experience. Writers of nonfiction (particularly academic) earn authority through persuasion, through proving or earning their credentials; convincing readers of their grasp of their discipline and their contribution to knowledge. Judges need neither seduction nor persuasion to earn authority; they are vested with it before they set pen to paper".....

"Most judgments also attempt to speak clearly and directly to the other readership, represented by the litigants. Many judgments use a measured and plain prose and aim for clarity. However, few reflect consciousness of a target readership which must be assumed to have a lower literacy level than that of the profession. I think many judges have no real connection with the readership for which they write, and very few judgments use plain English to any conscious degree...

Judgments can lose nothing by being written with attention to Plain English. Plain English cannot damage communication with professionals and can greatly facilitate understanding and access for non- professionals. In fact it can also make obtuse or jargonistic prose more elegant." She acknowledges, of course, that judgments cannot simply be recast wholly into plain English.

Taking her points in reverse, I conclude by offering these two comments. Have we given up, or should we give up the struggle to make our judgments accessible to the general public ? If not, then we do need to work at making our judgments more accessible to the general public ?

As to the other main point that Eva made, as I have already indicated, it may be that we are getting the balance wrong between authoritative decision making and persuasiveness. There is no easy solution here, but it is something worth thinking about.

In conclusion, I believe that we are tending to write at unnecessary length. Change will come about only if there is general agreement that is so, and if collectively we make a real effort to grapple with the problem. Courts of appeal have to be supportive. In the end, if the time taken by our judgments is partly a self-made problem, then the solution lies in our own hands.

CONTEMPORARY JUDGMENT WRITING : THE PROBLEM RESTATED

The Hon Justice Bryan Beaumont

A flexible approach would permit an ex-tempore judgment if this is appropriate for example, where the issues are few and have been well rehearsed in adequate oral argument.

One possible area of uncertainty in allowing a "proportionate" approach could arise when deciding whether the court should accord either summary or extended treatment to a discussion of legal principle. My suggestion is that for both trial and intermediate appellate purposes, extended treatment should be reserved for those cases only where what is involved is "novel law". as that concept is understood in the law reporting sense. For this purpose, "novel" law may be of several kings;

(a) a decision of a question on which there is no binding authority or no clear binding authority, which may occur both under the general law and on the interpretation of a statute or regulation, or of a common form of local ordinance or by-law or commercial document;
(b) a decision, the reasons for which, clarify the law where previously its expression has been obscure;
(c) a decision that an authority applies to novel facts (a special case of (a);
(d) a decision that an authority in another jurisdiction will be followed here, so turning probability into certainty;
(e) a decision that an old or criticised authority is still good law;
(f) a decision in an area where the law is changing, either to show a tendency that will lead to overruling earlier authority or to show that the courts are not yet ready to go so far;
(g) a decision explaining a decision, the exact application of which was arguable;
(h) a decision of characterisation, whether a case should be decided according to one well-known rule or another.

But, plainly, no one wants to read of the application of a leading case to similar facts.

Finally, we should not allow ourselves to be overwhelmed with legal information, especially in the form of lengthy written submissions. "Technological developments that increase and expand the range of material available" are all very fine, but is such a volume of material always necessary? Lord Bingham has remarked :

"It is often said that counsel in argument cite too many cases of peripheral relevance. I sometimes wonder if this disease, like gaolfever, may not have been communicated to the bench."

THE JUDGE AS LAW MAKER.

From Book "The Judge"
by Patric Devlin. Oxford Unit Press.

"What is the function of the Judge? prof, Jaffe has a phrase for it 'the disinterested application of known law'..

The social service which the Judge renders to the community is the removal of a sense of injustice, to perform this service the essential quality which he needs is impartiality and next after that appearance of impartiality. I put Impartiality before the appearance of it simply bacause the reality of appearance would not endure; In truth within the context of service to the community the appearance is more important of the two. The Judge who gives right Judgment while appearing not to do so may be thrice blessed in heaven but on earth he is no use at all:'

It is not the bare fact of physical injury or loss of property that arouses, a sense of injustice in a man- this may happen accidentally- it is the feeling that he has been wronged by an- other whom he cannot challenge or to whom he is forced to submit.

It is the affront to his dignity which if it is left unrelieved will lead to disorder and if others like him are similarly wronged to social unrest.

.... "We ought never to forget that Judges and juries are the institutions which secure us from comperable disosrders within the nation and that their value to the community is to be measured by the extent to which they do this and not by the extent to which their- Judgment and Verdicts are pleasing to the critical eye".

Dr. Johnson observed that 'authority from personal respect has much weight with most people, and often more than- reasoning.' Respect for office is not so great as it was but respect for the person remains, which is why in all walks of life so many inarticulate people are influential.

It is the virtue of English system that first to last the Judge is exposed to the parties; they do not read the Judgment, they see and hear it being made and given. This is why-impartiality and appearance of it are Supreme Judicial virtues.

JUDICIAL ACTIVISM- IT'S ILL EFFECTS

The disinterested application of law calls for many virtues, such as balance, patience, courtsey, detachment, which leave little room for the ardour of the creative reformer.

I do not mean that there should be a demarcation or that Judges should down tools when ever they meet a defect in the law..... To some extent and in some situation a Judge should be activist. But I am convinced that there should be no judicial dynamics.

Judges- will be the type of men who do not seriously question the status quo men whose ambition is to serve the law and not to be its master.....

Lawyers are not naturally interested in social reform any more than policemen are or soldiers. Without policement society would be threatened from within and without soldiers from without. Judges too are necessary to society; especially in a time of social change. **For change, is the measure of its beneficence to the many, causes hardship and displacement to the few.** It is essential to the stability of society that those whom change hurts should be able to count on even handed justice calmly dispensed, not driven forward by the agents of change."

It is this even- handedness which is the chief characteristic of the British judiciary and it is almost beyond price. If it has to be paid for-in-impersonality and remoteness, the bargain is still a good one...

In our own community the reputation of the judiciary for-independence and impartiality-is a national asset of such richness that one government after another tries to plunder it. This is a danger about which the judiciary itself has been too easygoing. To break up the asset so as to ease the parturition (the act of bringing for the young) of judicial activity, an embaryo (inital or rudimentory state of development) with a doubtful future, would be a calamity. The asset which I would deny to government I would deny also to social reformer. I am a firmly opposed to judicial creativity or dynamism as I have defined it, that is, of judicial operations in advance of the consensus.

THE JUDGE AND THE AEQUUM et BONUM

Justice according to law and justice on the merits, or ex aequo et bonu aequum - et - bonnum -est lex legum - what is judicials and beneficial is the law of Laws. The public washes it down with the proverb **that hard cases made bad law.** They do not want him to decide according to law, but they want him to take in the application of law as much freedom as he thinks to be needed to satisfy justice.

But written law, whether it is derived from statute or from precedent is naturally much less flexible than a statement of policy, and it is the gap between the text of the law and the policy inspiring it which leaves room for the aequum et bonum.

What motivated the State was the maintenance of order. It is because a sense of injustice is the most breeder of disorder yet invented that the state

has to concern itself with justice...'

A sense of injustice is more easily aroused by the apprehension of unequal treatment than by anything else.

The public desires order and dislikes law, though without law there would be no order. The judicial qualities which the public singles out for praise are common sense and humanity; devotion to the law is less admired than willingness to strain it.

so the Judge cannot openly dispense. But can stealthily stretch or mould.

DISCRETION OF THE JUDGE

What it means that the Judge is on a looser rein and in certain parts of the country left to find his own way. For the law leaves certain areas more or less uncharted. They are the wild spaces which the motorist sees on his map, framed in by the motor ways and trunk roads, divided even by the first and second class roads, crossed only by thin white lines, sometimes dotted.

In these fields that are best only roughly mapped; the Judge must act more or less, according to the State of map in his own discretion. This is another way of saying that he must decide each case largely according to its particular merits. It is thus that the discretion of the Judge admits the aequum et bonum.

JUDGE AND CASE LAW

While every Judge must be ready to act on his own and with no other guide than his own sense of justice- Judges are not by nature autocratic and need the protection and support of the law.

..... Between the territory which is best regulated by precise statutory language and the territory which is best left to the sense, of justice of the individual judge, there is an area fit for occupation by a controlled discretion.

..... But someone has to see, not only that the statute is applied in a way that carries out its propose but also that the law which results from its development is coherent. This work is of judges. They are the architects of case law and they should construct it to achieve the objects. I have listed especially uniformity, clarity and accountability.

JUDICIAL REVIEW- ACTIVIST ROLE

"of course. it is always arguable just how far the court ought to push its power of control. But in general public opinion has strongly supported the judges in their recent activist role, being well aware that executive power is growing incessantly and that administrative law must grow likewise if all this power is to be kept under control. If the courts are to provide the protection which the citizen needs, they must not be deterred by political controversy. Othersie the system of democratic government to which India and Britain are equally devoted, will fail to prevent the abuse of power.

NOTE : To be continued in the next issue.

मातृवत संस्था

साथियो। जागते रहो स्तंभ का उद्देश्य निश्चित ही मनोरंजनप्रद सामग्री या "बच्चों की कलम से" अथवा "अब हंसने की बारी है" के माध्यम से कपोल कल्पित बातें बताने का नहीं रहा है। शुद्ध रूप से उद्देश्य यह है कि जो भूलें हो रही हैं उन्हें यथा संभव टालना है। यह तभी संभव है जब हम सतत् रूप से जागृत एवं चैतन्य अवस्था में विधिक प्रावधानों एवं न्याय दृष्टांतों को देखेंगे व प्रज्ञावान जानकार व्यक्ति के रूप में कार्य करेंगे। हींग लगे ना फिटकरी का मुहावरा आपने भी सुना होगा मैं तो उसका उपयोग भी करता हूं व मेरा काम चोखा हो जाता है। मुझे यह पता नहीं था कि आप भी व्यवहारिक धरातल पर ऐसा ही करते होंगे। पर विभिन्न क्षेत्रों से पता लगा कि कार्य निराकरण व यूनिट अर्जन का गोपनीय नुस्खा आप तक पहुँच गया है। अब जब बात गोपनीय है ही नहीं तब सार्वजनिक करने में संकोच क्यों? सभी ने लाभ उठाना चाहिए। "एक रिमांड और चार यूनिट्स" का यह फार्मूला (सूत्र) है। ठीक वैसा ही है जैसा "एक तंदुरस्ती हजांर नियामत"। आज कल व्यवहार अपीलें रिमांड करने का आसान काम हो रहा है। कोई न कोई मीन मेख विचारण न्यायालय के निर्णय में निकालो एवं सम्पूर्ण प्रकरण रिमांड कर दो। लेकिन ऐसा भी नहीं है कि ऐसे प्रतिप्रेषण आदेश के संबंध में अन्य प्रक्रिया संबंधी प्रावधानों का पालन किया जाता होगा या कि आदेश पारित करने वाले पीठासीन अधिकारी को ज्ञान होगा। मजे की बात तो और भी हैं। पठन पाठन श्रवण की आदत तो लगभग समाप्त ही हो गई है। अभी 5 से 12 अक्टूबर 1999 के लिए आहूत अतिरिक्त जिला न्यायाधीश, जिन्हें पदोन्नत हुए भी तीन माह हो चुके थे, को लगभग 2 माह पूर्व की अग्रिम सूचना भेजी थी कि अमुक–अमुक प्रावधान अवश्य पढ़कर आयेंगे। लेकिन यदि कुछ एक अपवाद छोड़ दिए जावें तो केवल यह कहा जा सकता था कि कोरा कागज है मन (ज्ञान) मेरा.....। कहने को इन्होंने कई प्रकरण निराकृत किये थे। हत्या–डकैती, विभिन्न अपीलें, रिवीजनें आदि। क्लेम केसेस भी किये थे। लेकिन आधारभूत ढांचे का ज्ञान संचित नहीं किया। अतिरिक्त जिला न्यायाधीशों ने निर्णय/आदेश में यह नहीं लिखना चाहिए कि "अधीनस्थ न्यायालय" ने अमुक–अमुक प्रश्न ठीक से निर्धारित नहीं किया या किया। उन्होंने केवल "विचारण न्यायालय" शब्द का मात्र प्रयोग करना चाहिए। कार्यपालक दंडाधिकारीगणों के आदेश से संबंधित रिवीजनों में एक नई बात देखने को मिली वह यह कि रिवीजन में उनके लिए "अवर मजिस्ट्रेट या न्यायालय" शब्दों का

प्रयोग था। ये शब्दावली कहाँ से आयात की पूछने पर पता लगा मालूम ही नहीं। संभवतः "नो मॅन्स लेण्ड" से आयात हुई होगी या साहित्य सृजन हुआ होगा या पूर्व पीठासीन अधिकारीगणों के निर्णय में ये शब्द रहे होंगे।

अब आप कनिष्ठ बंधुओं की समस्याओं का निदान करोगे तो या किसी भी अधिकारी की समस्या का निदान करोगे तो आप पीड़ित होंगे। टी–क्लब में या अन्यत्र कोई अधिकारी मिलता है अथवा मेरे जैसे व्यक्ति से समय–असमय टेलीफोन पर समस्या का हल पूछा जावे तथा मैं अपना सही गलत अभिमत मेरी वास्तविक–काल्पनिक धारणाओं के अनुसार दूं तो बंधुजन अब आदेशिका में संदर्भ देते हैं कि पहले जो आदेशिका लिखी थी उसमें रिव्यू करके ये लिखा जाने लगा है कि मुझे अमुक वरिष्ठ ने ऐसा कहा है इसलिए उसके निर्देशानुसार अब ये आदेशिका लिखी जाती है। निवेदन कर दूं कि आपका अपना न्यायालय है तथा आप अपने स्वविवेक से कार्य करेंगे चाहे स्वयं परिश्रम न करके दूसरों से रेडीमेड उत्तर भी प्राप्त कर लिया हो। ऐसा न हो कि भविष्य में हम जैसे कठ वैद्य, नीम हकीम (Quack, empiric) होम्योपेथी जैसे फार्मूला नं.–1 से 100–200 तक तैयार करके रखे व सेवा निवृत्ति पश्चात् न्यायालय क्षेत्र के बाहर सड़क पर चादर डालकर फार्मूले बेचना चालू कर दें। Quack शब्द के शाब्दिक अर्थ पढ़ना। मजा आएगा।

एक माननीय न्यायाधिपति महोदय ने अपना निर्णय पारित किया। चेंबर में मुझे याद किया गया। गया। बैठा। विचारण न्यायालय का निर्णय पढ़ने को दिया। पढ़ा अच्छा लगा। प्रशंसा कर दी। वे मेरे पर हंसे तो नहीं पर मुस्कराए व पूछा नामजोशी साहेब ये बताओ कि घटना की तारीख कौन सी है। उस दृष्टिकोण से निर्णय को देखा। मैंने कहा क्या अंतर पड़ता है। चेक पर हस्ताक्षर हैं। पर्याप्त हैं। ब्लैंक डेटेड चेक भी तो जारी किये जाते हैं ताकि सब को सुविधा हो। पत्रिका के माध्यम से कक्षाओं में भी यह बताया गया है कि निर्णय लिखने के क्या–क्या तत्व हैं।

अभी परसों एक समाचार मिला। अच्छा लगा। लौह तथा पारस की संगत का था। न्यायिक अधिकारी के संपर्क में आकर कर्मचारी भी चार्ज, वाद–प्रश्न, आरोपी कथन बनाने, निर्णय लिखने में पारंगत एवं अभ्यस्त हो गये हैं। इतने अभ्यस्त व पारंगत कि अब हम ए.पी.पी. (ए.डी.पी.ओ.) की क्षमता पर भी विश्वास नहीं करते। वैसे भी आजकल न्यायालयों में उनकी उपलब्धि भी दुर्लभ कमोडिटी जैसी हो गई है।

साक्ष्य टंकित करने का कार्य यदि लिपिक का है तो लिपिबद्ध करवाना पीठासीन अधिकारी का है। अगस्त 1999 की "ज्योति" में भी इस संबंध में संपादकीय के माध्यम से दर्शाया गया था। माननीय मुख्य न्यायाधिपति महौदय ने भी अप्रसन्नता व्यक्त की थी कि पीठासीन अधिकारी पीठ पर अन्य कार्य करते हैं तो साक्ष लेखक आदि लिपिकीय वर्ग से पीठासीन अधिकारी साक्ष्य लिपिबद्ध करवा लेते हैं। इसके बावजूद इस व्यवहार में कुछ भी परिवर्तन आया होगा ऐसा आभास नहीं मिलता है। यदि पीठासीन अधिकारी साक्ष्य लिपिबद्ध करते समय अन्य काम नहीं भी करते हो तब भी क्या वे उस समय चैतन्य अवस्था में रहते हैं यह प्रश्न शेष रह जाता है। साक्ष्य लिपिबद्ध करते समय चौकस होना भी आवश्यक होता है। जिस प्रकरण की साक्ष्य चल रही है उस प्रकरण के वाद प्रश्न विचारणीय मुद्दे, अभिकथन, प्रतिरक्षा का आधार, चार्ज क्या है आदि विभिन्न बातें भी पूर्व से तैयार रखना होती है तब ही तो पीठासीन अधिकारी द्वारा साक्ष्य लिपिबद्ध करना का जा सकेगा। यदि पक्षकार कहता है कि साहब मैं जो कह रहा हूँ वह ठीक से नहीं लिखा जा रहा है तो हमारा कर्त्तव्य बनता है कि हम देखें के वस्तुस्थिति क्या है। यदि पक्षकार कोई आवेदन पत्र इस संबंध में देता है तो उसको भी अवश्य रूप से रिकार्ड पर लिया जाना चाहिये। टरकाने वाली बात नहीं होना चाहिये। टरकाने से काम नहीं चलेगा। पक्षकार तो उसी समय आपत्ति कर रहा है, आवेदन पत्र भी दे रहा है लेकिन बाबूजी ही परभारे यदि पक्षकार को कह देता है कि अगली पेशी पर अर्जी लगाना तो क्या स्थिती होगी। बात अच्छी है ऐसा नहीं कहा जा सकता।

गिरफ्तारी पूर्व प्रतिभू पर अभियुक्त था। तत्पश्चात अभियुक्त के विरूद्ध आरोप पत्र प्रस्तुत हुआ। आरोप पत्र प्रस्तुत होने पर न्यायालय ने उसके विरूद्ध गिरफ्तारी वारण्ट निर्गमित किया। क्यों किया, क्या कारण था? क्या सर्वोच्च न्यायालय के ***1982 के दृष्टांत 1982 सी.आर.एल.जे. पृष्ठ 1943 फ्री-लीगल एड वि. स्टेट*** से हम अवगत हैं कि आरोपी को प्रतिभूति पर छोड़ने पश्चात् आरोप पत्र प्रस्तुति के कालावधि में उसकी उपस्थिति अपेक्षित नहीं है। इस प्रकरण में भी वह प्रतिभूति पर मुक्त था।

दोस्तो! न्यायपालिका मातृवत संस्था है। उसकी सुरक्षा कवच में हमें फलना फूलना है। उत्पन्न होने वाली खरपतवार को सतत् हटाते जाना है अन्यथा खेत न्याय का नहीं अन्याय व का हो जायेगा व न्याय खरपतवार कहलाएगी।

एक पक्षीय प्रकरणों में विचारणीय बिंदु

पुरूषोत्तम विष्णु नामजोशी

मित्रो! यह कोई आवश्यक नहीं कि यदि विपक्षी; दावा अथवा अन्य कार्यवाहियों (प्रोसिडिंग्ज) में भाग नहीं ले रहा है तो प्रकरण का निर्णय अथवा आदेश हमेशा वादी/प्रार्थी के पक्ष में होना ही चाहिए। ये बात तो पक्षकार द्वारा सिद्ध किए गए तथ्यों पर ही निर्भर रहती है। ऐसे प्रकरणों में जहां दोनों ही पक्षकार प्रकरणों में भाग लेते है वाद प्रश्न अथवा विचारणीय बिंदु हमने निर्मित करना चाहिए। वर्तमान में हम केवल नियमित दावों में मात्र वाद प्रश्न, आदेश 14 व्य.प्र.स. का पालन करने हेतु निर्मित करते है। यह बात एकदम भिन्न है कि आदेश 14 व्य.प्र.स. तथा सिविल रुल्स एवं आर्डर्स के नियम 144 एवं 145 के अपेक्षा के अनुरूप वाद प्रश्न निर्मित करते हैं या नहीं। अभी कुछ दिन पूर्व ही प्रशिक्षण हेतु आए न्यायिक अधिकारी गणों के द्वारा लिखित निर्णय, वाद प्रश्न आदि का परीक्षण किया गया तो कुछ एक ने दावे में मांगी गई सहायता के अनुरूप वाद प्रश्न बनाना प्रतीत हुआ न कि अभिकथनों के अनुरूप।

विविध प्रकरणों में भी हम जब साक्ष्य लिपिबद्ध करके गुणदोष पर आदेश देते हैं तब आदेश पारित करते समय हम विचारणीय बिंदु निर्मित करते हैं। तथा उन बिंदुओं के आधार से आदेश देते हैं। इस प्रकार मुख्य अंतर यह हुआ कि नियमित वादों में जहां दो पक्षीय कार्यवाही हो रही है वहां तो वाद प्रश्न निर्मित करते हैं क्योंकि अनिवार्यता है। लेकिन एक पक्षीय दावों में तथा अन्य किसी भी कार्यवाही में हम विचारणीय बिंदु निर्मित नहीं करते हैं। आदेश या एक पक्षीय निर्णय लिखते समय यदि हम विचारणीय बिंदु निर्मित कर आदेश या एक पक्षीय निर्णय लिखकर प्रकरण खारिज भी करते हैं व कहते हैं कि अमुक अमुक तथ्य सिद्ध नहीं हुए या आदेश में लिखते हैं कि विपक्षी ने सिद्ध नहीं किए हैं तो ये विचारणीय बिंदु तो पक्षकारों के सामने कभी भी साक्ष्य पूर्व थे ही नहीं कि किन बिंदुओं पर न्यायालय उनसे साक्ष्य की अपेक्षा करता है तो वास्तव में पक्षकारों के साथ हम अन्याय कर रहे होते हैं। ले देकर केवल एक ही उत्तर बार–बार दिया जाता रहा है कि विचारणीय बिंदु निर्मित करने की अनिवार्यता नहीं है। ये भी कहा जाता है कि पक्षकारों का दायित्व है कि वे स्वयं ही निर्धारित करे, तय करे कि प्रकरण में क्या साक्ष्य अपेक्षित होगी। याने पक्षकार अपने अपने चिंतन शक्ति अनुसार व जज्ज साहेब अपनी बुद्धि अनुसार चिंतन करेंगे व विपरीत दिशाओं में न्यायरथ के घोड़े दौड़ायेंगे। विधि की इस अनिश्चितता को दूर करने हेतु तथा न्यायदान का लक्ष्य प्राप्त करने हेतु तथा न्यायालय को प्रकरण में निर्णय के लिए किन मुद्दों पर साक्ष्य की अपेक्षा है इस पर विचार हो। यदि नियमित प्रकरणों में वाद प्रश्न बन सकते हैं तो अन्य प्रकरणों में भी विचारणीय बिन्दु प्रथमतः निर्मित होना चाहिए एवं

तत्पश्चात ही राशि लिपिबद्ध आती है तो दूध में शक्कर होगी, सोने में सुहागा होगा न कि गोबर में गुड़ होगा। समग्र रूप से वैचारिक चिंतन की आवश्यकता है। अनुसंधनात्मक कार्य स्वयं दिग्विज्ञास (self orientation) की आवश्यकता है उसी दिशा में यह एक पग है।

ए.आय.आर. 1977 म.प्र. पृष्ठ 182 नगर पालिक निगम ग्वालियर विरुद्ध मोतीलाल (डी.बी) का दृष्टांत अध्ययन योग्य है। उक्त दृष्टांत में उल्लेखित निम्न दृष्टांतों को भी समग्र रूप से पढ़ना चाहिए जिससे उन दृष्टांतों का भाव, आशय तथा न्याय करने के प्रति चिंता भी ज्ञात होगी। वे दृष्टांत इस प्रकार हैं ***रामलाल वि. रेवा कोल्ड फिल्ड्स 1966 एम.पी. एल.जे. पृष्ठ 507, मोहनलाल वि. यूनियन 1962 जे. एल.जे. शार्ट नोट 269 (जो डी.बी. ने ओव्हर रूल्ड किया) शिवनारायण वि. कन्हैयालाल ए. आय. आर. 1948 नागपुर 168*** तथा ***भुजंग राव वि. बलीराम ए. आय.आर. 1928 नागपुर 165।***

नगर पालिक निगम वि. मोतीलाल ए.आय.आर. 1977 पृष्ठ 182 में निम्न बात बताई गई है जो चरण 7–10 एवं 17 में है जिसे नीचे प्रस्तुत कर रहा हूं।

7. We may here point out that every court in dealing with an ex parte case should take good care to see that the plaintiff's case is at least prima facie proved. Mere absence of the defendant particularly in the circumstances of a case like the present one does not justify the presumption that the whole of the plaintiffs case is true. Even the plaintiff failed to make out a prima case and (sic) the defendant is entitled ex debito justitiae to have such a decree set aside. **It is no doubt the practice that no issues are framed** but that does not absolve the plaintiff of his responsibility to prove his case. The plaintiff is bound to prove his case to the satisfaction of the court and his burden is not lightended merely because the defendant is absent. After having given our careful consideration to the facts and circumstances of the case we are satisfied that the plaintiff has failed to prove his claim.

10. With great respect we are unable to subscribe to this view. If it is held that in cases in which proceedings are taken ex parte against the defendant the Judge should tell the plaintiff how much evidence is required to prove his case, it would place the Judge in the position of an advisor to a party which law does not envisage. Unless the Judge cuts out or stops the evidence of the plaintiff, it is the duty of the plaintiff to produce all such evidence as he considers will prove his case.

17. While the ex parte evidence is being recorded it is for the plaintiff to decide as to what should be the kind and extent of evidence which will satisfy the Court for holding that his claim deserves to be decreed. There is no duty cast upon the Court to tell at every stage of recording the ex parte evidence that the evidence given by the plaintiff is either sufficient or more evidence is necessary. The fact that the defendant is absent and has not joined any issue

with the plaintiff does not in any way lessen the plaintiff's burden for proving his case. He must adduce all such evidence which, under any circumstance, should satisfy the court that his claim is genuine and deserves to be decreed. There is as already stated above, no legal duty cast upon the court at any stage of the ex-parte trial of the suit to warn the plaintiff in advance that the evidence adduced by him in the ex-parte proceedings is either insufficient or unreliable, and that if he wants a decree, some additional and reliable evidence should be adduced by him.

भुजंगराव वि. बलीराम 1928 नागपुर पृष्ठ 165 में कहा गया था कि In every ex-parte case the Court must consider whether there are any matters that ought to be proved by evidence in addition to having been proved by the admission of the defendant and if it finds that there are, **it must state them definitely, preferably in the form of issues.**

उपरोक्त दृष्टांतों को यदि विस्तार से देखा जावे तो कोई भी दृष्टांत यह नहीं कहता कि एक पक्षीय प्रकरणों में अथवा अन्य विविध प्रकरणों में विचारणीय बिंदु निर्मित न किए जावे। मुख्य बात यह है कि ये दृष्टांत कहते हैं कि ये कर्तव्य न्यायालय का नहीं है कि वो यह कहे कि किसने कितनी एवं किस प्रकार की साक्ष्य देना चाहिए। लेकिन इसका दूसरा पहलू देखने योग्य है। एक ओर न्यायालय यह तो नहीं बताएगा कि वह किस प्रकार के, कितनी साक्ष्य पर संतुष्ट होगा, न्यायालय पक्षकारों के सामने वे विचारणीय बिन्दु भी साक्ष्य पूर्व नहीं रखेगा कि अमुक बिंदु प्रकरण में विचारणीय बिंदु है, लेकिन निर्णय अथवा आदेश देते समय अचानक वह विचारणीय बिंदु निर्मित भी कर देगा व उन बिंदुओं पर न्यायालय निष्कर्ष भी दे देगा तथा पक्षकार हक्का बक्का अवाक रह जाएगा। ऐसी दोहरी मार की अपेक्षा तो उपरोक्त कोई भी दृष्टांत नहीं करता है। सही न्याय तो तब होगा जब पक्षकारों के सामने वादप्रश्न जैसे विचारणीय बिंदु निर्मित कर रखे जावे व तत्पश्चात साक्ष्य लिपिबद्ध की जावे। ऐसा थोड़े ही है कि न्यायालय चूहे पकड़ने का पिंजरा रखकर चूहे को पकड़कर मन संतोष करें। चूहे भी बौधिक दृष्ट से, तर्कशक्ति से मनुष्य से हुशार होते हैं। दुबारा उस पिंजरे में नहीं फंसते हैं। वाद प्रश्न शब्द प्रयोग दावों की सीमा तक होता है तो अन्य कार्यवाही में विचारणीय बिंदु शब्द प्रयोग होगा। एक पक्षीय दावे में भी विचारणीय बिंदु शब्द प्रयोग मात्र करते हैं। लेकिन दोनों ही शब्दावली का अर्थ यही है कि दो पक्षों के बीच विवाधक तथ्य **(FACT IN ISSUE)** क्या है। यहां Issue शब्द जो आया है वही आशय आदेश 14 व्य.प्र.स. में आए शब्द Issue का है। साक्ष्य अधिनियम की धारा 3 के 'तथ्य' (Fact) एवं विवाद्यक तथ्य (Fact in issue) से स्पष्ट है कि प्राख्यान एवं प्रत्याख्यान के आधार जो तात्विक प्रतिपादनाएँ (Material Proposition) तथ्य या विधि संबंधि हो विवाद्यक होंगे। आ. 14 नि. (1) व्य.प्र.स. में कहा है कि "विवाद्यक तब उत्पन्न होते हैं जब कि तथ्य या विधि की कोई तात्विक प्रतिपादना एक पक्षकार द्वारा प्रतिपाद और

दूसरे पक्षकार द्वारा प्रत्याख्यात की जाती है।" यदि यह बात सही है तो सभी कार्यवाहियों में ऐसी संभावना होगी ही। जहां तक दावे में प्रवादी ने उत्तरवाद प्रस्तुत न किया हो तो न्यायालय तुरन्त दावा वादी के पक्ष में डिक्री नहीं करता न करना चाहिए (इस संबंध में विस्तार से लेख लिखा जा रहा है जो इसी अंक में प्रकाशित हो रहा है) लेकिन जब न्यायालय साक्ष्य की अपेक्षा करती है तो न्यायालय के लिए यह उचित ही है कि वह पक्षकार को बताएँ कि ऐसे कौन से मुद्दे या तथ्य हैं जिन पर न्यायालय साक्ष्य की अपेक्षा करता है। न्यायालय ने यदि ऐसा किया तो वास्तव में न्यायालय न्याय कर रहा होगा, अन्याय नहीं। यदि यह माना जावे कि विधिक रूप से (Legally) यह आवश्यक नहीं है तब भी औचित्य (Propriety) तो है ही। Propriety शब्द का अर्थ है Fitness, Suitability, Conformity with **requirement** correct conduct of one's own properness. It is the quality of being socially or morally acceptable The state of being correct in one's social or moral behaviour. यहां जो शब्द Requirement आया है उसका विवेचन आगे करेंगे। आ. 14 नि 1 (5) में कहा है कि "न्यायालय वाद की प्रथम सुनवाई में वादपत्र को और **यदि कोई लिखित कथन हो तो** उसे पढ़ने के पश्चात, और आ. 10 के नियम 2 के अधीन परीक्षा करने के पश्चात तथा ..... विवाद्यकों की विरचना और अभिलेखन करने के लिए अग्रसर होगा जिनके बारे में यह प्रतीत होता है कि **मामले की ठीक विनिश्चय उस पर निर्भर करता है** (.....record the issues on which the right decision of the case appears to depend) अर्थात प्रकरण का उचित निर्णय होने हेतु जो विवाधक आवश्यक है उनकी रचना करने की अपेक्षा न्यायालय से है। आ. 14 नि. 1 (5) में उत्तर वाद यदि कोई हो तो वाद प्रश्न बनाते समय उसे भी विचार में लेना है। आ. 14 नि. 6 व्य.प्र.स. कहता है कि "इस नियम की कोई बात न्यायालय से यह **अपेक्षा (requires)** नहीं करती कि वह उस दशा में विवाधक विरचित और अभिलिखित करे जब प्रतिवादी वाद की पहली सुनवाई में कोई प्रतिरक्षा नहीं करता।" अर्थात यदि प्र. वादी की कोई प्रतिरक्षा नहीं है तो वाद प्रश्नों की आवश्यकता नहीं है। अब आ. 14 नि. 1(5) एवं 1 (6) को एक साथ पढ़ने के पश्चात एवं आ. 14 नि. 3 व्य.प्र.स. पढ़ने के पश्चात ज्ञात होगा कि वाद प्रश्न निर्मिति हेतु (1) वाद एवं उत्तरवाद (यदि हो तो) (2) आ. 10 नि. 2 व्य.प्र.स. का कथन (3) आ. 11 व 12 व्य.प्र.स. के अंतर्गत कार्यवाहियां, (4) तथा विलेखों की अंर्तवस्तु के आधार (5) पक्षकारों या उनके अधिवक्ताओं को सुनकर (6) विधि संबंधी बातें, देखना आवश्यक है। प्रकारान्तर से इन्हीं बातों पर से निर्णय भी देना होता है। निर्णय के समय उपरोक्त सभी बातों के अतिरिक्त रेकार्ड पर उपलब्ध साक्ष्य भी होती है। आ. 14 (1) (6) का ये अर्थ तो निश्चित ही नहीं है कि प्रतिवादी यदि प्रतिरक्षा नहीं करता है तो शेष तत्वों की उपेक्षा कर देना हैं। आ. 14 (1) (6) में शब्द प्रयोग Requires तथा ऊपर Propriety शब्द के

विभेद में प्रयोग किए गए शब्द प्रयोग Requires म एक महत्वपूर्ण साम्य यह है कि विधि की यद्यपि अपेक्षा (Requirmenty) नहीं है कि वाद प्रश्न बनाए जावे लेकिन Conformity with requirment का अर्थ है अपेक्षा के अनुरूप व्यवहार, आदि जैसा उपर बताया है। इस प्रकार सामान्य औचित्यपूर्ण व्यवहार यह है कि साक्ष्य प्रारंभ होने के पूर्व न्यायालय पक्षकार या पक्षकारों को यह बताएं कि न्यायालय इस प्रकरण में या कार्यवाही में किन मुद्दों पर साक्ष्य की अपेक्षा करती है। आ. 14 (1) (6) ऐसा नहीं कहता कि उत्तरवाद न हो तो वाद प्रश्न नहीं बनाएं जावें। बनाये जाने से रोक नहीं है।

इस संबंध में आ. 20 नि. 4 (1) (2) व्य.प्र.स. देखने योग्य है वह इस प्रकार है।

आ. 20 नि. 4 (1) लघुवाद न्यायालयों के निर्णय : लघुवाद न्यायालयों के निर्णयों में **अवधार्य प्रश्नों** और उनके विनिश्चय से अधिक और कुछ अन्तर्विष्ट होना आवश्यक नहीं है।

(2) अन्य न्यायालयों के निर्णयः- अन्य न्यायालयों के निर्णयों के मामले का संक्षिप्त कथन, **अवधार्य प्रश्न** उनका विनिश्चय और ऐसे विनिश्चय के कारण अनविष्ट होंगे।

अंग्रेजी अनुवाद इस प्रकार है:—

0-20 R-4- Judgments of Small Cause Courts-

(1) Judgments of a Court of small causes need not contain more than the **points for determination** and the decision there on.

(2) **Judgments of other courts-** Judgments of other courts shall contain a concise statement of the case, the **points for determination** the decision thereon, and the reasons for such decisions.

लघुवाद न्यायालयों के प्रकरण में प्रतिवादी को सूचना पत्र अंतिम निराकरण का होता है व प्रकरण में प्रथम सुनवाई के दिन ही साक्ष्य होना अपेक्षित है व भिन्न प्रक्रिया है। शेष न्यायालयों के प्रकरणों में अवधार्य प्रश्न (विचारणीय बिंदु या वाद प्रश्न) का होना अनिवार्य है।

उपरोक्त विचारों के पश्चात आप केवल यह चिंतन करें कि निर्णय, आदेश के समय यदि अवधार्य प्रश्न क्या है एवं उस पर निर्णय देना है तो ये अवधार्य प्रश्न साक्ष्य प्रारंभ होने के पूर्व पक्षकारों के सामने भी क्यों न रखे जावें? एक ओर यह कहना कि न्यायालय ने पक्षकार के सलाहकार के रूप में कार्य नहीं करता है तो दूसरी ओर यह भी कहना होगा कि न्यायालय ने पक्षकार के विरुद्ध घात लगाकर बैठना (ambuscade-ambush) भी तो उचित नहीं है कि पक्षकार का प्रकरण कब ठिकाने लगा दिया जावे। अब समय, क्रांतिकारी रूप से परिवर्तित हो रहा है। घात प्रतिघात का काम अब

न्यायालय में पक्षकार गण नहीं करेंगे अब Adversary Roll of Justice (न्याय न्याय पद्धति) नहीं अपितु Participatory Roll of Justice (न्याय में भागीदारी) की पद्धति से कार्य करना है। न्यायालय पक्षकारों की लड़ाई में दर्शक नहीं होगा न रेफरी या अंपायर होगा कि किसने किसको पीटा या मात दी और उंगली उठा दी अपितु हम ऐसा करेंगे तो लोग हमारे पर उंगली उठाएंगे। यद्यपि पक्षकार के अधिवक्ता के रूप में हमें अपने आप को प्रतिस्थापित नहीं करना है अपितु पक्षकारों के हितों की रक्षा हेतु मार्गदर्शक की भूमिका निभाना है। इस संबंध में व्य.प्र.स. में भी आ. 20 नि. 5 (ए) में अप्रतिनिधिकृत पक्षकार को विशेष जानकारी देने का कर्तव्य है तो दंड प्रक्रिया संहिता में फांसी की सजा देने पर भी धारा 363 (4) के अंतर्गत अभियुक्त को विशेष जानकारी देने का कर्तव्य है। ऐसे कई प्रावधान मिलेंगे। इस प्रकार न्याय दान में भागीदारी की भावना से हमें पक्षकारों के साथ दायित्व निभाना है। सही अर्थों में हमें सूरदास, अपाद पंगु का दंड बनना है। दंडाधिकारी का अर्थ सहारे से होगा सजा देने वाले से मात्र नहीं।

अतः ***नगर पालिक निगम विरुद्ध मोतीलाल ए आय.आर. 1977 म.प्र. पृष्ठ 182*** के दृष्टांत को विस्तार युक्त परिपेक्ष (Broad Perspective) में लेना होगा। उक्त दृष्टांत एवं उसमें संदर्भित दृष्टांतों को देखकर यह सुनिश्चित करना होगा कि जहां प्रतिवादी/प्रतिपार्थी एक पक्षीय है अथवा जहां विविध कार्यवाहियां दों पक्षीय रूप से चल रही है वहां पर भी यहां तक कि धारा 125 दं.प्र. सं. की कार्यवाही में भी साक्ष्य प्रारंभ होने के दिन से पर्याप्त पूर्व विचारणीय बिंदु निर्मित करें जिससे पक्षकारों को ज्ञात हो सके कि उन्हें किस विषय पर कितनी साक्ष्य देना है। चिंतन करें मनन करे तथा जो भी विधि पूर्ण न्याय संगत औचित्यपूर्ण दिखे करें लेकिन लक्ष्य न्यायदान का मात्र हो तो हम चूकेंगे नहीं।

●

शुद्धि पत्र

1. ज्योति खंड पांच भाग छह, दिसम्बर 1999 के लेख अस्थायी निषेधाज्ञा में पंक्ति क्र. 19 में "महाजनो येन गतः सो पंथः" लिखा गया है वह शुद्ध रूप में "महाजनों येन गंतः स पंथाः" पढ़ा जाना है। कृपया सुधार कर लें।
2. इसी अंक में Star Firmament में पृष्ठ क्र. 512 में प्रथम दृष्टांत में प्र. क्र. M.A. No 1993/99 के आगे "Decided on 3-11-1999 in National insurance Vs. Mehatram" शब्द जोड़े जावे।

अकिंचन एवं वर्ग विशेष व्यक्तियों के आय के संबंध में जानकारी

पुरूषोत्तम विष्णु नामजोशी

आ. 33 व्य.प्र.स. के अंतर्गत अकिंचन व्यक्ति को प्रारंभिक स्तर पर कोर्ट फीस देने से छूट दी गई है। जबकि धारा 35 कोर्ट फी अधिनियम के अंतर्गत राज्य सरकारों को भी छूट देने के अधिकारों के विषय में प्रावधान है। उक्त अधिकार के अंतर्गत वर्ग विशेष व्यक्तियों को छूट हेतु राज्य सरकार ने एक अधिसूचना/विज्ञप्ति क्र. 9/1/83/ बी–21 दि 1–4 1988 निर्गमित की थी। आ. 33 के अंतर्गत अब राज्य सरकार को किसी प्रकरण में पक्षकार बनाना अनिवार्य नहीं है उसी प्रकार वर्ग विशेष को जो छूट है उन प्रकरणों में भी राज्य सरकार को पक्षकार बनाना अनिवार्य नहीं है। लेकिन आय के संबंध में विवरण बुलाने के लिए जिला कलेक्टर को लिखा तो जाना ही चाहिए जिससे समस्त साधनों से आय क्या होती है यह ज्ञात हो सके। ऊपर उल्लेखित दोनों ही वर्गों के व्यक्तियों के विषय में एक निश्चित आय की सीमा निर्धारित है। कोई व्यक्ति अकिंचन व्यक्ति है या नहीं अथवा धारा 35 कोर्ट फीस अधिनियम के अंतर्गत छूट प्राप्त करने हेतु पात्र है या नहीं यह निर्धारित करने हेतु जिला कलेक्टर को पत्र लिखकर विवरण बुलाया जाना होता है ताकि पक्षकारों की साक्ष्य के अतिरिक्त जिला कलेक्टर का प्रतिवेदन भी विचार में लिया जा सके। दोनों ही श्रेणियों के व्यक्तियों के विषय में पत्र में लिखे जाने वाले तत्वों में भिन्नता है क्योंकि प्रावधानों में भिन्नता है अतः जिला कलेक्टर से विवरण बुलाये जाते समय पत्र की भाषा सुस्पष्ट हो व क्या महिती अपेक्षित है यह भी ज्ञात हो सके। आ. 33 नि 1 (क) की ओर ध्यान आकृष्ट करना उचित होगा। उक्त प्रावधान इस प्रकार है:–

आ. 33 नि. 1 (क)- निर्धन व्यक्तियों के साधनों की जांचः-

इस प्रश्न की हर जांच कि कोई व्यक्ति निर्धन व्यक्ति है या नहीं जब तक कि न्यायालय अन्यथा निर्देश न दे तब तक, प्रथम बार में न्यायालय के मुख्य लिपिक वर्गीय अधिकारी की रिपोर्ट को अपने निष्कर्ष के रूप में मान सकेगा या न्यायालय उस प्रश्न की जांच स्वयं कर सकेगा।

इस प्रकार न्यायालय अपनी ओर से जांच के लिए यथा योग्य व्यक्ति, अधिकारी को नियुक्त कर सकता है। चूंकि जिला कलेक्टर का प्रशासनिक संगठन (ढांचा) (एडमिनिस्ट्रेटिव मशीनरि) विस्तृत होती है व तर्क शुद्ध रूप से जांच की एक प्रक्रिया होती है अतः उस पर ही अवलंबन किया जाता रहा है। इसके अतिरिक्त संबंधित पक्षकारों की साक्ष्य इस विषय पर होती ही है। जो पत्र जांच हेतु भेजा जाता है उसमें सुस्पष्ट रूप से उन तथ्यों का खुलासा होना चाहिए जो विधि द्वारा अपेक्षित है तथा

न्यायालय को अपने प्रकरण से संदर्भित किया जा सके। अकिंचन के रूप में जो पत्र भेजना है तथा विशेष वर्ग के संदर्भ में जो पत्र भेजना है उसके प्रारूप नीचे दिये जा रहे हैं। यह बात ध्यान रखना है कि कलेक्टर से प्रतिवेदन की न्यूनतम अपेक्षा नहीं होती है। हमारा मुख्य उद्देश्य तो यह होता है कि चूंकि यह विषय कोर्ट फी संबंध में वित्तीय अथवा राजकोषीय -कर संबंधि (फिस्कल) है अतः राज्य सरकार को इस विषय में अभिज्ञ करना न्यायालय का कर्तव्य होता है। राज्य सरकार को अभिज्ञ करने पर अब राज्य सरकार की चिंता है कि वह देखे कि उसके कर, राज कोषीय आय की चोरी तो कोई नहीं कर रहा है। दावा अथवा अन्य कार्यवाहियाँ (प्रोसिडिंग्ज) प्रस्तुत होनें पर प्रक्रिया अनुसार अविलंब यह कार्यवाही कर देना चाहिए जिससे कोई भी विलंब टाला जा सके। प्रारूप इस प्रकार हैं:–

न्यायालय स.दा. सत्य, प्रथम व्यवहार न्यायाधीश वर्ग-2, न्याय नगर

पत्र क्र. दि : ....

प्रति,

जिला कलेक्टर,
कलेक्टोरेट,
न्याय नगर

विषयः– पक्षकार रामलाल पुत्र श्यामलाल की कोर्ट फी देने की क्षमता के विषय में।

इस न्यायालय में वादी रामलाल पुत्र श्यामलाल आयु 50 वर्ष कृषक निवासी ग्राम मुसाखेडी तहसील एवं जिला न्याय नगर ने एक दावा अकिंचन के रूप में प्रस्तुत किया है। जो दिनांक 01-01-2000 को प्रस्तुत हुआ है। जिसका विविध प्रकरण क्र. 1/2000 है तथा प्रकरण में अगली कार्यवाही हेतु तिथि 10-3-2000 निर्धारित की गई है।

आपसे निवेदन है कि किसी सक्षम अधिकारी के माध्यम से उक्त व्यक्ति की उसके समस्त साधनों से वार्षिक आय दावा तारीख को क्या होती होगी इस संबंध में जानकारी इस न्यायालय को अविलंब भेजने का कष्ट करें।

निर्धारित तिथि
10–3–2000

(स.दा. सत्य)
प्रथम व्यवहार न्यायाधीश
वर्ग–2, न्यायनगर

न्यायालय स.दा. सत्य, प्रथम व्यवहार न्यायाधीश वर्ग–2, न्यायनगर

पत्र क्र. दि. .....

प्रति,

जिला कलेक्टर
कलेक्टोरेट
न्यायनगर

विषयः– पक्षकार हीरालाल पुत्र पन्नालाल की कोर्ट फी देने की क्षमता के विषय में।

इस न्यायालय में वादी हीरालाल पुत्र पन्नालाल आयु 50 वर्ष कृषक निवासी ग्राम मुसाखेड़ी तहसील एवं जिला न्यायनगर ने एक दावा प्रस्तुत कर धारा 35 कोर्ट फी अधिनियम के अंतर्गत राज्य शासन द्वारा निर्गमित परिपत्र क्र. 9–1–83 बी–21 दि. 01–4–88 के अंतर्गत कोर्ट फी संदाय किये जाने से मुक्ति की प्रार्थना की है। जिसका प्रकरण क्रमांक 02/2000 है तथा प्रकरण में अगली कार्यवाही हेतु तिथि 11–3–2000 निर्धारित की गई है।

आपसे निवेदन है कि किसी सक्षम अधिकारी के माध्यम से उक्त हीरालाल की दावा तारीख 01–1–2000 से ठीक **एक वर्ष पूर्व के अंदर** समस्त साधनों एवं स्त्रोतों से सकल आय कितनी थी की जानकारी इस न्यायालय को अविलंब भेजने कष्ट करें।

निर्धारित तिथि
11–3–2000

स.दा.सत्य
प्रथम व्यवहार
न्यायाधीश वर्ग 2
न्यायनगर

परिपत्रों की प्रतिलिपि यहां दर्शायी जा रही है :

Notification F. No. 9-1-83-B-XXI, dated the 1st April, 1983 : In exercise of the powers conferred by section 35 of the Court Fees Act, 1870 (No. 7of 1870), the State Government hereby remits in the whole of the State of Madhya Pradesh, the Court fees mentioned in Articles 1-A and 2 of the first schedule and Articles 5, 17 and 21 of the second schedule to the said Act payable on plaint by the following categories of persons whose annual income immediately preceding the date presentation of plaint from all sources does not exceed rupees six thousand, namely :

(i) member of Schedule Tribes; (ii) member of Schedule Castes;
(iii) minors; (iv) women;
(v) artisen; (vi) unskilled labourer;
(vii) landless labourer;
(viii)person belonging to the weaker section of society.

Explanation.- For the purposes of this rule,

(i) "Member of Schedule Castes" means a member of any casts, race or tribe or part of or group within caste, race or tribe specified as such with respect to the State of Madhya Pradesh under Article 314 of the Constitution of India.

(ii) "Member of Schedule Tribes" means a member of any tribe, tribal community or part of or group within a tribe or tribal community specified as such with respect to the State of Madhya Pradesh under Article 342 of the Constitution of India.

[Published in MP Rajptra (Asadharan) dated 1st April, 1983, page 1062].

●

कोर्ट फीस से छूट

म.प्र. राज्य सरकार के आदेश परिपत्र

लोक न्यायालयों द्वारा निराकृत किए जाने वाले प्रकरणों में कोर्ट फी की वापसी

Notification F.No. 9.1.86 B-XXI, dated the 10th April, 1987- In exercise of the powers conferred by Section 35 of the Court Fees Act, 1870 (No. 7 of 1870), the State Government hereby remits in whole of the State of Madhya Pradesh the court fees payable:-

(1) On the application made to a Court for competent jurisdiction:-

(a) for passing a decree in terms of compromise arrived at before or through the instrumentality of Lok Adalat:

(b) for recording an adjustment of decree or order when proceeded by a settlement or compromise in writing arrived at before or through the instrumentality of Lok Adalat:-

(c) for compounding an offence under the provisions of Code of Criminal Procedure. 1973 (2 of 1974) or any other law for the time being in force, as a result of a compromise arrived at before or through the instrumentality of Lok Adalat : and

(2) On a plaint drawn in terms of the compromise arrived at before or through the instrumentality of Lok Adalat; filed before a Court of competent jurisdiction.

(3) In case of settlement of a case pending before a competent court is made through the instrumentality of Lok Adalat the party Shall be entitled to refund of the court fees already paid by him.

2. This Notification shall be deemed to have come into force with effect from the 19th November. 1985.

Published in M.P. Rajpatra. (Ashadharan), dated 10.4.87 Page 753-54

●

विधिक पोषाक

पुरूषोत्तम विष्णु नामजोशी

डिसेंवर 1999 के ज्योति में आपने न्यायिक संस्कार स्तंम्भ के अंतर्गत भेंट का समय एवं पोषाक विषय पर सामान्य व्यवहार के संबंध में पढ़ा। न्यायिक अधिकारीगणों की मांग के अनुरूप उच्च न्यायालय ने राज्य शासन के अनुमोदन से व्यवहार न्यायालय नियम एवं आदेश में पाठ 30 के रूप में नया पाठ जोड़ा है व नियम क्र. 594 के रूप में न्यायिक अधिकारी गणों हेतु यूनिफार्म (विधिक पोषाक) (The Legal wear) का निर्धारण भी कर दिया। जिसका प्रकाशन ज्योति के डिसेंबर 1999 के अंक में पृष्ठ क्र. 590–91 पर भी हो गया। जैसा कि पूर्व में भी चिंतन होता रहा है उसी अनुरूप सतही सोच के आधार पर अबकी बार भी यही चिंतन हुआ कि न्यायिक मजिस्ट्रेटों के लिए तो कोई विधिक पोशाक है ही नहीं। इसका क्या उत्तर दिया जावे समझ में नहीं आ रहा है। लेकिन उक्त संशोधन को पढ़ने से दो बातें ज्ञात होगी। प्रथम यह कि उक्त संशोधन उच्च न्यायालय ने धारा 23 व्यवहार न्यायालय अधिनियम के अंतर्गत किया है। धारा 23 इस प्रकार है:

S. 23- Power to make Rules

"1. The High Court may, from time to time, make rules for carrying out all or any of the purposes of this Act.

2. In particular and without prejudice to the generallity of the power, such rules may provide for all or any of the following matters ....."

उक्त प्रावधानों के अंतर्गत नियम बनाएं है। अतः वे न्यायिक अधिकारीगणों के लिए हैं। जिला न्यायाधीश अथवा व्यवहार न्यायाधीश क्रमशः सत्र न्यायाधीश अथवा न्यायिक दंडाधिकारी नहीं होता ऐसा किसी न्यायिक अधिकारी का कहना नहीं हो सकता। अतः विधिक पोशाक न्यायिक अधिकारी हेतु है फिर चाहे वह व्यवहार न्यायालय या दंड न्यायालय के अधिकारों का प्रयोग ही क्यों न करता हो। इस प्रकार जो भी गणवेश, वेश भूषा, विधिक पोशाक निर्धारित की है वह न्यायिक अधिकारीगणों के लिए है।

वेशभूषा का विधिवत निर्धारण होने के पश्चात उसका पहनना भी उतना ही आवश्यक है। सर्वोच्च न्यायालय ने अपने निर्णय ***(1999) 5 एस सी.सी. 675 स्टेट ऑफ राजस्थान वि. राजस्थान ज्यूडीशियल आफिसर्स एसोसिएशन*** में उल्लेखित भाग को यहां त्वरित संदर्भ हेतु प्रस्तुत किया जा रहा है। ज्योति डिसेंबर 1999 में पृष्ठ क्र. 581 पर टिट बिट क्र. 78 में प्रकाशित किया है। जो इस प्रकार हैं:–

A judicial officer is undoubtedly required to dress in the manner prescribed by relevant rules of each State in order to maintain dignity of his office. The reason why a black jacket and bands are prescribed for a judicial officer is quite different from the reason why a uniform is prescribed for peons, chaprasis, police constables and so on. The latter have to mix with the public and a uniform identifies them as belonging to a specified group of persons who have authority or duty to act in a certain way or perform certain services. **A judicial officer presides over a court and is quite identifiable by reason of the position he occupies in the court. Nevertheless, in order that there may be certain amount of decorum and dignity associated with this office, he is expected to dress respectably in the manner specified,** Bands and gowns are an insignia of his office.

ड्रेस पहनने का अर्थ क्या है यह बताते हुए सर्वोच्च न्यायालय डेकोरम शब्द का प्रयोग किया है उसका अर्थ है मर्यादा, शालीनता,शिष्टाचार। दूसरा शब्द है डिग्निटी उसका अर्थ है मान मर्यादा, प्रतिष्ठा, गरिमा, महिमा, गौरव, आन शान अथवा बड़प्पन। राष्ट्रध्वज की शान रखने का अर्थ राष्ट्रध्वज को सुरक्षित रखना ही नहीं है, अपितु जिस राष्ट्र का वह प्रतीक है उस राष्ट्र की मान मर्यादा, प्रतिष्ठा, गरिमा महिमा, गौरव, आन–शान व उसका बड़प्पन बनाकर रखना है। कहने का अर्थ यह कि उक्त पोषाक जो हम न्यायालय में पहनते हैं उसकी शान तब रहेगी जब हम उस उद्देश्य के अनुरूप कार्य करेंगे। यथा बोर्ड पर बैठकर पान–सुपारी नहीं खाएंगे। तमाखू नहीं चबाएंगे एवं वहीं नहीं थूकेंगे। कोई अधिवक्ता आदि तत्सम् वस्तुएं आपके लिए प्रस्तुत करें तो न तो लेंगे न खाएंगे। उसी प्रकार न्यायालय कक्ष में आने वाले प्रत्येक वकील, पक्षकार या अन्य व्यक्ति कर्मचारी को भी ऐसा करने से निवारित करेंगे। अभी कल ही एक स्थान से सूचना मिली बड़ी मजेदार थी। एक न्यायिक अधिकारी के विरुद्ध यह शिकायत थी कि वे वकील वर्ग को न्यायालय कक्ष में पान नहीं खाने देते जबकि इन्हीं वकीलों को वहीं पदस्थ एक अन्य न्यायिक अधिकारी से कोई शिकायत नहीं है क्योंकि वे **खाओ और खाने दो** के सूत्र में विश्वास करते हैं।

दूसरी बात यह है कि ऐसा न हो कि कोट कुर्सी पर पहनाकर रखा जावे। साहेब चेंबर में या अन्यत्र हो, साक्ष्य लिपिबद्ध करने हेतु विभिन्न फ्रन्ट्स् खोले हो यह भी उसी डेकोरम व डिग्निटी का अपमान होगा। अतः यथा संभव यथा शक्ति नियमों का पालन होता रहे इस अपेक्षा के साथ कार्य करना चाहिए। प्रशिक्षण काल में न्यायिक अधिकारी गणों का चेहरा देखकर पता लग जाता है कि व्याख्यान के अंतराल में मुझसे क्या पूछने वाले है। वे पूछे उसके पूर्व ही मैं बता देता हूं कि मैं 'ज्योति' के निदेशक के रूप में विधि प्रावधान एवं प्रक्रिया के अनुरूप बताऊँगा। ये बात एकदम भिन्न है कि प्रत्येक नियम का कठोरता से पालन हो सकता है या नहीं। लेकिन इसका यह अर्थ तो नहीं है कि नियम प्रावधान नहीं बताए जावे। अब तो नियमों का पालन करना ही पड़ेगा।

आने वाले समय में इसके लिए भत्ता भी तो मिलेगा। भत्ता मिलने के आदेश आने तक यह चिंतन न बना रहे कि बॅन्ड्स् मैले है या शर्ट मैला हो गया है तब भी चलेगा कोट पर ब्रश नहीं है तब भी चलेगा। एक माननीय से बात हो रही थी। वार्तालाप में यह कहा गया कि टिप–टॉप रहने वाले व्यक्ति के पैर के मोजे (जुर्राब) कैसे हैं व हाथ पैरों के नाखून कटे हैं या नहीं इतने पर से तो उसके व्यवस्थित रूप से रहने की आदत, स्वभाव प्र कृति पता लग जाती है। अब जब न्यायिक अधिकारी गणों की मांग पर उनकी इच्छा के अनुरूप नियम बनाए गए हैं तो उसके पालन में आलस या उपेक्षा या अनिच्छा क्यों होना चाहिए।

इस लेख का समापन एक चिंतन के साथ समाप्त कर रहा हूं। एक माननीय न्यायाधिपति (स्वर्गीय) से चर्चा हो रही थी। वेशभूषा पर से ही हो रही थी कि समाज में सामान्य व्यवहार में कैसी वेशभूषा हो। महाराष्ट्रीय वर्ग में विवाह आदि के लिए जो निमंत्रण पत्र दिया जाता है उसमें विशेष रूप से यह लिखा जाता है कि आप सहपरिवार इष्ट मित्रों सहित पधार कर इस कार्य की **शोभा** बढ़ाएं। इस मुद्दे पर माननीय कह रहे थे कि हमारे जाने से यदि निमंत्रण कर्ता के कार्यक्रम में शोभा आनेवाली है तो हमने अवसर अनुसार वेशभूषा करना चाहिए। जिससे निमंत्रणकर्ता के कार्यक्रम की शोभा बढ़े। इसी प्रकार न्यायालय प्रतिष्ठा सम्मान आदि बढ़ाने हेतु हमारी वेशभूषा एवं उसके धारणकर्ता का रहंन–सहन, आचार–विचार–व्यवहार पद अनुरूप हो यही अपेक्षा न्यायिक वेशभूषा की है।

BE NICE

1. **Be well manicured.**
   Do your socks match your suit?
2. **Don't wear light socks with dark suit.**
3. **Are your shoes polished?**
4. **Does your belt match your shoes?**
5. **Is your suit losing its crispness?**
6. **Do your clothes or breath reek of somke? People will find this offensive.**
7. **Are your cuffs frayed?**
8. **Check your breath before you meet someone.**

Courtesy : **The book of excellence by Byrd Baggett & BPB. Publications New Delhi.**

अभिकथनों के आधार से दावे का पारित करना

पुरुषोत्तम विष्णु नामजोशी

न्यायालयों को आ. 8 नि. 10 व्य.प्र.स. के अंतर्गत अधिकार है कि जहां प्रति वादी अपनी प्रतिरक्षा हेतु उत्तरवाद प्रस्तुत नहीं करता तो न्यायालय उसके विरुद्ध निर्णय सुनाएगा। एक दृष्टांत ***2000 (1) एम.पी. एच.टी. 119 (राजेन्द्र कुमार वि सुंदरलाल)*** का संदर्भित है जो इस ज्योति में टिट बिट में प्रकाशित भी हो रहा है। उसमें भी कहा है कि कई बार अवसर दिये जाने के बावजूद प्रतिवादी ने जवाबदाता प्रस्तुत नहीं किया तो निर्णित किया गया कि न्यालय ने उचित रूप से आदेश 8 नि 10 के अंतर्गत **विवेकाधिकार का प्रयोग** करते हुए प्रतिवादी के विरुद्ध निर्णय सुनाया। **उस स्थिति में** न्यायालय के लिये यह आवश्यक नहीं था कि वह पहले वादी की साक्ष्य अंकित करता, वरन् न्यायालय को यह अधिकार था कि वह सीधे ही तुरंत निर्णय सुना दे। उपरोक्त दृष्टांत से दो बातें ज्ञात होती हैं। एक तो **ऐसी स्थिति** होना चाहिये तथा दूसरी बात **विवेकाधिकार का प्रयोग** होना चाहिये। इस प्रकार प्रकरण में उपलब्ध स्थिति क्या है यह निर्धारित होगा तथा प्रत्येक प्रकरण के गुण-दोष के आधार पर ऐसा विवेकाधिकार प्रयोग में लिया जाएगा।

नगर पालिक निगम वि. मोतीलाल ए.आय.आर. 1977 म.प्र. 182 डी.बी. (इसी पत्रिका में लेख एक पक्षीय प्रकरणों में विचारणीय बिंदु) में भी ***ए.आय.आर. 1948 नागपुर 168 (शिव नारायण वि. कन्हैयालाल एवं ए.आय.आर. 1928 नागपुर 165 भुजंगराव वि. बलीराम)*** के दृष्टांत संदर्भित किए है उक्त निर्णय के चरण 11 में कहा है कि

> "In this connection it would not be out of place to observe that even Bose J. in A.I.R. 1948 Nag. 168 had not accepted the extreme view enunciated by Hallifax A.J.C. in **A.I.R. 1928 Nag. 165** that where a defendant does not appear a court is bound to pass a decree at once and that it is not necessary for the plaintiff to adduce evidence at all."

इस प्रकार प्रत्येक प्रकरण की परिस्थिति के अनुसार निर्धारण करना आवश्यक होता है। न्यायालय को क्या–क्या अधिकार हैं यह देखने योग्य है इसके लिए आ. 8 नि. 10, आ. 8 नि 5, आ.12 नि 6, आ. 15 नि. 1, आ. 23 नि. 3 व्य.प्र.स को भी देखना होगा। आ. 8 नि. 10 में कहा है :

> "..... the court **shall pronounce judgment** against him, **or make such order** in relation to the suit **as it thinks fit** ....."

आ. 8 नि 5 (1) के परन्तुक में कहा है कि;

"provided that the Court **may** in its **discretion** require any fact so **admitted** to be proved otherwise than by such admission" आ. 12 नि. 6 में कहा है "..... **make such order or give such judgment as it may think fit,** having regard to such admissions" आ. 15 नि 1 में कहा है "where at the first hearing of a suit it appears that the parties are not at issue on any question of law or of fact, the Court **may** at once **pronounce Judgment.**" आ. 23 नि 3 में कहा है "where **it is proved** to the satisfaction of the Court that a suit has been adjusted ..... by any lawful agreement ..... the Court **shall** order ....."

उपरोक्त सभी संदर्भों में अनिवार्यता नाम की कोई बात नहीं है। न्यायालय की संतुष्टि न्यायालय का विवेक है कि वह ऐसा करे अथवा प्रमाण प्रस्तुत करने को कहे।

आ. 8 नि. 10 अपने आप में पूर्ण नहीं है अपितु आ. 8 नि. 1, आ. 8 नि. 5 तथा आ. 8 नि. 9 को भी ध्यान रखना होगा। कोई एक पक्षकार उत्तरवाद प्रस्तुत किए सिवाय भी प्रकरण में भाग ले सकता है और प्रकरण में प्रतिरक्षा कर सकता है। उपरोक्त न्याय दृष्टांत एवं प्रावधान वादी का वाद वादी के पक्ष में निर्णीत करने हेतु नहीं कहते हैं अपितु निर्णय पारित करने के संबंध में कहते हैं एवं देय स्थिति में आ. 8 नि. 10 के अंतर्गत प्रति वादी के विरूद्ध निर्णय देने हेतु कहते हैं या कि प्रकरण के अनुरूप जो ठीक समझे आदेश करेगा। इस संबंध में विस्तार से उदाहरणों सहित आगे बता रहा हूं।

आ. 8 नि. 1 व्य.प्र.स. लिखित कथन (उत्तरवाद) प्रस्तुत न करने का परिणाम बताता है। ज्योति खंड V भाग VI पृष्ठ 494 दिसंबर 1999 पर लेख "आ. 8 नि. 10 व्य.प्र.स. के अंतर्गत आदेशिका का लिखना" में प्रक्रिया संबंधी विवरण दिया है। यहां यह बताने का प्रयत्न है कि देय परिस्थितियों में (Under given circumstances) प्रावधानों का प्रयोग कैसे करें।

एक समस्या यह पूछी जाती है कि एक पक्षीय दावा है तो क्या उसे खारिज किया जा सकता है। उत्तर स्पष्ट है. ऐसा हो सकता है जैसा कि ***नगरपालिक निगम वि. मोतीलाल, ए. आय. आर. 1977 एम.पी. 182*** में बताया है लेकिन इसी पत्रिका में लिखे लेख **एक पक्षीय प्रकरणों में विचारणीय बिंदु** को अवश्य पढ़ लें जिससे प्रकरण में न्याय हो सके। कभी–कभी प्र. वादी उत्तरवाद में वादी की सब बातें स्वीकार कर लेता है, अथवा प्रतिवादी प्रकरण में सम्मिलित ही नहीं होता या जानबूझ कर समय मांगेगा व न्यायालय में अप्रत्यक्ष रूप से यह चाहेगा कि न्यायालय आ. 8 नि. 10 व्य. प्र.स की कार्यवाही करे। जब न्यायालय ऐसा करेगा तथा प्रतिवादी ने न्यायालय में आना बंद कर दिया है तो यह मत समझना कि आ. 8 नि. 10 व्य. प्र. स. की कार्यवाही

करके वादी के पक्ष में दावा डिक्री ही करना है। अन्यथा आप जैसे वादी व मुझ जैसा न्यायाधीश हो तो इस राष्ट्र की सब संपत्ति आपकी हो जाएगी।

वादी ने एक दावा विवादित संपत्ति पर विरोधी अधिपत्य से स्वामित्व हो जाने संबंधी दावा लगाया। प्रतिवादी ने उपरोक्त अनुसार या तो स्वीकृति का दावा प्रस्तुत किया या कि एक पक्षीय कार्यवाही हो गई या आ. 8 नि. 10 व्य.प्र.स. के अंतर्गत कार्यवाही हो गई। न्यायालय में वादी के केवल अभिकथन मात्र है। तब यदि वादी का वाद पारित हो गया तो क्या परिणाम होगा। शासन को स्टाम्प ड्यूटी व रजिस्ट्रेशन चार्जेस मिलना बंद हो जाएंगे क्योंकि अब संपत्ति बिना विक्रय पत्र एवं पंजीयन किए एक से दूसरे के पास जाएगी। उसी प्रकार राजीनामें के आधार से भी इसी प्रकार का षडयंत्र दुराभिसंधी, कपट या साजिश से न्यायालयों को माध्यम बनाकर डिक्रियाँ प्राप्त की जा सकेगी। इसलिए न्यायालयों का कर्तव्य है कि वे प्रथमतः अपने **विवेकाधिकार का प्रयोग** करें व प्रकरण की **उस स्थिति** का आकलन करें कि क्या बिना साक्ष्य के वादी का वाद डिक्री किया जा सकता है। प्रकरण में उपलब्ध परिस्थितियों का अध्ययन करने के पश्चात ही किसी निष्कर्ष पर पहुंचे अन्यथा समस्त कार्यवाही केवल यांत्रिकी रूप की होगी, न्यायिक चिंतन की नहीं।

अभी कुछ दिन पूर्व प्रशिक्षण कक्षा में यह पूछा गया कि म.प्र. स्थान नियंत्रण अधिनियम के अंतर्गत निष्कासन के दावे में यदि प्र. वादी एक पक्षीय हो जाता है अथवा उत्तरवाद प्रस्तुत नहीं करता है तो साक्ष्य लिए बिना ही क्या वादी का वाद डिक्री किया जा सकता है। यदि अधिनियम की धारा 12 को पढ़ा जावे तो ज्ञात होगा कि उक्त धारा के अनुसार वादी को प्रत्येक उपधारा हेतु तथ्य सिद्ध करने होंगे। इस प्रकार प्रकरण की यह स्थिति होगी कि वादी तथ्य को सिद्ध करें ताकि वादी दावा डिक्री किया जा सके। एक ओर प्रश्न यह पूछा गया कि वादी ने इसी अधिनियम की धारा 12 (1) (ए) के अंतर्गत दावा निष्कासन हेतु प्रस्तुत किया। जिसमें उभय पक्षों ने राजीनामा किया। राजीनामें के अनुसार प्र. वादी समस्त देय किराया संदाय कर देगा जो डिसेंबर 1999 तक दे देगा व विवादित स्थान का रिक्त अधिपत्य भी वादी को डिक्री पेटे दे देगा। आ. 23 नि. 3 व्य. प्र.स. के अनुसार राजीनामा विधि सम्मत होना चाहिए। धारा 12 (1) (ए) के आधार से जिसमें प्रतिवादी ने समस्त बकाया किराया निर्धारित समय में संदाय कर देना स्वीकार किया है में राजीनामें के आधार पर निष्कासन तो नहीं हो सकता क्योंकि धारा 13 (5) के अनुसार यदि किराया संदाय कर दिया है एवं डिफाल्ट (चूक) नहीं है तो केवल खर्चों के लिए मात्र दावा पारित हो सकेगा। प्रतिवादी ने किराया संदाय करने में चूक नहीं की है तथा किराया संदाय करने हेतु समझौते अनुसार डिसेंबर 1999 तक का समय भी है अतः ऐसे प्रकरण में दावा निष्कासन हेतु डिक्री नहीं करना चाहिए।

जैसा कि उपर आ. 8 नि. 5–10, आ. 12 नि 6, आ. 15 नि.1 आ. 23 नि. 3 के प्रावधानों का उल्लेख किया है कि उसमें न्यायालय को विवेकाधिकार दिया है अतः प्रत्येक प्रकरण को देखें, विचार करे कि कहीं वादी प्रतिवादी अनुचित लक्ष्य प्राप्ति हेतु न्यायालयों को साधन तो नहीं बना रहे हैं। न्यायालय को पूर्ण अधिकार है कि प्रकरण में तथ्य स्वीकृत होने पर भी वह सिद्ध करने को कहे। साक्ष्य अधिनियम की धारा 3 में भी 'उपधारणा कर सकेगा' के क्षेत्र में भी न्यायालय पक्षकारों को ऐसा तथ्य सिद्ध करने हेतु कह सकेगा। "निश्चयात्कक प्रमाण" में भी एक तथ्य के सिद्ध होने पर ही दूसरा तथ्य सिद्ध माना जाना है। अतः प्रथम तथ्य सिद्ध करने हेतु कहा जा सकता है। दावे की प्रकृति को देखें। तथ्य का प्रश्न, विधि का प्रश्न एवं विधि एवं तथ्य का सम्मिश्र प्रश्न क्या होता है इसका चिंतन करें (देखें ज्योति जनरल खंड III भाग III जून 1997 पृष्ठ 8) जहां विधि एवं तथ्य का सम्मिश्र प्रश्न (मिक्सड् क्वेश्चन ऑफ लॉ ॲण्ड फॅक्ट) हो वहां तथा तथ्यों संबंधी प्रश्न है वहां तो साक्ष्य लिपिबद्ध करना ही चाहिए। यूनिट के चक्कर में न्याय अन्याय की सीमा का उल्लंघन अहितकारी होगा ही। ऐसा न हो कि Peeny wise pound foolish(अशर्फिया की लूट और कोयले पर छाप) की स्थिति उत्पन्न हो जावे। **माननीय प्रशासनिक न्यायाधिपति महोदय श्रीमान डी.पी. एस. चौहान महोदय ने (अब कार्यकारी मुख्य न्यायाधिपति) अपने प्रबोधन वर्ग में कहा था कि "वर्तमान में न्यायिक अधिकारीगणों को न्याय का पर्यायवांची शब्द 'निराकरण यूनिट्स' प्राप्त करना रह गया है व हर कोई यूनिट की परिभाषा में ही बोलना चाहता है व सोचता है'** (ज्योति खंड पांच भाग छह डिसेंबर 1999) उपरोक्त चिंतन वर्तमान संदर्भ में पर्याप्त होगा ऐसी आशा है।

यह अंक प्रकाशन हेतु जब अंतिम रूप धारण कर रहा था तब सर्वोच्च न्यायालय का एक दृष्टांत ***(1999) 8 एस.सी.सी. 396 बलराज तनेजा विरुद्ध सुनील मदान*** प्रकाशित हुआ था उसे भी पृष्ठ क्रमांक 37 पर सम्मिलित किया जा रहा है। कृपया उक्त दृष्टांत को पूर्णरूप से पढ़े एवं इस लेख का आशय एवं भाव समझें जिससे भविष्य में व्यवहारिक रूप से कठिनाई न हो।

UNITS

EVERY JOB DEMANDS ITS QUOTA (UNITS) OF EFFORTS. NEVER GIVE UP TOO SOON. STRIVE ON, UNTIL YOU WIN.

Swami Chinmayanand

1. **FLASH**

C.P.C., O. 8 R, 10, O. 8 R. 5 (2), O. 12 R. 6, O. 6 Rr. 2 & 4, O. 7 R. 1 (e), SECTION 2 (9) AND O. 20 R. 4 (2):-
(1999) 8 SCC 396
BALARAJ TANEJA Vs. SUNIL MADAN

Civil Appeal No. 4968 of 1999, decided on September 8, 1999

A. **Civil Procedure Code, 1908- Or. 8 Rr. 10 and 5 (2) and Or. 12 R. 6** Written statement not filed- Suit if can be automatically decreed Just as the court ought not to act blindly or mechanically upon admission of a fact made by the defendant in his written statement, held, court ought not to pass judgment merely because a written statement has not been filed. Court ought to be **cautious** and only on being satisfied that there is no fact which needs to be proved despite deemed admission, should proceed to pass a judgment- Further, held, if plaint itself indicates the existence of disputed questions of fact involved in the case regarding which two different versions are set out in the plaint itself, the court must not pass judgment without requiring the plaintiff to prove the facts so as to settle the factual controversy. Plaintiff-Respondent 1's plaint in suit for specific performance of agreement for sale clearly setting out that plaintiff denying claim of defendant-appellants, made in a letter, that they had obtained permission from the IT Department for the sale and had sent the certificate to Respondent 1 Held, non-filing of written statement did not resolve the controversy. Division Bench of High Court erred in dismissing appeal of defendant-appellants and confirming the decree passed in favour of Respondent 1 under Or. 8 R. 10

B. **Civil Procedure Code, 1908 Or. R. 10, Or. 6 Rr. 2 & 4 and Or. 7 R.1 (e)** Judgment not to be passed despite non-filing of written statement by defendant where **factual controversy** still alive- Where pleadings in the plaint, even if treated as admitted, would keep the controversy alive, held, such facts would have to be proved by the plaintiff even though no written statement had been filed and till such proof were furnished court could not legally proceed to pass a judgment under Or. 8 R.10- Further, **pleadings limited in character would stand admitted** and thus proved on account of non-filing of written statement- plaintiff- Respondent 1 in a suit for specific performance of an agreement for sale of immovable property pleading that appellant-defendants (vendors) had not obtained the requisite IT clearance- But also pleading that the vendors "insisted that they had obtained the certificate" and had sent it to him. Respondent 1 further denying

that certificate obtained and sent to him- Held, non-filing of written statement would not resolve the controversy- High Court erred in passing a decree under Or. 8 R. 10 and the Division Bench in confirming it Evidence Act, 1872, S. 58 proviso- Held, exception to general rule of evidence.

C. **Constitution of India- Arts. 136 and 141** Interference in civil procedure matters- Though Supreme Court is not bound to interfere in exercise of its discretionary jurisdiction in every case where a judgment may be partly or wholly incorrect, held, where a question of law arises (in this case what the court should do in a case where the written statement had not been filed), the question has to be decided so as to provide guidance for all the lower courts as to how they should proceed in such a situation

D. **Specific Relief Act, 1963 S. 16 Civil Procedure Code, 1908 OR. 8 R. 10** Before acting under Or. 8 R. 10, the court in a suit for specific performance has to scrutinise the facts set out in the plaint to find out whether all the requirements, in particular those indicated in S. 16 of the Specific Relief Act regarding readiness and willingness, have been complied with or not.

E. **Civil Procedure Code, 1908 Or. 8 R. 10** Discretion of court under- Words "make such order in relation to the suit as it thinks fit" are of immense significance as they give a discretion to the court not to pronounce judgment against the defendant and instead pass such order as it may think fit in relation to the suit.

F. **Civil Procedure Code, 1908 Or. 8 Rr. 10, 1&9 R. 10** governs the situation where a written statement is required under R. 1 and also the situation where it has been demanded under R. 9 Thus, held in both situations if written statement has not been filed, it will be open to the court to pronounce judgment against the defendant or make such order in relation to the suit as it thinks fit.

G. **Civil Procedure Code, 1908 Or. 8 R. 5 (2) and Or. 8 R. 10 Held,** are two separate and distinct provisions under which the court can pronounce judgment on the failure of the defendant to file written statement .

H. **Civil Procedure Code, 1908 S. 2 (9), Or. 20 R. 4 (2) and Or. 8 R. 10 "Judgment"** Crucial features of Whether a case is contested or is decided ex part or is a case where written statement is not filed (and is decided under Or. 8 R. 10), held, the court has to write a judgment in conformity with CPC or at least must set out the reasoning by which the controversy is resolved Further, held, even if the definition

of "judgment" were not indicated in Or. 20 R. 4 (2) "judgment" would still mean the process of reasoning by which a Judge decides a case in favour of one party and against the other A judgment which does not indicate its reasoning suffers from infirmity Even where CPC is not applicable, the court is not absolved from its obligation of writing a judgment as understood in common parlance.

defendant (fail or omission or omit) file written statement

I. **Civil Procedure Code, 1908- Or. 8 R. 5 (1), proviso-** Evidence Act, 1872- S. 58 proviso- Held, proviso to S. 58 Evidence Act corresponds to the proviso to Or. 8 R. 5 (1) Civil Procedure Code and is an exception to the general rule of evidence that a fact which is admitted need not be proved.

J. **Judicial Process- Judicial Composure** Should not be disturbed by annoyance of the court at the conduct of parties- Such annoyance held, apparent where judgment of High Court under Or. 8 R. 10 decreeing the suit neither set out the facts of the case nor recorded the process of reasoning by which the court felt that the case of the plaintiff was true and stood proved

K. **Delhi High Court Act, 1966 (26 of 1966) Ss. 5 (2)** and 7 Contention not gone into that definition of "judgment" contained in S. 2 (9) CPC would not be applicable to a judgment passed by Delhi High Court in its original jurisdiction because in that situation proceedings are regulated by the Delhi High Court Act.

Respondent 1, S, filed a suit in May 1996 against the appellants and Respondent 2 for specific performance of an agreement for sale dated 6-8-1992 in respect of a property located in New Delhi. The appellants appeared in court on 20-9-1996 and sought time to file a written statement; time was granted and the suit was adjourned to 22-1-1997. On that date the written statement was not filed; further time was sought instead. One last opportunity was granted and the written statement was directed to be filed by 7-2-1997. It was not filed on that date either. The High Court at that point decreed the suit in favour of S under Order 8 Rule 10 CPC, and directed S to deposit Rs. 3 lakhs, the balance sale consideration; the order made clear that if the amount was deposited within the stipulated 6 weeks, S would be at liberty to apply to the Court for appointment of a Commissioner for executing the sale deed. The order contained no assessment of the case as set up by S. in his plaint. The review application, as also the appeal of the appellants were dismissed on 13-5-1997 and 29-4-1998 respectively.

In his plaint Respondent 1, S, had stated that under the agreement the total sale consideration was Rs. 7 lakhs. Rs 4 lakhs had been paid at the time of the signing of the agreement; Rs. 2.25 lakhs was supposed to have been paid by Respondent 1 on receipt of permission for the sale from the Income

Tax Department and the final Rs. 75,000 at the time of the registration of the sale deed. S also stated in the plaint that, as regards the permission from the IT Department, the appellants did not give him any information up to 13-2-1996 despite several requests and reminders. According to the plaint, by letter dated 1-3-1996, appellant-defendants informed S for the first time that the IT Department's permission had been obtained in December 1995 and that the certificate so indicating had been sent to S.S. went on to record in his plaint that he wrote to the appellants saying that he never received any such certificate and that they should acquire it and send it to him.

Before the Supreme Court, it was contended for the appellant- defendants that the High Court had adopted a purely punitive approach, which had resulted in a serious miscarriage of justice. It was also contended that the suit could not have been decreed under Order 8 Rule 10 CPC only because no written statement had been filed, unless the facts set out in the plaint were found proved by the High Court. Thus even a decree under Order 8 Rule 10 must be accompanied by a judgment, setting out the facts and the reasons for the decree being issued.

For Respondent 1, it was primarily contended that the appellant had adopted dilatory tactics with the intention of delaying the disposal of the suit and harassing Respondent 1, who had already paid a substantial sum of money; that the appellants were negligent because their appeal before the Division Bench of the High Court was filed beyond time; that to date they had not given any reasons for not filing their written statement; that Respondent 2, the owner of the property was not party to the SLP.

Allowing the appeal of the vendors and remanding the case, the Supreme Court

HELD:

Just as under Order 12 Rule 6 CPC the court cannot act blindly upon the admission of a fact made by the defendant in his written statement the court should not proceed to pass judgment blindly merely because a written statement has not been filed by the defendant traversing the facts set out by the plaintiff in the plaint filed in the court. In a case, specially where a written statement has not been filed by the defendant, the court should be a little cautious in proceeding under Order 8 Rule 10 CPC. Before passing the judgment against the defendant it must see to it that even if the facts set out in the plaint are treated to have been admitted, a judgement could possibly be passed in favour of the plaintiff without requiring him to prove any fact mentioned in the plaint, It is a matter of the court's satisfaction and, therefore, only on being satisfied that there is no fact which need be proved on account of deemed admission, the court can conveniently pass a judgment against the defendant who has not filed the written statement. But if the plaint itself indicates that there are disputed questions of fact involved in the case regarding which two different versions are set out in the plaint itself, it would not be safe for the court to pass a judgment without requiring the plaintiff to prove the facts so as

to settle the factual controversy Such a case would be covered by the expression "the court may, in its discretion, require any such fact to be proved" used in sub- rule (2) of Rule 5 of Order 8, or the expression "may make such order in relation to the suit as it thinks fit" used in Rule 10 of Order 8.

In view **Razia Begum case, 1959 SCR 1111** wherein it was held that Order 12 Rule 6 has to be read along with the proviso to Order 8 Rule 5 and so notwithstanding the admission made by the defendant in his pleading the court may still require the plaintiff to prove the facts pleaded by him in the plaint, and Section 58 of the Evidence Act, 1872 it is clear that the court, at no stage, can act blindly or mechanically. While enabling the court to pronounce judgment in a situation where no written statement is filed by the defendant, the court has also been given the discretion to pass such order as it may think fit as an alternative. This is also the position under Order 8 Rule 10 CPC where the court can either pronounce judgment against the defendant or pass such order as it may think fit,

Razia Begum v. Sahebzadi Anwar Begum, **AIR 1958 SC 886 : 1959 SCR 1111 :** relied upon

The proviso to Order 8 Rule 5 (1) and Rule 5 (2) read together indicate that where

(i) an allegation of fact made in the plaint is not denied specifically, or

(ii) by necessary implication, or

(iii) stated to be "not admitted" in the pleading of the defendant, or

(iv) the defendant has not filed the written statement,

such allegations of facts shall be treated as admitted. The court in such situation can either proceed to pronounce judgment on such admitted facts or may require the plaintiff inspite of such admission, to prove such facts.

Order 8 Rule 5 (2) is thus an enabling provision which enables the court to pronounce judgment on the basis of facts contained in the plaint, if the defendant has not filed a written statement, What is important to note is that even though a written statement is not filed by the defendant, the court may still require a fact pleaded in the plaint to be proved.

In the present case the pleadings of Respondent 1 themselves show that there was a dispute between the parties, namely, the plaintiff and the defendants, whether permission from the Income Tax Department had been obtained by the defendants (the present appellant and Respondent 2) and sent to the plaintiff (the present Respondent 1) or the said permission was, at no time, obtained by the defendants nor had the defendants sent it to the plaintiff (Respondent 1). This was a vital fact which had an important bearing upon the conduct of Respondent 1. If it were established that the certificate (permission) from the Income Tax Department had already been obtained by the defendants and sent to him, the denial of the plaintiff would be reflective of his attitude that he was not ready and willing to perform his part of the contract. On

the contrary, if it was found that the defendants had not obtained the certificate, the question whether specific performance could still be decreed would have immediately arisen particularly because of the relevant provisions of the Income Tax Act.

Since on plaintiff-Respondent 1's own showing as set out in the plaint, the defendants had been asserting that they had obtained the permission and sent the same to the plaintiff, which was not accepted by the plaintiff, there arose between the parties a disputed question of fact which had to be investigated and decided particularly as it was likely to reflect upon the conduct of the plaintiff whether he was willing to perform his part of the contract or not. It had, therefore, to be proved as a fact that permission of the Income Tax Department had not been obtained by the defendants nor had that certificate (permission) been sent to the plaintiff.

If the pleadings of Respondent 1 were limited in character that he had pleaded only this much that the defendants had not obtained the certificate (permission) from the Income Tax Department and had not sent it to him, this fact would have stood admitted on account of non-filing of the written statement by the defendants. But Respondent 1, as plaintiff, himself pleaded that "defendants insisted that they had obtained the certificate (permission) from the Income Tax Department and sent it to him". He denied it having been obtained or sent to him. Non-filing of the written statement would not resolve this controversy. The plaint allegations, even if treated as admitted, would keep the controversy alive. This fact, therefore, had to be proved by the plaintiff and the Court could not have legally proceeded to pass a judgment unless it was established clearly that the defendants had committed default in not obtaining the certificate (permission) from the Income Tax Department and sending the same to the plaintiff.

The jurisdiction of the Supreme Court under Article 136 of the Constitution is a discretionary jurisdiction and notwithstanding that a judgment may not be wholly correct or in accordance with law, the Supreme Court is not bound to interfere in exercise of its discretionary jurisdiction. But in the instant case, it is not merely a matter of the defendants' conduct in not filing the written statement but the question of law as to what the court should do in a case where written statement is not filed, is involved, and this question has to be decided so as to provide for all the lower courts as to how the court should proceed in a situation of this nature.

In a suit for specific performance it is mandatorily required by Section 16 of the Specific Relief Act to plead readiness and willingness of the plaintiff to perform his part of the contract. The court, before acting under Order 8 Rule 10 has to scrutinise the facts set out in the plaint to find out whether all the requirements, specially those indicated in Section 16 of the Specific Relief Act, have been complied with or not. Readiness and willingness of the plaintiff to perform his part of the contract is a condition precedent to the passing of a decree for specific performance in favour of the plaintiff.

Order 8 Rule 10 CPC governs both the situations where a written state-

ment is required under Rule 1 of Order 8 as also where it has been demanded under Rule 9. In both the situations, if the written statement has not been filed by the defendant, it will be open to the court to pronounce judgment against him **or make such order in relation to the suit as it thinks fit.** If the written statement is not filed, the court is required to pronounce judgment against the defendant. The words "against him" are to be found in Rule 10 of Order 8 which obviously means that the judgment will be pronounced against the defendant. This rule also gives a discretion either to pronounce judgment against the defendant or "make such order in relation to the suit as it thinks fit". These words are of immense significance, inasmuch as they give a discretion to the court not to pronounce judgment against the defendant and instead pass such order as it may think fit in relation to the suit.

There are two separate and distinct provisions under which the court can pronounce judgement on the failure of the defendant of file written statement. The failure may be either under Order 8 Rule 5 (2) under which the court may either pronounce judgment on the basis of the facts set out in the plaint or require the plaintiff to prove any such fact: or the failure may be under Order 8 Rule 10 CPC under which the court is required to pronounce judgment against the defendant or to pass such order in relation to the suit as it thinks fit.

Sangram Singh v. Election Tribunal, Kotah, **AIR 1955 SC 425 : (1955) 2 SCR 1, followed** ***Chuni Lal Chowdhry v. Bank of Boroda,*** **AIR 1982 J&K 93: (1982) 1 Ren CJ 601 ;** ***Sial Sinha v. Shivadhari Sinha,*** **Air 1972 Pat 81 : 1971 BLJR 742 ;** ***Dharampal Gupta v. District Judge,*** **(1982) 1 ARC 562;** ***State of U.P. v. Dharam Singh Mahra,*** **AIR 1983 All 130 : 1983 All WC 1, approved**

Sushila Jain v Rajasthan Financial Corpn., **AIR 1979 Raj 215;** ***Rosario Santana Vaz v. Joaquina Natividade Fernandes,*** **AIR 1981 Goa 61, referred to**

"Judgment" as defined in Section 2 (9) of the Code of Civil Procedure means the statement given by the Judge of the grounds for a decree or order. What a judgment should contain is indicated in Order 20 Rule 4 (2). It should be a self contained document from which it should appear as to what were the facts of the case and what was the controversy which was tried to be settled by the court and in what manner. The process of reasoning by which the court came to the ultimate conclusion and decreed the suit should be reflected clearly in the judgment. Whether it is a case which is contested by the defendants by filing a written statement, or a case which proceeds ex parte and is ultimately decided as an ex parte case, or is a case in which the written statement is not filed and the case is decided under Order 8 Rule 10, the court has to write a judgment which must be in conformity with the provisions of the Civil Procedure Code or at least set out the reasoning by which the controversy is resolved.

Nanhe v. Saiyad Tasadduq Husain, **(1912) 15 Oudh Cases 78;** ***Thippaiah v. Kuri Obaiah,*** **ILR (1980) 2 Kant 1028;** ***Dineshwar Prasad Bakshi v. Parmeshwar Prasad Sinha,*** **AIR 1989 Pat 139; 1988 BBCJ 449, approved**

Even if the definition were not contained in Section 2(9) or the contents there of were not indicated in Order 20 Rule 4(2). CPC, the judgement would still mean the process of reasoning by which a Judge decides a case in favour of one party and against the other. In judicial proceedings, there cannot be arbitrary orders. A Judge cannot merely say "suit decreed" or "suit dismissed" The whole process of reasoning has to be set out for deciding the case one way or the other. This infirmity in the present judgement is glaring and for that reason also the judgment cannot be sustained.

Suggested Case Finder Search Text (inter alia):

Chronological list of cases cited

1. **AIR 1989 Pat 139 : 1988 BBCJ 449, *Dineshwar Prasad Bakshi v. Parmeshwar Prasad Sinha***
2. **AIR 1983 All 130: 1983 All WC 1, *State of U.P. v. Dharam Singh Mahra***
3. **(1982) 1 ARC 562, *Dharampal Gupta v. District Judge***
4. **AIR 1982 J&K 93: (1982) 1 Ren CJ 601, *Chuni Lal Chowdhry v. Bank of Baroda***
5. **AIR 1981 Goa 61, *Rosario Santana Vaz v. Joaquina Natividade Fernandes***
6. **ILR (1980) 2 Kant 1028, *Thippaiah v. Kuri Obaiah***
7. **AIR 1979 Raj 215, *Sushila Jain v. Rajasthan Financial Corpn.***
8. **AIR 1972 Pat 81 : 1971 BLJR 742, *Sial Sinha v. Shivadhari Sinha***
9. **AIR 1958 SC 886 : 1959 SCR 1111, *Razia Begum v. Sahebcadi Anwar Begum***
10. **AIR 1955 SC 425 : (1955) 2 SCR 1, *Sangram Singh v. Election Tribunal, Kotah***
11. **(1912) 15 Oudh Cases 78, *Nanhe v. Saiyad Tasadduq Husain***

NOTE- Please refer to 'JOTI JOURNAL' December, 1999 issue at page 494 with reference to an article on 'O, 8 R. 10 C.P.C.' and an article published in this issue (Feb 2000) entitled as "अभिकथनों के आधार से दावों का पारित करना"

***Courtesy:-* Supreme Court Cases, Eastern Book Company, Lucknow.**

●

2. CRIMINAL TRIAL : DUTY OF AGENCIES INVOLVED IN JUSTICE SYSTEM : DUTY TOWARDS THE COMPLAINANT AND THE ACCUSED:-

A judgment by **Hon'ble Shri Justice R.S. Garg.** Judge, High Court of M.P. at Jabalpur Main Seat in **Criminal Appeal No. 2773 of 1999 Vinod s/o Todar Singh and ors. Vs. State of M.P.,** dated 8-12-1999.

The judgment being of general importance, it is reproduced as it is. A foot note is also given thereunder to know the procedure to procure the attend-

ance of a witness who is likely to be transferred from [illegible] tenure of service.

1. The present appeal arises out of the judgment dated 13.9.99 passed by the Third Addl. Sessions Judge, Jabalpur in Sessions Trial no. 749/96. convicting each of the appellant under section 323 IPC. sentencing them to undergo R.I. for 6 months and pay fine of Rs. 250/- , in default of payment of fine each of them to undergo R.I. for one month each. have filed this appeal.

2. The prosecution case in brief was that the complainant PW. 1 Madan had given a five rupee note to accused Netram for purchasing a bidi. The said accused returned four one rupee note to the complainant but as the notes were torn and were bad in shape, the complainant refused to accept the said currency notes and asked for good money, on which Netram started abusing the complainant, On complainant's request that his money be returned back, accused Netram and the other accused who are having their shops nearby started beating the complainant by hands fists etc, According to the complainant, the police constable had come on the spot and the complainant was taken to the police station but the police did not take his report. Thereafter he was brought to the hospital where also he was informed that he was absolutely all right and accordingly he was not treated. Suffering severe pains, the complainant went to the M.L.A. of the locality who persuaded the police to take the report. Thereafter the complainant was sent for his medical examination. He was again examined by the doctors and was admitted in the hospital. One Dr. Pram Bahadur Punnu examined the complainant and reported that the injuries suffered by the complainant were dangerous to life as the complainant had suffered rupture in the spleen. On completion of the investigation, the prosecution agency filed the challan against the accused persons. The learned trial court on conclusion of the trial, acquitted each of the appellant for offences punishable under section 307/34 IPC but however convicted them under section 323 IPC and sentenced them as referred to above. Being aggrieved by the said conviction and sentences, the appellants have filed this appeal.

3. It is most unfortunate case where each and every person deployed to see that proper justice is done not only to the accused but to the complainant as well, has failed in his duty. From the statements of PW. 1 Madan it clearly appears that he was taken to the police station but his report was not taken. It is unfortunate that the police authorities only to show the less number of registration of the crimes did not record his first information report, It is again unfortunate that the complainant who was suffering severe pains was not properly treated by the doctors on duty in the Victoria Hospital. It is again unfortunate that the public prosecutor/Government pleader did not care to summon doctor pram Bahadur Punnu to prove the report and to show to the court that the complainant infect had suffered grievous injuries and the injuries were dangerous to life. It is again unfor-

tunate that the trial court did not persuade the learned Govt. Pleader to produce the witness to do complete justice in the matter. It appears that because of the in-difference shown by the persons concerned at different stages, the complainant infact could not get justice. It is mockery of law that the complainant who suffered injury had to depend upon such persons who did not know how to discharge their duties.

If the procedural law is read it would show that the same is made in the interest and for the benefit of the accused. On one side the report of the complainant is not recorded and on the other hand the complainant is required to approach a political/powerful man so that in this system he may get some justice or some solace. The doctors who are under the oath to treat the patient have acted in such a platonic manner as if they were not the doctors but ordinary Govt, Servants. It is expected in the system that a person who goes to the police station is permitted to state his case and his report is recorded in its true perspective. Even if the present was a case under section 323 IPC (in Rojnamcha Thana inserted by editor). The police was required to register the case without intervention of the M.L.A. so that the wrong doers were brougth to the book. The system says that the accused must be benefitted by every lapse committed by the prosecution but says nothing in favour of the sufferer. On one side the report of the complainant is not recorded right in time and on the other hand the accused says that there was unexplained delay in loading the F.I.R. A fortunate complainant gets if his report recorded cannot ask the investigating officer to investigate in a particular manner. He can't ask the Investigating Officer to examine particular person as a witness because the choice is given to the Investigating Officer and he is the master for Investigation. If the complainant wants to engage a private lawyer so that he may get complete justice, the procedural law does not permit him to engage a private counsel to conduct his case and if he is permitted to engage a private counsel, then such counsel can only help and assist the public prosecutor. The accused is absolutely free to engage a counsel of his choice or he may even change a counsel as and when he wants. No option has been given to the complainant to examine the witnesses. He cannot even ask the government pleader to summon and examine the witnesses. The choice is given to the public prosecutor to examine the witnesses as he wants. If the complainant asks the court to examine a particular witness, such witness shall not be examined by the court unless the public prosecutor makes a request to the court. The conduction of the case is left in the hands of the public prosecutor, defence counsel and the Judge. The public prosecutor may give up the witnesses, and no body is ready to see whether such person is an important witness or not. The court is simply happy if witnesses are given up because its burden of recording evidence is reduced. But, is it not for the court conducting the trial to see whether such request of giving up witnesses is to be allowed or some letter are put on powers of public prosecutor. Non availability of the witnesses may some times persuade the public prosecutor to give up

the witness but the court can't be a silent spectator to the drama going in the court. Should we have a trial in the court or a farce in the name of the trial. Is it not the duty of the presiding officer to see that the summons are issued in accordance with its direction or should it feel content by writing "that the summons be issued positively" : Even if it burdens the court's work the Presiding Officer can't be permitted to say that he would not observe his own proceedings should the fate of the case be left in the hands of the Public Prosecutor and the defence or the judge should press his authority. When summons are not issued despite directions of the court and lapses. Is it fair? Is it not a slur on the system that the crime goes unpunished and the victim is not heard at all. What would a victim think about the system. It would not be out of place to mention that each of these persons is absolutely indifferent as none of them have suffered the pains of the injuries. Each is happy that somthing is being done in the matter.

5. For large number of courts there are few public prosecutors/G.P./A.G.P. Is every court not/ entitled to be assisted by public Prosecutor/ Govt. Pleader/ A.G.P. For Jabalpur I say with authority that for fourteen Magistrates, we only have five public prosecutors. Can with this less number of the public prosecutors the cases are to be conducted properly and be decided in accordance with law. For large number of courts there are less than few court Moharrirs for issuing summons. He does not find time to issue summons and the court is required to adjourn the case time and again. One fine morning the Judge feeling frustrated closes the prosecution's right to lead evidence and acquits the accused for want of evidence. Would it be fair. Are we giving proper justice to the victim. If the state deprives an individual of his right to prosecute his case on an assurance that it would look after the interest of the individual with sincerity and honesty then why such assurances should not be translated into action. Why P.P./G.P./A.G.P. should not conduct the trials properly, why should State and its officers feel that to decide a case in accordance with law is the duty of the Court and they are not required to assist the court. Why should they expect that in their absence the court would record the statements of the witnesses. The absence of A.G.P./G.P./P.P. would not be sufficient as an excuse in favour of the Judge. **If the old saying that "to decide is divine" means someting more then a judge is bound to discharge his duties with utmost sincerity commitment and dedication. A Judge is expected to decide a case and not dispose it or weed it out.** It is expected of the prosecuton Agency and police that after receiving the summons or warrants the same would be served or executed as is required under the law. Whether summons and warrants are served or not. At least a report be submitted to the court on the date already fixed for the purpose. Why the witnesses should not be kept in attendance. Is it not the duty of the police to produce the under trial prisoner before the court as and when so asked. Can they be permitted to say that for want of police force or Guards the accused cannot be produced in the court on the date fixed for the pur-

pose. It is prime duty of the prosecution agency to produce the Govt. Servats, Doctors, Investigating Officers and Police personnel etc. on the date of hearing. All persons who are required to appear in the court as witnesses are not immune from court proceedings. If the accused is convicted, then he has a right of appeal but the law does not give a right of appeal to the complainant even if he feels that the acquittal is wrong or that the findings recorded by the trial court are bad. Whether an appeal is to be filed or not is again left to the choice of the State. which is expected to protect the interest of every citizen. In the present case. I am required to write all this because the manner in which the case was conducted by the public prosecutor was absolutely dissatisfactory. It is expected of a public prosecutor that he should bring before the court all such witnesses who can prove the guilt of the accused. If it is the duty of the public prosecutor to see that an innocent person is not punished then he must see that a wrong doer does not escape the proper punishment. If Dr. Prem Bahadur was examined in the court then certainly he could prove his report and could bring on the record that the injuries suffered by the complainant were dangerous to life. The records show that the public prosecutor/Govt. Pleader was happy in informing the court that doctor Prem Bahadur was transferred to some other place and felt content after examining PW. 8 Dr. Pawan Kumar Agrawal, less realising that said doctor Pawan kumar Agrawal was not acguainted with the hand writing of Dr. Prem Bahadur Punnu and could not prove the contents of Ex. P. 10 or handwriting of the said doctor. Though Ex. P. 10 as it is. would not be admissible in evidence but a perusal of Ex. P. 10 would show that according to the doctor, the patient had rupture in his spleen and had suffered other injuries also. The opinion of doctor Punnu was that the injuries were dangerous to life. If on face of this report. the Government Pleader/ Public Prosecutor was content with examination of PW. 8 then this court is required to intervene in the matter at this stage. The learned trial court permitted the learned Addl. Government Pleader to close the evidence for the prosecution vide its proceedings dated 24.8.99. It does not appear from the said proceedings recorded by the learned court that it ever applied its mind to the facts of the case which were brought on record and the manner in which doctor Prem Bahadur was not being examined. Non- examination of Dr. Prem Bahadur Punnu in the opinion of this court, has certainly caused injustice to the complainant. The law no where says that every benefit should be extended to the accused only. A complainant who suffered under the hands of an accused person is also entitled to justice. and in fact true justice. Why one should be so platonic and indifferent to the injury of others? When the court tries an offender on a particular charge, it is expected of that court that it would persuade the State, and its prosecution agency/learned Govt. Pleader and the concerned police officers of the said police station to bring the proper evidence on record for doing complete and absolute justice between the parties. A court is not expected to decide the case in a very casual or cavalier manner. The duty of the court

is to do justice. not only to the accused but to the complainant also. In the instant case the learned trial court awarded six months. R.I. to and imposed a fine of Rs. 250/- on each accused. The amount of fine would go to the State. Was the court awarding costs. to litigation to the State or was rewarding it for securing the conviction. Who had suffered the injuries. the State or the complainant. Who should have been compensated for the injuries. The complainant was running from pillar to post for redressal of grievances not the State or its agencies. For what Section 357 is enacted. Why a court imposing fine should not give something out of it to the victim. Is it not the duty of the court to exercise its powers of Section 357 and award proper compensation to the victim. Is the victim not entitled to some sympathy from the court. Should the Judge be not persuaded by the condition of the victim. When accused is required to pay compensation to the complainant he learns that crime does not pay but one has to pay for the crime. For paying the fine the accused will have to earn, pay and learn while on the other hand the complainant would feel that somebody cares for him.

6. The proceedings recorded by the learned trial court show that the summons issued on Dr. Prem Bahadur Punnu returned unserved as he was not available in the said hospital but the copies of the summons are not avaialble in the record sent to this court. Be that as it may. the trial court was bound to obtain correct and complete address of doctor Prem Bahadur Punnu and summon him as a witness. In the opinion of this court, neither the learned public Prosecutor nor the learned court below were justified in not examining the doctor Prem Bahadur Punnu At this stage, it would again be necessary to refer to the bed head ticket of the patient which would clearly show that the patient was admitted in the hospital on 12.3.96 and was discharged from the hospital on 26.3.96. If such facts can be ignored then obviously no court would be doing justice to the case on hands. Taking into consideration the totality of the circumstances and the manner in which the learned Government Pleader did not examine the doctors. I am of the opinion that the judgment delivered by the trial court deserves to be set aside and the matter needs to be sent back to the trial court for taking further evidence.

7. The Judgment delivered by the trial court is set aside. The trial court is directed to obtain the correct address of doctors M.L. Agrawal and Prem Bahadur Punnu. issue summons to them and after securing their attendance. examine them as prosecution witnesses. The appellants who are present in the court are directed to appear before the trial court on 4.1. 2000. A copy of this judgment be supplied to the learned counsel for the State so that he may issue proper instructions to the learned Addl. Government Pleader/Govt. Pleader who has to conduct the case in the trial court.

8. Let Superintendent of Police. Jabalpur be also informed that it is the duty of the police to obtain correct addresses of the witnesses, serve them with

the summons and produce them in the court so that they are examined in support of the prosecution allegations. It is expected of the trial court that it shall conclude the trial within a period of six months from the date of appearance of the accused persons. The appeal is allowed and the matter is remanded to the trial court for further trial and disposal may decision in accordance with law.

टिप्पणीः-

साक्षी को उपस्थित रखने का प्रयास

सामान्य रूप से साक्षियों को आहूत करने का प्रयत्न होता ही है लेकिन विशेषज्ञ साक्षी विशेषकर डॉक्टर को उपस्थित करना कभी–कभी कष्टप्रद भी होता है। इस सम्बन्ध में प्रबन्धनात्मक लेख पृथक से लिखूंगा। ऊपर उल्लेखित न्याय दृष्टांत के संदर्भ में संक्षिप्त टिप्पणी मात्र दी जा रही है जिस पर विचार करना अपने अपने चिंतन के प्रति न्याय करना होगा।

डॉक्टर वर्ग का स्थानांतरण भी होता रहता है। जब तक जहां पर वह पदस्थ रहा है वहां पर उसे मेडिको लीगल केसेस (एम.एल.सी.) प्रकरणों का परीक्षण विपुल संख्या में करना पड़ता है। उसके स्थानांतरण पर भी आने वाले वर्षो में उसे न्यायालय में आना है। इस सम्बन्ध में भी प्रबन्धनात्मक लेख में खुलासा होगा। जब तक एक डॉक्टर वर्तमान पदस्थापना पर पदस्थ है वह समय–समय पर आता रहता है लेकिन स्थानांतरण पश्चात उसका नई पदस्थापना के स्थान का पता लगाना कभी–कभी कठिन हो जाता है। सबसे आसान पद्धति तो वहां के जिला चिकित्सा अधिकारी से पता लगाना है। लेकिन यदि उक्त डॉक्टर का फिर अन्यत्र चला जाना ज्ञात हो तो वहां–वहां के जिला चिकित्सालयों से भी ज्ञात हो सकता है। लेकिन वे स्नाकोत्तर–अध्ययन आदि के लिए आयुर्विज्ञान महाविद्यालयों में या प्रतिनियुक्ति पर अन्यत्र पदस्थ हो जाते हैं तो परेशानी या असुविधा हो जाती है। पीठासीन अधिकारी गणों ने यदि किसी सीमा तक गतिशीलता का धर्म अवलंबन कर किया तो ज्यादा अच्छा है। लेकिन हम स्वयं अपने धर्म का पालन नहीं करते दूसरों को हमारे धर्म का आदर्श बताते हैं। यथा उच्च न्यायालय का स्थायी निर्देश है कि पीठासीन अधिकारी आदेशिकाओं में भी अपने हस्ताक्षरों के नीचे अपना नाम लिखेंगे। ये निर्देश कितने जन पालन करते हैं यह बात तो भिन्न है कितनों को इस परिपत्र की जानकारी है यह भी चिंता युक्त चिंतन का प्रश्न हो सकता है।

प्रत्येक डॉक्टर जिसने प्रतिवेदन दिया है व हस्ताक्षर मात्र किए है उसे न्यायालय ने अपने सामने उससे नाम लिखवाने की पद्धति शुरू कर देना चाहिए व उसे मार्गदर्शित करना चाहिए जिससे उनमें भी इस बात की पकृति विकसित हो जाएगी। एक से दूसरे

डॉक्टर के बीच चर्चा का विषय हो जाएगा व अपने आप यह पद्धति गति पकड सकती है। जब सामान्य रूप से डॉक्टर को आहूत करने हेतु प्रयुक्त की जा सकने वाली कोई भी प्रक्रिया अविलंब प्रतिक्रिया व्यक्त नहीं कर रही है तो यह उचित होगा कि निदेशक स्वास्थ्य सेवाएं भोपाल जिसका स्थानीय पूर्ण पता जिला चिकित्सालय से प्राप्त किया जा सकता है को एक पत्र चाहे तो अर्ध शासकीय पत्र लिखा जाना चाहिए व उसमें समस्त तथ्यों का खुलासा हो एवं साथ ही एक समन्स भी सम्बन्धित डॉक्टर के नाम से हो व प्रतिवेदन (मेडिकल रिपोर्ट) की एक प्रतिलिपि भी हो यदि उक्त प्रतिवेदन से डॉक्टर का नाम ज्ञात नहीं हो सकता हो। ऐसा करने से डॉक्टर की साक्ष्य के लिए उपलब्धि लगभग सुनिश्चित हो सकती है। अपवाद भी हो सकते हैं लेकिन वे अपवाद केवल अपवाद होंगे व कुछ विशेष प्रयत्नों से जैसे स्वास्थ्य सचिव आदि के माध्यम से सुलझाए जा सकते हैं। एक घटना का उल्लेख करना पर्याप्त होगा। गुना में मेरी जिला न्यायाधीश के रूप में पदस्थापना में धारा 376 भा.द.वि. के प्रकरण के सम्बन्ध में भी ऐसी ही स्थिति निर्मित हुई। महिला चिकित्सक का एक प्रतिवेदन था लेकिन उस पर नाम नहीं था। साक्ष्य सूची में भाग्यवश सही नाम था। कभी–कभी साक्ष्य सूची में पुलिस अंदाज व कयास से भी नाम लिख देती है ऐसा अनुभव आपको भी होगा। जिला चिकित्सालय में समन्स जाते थे पुलिस लिखकर भेजती थी कि ऐसा डॉक्टर इस अस्पताल में नहीं है। एक डॉक्टर हो तो पुलिस प्रयत्न भी करे। कई डॉक्टरों की तलाश कई न्यायालयों को हो तो किस किस की तलाश करे। पुलिस तो अपने परंपरागत शब्दावली के अनुरूप हमेशा उत्तर देती है कि हिकमत अमली से प्रयत्न जारी है। इस प्रकरण की जो डॉक्टर थी उस विषय में नैमित्यिक रूप से आने वाले डॉक्टर महोदय से पूछा तो उन्होंने बताया एम.एस. करने ग्वालियर गई थी। डीन मेडिकल कालेज को पत्र लिखा तो उत्तर आया मेडिकल कॉलेज में ऐसा डॉक्टर पदस्थ नहीं है। कयास लगाया ग्वालियर के सिविल सर्जन के माध्यम से समन्स भेजकर निवेदन किया कि आपके जिले में वह डॉक्टर कहीं पदस्थ हो तो उसे निश्चित दिनांक को उपस्थित होने हेतु निर्देशित करे एवं रिपोर्ट की फोटो कॉपी भी भेज दी। डॉक्टर मिल गई समन्स निर्वाहित हुआ पर वह लौट आई। उसकी पदस्थापना मुरार (ग्वालियर) के प्रसूति गृह में थी। पुनः सिविल सर्जन को पत्र समन्स भेजा एवं प्रतिलिपि उक्त चिकित्सक को भेजी। कार्यालय का व घर का टेलीफोन नंबर दिया व कहा कि चूंकि प्रसूति गृह में उक्त डॉक्टर की ड्यूटी है व आपात स्थिति की ड्यूटी की भी ज्यादा संभावना होती है अतः पत्र में यह भी लिखा कि वह उक्त तिथि पर नहीं आ सकती हो तो टेलीफोन पर संपर्क कर उसकी सुविधा की तिथि सूचित करें अथवा जिस दिन भी आ सकती हो तो आ जाए साक्ष्य लिपिबद्ध कर ली जाएगी। अधिवक्तागणों का सहयोग मुझे हर स्थान पर अविस्मरणीय रूप से मिलता ही रहा

है. इसलिए डॉक्टर को यह भी छूट दी। निर्धारित तिथि पर डॉक्टर आ गई। उसके मन में कुछ भय भी होगा या न भी होगा वह अपने निकट परिचित रिश्तेदार महिला प्राध्यापिका को साथ लाई थी। आते ही मैंने उक्त महिला डाक्टर की साक्ष्य लिपिबद्ध की। उक्त दोनों महिलाओं को चेंबर में बुलाया, कॉफी प्रस्तुत की। उन्होंने कॉफी ली। महिला मुंह के बजाय आंखों से ज्यादा बोलती है। उसकी प्रतिक्रिया समझ गया। मैंने ही उनके आभार व्यक्त किए। वे ससन्मान गई। मुझे प्रसन्नता थी कि न्यायपालिका की प्रतिष्ठा बढ़ी है। वो इसलिए कि मुझे पीड़क (कोअर्सिव) कार्यवाही की आवश्यकता नहीं पड़ी तथा डॉक्टर को भी लगा कि उसके सम्मान की भी रक्षा हो गई। साक्षी का न आना या उसका पता न पड़ना कभी कभी संवादहीनता की स्थिति के कारण होता हैं। एकान्तवासी (आइव्हरि टॉवर) की स्थिति न हो। मुझे एक व्यवहार न्यायाधीश (महिला) का भी प्रकरण जो गुना का ही है ज्ञात है जिसमें उसने ऐसे ही दृढ़तापूर्वक डॉक्टर का पता लगाया। किसी महिला के नाक को विच्छेदित करने का प्रकरण था। उसी प्रकार एक जिला न्यायाधीश के यहां न केवल डॉक्टर साक्ष्य में आया अपितु समय समय पर निवास स्थान पर आकर औपचारिक संबंधों को बनाएं रखा। ऐसी किंवदन्ति थी कि डॉक्टर न्यायालय में साक्ष्य में आता ही नहीं है। मूल मुद्दा संभवता संवाद स्थिति का है व न्यायालय के पीठासीन अधिकारियों के व्यवहार का भी तो हो सकता है। प्रत्रिका के माध्यम से बाद में चर्चा करेंगे।

पत्र का प्रारूप

न्यायालय स.दा.सत्य, न्यायिक दंडाधिकारी प्रथम श्रेणी, न्याय नगर

पत्र क्र. : दि. : .....

प्रति,

निदेशक,
चिकित्सा सेवाएं
भोपाल म.प्र.
न्याय नगर

विषयः- डॉक्टर रामलाल की साक्ष्य के रूप में उपस्थिति

इस न्यायालय में अपराधिक प्रकरण क्रमांक 1/96 शासन वि. श्यामलाल लंबित है जिसमें अगली तिथि साक्ष्य हेतु दि. 02-4-2000 निर्धारित है। डॉक्टर रामलाल की साक्ष्य भी होना है लेकिन उनकी पदस्थापना का स्थान आदि ज्ञात नहीं हो रहा है। अतः उक्त डॉक्टर का समन्स आपकी ओर इस पत्र के साथ संलग्न किया है। आपसे निवेदन है कि उक्त डॉक्टर वर्तमान जहां भी पदस्त हो उन्हें यह समन्स सक्षम

अधिकारी के माध्यम से निर्वाहित कर निर्देशित करें कि वे इस न्यायालय में निर्धारित तिथि पर अवश्य रूप से उपस्थित रहें। उनकी अन्तिम ज्ञात पदस्थापना न्यायनगर थी। उनके समन्स के साथ एम.एल.सी रिपोर्ट की नकल भी संलग्न है जिससे उन्हें ज्ञात हो सके कि यह प्रतिवेदन उनके द्वारा ही हस्ताक्षरित है। सम्बन्धित डॉक्टर की सुविधा हेतु मेरे निवास स्थान का टेलीफोन नं. 0761-324465 एवं कार्यालय का नं. 0761-325995 दिया जा रहा है जिस पर आवश्यकता पड़ने पर संपर्क किया जा सकेगा।

(स.दा. सत्य)
प्रथम व्यवहार न्यायाधीश
वर्ग.२ एवं न्यायिक दंडाधिकारी
प्रथम श्रेणी, न्यायनगर

आप अपने पत्र व्यवहार में कार्यालय, निवास स्थान के शासकीय एवं निजी फोन नम्बर व एस.टी.डी. नंबर का भी खुलासा कर सकते हैं। व समन्स में भी ऐसी ही कर दें। वैसे भी राज्य शासन का परिपत्र है कि शासकीय पत्र व्यवहार में टेलीफोन नंबरों का खुलासा करना आवश्यक है।

अपने अपने स्तर पर शिष्ट रूप से प्रयत्न करें। यश निश्चित ही प्राप्त होगा।

एक न्यायिक अधिकारी ने निनामी बेनामी पत्र व्यवहार द्वारा सूचित किया था कि परिवादी के प्रति चिंतन का कोई भी आधार दंड प्रक्रिया संहिता में नहीं है। पता नहीं न्यायिक अधिकारी होकर इतना डरपोक है कि ऐसे अच्छे कार्य के लिए भी अपना नाम प्रगट नहीं कर सका। उच्च न्यायालय का यह निर्णय पढ़ने से ज्ञात होगा कि जिसका कोई नहीं उसका न्यायालय है। डरपोक बनकर न्यायदान नहीं किया जाता। दमखम से यह कार्य होता है फिर भी न्याय की चौखट में रहा जा सकता है।

●

3. C.P.C., O. 22 Rr. 3, 4 (5) AND 9, O. 43 R. 1 (k) AND LIMITATION ACT, SECTION 5: ABATEMENT OF SUIT:-
1999 (2) M.P.L.J. 461
RAMADHAR SHRAMA Vs. SEWARAM

Application under O. 22 R. 3 may be treated as an application under O. 22 Rule 9.

In this connection suffice it to say that the absence of a formal prayer for condoning the delay did not bear the Court from taking into account the relevant material on record for the purpose of deciding as to whether applicant had made out sufficient cause for condoning the delay in making the applica-

tion for substitution. In its decision in the case of ***Firm Kaura Mal vs. Firm Mathra Dass, reported in AIR 1959 Punjab 646,*** it had been clarified by the Punjab High Court that merely because there was no written application filed by the appellant is hardly a sufficient ground for refusing him the relief, if he is otherwise entitled to it, indicating that procedure is meant for advancing and not for obstructing the cause of justice; and if the entire material was on the record, it could not promote the ends of justice, if that material was ignored and the relief refused to the appellant, merely because he had not claimed it by means of a formal application in writing or that a formal affidavit was not filed. It was further indicated, that the language of section 5 of the Limitation Act does not provide that an application in writing must be filed before relief under the said provision can be granted. While making the aforesaid observations the Punjab High Court drew support from an earlier decision of the allahabad High Court in the case of ***Mt. Kulsoomun Nissa vs. Noor Mohammad, reported in AIR 1936 Allahabad 666.***

The learned counsel for the applicant has further urged that the appeal filed by the plaintiffs against the order passed by the trial Court was not maintainable and in this view of the matter it was not open to the First Appellate Court to upset the order declaring the suit to have abated rejecting the application filed by the plaintiffs under Order 22, Rule 3, Civil Procedure Code. So far as this aspect is concerned, a perusal of Order 43, Rule 1 of the Code of Civil Procedure indicates that in sub-rule (k) there of an order under Rule 9 of Order 22 refusing to set aside the abatement or dismissal of a suit has been specifically made appealable. An appeal, therefore, lies against an order passed by the trial Court refusing to set aside the abatement. As already indicated hereinabove a prayer seeking substitution of the heirs and legal representatives of a deceased defendant and bringing them on record in his place is wide enough to include within its ambit the prayer for setting aside the abatement which had already set in on account of the death of the defendant. In the circumstances, therefore, the rejection of the application filed by the plaintiffs seeking to bring on record the heirs and legal representatives of the deceased defendant had to be treated as a refusal to set aside the abatement which had already set in as noticed herein above. The order passed by the trial Court was, therefore, appealable under Order 43, Rule 1 (k) of the Civil Procedure Code. The contention of the learned counsel for the plaintiffs in this regard is totally devoid of merits and is not acceptable.

●

4. CONTEMPT OF COURT, SECTION 10 AND 12:-
1999 (2) M.P.L.J. 521
JAGDISH PRASAD Vs. RAJENDRA KUMAR

Discourtesy to court. Summonses sent for service on witnesses in sessions case to office of Superintendent of Police. Summonses returned unserved. Contemner S.P. held not only neglected his duties but and shown scant regard and discourtesy to court in not co-operating in expeditious trial of case within time limit fixed by High Court. Apology of contemner rejected and

fine of Rs. 500/- was imposed. Contemner made liable for costs of proceedings at Rs. 500/-. ***Salim vs. State of M.P. 1990 JLJ 600*** referred.

●

5. M.P. ACCOMMODATION CONTROL ACT, SECTION 12 (1) (a) :- LIABILITY TO PAY RENT AND PROOF THEREOF
1999 (2) M.P.L.J. 478
GOPAL SELAR Vs. BADRILAL AND OTHERS

The onus to show payment of rent lies on tenant. Mere oral testimony in this regard is not sufficient.

Landlord in his notice had demanded not only the arrears of rent due but also the rent for the period subsequent to the notice during which the tenancy was to continue. This will not invalidate the notice so as to relieve the tenant of his obligation to clear off the arrears of rent within the stipulated period as required under the provisions of section 12 (1) (a) of the M.P. Accommodation Control Act. The onus to show payment of rent lies on the tenant. Mere oral testimony in this regard is not sufficient. In a case where the tenant comes forward alleging that the rent was paid but no receipt was issued by the landlord but no explanation is furnished for not sending the rent by money-order, the tenant's version is not liable to be accepted. ***Mohanlal vs. Lachmandas, 1991 HRR 510*** relied on.

●

6. SCHEDULED CASTES AND SCHEDULED TRIBES (PREVENTION OF ATROCITIES) ACT, SECTION 3 (1) (v): EXTENT OF PROOF REQUIRED:-
1999 (2) M.P.L.J. 474
JANGGU Vs. STATE OF M.P.

For securing a conviction under section 3 (1) (v) of the Scheduled castes and Scheduled Tribes (Prevention of Atrocities) Act, the prosecution, for the first clause is required to show that the accused had wrongfully dispossessed a member of Scheduled Caste or Scheduled Tribe from his land or premises. A wrongful dispossession, presupposes positive and de-facto possession. Unless a man is shown to be in actual physical possession of the property, he cannot be dispossed. For securing conviction under the second clause, the prosecution is required to prove that the complainant had some rights and he was enjoying the said rights over any land, premises or water. The second clause would cover a contingency relating to right of easements, right of way and fetching of the water etc. unless it is proved by the prosecution that the complainant had a right and was enjoying the same, the prosecution would not be entitled to say that because accused did not permit the complainant to take possession of the property which he was allegedly entitled, he be convicted. Where the complainant was not in possession, of the property there would be no question of his wrongful dispossession. Conviction set aside.

CRIMINAL TRIAL : DUTY OF THE COURT WHILE CONSIDERING THE DEFENCE PUT UP BY ACCUSED:-

The prosecution is required to establish its case beyond every shadow of

doubt, but the accused is only required to show to the court that the defence raised by him may not be foolproof, but is probable and plausible. If the court is of the opinion that the defence appears to be reasonable and probable, then the court is not entitled to reject the statments of witnesses.

●

7. HINDU MARRIAGE ACT, SECTION 13 (1) (ia) : CRUELTY:-
1999 (2) M.P.L.J. 451
AMITA Vs. A.K. RATHORE

The expression 'cruelty' which constitutes a ground for divorce under section 13 (1) (ia) of the Hindu Marriage Act has not been defined. The Courts have to interpret, analyse and define as to what constitutes 'cruelty' in a given case. This would depend on many factors such as social status, background, customs tradition, caste and community, upbringing of the parties as also the public opinion prevailing in the locality. The court has to rest its decision on the facts and circumstances of each case on assessment of human nature and human affairs with due regard to social conditions and customs of the parties. A decree under section 13 (1) (ia) of the Act can be granted only when there is proof of cruelty which satisfies the conscience of the court and where the relationship between the parties had deteriorated to such an extent that it had become impossible for them to live together without mental agony, torture or distress. ***Shobha Rani vs. Madhukar Reddi, AIR 1988 SC 121*** relied on.

HINDU MARRIAGE ACT. SECTION 23:-

Proceedings under the Hindu Marriage Act, 1955, are of civil nature, the test of criminal proceedings need not be applied and it is not necessary to prove the allegations beyond all reasonable doubt, the reason being that a criminal trial involves the liberty of the subject which may not be taken away on a mere preponderance of probabilities and it would be wrong to input such a consideration into trial of civil nature. The word 'satisfied' in section 23 of the 'Act' must mean satisfied on preponderance of probabilities and not satisfaction beyond reasonable doubt; which requires proof of higher standard in criminal or quasi-criminal trials. Proof beyond reasonable doubt is not postulated where human relationship is involved and eye-witnesses are difficult to obtain. **Dr. N.G. Dastance Vs. Mrs. S. Dastance. AIR 1975 SC 1534** and ***Shobha Rani vs. Madhukar Reddi, AIR 1988 SC 121*** relied on.

●

8. HINDU ADOPTIONS AND MAINTENANCE ACT, SECTIONS 10 (iv) AND 16: PRESUMPTION ABOUT JOINT FAMILY:-
1999 (2) M.P.L.J. 502
UMA PRASAD Vs. PADMAWATI AND OTHERS

Until a nucleus of the Joint Hindu Family property is proved or admitted no presumption arises that the whole of the property of Joint Hindu Family was joint.

Where the material on record clearly showed that each of the sons had

started separate business, the grandfather was heavily indebted with no finance with him to create a Joint Hindu Family nucleus.

It was held that it is crystal clear that until a nucleus of the Joint Hindu Family Property is proved or admitted no presumption arises that the whole of the property of Joint Hindu Family was joint. There was no proof of formal partition but the circumstances led to the fact that all the coparceners lived separately and had their separate business. The Joint Hindu Family had various houses. There was no evidence when this property had been acquired. In view of the eloquent evidence it was concluded that plaintiffs' father had completely separated from the rest of the family. The decree of dismissal of the plaintiff's suit was in the circumstances justified. ***G. Narayan Raju vs. Chamaraju and others, AIR 1968 SC 1276*** relied on.

PARTITION:- Money transactions for Joint Hindu Family between one who is lending and the other who is borrowing and showed corresponding debts and credits in their books, it goes a long way to indicate that there has been disruption of the Joint Hindu Family.

●

9. M.P. ACCOMMODATION CONTROL ACT, SECTIONS 23-A AND 12 (1). (e) AND (f) :- BONAFIDE REQUIREMENT:-
1999 (2) M.P.L.J. 489
RANJIT NARAYAN Vs. SURENDRA

Bonafide requirement of landlord must be decided applying objective tests of find out if need of landlord for suit accommodation is genuine and reasonable.

●

10. N.D.P.S.ACT, SECTION 50:-
1999 (2) M.P.L.J. 406
KISHAN Vs. STATE

Compliance of section 50 not necessary where police officer makes search or arrests a person in normal course of investigation into an offence or suspected offence without any prior information as contemplated under Narcotic Drugs and Psychotropic Substances Act.

●

11. N.D.P.S. ACT, SECTION 50:-
JT 1999 (4) SC 540
PON ADITHAN Vs. DEPUTY DIRECTOR, NARCOTICS CONTROL BUREAU, MADRAS

Compliance. No preparation of contemporaneous writing about informing accused of his right there-under. Only evidence of intelligence officer. Statement found reliable. Involvement of said witness in offence under the Act after a decade. It was held that there was no infirmity in the evidence and subsequent involvement cannot affect the evidence of this case.

Compliance, Oral testimony of sole witness. If sufficient to establish requirements. Absence of independent witness and documentary evidence. It was held that oral evidence of such witness can be regarded as sufficient for compliance of requirements under Section 50 **T.P. Razak's case (1995) Supp. 4 256)** distinguished.

EVIDENCE ACT, SECTIONS 25 AND 26 : Confessional statement of accused. Recorded when in custody of PW, an intelligence officer of Narcotics Bureau. No complaint of any threat. Suggestion put to PW and then in statement under Section 313 Cr.P.C. taking same stand. Said statement is vague. It was held that, that by itself would not be sufficient to hold that statement was made under compulsion.

●

12. N.D.P.S. ACT, SECTION 50 AND 42 :-
JT 1999 (4) SC 495
STATE Vs. BALDEO SINGH

No prior information or investigation into an offence leading to recovery of contraband held Section 42 is not applicable. Recovery of narcotic drug. it was held that from that stage, procedure of NDPS Act should be followed.

It is mandatory for the empowered officer to inform the person, to be searched, the right to be taken to nearest Gazetted Officer or Magistrate. The accused has a right to be informed, though not in writing. Failure to do so would render search illegal. **Balbir Singh's case, JT 1994 (2) 108** followed and relied upon. The prosecution must establish that empowered officer had conveyed the information to the concerned person of his right of being searched in the presence of Magistrate or G.O.

The non- compliance would vitiate the conviction if not the trial. The non compliance of provisions of Section 50 Evidence Act collected in violation of the provisions. The evidence of seizure of illicit article in violation of the provisions must be excluded.

●

13. N.D.P.S. ACT, SECTIONS 21 AND 27:-
JT 1999 (4) SC 92
RAJU @ SALIM Vs. STATE OF KERALA

Raju found in possession of small quantity of 100 mgs of brown sugar. Plea of accused in statement u/s 313 of Cr. P.C. that it was only for own "consumption". Value of Rs. 25/- only. No evidence of addiction led. Aspects not considered by trial court or High Court. It was held that accused deserves to be convicted u/s 27.

The whole judgment from paragraphs 2 to 5 are reproduced:-

1. The facts as found by the trial court are that on 27.12.89, the appellant was found in possession of 100 mgs. of brown sugar. It was about 1.25 p.m. when he was passing on a road. Though it is not very clear as to what exactly was the explanation given by him to them, it appears from cross

examination of the witnesses and the statement recorded under Section 313 Cr. P.C. that he had purchased the said quantity from one Mattancharry Refeeque for a sum of Rs. 25/- for his personal consumption. Though the quantity found was 'small quantity', the Trial Court refused to give benefit of Section 27 of the Act to the appellant on the ground that he had failed to establish that it was for his personal consumption. The trial Court proceeded on the basis that the appellant possessed the same for sale and convicted him under Section 21 of the Act. The High Court also adopted the same line of reasoning and confirmed the finding recorded by the Trial Court.

2. What is contended by the learned counsel for the appellant is that the courts below have not properly considered the defence raised by the appellant. He submitted that even though he had raised the plea that the quantity of 100 mgs. was 'small quantity' and it was kept for his personal consumption, the trial court rejected the said plea on the ground that no evidence was led by the appellant to prove his defence and that if the appellant was an addict to brown sugar, one would have found withdrawal symptoms in him but no such tendencies were exhibited by the appellant at any stage of trial.

3. The prosecution had led no evidence to show that he was an addict or that he was regularly taking brown sugar. Therefore, it was not proper to reject the defence of the appellant on the ground that during the trial the appellant was in custody and could not have consumed brown sugar and yet he did not exhibit withdrawal symptoms. It is also not in dispute that the quantity which he was carrying was 'small quantity'. The value of it was only Rs. 25/- It is, there fore, doubtful if such a small quantity was purchased by him for sale and make any profit out of it. In any case, there is no evidence on the basis of which such an inference can be drawn. These aspects have not been considered by the trial court and the High Court. We are of the opinion that this appeal deserves to be allowed and the conviction of the appellant deserves to be altered from Section 21 to Section 27 of the NDPS Act.

4. We accordingly allow this appeal and alter the conviction of the appellant from under Section 21 to one under Section 27 of the NDPS Act and also alter the sentence of 10 years rigorous imprisonment and a fine of Rs. 1 lakh to rigorous imprisonment for one year and a fine of Rs. 5,000/- In default of payment of fine, the appellant shall suffer further imprisonment for a period of three months.

●

14. N.D.P.S. ACT, SECTION 50:-
(1999) 7 SCC 88
C. ALI Vs. STATE OF KERALA

Requirement of informing the accused of his right to be searched in the presence of a gazetted officer or a Magistrate mandatory. Non-compliance thereof vitiates the trial. No presumption to that effect can be raised.

Paragraph 2 of the judgment is reproduced:-

The appellant had contended a point before the High Court that the mandatory requirement of section 50 of the Act was not complied with in this case. We do not find any clear finding recorded by the High Court on this point. As the deposition of the Circle Police Inspector (PW5) was recorded in Malayalam language, we told learned counsel for both the parties to verify and tell us whether he had stated in his evidence that the appellant was informed about his right to be searched in the presence of a Magistrate or a gazetted officer. After going through his evidence, both the learned counsel stated that the evidence of the witness is silent on this point. The settled position of law is that the person to be searched under NDPS Act, 1985 is required to be told about his right under section 50 before he is searched and that is a mandatory requirement. No presumption to that effect can be raised. As there is no evidence on record to show that the appellant was informed about his said right, it has to be held that the said mandatory requirement of Section 50 was not complied with in this case. On this short point, this appeal deserves to be allowed. Accordingly, we allow this appeal, set aside the conviction the appellant and also quash the order of sentence passed against him.

●

15. ADMINISTRATIVE LAW : NATURAL JUSTICE : OPPORTUNITY TO SHOW CAUSE TO ADVERSELY AFFECTED PERSON WHEN NOT NECESSARY:-
(1999) 7 SCC 332
DHARMARATHMAKARA R.A.R.M.E. INSTITUTION Vs. EDUCATIONAL APPELLATE TRIBUNAL

Undisputed facts for which there was no plausible explanation and affected person could not put forth any valid defence when opportunity given by Court. Plea rejected on the facts of the case that enquiry ought to have been conducted as provided in statutory rules. It was held that giving opportunity is a check and balance concept that no one's right be taken away without giving opportunity or without enquiry where statute so requires, but this is not necessary where allegations/charges are admitted and no possible defence is placed before the authority concerned. No enquiry is necessary when one admits one's violations. Termination of services of a lecturer upheld in this case though no enquiry was conducted against her.

●

16. CONTRACT ACT, SECTION 171 :-
(1999) 7 SCC 359
BOARD OF TRUSTEES OF THE PORT OF BOMBAY Vs. SRIYANESH KNITTERS

The dispute in this case arose when the appellant Port Trust refused to release certain goods (acrylic fibre) imported by the respondents, on the grounds that payment in respect of wharfage and demurrage was still due from the respondents for consignments of woolen rags imported earlier by them. The consignments of wollen rags had remained at the docks for a cer-

tain period which ended when a dispute between the respondents and the Customs Authorities was resolved.

After the release of the consignments of woolen rags the appellants demanded demurrage charges. When the respondents denied liability the appellants filed several suits for recovery. Some time later the respondents' consignments of acrylic fibre arrived, which the appellants refused to release. The refusal was based on a circular dated 2-10-1979, claiming on the basis of Section 171 of the Contract Act, 1872, a general lien over goods in the custody of the Port Trust.

The respondents then filed a writ petition claiming the circular to be ultra vires, Writ was allowed. Appellants L.P.A. was rejected. In appeal before the Supreme Court it was contended on behalf of the appellant Port Trust that it had a general lien under Sections 59 and 61 of the MPT Act over the acrylic fibre consignment because of the unpaid earlier dues. Secondly that they were wharfingers and thus bailees entitled to general lien under Section 171 of the Contract Act. It was further contended that Major Port Trust Act, 1963 was not a complete Code to the exclusion of other Acts like Contract Act. The Supreme Court allowed the appeal and held that the Major Port Trust Act is not exhaustive, the Act is silent on this point. It is permissible to read the provisions of two Acts together. The Act makes provision for the constitution of port authorities and vests the administrative control and management of such ports in such authorities and provides for matters connected therewith. It is because the MPT Act does not provide for a general lien that the appellants are relying on the provisions of Section 171 of the Contract Act. This is permissible. It is not possible to hold that the MPT Act ousts the applicability of the provisions of Section 171 of the Contract Act.

●

17. CPC, SECTION 34 (1) AND INTEREST ACT, SECTIONS 5, 2 (a) AND 2 (b) AND THE MEANING OF THE WORD 'COURT'- POWERS OF THE ARBITRATOR REGARDING AWARD OF INTEREST:-
(1999) 7 SCC 339
STATE OF J & K Vs. DEV DUTT PANDIT

As under Section 2 (a) "court" includes arbitrator, held, under Section 5 of Interest Act, Section 34 CPC would be applicable to an arbitrator as well. Thus arbitrator entitled to award interest pendent lite and future interest at a rate not exceeding the current rate of interest, which has been defined in cl. (b) of Section 2.

ARBITRATION ACT; NON-SPEAKING ORDER:-

Extent of court's limitation while examining the non-speaking awards though Court is bound by certain limitation while examining the non-speaking award, there is no bar against assessing whether the award is within the terms of the reference and the terms of the contract.

●

18. SPECIFIC RELIEF ACT, SECTION 16 (c) : READINESS AND WILLINGNESS TO PERFORM OWN PART OF THE CONTRACT: FALSE PLEA EFFECT

(1999) 7 SCC 303

RAM KUMAR Vs. THAWAR DAS THROUGH L. RS.

A person who falsely claims to have paid a sum of money and attempts to prove the plea at trial stage, held cannot be said to have been ever ready and willing to pay the sum due under the contract in question. "readiness and willingness" to perform the contract is a mixed question of law and fact. A party having failed to prove such willingness cannot claim protection of his possession by reference to S. 53-A.

●

19. CPC. SECTION 100 AND 0.6 Rr. 4 AND 5 : SECOND APPEAL:-

(1999) 7 SCC 288

HARI SINGH Vs. KANHAIYA LAL

Mere lack of details in pleadings cannot be reason enough to set aside concurrent findings of fact. Details where required may be supplemented through evidence.

NOTE :- Please refer to 'JOTI JOURNAL' Vol. V Part V Tit Bit No. 74 (Oct '99)

●

20. CPC, O. 40 R. 1: COURT'S DISCRETION:-

(1999) 7 SCC 488

INDUSTRIAL CREDIT & INVESTMENT CORPORATION OF INDIA LTD. Vs. KARNATAKA BAL BEARINGS CORPORATION LTD.

The words "just and convenient" have to be attributed a proper meaning and the intent of the legislature as regards the extent of the empowerment by the Code, is rather catogorical in nature. The discretion empowered cannot thus be said to be non-existing, having due regard to the language of Order 40 Rule 1 though, however, the court shall have to be rather cautious in its approach and use proper circumspection.

The court must consider whether special interference with the possession of the defendant is required or not and it is only in the case, where the court feels is expedient that in the event property is not sold, the initiator of the action would be subject to perpetration of a great and irreparable loss, the diminution in value of the assets, wastage and wrongful entrants or trespassers' attempt to make an inroad for their permanent settlement. there should not be any hesitation in directing the sale of immovable property. However, the instances noted above are only illustrative in nature and no hard and fast rule can be laid down in regard to the exercise of the court's powers under Order 40 Rule 1, the same being dependent on the facts and circumstances of each case as is available before the court. A court may appoint a receiver not as a matter of course but as a matter of prudence having regard to the justice of the situation.

●

21. CR.P.C. SECTIONS 301, 302, 225 & 24 : ROLE OF PRIVATE COUNSEL:-

(1999) 7 SCC 467

SHIV KUMAR Vs. HUKUM CHAND

The role of private counsel is limited to act under the direction of the Public prosecutor. However, he can submit written arguments after closure of the evidence with prior permission of the court. Duty of the Public Prosecutor to act fairly and not merely to obtain conviction by any means fair or foul. If the accused is entitled to in legitimate benefit the Public Prosecutor should make it available to him or inform the court even if the defence counsel overlooked it. Unlike Section 302, S. 301 is applicable to all courts of criminal jurisdiction.

Unlike Section 302 CrPC, the application of which is confined to Magistrate Courts, Section 301 CrPC is applicable to all the courts of criminal jurisdiction. This distinction can be discerned from employment of the words "any court" in Section 301. IN view of the provision made in the succeeding section as for Magistrate Courts the insistence contained in Section 301 (2) must be understood as applicable to all other courts without any exception. The first sub-section empowers the Public Prosecutor to plead in the court without any written authority, provided he is in charge of the case. The second sub-section, which is sought to be invoked by the appellant, imposes the curb on a counsel engaged by any private party. It limits his role to act in the court during such prosecution "under the directions of the Public Prosecutor". The only other liberty which he can possibly exercise is to submit written arguments after the closure of evidence in the trial, but that too can be done only if the court permits him to do so.

From the scheme of the Code the legislative intention is manifestly clear that prosecution in a Sessions Court cannot be conducted by anyone other than the Public Prosecutor. The legislature reminds the State that the policy must strictly conform to fairness in the trial of an accused in a Sessions Court. A Public Prosecutor is not expected to show a thirst to reach the case in the conviction of the accused somehow or the other irrespective of the true facts involved in the case. The expected attitude of the Public Prosecutor while conducting prosecution must be couched in fairness not only to the court and to the investigating agencies but to the accused as well. If an accused is entitled to any legitimate benefit during trial the Public Prosecutor should not scuttle or conceal it. On the contrary, it is the duty of the Public Prosecutor to which it to the fore and make it available to the accused. Even if the defence counsel overlooked it, the Public Prosecutor has the added responsibility to bring it to the notice of the court if it comes to his knowledge. A private counsel, if allowed a free hand to conduct prosecution, would focus on bringing the case to conviction even if it is not a fit case to be so convicted. That is the reason why Parliament applied a bridle on him and subjected his role strictly to the instructions given by the Public Prosecutor.

It is not merely an overall supervision which the Public Prosecutor is expected to perform in such cases when a privately engaged counsel is per-

mitted to act on his behalf. The role which a private counsel in such a situation can play is perhaps, comparable with that of a junior advocate conducting the case of his senior in a court. The private counsel is to act on behalf of the Public Prosecutor albeit the fact that he is engaged in the case by a private party. If the role of the Public Prosecutor is allowed to shrink to a mere supervisory role the trial would become a combat between the private party and the accused which would render the legislative mandate in Section 225 of the Code a dead letter.

●

22. C.P.C., OR. 8 R. 10 : DEFAULT IN FILING WRITTEN STATEMENT : EFFECT:-
2000 (1) M.P. HIGH COURT TODAY (M.P.H.T.) 119
RAJENDRA KUMAR RATHORE VS. SUNDERAL (DEAD) THROUGH L.Rs.

The defendant defaulted in filing written statement despite several opportunities granted by the Court, it was held that the High Court properly exercised its discretion under O. 8 R. 10 C.P.C. to pronounce judgment against him. The Court was not obliged in that situation to record plaintiff's evidence but had power to straightway pronounce judgment.

NOTE:- Please refer to 'JOTI JOURNAL' December 1999 issue at page 494 onwards. An attempt has been made to write an article as to when a suit can be decreed straightway without requiring the plaintiff to adduce evidence. This article appears in this issue of February 2000.

M.P. ACCOMMODATION CONTROL ACT, SECTIONS 12 (3) AND 13 (1):-

When tenant not entitled to claim the benefit of the provision of Section 12 (3). The tenant depositing the rent only after the passing of the decree of eviction by the Trial Court. He never made any application either in the Trial Court or in the lower appellate court for extension of time to deposit the rent. The applications which he successively made in the Trial Court were that he may be exempted from compliance under Section 13 (1) of the Act because he had allegedly agreed to purchase the suit house and had also filed a suit for specific performance against the landlord. Those applications for exemption were repeatedly rejected as misconceived by the Trial Court. Held, the tenant had failed to comply with Section 13 (1) and, therefore, could not claim the benefit under Section 12 (3). Hence the decree of eviction granted under Section 12 (1) (a) not interfered with.

●

23. I.P.C., SECTION 302:- DROWNING DEATH:-
2000 (1) M.P.H.T. 49 (D.B.)
SHOBHANLAL Vs. STATE OF M.P.

The dead body of the wife was found in a well. No marks of injuries were found on the body. No water was either found in the lungs or in the stomach. The two doctors, who performed the post mortem examination were unable to

form any definite opinion about the cause of death. Proceeding on the hypothesis that the deceased might have been smothered by a pillow or her breathing might have been blocked by some other means to kill her. The conviction by the trial Court was set aside. Held, that the prosecution has miserably failed to prove that the death of the deceased was homicidal. Homicidal death proof in drowning may often remain a mystery.

CONVERSION OF OFFENCE INTO A LESSER OFFENCE: SECTION 222 Cr. P.C.:-

The conviction of the accused for the offences under Sections 364 and 147 I.P.C. may be converted into a lesser offence under Section 365 read with sections 149 and 147 of I.P.C. ***Faiyaz Ahmed and Ors. Vs. State of Bihar, AIR 1990 SC 2147 and Bhagwat and others Vs. State, 1971 Cri. L.J. 1222*** relied on.

●

24. CR. P.C., SECTION 438 : ANTICIPATORY BAIL : THE POWER OF THE HIGH COURT TO GRANT ANTICIPATORY BAIL :-
2000 (1) M.P.H.T. 127
SACHINDRA MAHAWAR Vs. STATE OF M.P.

The High Court may make an ad interim order of anticipatory bail in favour of a person apprehending arrest on an accusation of a non-bailable offence committed or registered outside its territorial jurisdiction, provided the applicant permanently resides within its territorial jurisdiction. Such ad interim anticipatory bail should be granted only for a limited period, with a direction to the applicant to move the competent Court where the offence has been registered or committed. This view taken in Division Bench decision of M.P. High Court in ***Kailashpati kedia Vs. State of Maharashtra and others, 1996 MPLJ 847*** is still good law even after the decision of the Supreme Court in ***State of Assam Vs. R.K. Krishna Kumar reported in 1997 J.T. (8) S.C. 650.***

●

25. COURT FEES ACT, SECTION 7 (XI) (cc) AND M.P. ACCOMMODATION CONTROL ACT, SECTION 12 (1) (o):-
2000 (1) M.P.H.T. 46 (D.B.)
MADAK CHAND JAIN Vs. SMT. FATIMA

Suit for eviction on the ground under Section 12 (1) (o) is a composite suit. Court fees had to be paid on the basis of sub-clause (cc) of Clause (xi) of Section 7 of the Court Fees Act, i.e. on annual rental value of the let out accommodation. No separate valuation for court fees and jurisdiction is required to be made with regard to ejectment from the encroached portion. ***Kishanlal Vs. Rambharose, 1976 JLJ SN 63*** OVERRULED and ***Kevalchand Puranchand & another Vs. Suganchand Puranchand, 1983 MPLJ 381*** held to be good law.

●

26. CRIMINAL TRIAL : APPRECIATION OF EVIDENCE OF POLICE WITNESSES:-
2000 (1) M.P.H.T. 60 (D.B.)
STATE Vs. KISHANLAL

The evidence of the police officer should not be ignored or discarded on some assumed grounds.

EVALUATION OF EVIDENCE IN CRIMINAL CASES: Cr P.C. SECTION 378 (1) AND EVIDENCE ACT SECTION 114 ill (i):-

Paragraphs 1 and 2 of the edited portion of the citation are reproduced:-

(1) Code of Criminal Procedure (2 of 1974), Section 378 (1)- Acquittal of the accused persons of the offences under Sections 395, 396, 397 and 412 I.P.C. Appeal against acquittal. Additional Sessions Judge acquitting because two prosecution witnesses turned hostile and the Investigating officer had kept the same witnesses as disclouser and recovery witnesses although recoveries were made from various different places. But the hostile prosecution witnesses could hardly be believed as they were discredited with their contrary police statements and there was also positive evidence that huge quantity of ornaments were recovered on the informations and from the possession of the accused persons. The investigating officer could not have planted those numberous ornaments. The accused persons did not also claim those ornaments, except accused Narayan who pleaded that the police had seized from him his own ornaments; but this defence was not even put to the concerned police officer when he gave evidence. The police was justified in taking the same two witnesses when the accused were interrogated on the same day and the police proceeded to make recoveries in consequences of the informations. The High Court on re-appreciation of the entire prosecution evidence found the evidence of the victim Ram Kishore (P.W. 3), Kammobai (P.W. 20), Jethani of murdered woman Sushila, Nirmal Tigga Naib-Tahsildar (P.W. 6) who conducted the test identification proceedings of the recovered ornaments and of Investigating Officer R.N. Tiwari, who proved the disclosure statements made by various accused persons and also proved recoveries of ornaments from them, coupled with documentary evidence on record, to be entirely satisfactory bringing home to the accused the offences charged against them, although the evidence of peronal test identification of the accused having been found to be unsatisfactory was ignored in arriving at the conclusion of guilt of the accused persons.

2. **Evidence Act (1 of 1872), Section 114 illustration (a)-** The dacoity was committed on the night between 27th and 28th September, 1982 and the ornaments taken away in the dacoity were recovered on the informations and from the possession of the seven accused persons on 20-10-1982; i.e., within about three weeks of the commission of the offence. The evidence in the case suggested that these accused had distributed the looted ornaments between them. These accused were not goldsmiths or silversmiths. They did not claim any lawful acquisition of those properites. In

the circumstances, the just and proper presumption to be drawn was that they were dacoits who had committed offences under Sections 395 and 396 I.P.C. with regard to the rest of the three accused who were charged by the prosecution itself of the offence under Section 412 I.P.C., it was held that it was proper to draw the lesser presumption against them of the offence under Section 412 I.P.C., AIR 1972 S.C. 2501; AIR 1971 S.C. 196, AIR 1995 S.C. 1598 and AIR 1983 S.C. 446 Rel.

●

27. M.P. LAND REVENUE CODE, SECTION 57 : EXPRESSION "ANY RIGHT":-

2000 (1) M.P.H.T. 138

HUKUM SINGH Vs. STATE OF M.P.

On harmonious construction the expressions "any right" used in sub-section (2) of Section 57 includes Bhumiswami rights. Hence a suit in which the plaintiffs claim Bhumiswami rights against the State is not maintainable unless the dispute was adjudicated under Section 57 (2) of the Code. Where though an application under Section 57 (2) of the Code was filed but was withdrawn, the suit filed without adjudication under Section 57 (2) was held to be not maintainable. ***Ram Sahai Vs. State of M.P., 1996 RN 195 and Ramveer Singh Vs. State of M.P., 1997 RN 375,*** held to have been decided per incuriam.

This is a judgment by **Hon'ble Shri Justice S.S. Jha** from Gwalior Bench. Being of general importance for all the Judicial Officers, it is reproduced as it is:-

This appeal is admitted on the following substantial questions of law:-

(i) "Whether the suit filed by the plaintiffs/appellants was barred under the provisions of Section 57 (2) of the M.P. Land Revenue Code, 1959?"

(ii) "Whether it was mandatory upon the plaintiffs to depossit the amount for acquiring Pucca tenancy rights under Section 38 (2) of the Madhya Bharat Zamindari Abolition Act?"

2. For appreciating the dispute, Section 57 of M.P. Land Revenue Code (Hereinafter, referred to as 'Code')is reproduced below:-

"57 State ownership in all lands:-

(1) All lands belong to the State Government and it is hereby declared that all such lands, including Standing and flowing water, mines, quarries, minerals and forests reserved or not, and all rights in the subsoil of any land are the property of the State Government:

Provided that nothing in this Section shall, save as otherwise provided in this Code, be deemed to affect **any rights** of any person subsisting at the coming into force of this Code in any such property.

(2) Where a dispute arises between the State Government and any person in respect of **any right** under sub-section (1) such dispute shal be decided by the Sub-Divisional Officer.

(3) Any person aggrieved by any order passed under sub-section (2) may institute a civil suit to contest the validity of the order within a period of one year from the date of such order.

(3-a) (a) Notwithstanding anything contained in the Code of Civil Procedure, 1908 (V of 1980) no Civil Court shall, in a civil suit instituted under sub-section (3) on or after 24th October, 1983, by order of temporary injunction disturb the person to whom possession is restored under Section 250 if such person furnishes a reliable surety to recompensate the aggrieved party against any loss in case the Civil Court grants a decree in favour of the aggrieved party. Provided that no surety shall be required to be furnished by a member of a tribe declared to be an aboriginal tribe under subsection (6) of Section 165,

(b) Where a Civil Court by an order of temporary injunction disturbed the person referred to in clause (a) on or after 24th October, 1983, but before the publication of Revenue Department's Notification No. 1-70-VII-N-2-83, dated 4th January, 1984 such order shall abate on such publication and the Tehsildar shall restore possession to a person who is disturbed by such order.

(4) Where a civil suit has been instituted under sub-section (3) against any order shall not be subject to appeal or revision."

3. Learned counsel for the appellants raised following contentions:-

(a) In a case where there is no dispute as to ownership between the State and plaintiff, bar of suit under Section 57 (2) of the Code is not attracted.

(b) When a declaration that all the lands in the State are owned by the State Government, then no claim for right of ownership against State can be made.

(c) Plaintiffs are claiming rights of 'Bhumiswami' against the State, therefore in the absence of claim as to ownership against the State suit is not barred under Section 57 (2) of the Code.

(d) Proviso to Section 57 (1) of the Code provides that rights subsisting at the time of enforcement of the Code are saved.

(e) Since Bhumiswami is only one class of holder of land under Section 158 of the Code, the claims of Bhumiswami rights against the State are maintanable.

4. Learned counsel for the appellants placed reliance upon the following judgments in the cases of ***State of M.P. Vs. Gyasiram (1993 RN 113) = (1993 M.P.L.J. 503) Ramsahai Vs. State of M.P. (1996 RN 195), Ram Veer Singh Vs. State of M.P. (1997) RN 375), Sheela Devi Vs. State of M.P. (1994 RN 157), Gajraj Vs. Jagat Singh (1970 RN 133) and Her Highness Mehr Taj Nawab of Bhopal Vs. State of M.P.*** (1977 JLJ 337).

5. Learned counsel for the appellants submitted that Division Bench of this Court in the case of ***State of M.P. Vs. Gyasiram*** (supra) has considered this question in length. Learned counsel strongly relied upon the conclusions drawn by Chawla, J. in para 26 of the judgment. Para 26 of the judgment is reproduced below:-

"26. My conclusions may be summed up as follows:-

(1) A dispute about ownership of land between the State Govenment and any person has first to be carried for decision to the Sub- Divisional Officer. A suit involving such dispute cannot be directly brought in a Civil Court.

(2) A dispute about rights short of ownership in any land, said to have been saved on the date of the coming into force of the Revenue Code arising between the State Government and any person should also be first carried for decision to the sub-Divisional Officer. A suit involving such a dispute cannot be directly brought in a civil Court.

(3) A dispute about rights short of ownership said to have been acquired by any person in any land, after the commencement of the Revenue Code, arising between the State Government and any such person, falls outside the abmit of section 57(1) and can not therefore be decided by the Sub-Divisional Officer under Section 57 (2) of the Revenue Code. A suit, for instance, raising a dispute that the plaintiff had acquired Bhumiswami rights over any piece of land after the commencement of the Revenue Code, may be directly brought against the State Government in a civil Court."

Interpreting the conclusions drawn in para 26 of the judgment, this Court has held that suits claiming rights of Bhumiswami against State are maintainable. Learned counsel for the appellants placed reliance on the cases of **Ramsahai (supra) and Ramveer Singh (supra)** and submitted that now it is settled that suit claiming Bhumiswami rights are maintainable and question of law deserves to be answered that suit is maintainable.

6. The question involved in this case is whether claiming right of Bhumiswami against State amounts to claim of ownership. The word ownership' Used in Section 57 (1) of the Code includes Bhumiswami rights. In Section 57 (1) after it is declared that all lands belong to the State Government and are the properties of the State Government therefore, the ownership rights have vested in the State, the proviso to the Code provides that rights subsisting on the date of commencement of the Code shall not be affected save otherwise provided in the code. Thus the rights existing have converted into the rights conferred under this Code. Section 158 of the Code has conferred rights of 'Bhumiswami' to the holders of lands mentioned in sub-section (a) to (e) of Section 158 (1). Therefore, the words "any right subsisting on the date of comming into force of this Code" shall include Bhumiswami rights, therefore, on harmonious construction of Section 57 (2) of the Code word "any right" would include Bhumiswami rights. Suit

rule (2) of Section 57 provides that any dispute arising between the State Government and any person in respect of any right under sub-section (1) shall be decided by the Sub- Divisional Officer.

7. On plain reading of Section 57 (1) of the Code with proviso and Section 158 of the Code, it is clear that any rights would include rights in the land, other than ownership.

8. Rights of Bhumiswami are considered by Full Bench of this Court in the case of ***Ram Gopal Vs. Chetu* (1976 JLJ 278).** The Full Bench held in para 14 as under:

> "It must be remembered that a Bhumiswami has a title though he is not the "Swami" of the "Bhumi" which he holds, in the sense of absolute ownership, because as declared in Section 57 of the Revenue Code, ownership of land vests in the State Government, yet, he is a Bhumiswami. He is not a mere lessee. His rights are higher and superior. They are akin to those of a proprietor in the sense that they are transferable and heritable, and he cannot be deprived of his possession, except by due process of law and under statutory provisions, and his rights cannot be curtained except by legislation."

Thus rights of Bhumiswami though he is not the owner of the land which he holds, in the sense absolute ownership because as declared in Section 57 of the Code that ownership vests in the State, yet, he is a Bhumiswami, His rights are higher and superior and akin to those of proprietor in the sense that they are transferable and heritable, He cannot be dispossessed except by process of law under the statutory provisions.

9. The observations made by learned Chawla, J. in the judgment in the case of ***State of M.P. Vs. Gyasi Ram (Supra) are obiter dictum.*** The majority view is recorded in para 17 of the judgment, Para 17 of the judgment is reproduced below:-

> "From the Scheme of the provision and its intendment, it is clear that the dispute in respect of **'any right'** as against the State is barred by Section 57 (2) of the Code, and a civil suit can only be instituted under Section 57 (3) of the Code to challenge the validity of the order. The provision thus excludes the jurisdiction of the civil Courts and even a case of declaration of rights or title relating to ownership of the land as against the State cannot be instituted. Therefore, it cannot be contended that the provision is enabling and concurrent or alternate".

10. Full Bench of this Court in the case of **Ram Gopal (supra)** has clarified that the rights of Bhumiswami, as held by the Full Bench the word 'any right' in Section 57 (2) of the Code includes all the rights in the land other than ownership rights. After declaration in Section 57 (1) of the Code that all lands belong to the State, therefore, the word **'any right'** occuring in Section 57 (2) of the Code would mean rights other than Bhumiswami rights. When the legislature has prescribed procedure for institution of suits after adjudication of rights under Section 57 (2) of the Code, then

suit will be maintainable under Section 57 (3) of the Code. Under Section 57 (3), suit can be filed within one year from the date of adjudication of rights under Section 57 (2) of the Code.

11. In the light of the aforesaid discussions and as held by Division Bench in the case of ***State of M.P. Vs. Gyasi Ram*** (supra), the judgments delivered in the cases of **Ramsahai and Ramveer Singh (Supra)** are per incuriam.

12. Since the plaintiffs are claiming Bhumiswami rights against the State, therefore, suit is not maintainable unless dispute is adjudicated under Section 57 (2) of the Code. In the present case, though an application under Section 57 (2) of the Code was filed, but the application was withdrawn. Thus the suit as filed without adjudication under Section 57 (2) of the Code is not maintainable.

13. Substantial question of law No. (i) is answered accordingly.

14. Question of law No. (ii) does not arise in this case. If the plaintiffs had acquired any rights over the land by compliance or non-compliance of Section 38 (2) of Madhya Bharat Zamindari Abolition Act, it can only be examined in an application under Section 57 (2) of the Code. Since the suit itself not maintainable, this question of law does not arise in the appeal.

15. In the result, the appeal fails and is dismissed with costs throughout. Counsel's fee as per schedule.

●

28. N.D.P.S. ACT, SECTION 50:-
2000 (1) M.P.H.T. 103
SHYAM SUNDER Vs. STATE OF M.P.

The provisions of Section 50 are attracted not only to bodily search of an accused but also to search of his luggage. Accused not knowing Hindi. A notice in Hindi was given to the accused. In addition to the giving of such notice, evidence must be given that the contents of the notice were explained to the accused. In the absence of such evidence, held there was no compliance of Section 50. Accused was acquitted.

●

29. PREVENTION OF CORRUPTION ACT, SECTION 13 (1) (e):-
2000 (1) M.P.H.T. 97
PARAMANAND JHA Vs. STATE

It is not an investigative trial. Notice by Investigating Officer, after completion of investigation and before filing a challan, to the accused to explain his known sources of income and how he has no disproportionate assets, is not an ingredient of the offence under Section 13 (1) (e), just because of the use of expression 'cannot satisfactorily account' therein. No 'investigative trial' by the Investigating Officer is Contemploted in this provision **AIR 1996 S.C.W. 15** and **1991 (3) S.C.C. 655** Relied on.

●

30. **HINDU MARRIAGE ACT, SECTION 19 : JURISDICTION : OPPORTUNITY TO CROSS EXAMINE : L.P. NO. 359/97**
1999 (2) VIDHI BHASVAR 258
LALIT GURUBAXANI Vs. SMT. USHA GURUBAXANI

Objection as to territorial jurisdiction not taken in trial court or even in first appellate Court. No prejudice shown cannot be allowed to be taken in LPA for the first time.

EVIDENCE ACT, SECTION 138 : OPPORTUNITY TO CROSS-EXAMINE:-

Opportunity to produce evidence and to cross examine witnesses of opponent given, No complaint can be heard.

Paragraph 10 of the judgment is reproduced:-

Coming to the question whether the appellant had got sufficient opportunity or not, to produce his witnesses or to cross- examine the witnesses produced by the wife, learned Single Judge has examined the matter in detail and we also find that first exparte decree which was passed was set aside by the trial Court and the husband-appellant was given opportunity to further examine the witnesses or cross examine the witnesses produced on behalf of the wife, but he did not avail of that opportunity also and for one reason or the other tried to seek adjournments to delay the agony of the wife. We are therefore satisfied that the husband had been afforded adequate opportunity to contest the case but he did not avail of the same for which he has to blame himself. Learned counsel for the appellant-husband also submitted that in fact, as per allegations of the wife, the husband has already entered into second marriage and the present marriage is completely broken, therefore, no purpose would be served in restoring the conjugal rights. Our attention was invited to the decision of this Court in the case of ***Baburao v. Sushila Bai [1963 JLJ 446-AIR 1964 MP 73]*** wherein their Lordships have considered the scope of section 9. It is observed that it is the discretion of the Court whether to grant or not to grant a decree for restitution of conjugal rights.

Learned counsel for the appellant-husband submitted that the marriage has irretrievably broken down and as per allegations of the wife that the second marriage has been contracted by the appellant-husband, therefore, no useful purpose would be served in affirming the decree of restitution of conjugal rights. It is true that it is a discretion of the Court whether to grant a decree of restitution of conjugal rights or not, but in the present case, we need not to go into this question and we are satisfied that the act of the appellant- husband was reprehensible and he himself is responsible for the problem created by him and he cannot be permitted to be given benefit of his own wrong. It is he who deserted his wife, therefore, the wife has a right to seek redress of her grievance. We are not going to exercise our discretion in favour of the husband looking to his conduct. Consequently, we overrule this submission also.

NOTE:- Please refer Section 21 and 21-A of the CPC which are reproduced here:-

"SECTION 21, OBJECTIONS TO JURISDICTION:-

(1) No objection as to the place of suing shall be allowed by any appellate or revisional Court unless such objection was taken in the Court of first in stance at earliest possible opportunity and in all cases where issues are settled, at or before such settlement, and unless there has been a consequent failure of justice.

(2) No objection as to the competence of a Court with reference to the pecuniary limits of its jurisdiction shall be allowed by any Appellate or Revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity, and, in all cases where issues are settled, at or before such settlement, and unless there has been a consequent failure of justice.

(3) No objection as to the competence of the executing Court with reference to the local limits of its jurisdiction shall be allowed by any Appellate or Revisional Court unless such objection was taken in the executing Court at the earliest possible opportunity, and unless there has been consequent failure of justice.

SECTION 21A:- Bar on suit to set aside decree on objection as to place of suing : No suit shall lie challenging the validity of a decree passed in a former suit between the same parties or between the parties under whom they or any of them claim, litigating under the same title, on any ground based on an objection as to the place of suing.

EXPLANATION:- The expression "former suit" means a suit which has been decided prior to the decision in the suit in which the validity of the decree is questioned, whether or not the previously decided suit was instituted prior to the suit in which the validity of such decree is questioned."

NOTE:- Judicial Officers are requested to go through Sections 33 & 138 of the Evidence Act and also ***1995 M.P.L.J. 83, Nandram Vs. State.*** A separate article in this subject may appear in near future.

●

31. CIVIL COURTS ACT (M.P.), SECTION 21 (4) : WORK DURING VACATION:-

1999 (2) VIBHA 279

SAPNA SANGEETA DISTRIBUTORS INDORE (M/s.) Vs. Ms. CITY CABLES

Hearing Civil case during vacation. It is a rule of practice hardened into rule of law. Hearing during vacation judging as to whether matter is urgent or not, judge has to adopt third party's dispassionate and objective approach Petitioner likely to suffer huge loss if interference is made in his right of exhibitor of film. In such case he should not be asked to come after vacation. Possibility of eclipse of fundamental and legal right of citizen. The Court has to make it available even in civil matter during the vacation. The Courts are for the purpose of protecting fundamental and legal rights of every citizen. Refus

ing to protect such grievance during vacation is causing injury or possible injury to him.

The Judgment is being of general importance the judgment is being reproduced here:-

1. Both these two persons appearing for respondents No. 2 and 3 submitted that they do not have any cause to show so far as the admission of this petition is concerned. There fore, this petition stands admitted and for the reasons stated hereunder this petition is being decided today finally, as a short question arises for determination which would be conveying guidelines to the subordinate Courts as to what should be the approach while dealing with urgent matters which have been filed during vacation for seeking urgent orders to meet out urgent needs.

2. This question is dealing with exhibition of film 'Beewi No. 1' which was to be exhibited in Sapna- Sangeeta Talkies owned by the petitioner who was entitled to exhibit it under an agreement and necessary certification from the Central Board of Film Cerification of Govt. of India. The learned District Judge, Indore, while dealing with an urgent hearing application praying the District Court to exercise Civil Jurisdiction in summer vacation held that the said suit and application for injunction was not deserving to be urgently heard in vacation. The District Judge, Indore directed Shri Dalal, the counsel for the petitioner, to file the suit and application after the summer vacation.

3. Section 21 of M.P. Civil Courts Act, 1958 (hereinafter referred to as 'the Act' for convenience) makes a provision by its sub-section (4) by providing that the District Judge may provide such arrangements as he may deem fit for disposal of urgent civil matters during vacation. It is a Rule of Practise hardened into a Rule of Law and legal precedent that all the matters which have been filed during the vacation should be decided before the vacation ends. Of course, a discretion has been given to the District Judge to make necessary arrangement for disposal of such urgent civil works. A reasonable approach has to be taken for the purpose of judging as to whether a particular matter is urgent or otherwise and for that purpose the concerned Judge has to adopt third party dispassionate and objective approach. In the present case exhibition of 'Beewi No. 1' was either fetching a significant profit or if not permitted to exhibit, was likely to cause significant loss to the petitioner who is in possession of **prima facie** right of exhibiting it in his Talkies, nemely "Sapna-Sangeeta" and in the whole Cine Circuit of C.P. When the petitioner filed a suit for the purpose of seeking an injunction against all the concerned persons prohibiting them to exhibit the said Film in any manner publicly, it was the duty of the learned Judge to keep it in mind as to what was the possibility of profit or loss which was likely to be caused to the petitioner on account of unwarranted, unauthorised interference in his right of exhibition of that film, in cine circuit of C.P. Every interference in such right was likely to cause huge loss to the petitioner Therefore, it was not proper on the part

of the District Judge, Indore to ask the petitioner to file the said suit after the vacation and to press his application for injunction, as interim relief, after vacation.

4. There may be some reasons which may not permit a Subordinate Court to hear the matter during vacation, but he should mention it in his order, e.g. those grounds can be indicated like coming to a conclusion that (1) there is no urgency, (2) no possibility of huge losses. (3) non-availability of time to dispose of such urgent matters which has been filed during the vacation. While coming to a conclusion whether a particular matter is urgent or otherwise, some reasons have to be indicated and for that purpose there has to be a **prima facie** valuation or assessment of the loss to be occasioned to such petitioner or plaintiff who has been asked to come back to the Court after the vacation is over. When there is possibility of eclipse to the fundamental right of Citizen or legal right of a Citizen, the Court has to make itself available for the purpose of dealing with such urgent prayers made by litigants in even civil matters. After all, the Courts are meant for administration of justice and a person who comes to the Court for seeking urgent relief for redressing his possible injury in legal rights, has not to be turned down by asking him to come after the vacation. If it was so, what was the necessity of providing sub-section (4) to S. 21 of the Act? Courts are for the purpose of protecting the fundamental and legal rights of every Citizen and returning such persons by asking him to come to the Court after vacation would be according to me, causing injury or possible injury to him. It is hereby made clear that by this order this Court is not blaming the District Judge, Indore. This Court found it necessary to give some guidelines for the purpose avoiding possibility of such rejections. which is necessary in the interest of justice and for the purpose of maintaining clean, continuous and benevolent stream of administration of justice.

5. Thus, this petition is hereby allowed. The District Judge Indore is hereby directed to accept the plaint as well as injunction application and to decide it on merit in accordance with law before the vacation gets over.

NOTE : Please go through ***1981 (II) M.P.W.N. 187 Nagarpalika Maheshwar Vs. Dwarka Das*** by **Hon'ble Justice Shri Hargovind Mishra.** The Text is as under :

By order dated 16-5-1981 the District Judge has refused to consider the application on the ground that the Court cannot exercise jurisdiction to hear Civil work during vactions and has ordered that the papers be kept in office to be palced before the Court for hearing on the opening day after vacation, i.e on 15-6-1981. It is against this order that the petitioners have preferred revisions along with the aforesaid applications, coupled with an application for urgent hearing of the matter during summer vacation.

Held : It appears that sub-section (3) of S. 21 of the Act has been enacted to act as a safety valve to meet the situations of such character, otherwise there will be no occasion for doing a judicial act on a holiday. If the construc

tion put by the learned District Judge on the provisions of S. 21 (3) Act were to be accepted as correct and it be regarded that its object is merely to save orders passed by Civil Courts in ignorance of a holiday having been declared and which takes time to reach the Courts, then the provision will be rendered nugatory. Sub-section (3) of S. 21 of the Act is an under :

"S. 21 (3) -A judicial act done by a Court on a day specified in a list published under sub-section (2) shall not be invalid by reason only of its having been done on that day."

We cannot read into sub-section (3) the further requirement that the validity of a judicial act done by a Court on a holiday will not be effected if it has been done in ingnorance of the fact that the day on which the act is done is duly declared holiday. Section 21 (3) ia a protective provision. However the powder to do a judicial act and performance of judicial functions is implicit in it. The ojbect of the provison appears to be to confer on the courts inter-alia power to perform judicial functions on a day specified in the list published under sub-section (2) of S. 21 of the Act in case of emergency on an appropriate case for exercise of power to grant interim relief having been made out, it is obligatory on the Courts to give the same. Closing for summer vaction does not bring about cessation of jurisdiction of Court to administer justice. The connotation of the term vacation is given in Webster Universal Dictionary (Full colour illustrated Unabridged International Edition at page 1646) inter-alia as under -

"A fixed, stated, interval in a year during which the ordinary business, work, study and etc. is suspended used exp. of Courts of law and of a University period when the Courts are up or not sitting."

The meaning of the term 'holiday' is given at page 641 of the said Dictionary inger-alia thus :

"Day on which work is wholly or partially suspended day of recreation and amusement; to have a holiday every Saturday, on one's birthday, etc."

Courts are not to act upon the principle that every procedure is to be taken as probibited unless it is expressly provided for by the Code, but on the converse principle that every procedure is to be understood as permissible till it is shown to be prohibited by the law. See *Narsinghdas Vs, Mangal Dubey 5 All. 163 (FB) at page 172.*

The matter of hearing civil matter on a holiday is essentially a matter within the domain of procedure. In the absence of any prohibition in that behalf, the learned District Judge has jurisdiction to administer justice even during summer vacation. This power does not appear to be exercisable except on emergency being made out. ***AIR 1977 SC 1348 (1871) 16 Satherland WR 230 and Webstter Universal Dictionary, 1645 and 641*** relied on. Revision allowed.

32. EVIDENCE ACT, SECTION 3, AND CRIMINAL TRIAL : APPRECIATION OF EVIDENCE:-
1999 (2) VIBHA 282
RAMLAL Vs. STATE

Murder case resting on circumstantial evidence. Conclusion should be fully established. Consistent with guilt of accused should be conclusive. Other hypothesis should be excluded. Only accused should be proved to have committed the crime.

●

33. MOTOR VEHICLES ACT, 1988, SECTION 149:-
1999 (2) VIBHA 289
NEW INDIA ASSURANCE CO. LTD. Vs. SMT. PRABHA DEVI VERMA

Insurer issuing policy in the neme of one partner in whose name vehicl was not registered. Name of firm also written in the policy. Insurer issued th policy in the name of firm conciously, cannot avoid liability on this count.

MOTOR VEHICLES ACT, 1988, SECTIONS 170 AND 173:-

Permission to defend claim case on all possible defences should b obtained by insurer from Claims Tribunal. Such a plea cannot be raised i appeal.

Permission to defend on all available defences can be granted only c conditions precedent of S. 170. Insurer joined in claim petition. Permission contest also granted to insurer. No appeal by insurer is maintainable. Al **1998 Supp. SC 2988** followed.

Paragraph 11 of the judgment is reproduced:

The last plank of submission of Mr. Ruprah is that the award granted the Tribunal is excessive, and therefore, the Insurance Company should granted permission under section 170 of the Act to contest the same by raisi all the defences. The aforesaid submission though looks attractive on the fi flush, it has no substance. The Insurance Company was very much aware th the owner and driver of the vehicle remained **ex parte** before the Tribunal could have sought written permission from the Tribunal to raise all t defences which were opened to be raised by the owner and the driver. In t context, we may profitably refer to section 170 of the Act which reads as und

> **"170 Impleading insurer in certain cases** - Where in the course inquiry, the Claims Tribunal is satisfied that-
>
> (a) there is collusion between the person making the claim and the p son against whom the claim is made; or
>
> (b) the person against whom the claim is made has failed to contest claim,
>
> it may, for reasons to be recorded in writing direct that the insurer may be liable in respect of such claim, shall be impleaded as part the proceeding and the insurer so impleaded shall thereupon h

without prejudice to the provisions contained in sub-section (2) of section 149, the right to contest the claim on all or any of the grounds that are available to the person against whom the claim has been made".

The aforesaid section came to be interpreted by the Apex Court in the case of ***Shankarayya v. United India Insurance Co. Ltd.*** **[AIR 1998 Supp. SC 2968].** We may usefully reproduce a relevant passage from the aforesaid judgment.

"4. It clearly shows that the Insurance Company when impleaded as party by the Court can be permitted to contest the proceedings on merits only if the conditions precedent mentioned in the section are found to be satisfied and for that purpose the Insurance Company has to obtain order in writing from the Tribunal which should be reasoned order by the Tribunal. Unless that procedure is followed the Insurance Company cannot have a wider defence on merits than what is available to it by way of statutory defence. It is true, that the claimants themselves had joined respondent No 1- Insurance Company in the claim petition. That was done with a view to thrust the statutory liability on the Insurance Company on account of the contract in insurance. That was an order of Court itself permitting the Insurance Company which was impleaded to avail of a larger defence on merits on being satisfied on the aforesaid two conditions mentioned in section 170. Consequently, it must be held that on the facts of the present case, respondent No. 1 Insurance Company was not entitled to file an appeal on merits of the claim which was awarded by the Tribunal."

NOTE:- Please refer to Star Firmament on M.V. Act, 1998, Section 149 (2) Permission to defence an Insurance Company, M.A. No. 1993/1999. National Insurance Company Vs. Mehttar Ram decided on 3-11-1999.

●

34. C.P.C., ORDER 41 RULE 27:-
1999 (1) M.P.W.N. 212
FOOD CORPORATION OF INDIA Vs. SANTOSH KUMAR SAXENA

Full opportunity to file documents given by Trial Court. No affidavit filed. Additional documents rightly refused in appeal.

●

35. C.P.C., O. 23 R. 3:- COMPROMISE DECREE:-
1999 (1) MPWN 211
ASHOK KUMAR RAJPUT Vs. RAM KUMAR

No pre-condition of returning decretal articles can be imposed. Such condition should be made part of the decree it self.

●

36. C.P.C.O. 8 R. 6-A:-
1999 (2) VIBHA 89
RAM PYARI VERMA Vs. DARSHANLAL

Eviction of the tenant may be sought by filing counter claim. Provisions under O. 41 R. 27 are not arbitrary. They are judicial and circumscribed by limitations specified therein. Appellate Court able to pronounce judgment on available meterial. No additional evidence can be entertained.

●

37. C.P.C. O. 41 R. 11 AND 22 AND S. 100:-
1999 (1) MPWN 207
SURJA DEVI Vs. SMT. SHIV DEVI

Second appeal dismissed in-limine. Opportunity to file cross-objections not available. Cross-objections right to file is a contingent right of filing the appeal. Cross-objections can be pressed only when Court assumes jurisdiction to decide appeal. Suit of plaintiff dismissed entirely. Defendant cannot file an appeal against finding. If appeal is filed by plaintiff, defendant can file cross- objections.

●

38. C.P.C. O. 41 R. 22 : AND COURT FEE
1999 (2) VIBHA 120
STATE Vs. BADRI PRASAD

Court-fees Act and Cross-objections. O. 41 R. 22 cross-objection to enhance amount of compensation cannot be entertained without payment o court fees.

●

39. CR.P.C. SECTION 313 : CRIMINAL TRIAL
1999 (1) MPWN 208
PARAMJEET SINGH Vs. UNION OF INDIA

Defence not revealed in cross-examination of prosecution witnesses nc in statement of accused. Cannot be put in arguments.

NOTE:- Please also see **1990 C.Cr. J. Pt. II 1 *Motilalal Vs. State*, 1979 Cr L.J. 584 (SC), 1971 JLJ 889 (4), 1966 Cr.L.J. 841, 1989 Cr. L.J. 1227.**

●

40. CR.P.C., SECTION 154; DELAY
1999 (2) VIDHI BHASVAR 77
RADHELAL Vs. STATE OF M.P.

The delay in F.I.R. duly explained by the prosecution cannot be doubtec

●

41. CR.P.C., SECTIONS 157/164, AND 438:-
1999 (2) VIBHA 60
KAILASH SONKAR Vs. STATE OF M.P.

Accused pitted with well orchestrated conspiracy in serious offence. Pr arrest bail order before interrogation would greatly harm investigation. Stat ment recorded under may be examined at bail stage. Fact that witnesses a co-accused need not be examined.

Material already collected disclosing'an accusing finger'. No anticipatory bail as such be granted to such an accused. Custodial interrogation. More elecjation oriented than questioning a suspect having favourable order of anticipatory bail.

●

42. CR.P.C., SECTIONS 227 AND 228 : FRAMING OF CHARGE:-
1999 (2) VIBHA 105
K.P. AGNIHOTRI Vs. STATE OF M.P.

Stage of framing of charge. Objections as to non-existing prima facie case and delay in prosecution can be raised. The ingredients of Penal provisions not Specified. No charge can be framed. Quashing of chargesheet at initial stage not called for under inherent powers without prima facie case against the accused is made out. Power should be exercised sparingly and with caution. Quashment of chargesheet on the ground of delay. Each and every delay does not necessarily prejudice the accused. Circumstances including nature of offence and systemic delays etc. are to be considered.

●

43. CR.P.C., SECTION 482 : CHARGE : & I.P.C. SECTION 420
1999 (2) VIBHA 36
JAMSHED GUZDER Vs. STATE OF M.P.

Chances of conviction very bleak. Prosecution cannot be allowed to be continued. quashment of criminal case at its initial stage permissible. Dishonest or fradulent intention at the time of Parting with money not established Prima facie no inducement alleged no criminal case can be allowed to Proceed.

●

44. CONSUMER PROTECTION ACT, SECTION 21:-
1999 (2) CPR 50 (NC)
NEW INDIA INSURANCE CO. Vs. M/s VIMAL

Complainant took insurance policy for his shop. Fire broke out in the insured premises destroying insured goods. Complainant informed the Insurance Company, which appointed surveyor for assessing the loss. Surveyor assessed the loss at Rs. 1,62,275/- Insured goods were hypothecated with the State Bank of India. The Insurance Company paid the above amount to the S.B.I., which gave receipt to the Insurance Company for full and final statement of the claim. Held, if Bank gives receipt to the Insurance Company for full and final settlement of the claim, it cannot stop complainant from lodging complaint with the Forum and also does not amount to repudiation of balance amount of claim.

●

45. COURT FEES ACT, SECTION 8, SCH. I ART. 1A AND SCH II ART. 11:-
1999 (2) VIBHA 120
STATE OF M.P. Vs. BADRI PRASAD

Appeal for enhancement or for reducing amount of compensation. Ad valorem court-fees on difference of amount has to be paid under S. 8 Sch I Art. 1A. Provision of Sch. II Art. 11 for Paying fixed court-fees not attracted.

[Please see Tit bit No. 49 1999(2) V.B. 120]

●

46. DRUGS AND COSMETICS RULES, R. 66 (2) : APPEAL UNDER:-
1999 (2) VIBHA 102
ASHOK KUMAR Vs. STATE OF M.P.

Appellate court should consider all points raised in memo of appeal. It should pass a speaking order after application of mind.

●

47. ELECTRICITY ACT, SECTIONS 39 AND 50 : & I.P.C., S. 379:-
1999 (2) VIBHA 14
STATE OF M.P. Vs. BABU SINGH

Unauthorised artifical means proved. Electricity current in cut-out and starter proved. Theft of electricity energy may be presumed. Assistant Engineer of Electricity Board is a person aggrieved. He can lodge the complaint wthout any sanction under.

NOTE:- Please see 'JOTI JOURNAL' October, 1996 issue at page 18.

●

48. EVIDENCE ACT, SECTION 8 : MOTIVE:-
1999 (1) MPWN 231
AJAD SINGH Vs. STATE OF M.P.

Motive is not an ingredient for crime. It is generally hidden in mind of criminal. Absence of motive cannot disprove crime.

NOTE:- Please see 'JOTI JOURNAL' December, 1999 issue at page 560 note above Tit bit No. 46.

●

49. HINDU MARRIAGE ACT, SECTION 27:-
1999 (1) MPWN 216
KARAN Vs. SMT. MAMTABAI

Section 27 of H.M. Act provides sharing of only property which spouses received individually or collectively as presents which had come to be as a way of life in their joint use in their day-to-day living.

●

50. LAND ACQUISITION ACT, SECTIONS 23 AND 54 : COMPENSATION:-
1999 (2) VIDHI BHASVAR 120
STATE OF M.P. Vs. BADRI PRASAD

Compensation determined as per land sold in the area fetching of single and double crop also taken into account. Determination based on well settled principles not liable to be inferred with. Appeal for enhancement or for reduc-

ing compensation amount. Ad volorem court-fees on difference of amount has to be paid.

[Please see Tit bit No. 44 1999 (2) V.B. 120]

●

51. I.P.C., SECTION 376:-
1999 (2) VIBHA 77
RADHELAL Vs. STATE OF M.P.

Accused making her close relation subject to his lust. 5 years RI is on lesser side. Corroboration of prosecutrix's evidence not a rule of law if her evidence inspires confidence. No material contradiction. Minor contradictions cannot falsify prosecution case. Offence proved by prosecutrix and other witnesses. Conviction cannot be said to be based merely on presence of semen and blood on the clothes of prosecutrix. Rape incident narrated to husband and other relations. Case lodged. Prosecutrix cannot be said to be a consenting party. Injury on person of prosecutrix not necessary in every case. Prosecutrix a married lady. Incident took place in house. Absence of injury is immaterial.

●

52. I.P.C. SECTION 409 : & PREVENTION OF CORRUPTION ACT, Ss. 5 (2) (c):-
1999 (1) MPWN 230 (SC)
R.N. LYNGDOH Vs. STATE (DELHI)

Offence under. Sentence of imprisonment. Accused an old aged person. Health also not sound. In such case less than minium sentence can be imposed, undgergone sentence is proper.

●

53. SUCCESSION ACT, SECTION 63 (c) : WILL:-
1999 (2) VIBHA 117
NARBADA PRASAD Vs. HARNARAYAN

No attestation will not proved according to law. Claim put through Will. No alternative claim on succession claimed. Such claim cannot be granted.

●

54. TERRORIST AND DISRUPTIVE ACTIVITIES (PREVENTION) ACT, S. 5 & ARMS ACT, SECTION 25:-
1999 (3) CRIMES 53 (SC)
KAKA SINGH Vs. STATE OF PUNJAB

Appellant found with unlicenced Gun and Catridges. Believing the prosecution witness the Designated Court convicted appellant under S. 5 of TADA and S. 25 of Arms Act, 1959. In appeal to Supreme Court held appellant proved of having in his possession an unlicenced gun and live cartridges in notified Area and was rightly convicted under the above mentioned provisions.

●

55. **WORKMEN'S COMPENSATION ACT, 1923. SECTIONS 3 AND 4:-**
1999 (1) MPWN 227
CHHOTE KHAN Vs. RAJESH KUMAR

Driver having no valid licence dying in accident while driving. Neither insured nor insurer is liable to pay compensation

●

56. **MOTOR VEHICLES ACT, 1988, SECTION 129 : WEARING OF HELMET:-**
1999 (2) T.A.C. 180 (P&H, HC)
NAVINDER JEET, ADVOCATE Vs. CHANDIGARH ADMINISTRATION

Petition for queshing direction by which Court had directed that all persons while driving two-wheelers or sitting on the pillion seat shall wear helmet. Operation of the said order stayed by the Supreme Court whether the Order of Supreme Court would come in the way of submitting challan against the pillion rider without safety helment. It was held that no interim order of Supreme Court does not come of rescue of the petitioner.

●

57. **MOTOR VEHICLES ACT, 1988, SECTION 140 AWARD OF INTERIM COMPENSATION:-**
1999 (2) T.A.C. 96 (GUJ. HC)
NEW INDIA ASSURANCE CO. LTD. Vs. SANJAY VAJUBHAI

Award of Interim Compensation. Procedure and powers of Claims Tribunal. Ambit and scope of Section 140. Dispute as to involvement of offending vehicle. Obligation on the part of Tribunal to suo motu consider the grant of interim compensation even where claimant does not move application. Power of Tribunal to pass order for reimbursement of the amount against owner of the vehicle insured where insurer is not liable to pay compensation. Whether Tribunal was justified in awarding interim compensation. Yes. Award of Tribunal upheld.

●

58. **MOTOR VEHICLES ACT, SECTION 140 : INTERIM AWARD GRANT OF:-**
1999 (2) T.A.C. 112 (M.P. HC) (INDORE BENCH)
THUKA RAM Vs. SOHAN

Conflict between date of accident and date of F.I.R. F.I.R. lodged after about 3-1/2 months from the date of accident. Claims Tribunal refused to award interim relief. Whether claimants are entitled to interim relief. Held, Yes. Order of Tribunal refusing to grant interim relief set aside. Insurance Company directed to pay Rs. 25.000/- as interim relief

●

59. **MOTOR VEHICLES ACT, 1988, SECTION 140, 147 (1) (b) (3) AND 149 :-**
NO FAULT LIABILITY:-
1999 (2) T.A.C. 185 (RAJ. HC) JODHPUR BENCH)
NATIONAL INSURANCE CO. LTD. Vs. HEERA

Liability of Insurance Company Goods vehicle. Gratuitous passengers,

Accident occurred by over- turning of the insured tractor- trolley with the result some of persons died and some others injured whether claimants are entitled to claim compensation based on principle of "no fault liability" and Insurer is liable to pay to heirs and legal representatives of deceased persons without fulfilling condition precedent contemplated under Section 149 of the Act. Held, yes. If insurer suceeds to establish any such defence available to it, owner is to be held liable to reimburse the amount paid by Insurer under Section 140 of the Act.

MOTOR VEHICLES ACT, SECTIONS 140 AND 173 : APPEAL SCOPE OF:-

Appeal against interim award of Tribunal. Maintainability of. Whether interim compensation awarded by Tribunal is also an award and an appeal is maintainable under Section 173 of the Act. Yes. Award includes order of compensation passed under Section 140 within the fold of 'award' used under Section 173 of the Act. Appeal against interim award is maintainable and revision is not tenable.

●

60. MOTOR VEHICLES ACT, 1988, SECTIONS 147 AND 166 : COMPENSATION:
1999 (2) T.A.C. 59 (P & H, HC)
UNITED INDIA INSURANCE CO. LTD. Vs. NEENA TANDON

Compensation. Liability of Insurance Company. Driving licence. Insurance Company examined only District Transport Officer who deposed that licence issued to the driver was only for driving scooter and also admitted about maintenance of separate register for addition of medium or heavy vehicles on licence. Said register not produced. No notice issued either to the owner or driver to produce driving licence. Whether Insurance Company is liable to pay compensation. Held, Yes. Insurance Company failed to prove breach of terms of policy. Finding of Tribunal upheld.

●

61. MOTOR VEHICLES ACT, 1988, SECTION 147 (1) (b) (i) : LIABILITY OF INSURANCE COMPANY:-
1999 (2) T.A.C. 1 (RAJ. HC) (JAIPUR BENCH)
NATIONAL INSURANCE CO. LTD. LTD. Vs. NIRMALA BAI

Gratuitous Passenger travelling in car. Car insured under "Act only policy". Plea that accident was due to vis major. Tribunal awarded compensation and fastened liability of payment on Insurance Company. Contention that deceased was a gratuitous passenger and cannot be said to be a third party. Whether Insurance Company is absolved from the liability in respect of the person carried in or upon the vehicle when the policy of insurance is an "Act only policy". No. Finding of Tribunal upheld.

●

62. MOTOR VEHICLES ACT, 1988, SECTION 149:-
1999 (2) VIDHI BHASVAR 3
BROTHERS TRANSPORT SERVICE (M/s) Vs. DR. SHAFI-UZ-ZAMA

Policy covering liability of one accident. Liability of each victim is covered.

●

63. MOTOR VEHICLES ACT, 1988, SECTION 149 (2) LIABILITY OF INSURER:-
1999 (2) T.A.C. 56 (MP, HC)
ASHOK KUMAR AGRAWAL Vs. OM PRAKASH

Liability of Insurer. Insurance Policy. Plea of breach of conditions of policy. Tribunal absolved the Insurer from its liability on the ground that offending jeep in which injured was travelling on payment of hire was being plied as taxi and not as private car. Whether Insurer is liable for payment of compensation. Held, no. Tribunal is right in absolving Insurer from its liability.

●

64. M.P. ACCOMODATION CONTROL ACT, SECTIONS 2 (a), 12 (1) (e) AND 12 (f) :- ACCOMMODATION : MEANING AND PURPOSE OF :-
1999 (2) JLJ 260
PREM NARAYAN Vs. HAKIMUDDIN SAIFI

The Court cannot burden the landlord with additional conditions of disclosing particulars of residential accommodation in his possession and proving that it is not reasonable suitable for non-residential purposes. Non suiting him on such ground will mean non suiting him on extraneous grounds.

Paragraphs from 12 to 16 of the judgment are reproduced:-

12. Now the ingredients of clause (f) with which we are concerned here, are:

(1) the accommodation from which the tenant is sought to be evicted has been let out for nor-residential purposes;

(2) the landlord is the owner thereof and requires that accommodation bonafide for the purpose of continuing or starting (i) his bussiness or (ii) business of any of his major sons or unmarried daughters; or

(3) the landlord requires the accommodation for any person for whose benefit the accommodation is held by him; and

(4) the landord or such person has no other reasonably suitable non-residential accommodation of his own in his occupation in the city/town concerned.

13. Admittedly, here requirements (1) and (2) are satisfied (2 and 3 are alternative) In regard to (4) what is necessary for the appellant is to satisfy the Court/Rent Controller that he or such person for whom eviction is sought has no other reasonably suitable non-residential accommodation of his own in his occupation in the city or town concerned. On this aspect the learned Distt. Judge correctly recorded the finding in favour of the appellant. It follows that the landlord seeking eviction of a tenant from non-residential accommodation on the ground that he required the same to the purpose of continuing or starting his business or that any of his majo sons or unmarried daughters, has to prove that he has no other reason

ably suitable non-residential accommodation of his own in his occupation in the city or town. It is no part of the obligation of the landlord seeking eviction of a tenant under Clauses (f) of Section 12 (1) of the Act to ever in his plaint/petition the facts that he is in occupation of residential accommodation and that it is not suitable for non- residential purposes. These facts are not the requirement of clauses (f) and are irrelevant to make out a case under that clause. To read such a requirement in the said clause (f) would amount to doing violence to language of the clause nay rewriting the clause which is far bayond the principle of iron out the creases and is clearly impermissible.

14. It is futile to contend that accommodation is a neutral word taking in its fold both residential as well as non-residential purposes, the landlord ought to disclose the residential accommodation in his possession and show that it is not reasonably suitable for non- residential purposes when he is seeking eviction of the tenant from accommodation let for non-residential purposes. The Court cannot burden the landlord with additional conditions of disclosing particulars of residential accommodation in his possession and proving that it is not reasonably suitable for non residential purposes. Non suiting him on such grounds will mean non- suiting him on extraneous grounds. It follows that the appellant has fulfilled the fourth requirement of clause (f) also.

15. It is, however, contended that there is no provision in the Act which prohibits use of the residential accommodation let for non residential purposes. therefore, it is the duty of the landlord to show if he has in possession residential accommodation, even when he is seeking eviction of tenant for non-residential accommodation. Neither on principle nor on authority can such a contention be countenanced. We have no hesitation in rejecting the same.

16. From the above discussion, it follows that the appellant has satisfied all the requirements of clause (f) of Section 12 (1) of the Act. The impugned judgments and decrees of the High Court of this aspect are, therefore, erroneous and are liable to be set aside.

●

65. CRIMINAL TRIAL :-
1999 (2) JLJ 310
STATE Vs. HANIF KHAN

RELATED WITNESS:-

Eye witnesses were related to the deceased. There was a long bitter enemity between the complainant and the accused. Their evidence cannot be brushed aside together. They will not allow the real culprit to escape and falsely implicate innocence. What is required is careful, continuous and closed appreciation when parties are at enemical terms. Such witnesses try to implicate many members of the opposite group.

CONTRADICTIONS : APPRECIATION OF : Minor contradictions in the

state ment of eye witnesses are natural whose statement cannot be discarded. Evidence of (material witnesses) also corrborating and medical evidence can safely be believed.

NOTE : Bracketed portions inserted.

PRESENCE OF LADIES:- Incident taking place in house. Presence of ladies of the house and witnessing of the incident by them is natural.

DISCREPENCY:- Ocular and medical evidence. Use of sharp weapon stated by witnesses. One of the witnesses stating use of blunt part of sharp weapon. There remains no discrepency.

Cr. P.C. Section 154, F.I.R. : FIR need not contain explanation of injuries on persons of accused. Explanation in Court statement is enough.

In a murder case there was delay in filing the F.I.R., The distance between the police station and the place of occurrence was 4½ Kms. Informer not using bullock cart out of fear. Catching bus. Delay of 4 hours explained, by the prosecution. .

CRIMINAL PRACTICE: WITNESS HEARING ALARM:-

Witnesses residing at a distance of 2 Furlongs and 1½ Furlong from the place of incident can hear alarm raised by complainant party.

PLACE OF INCIDENCE:- House of deceased persons deposed by all witnesses as place of occurrence. Investigation officer collected blood stained earth from there. Cycles left by accused also seized from there. Place of incedent established.

LEGAL MAXIM:- HOSTILE WITNESS APPRECIATION OF:-

The maxim **Falsus in uno falsus in omnibus,** i.e. false in one particular is false in every particular. This principle does not apply in criminal trial. It is the duty of Court to disengage truth from falsehood.

●

66. NATURAL JUSTICE : PRINCIPLES OF:-
1999 (2) JLJ 280
KAILASH KUMAR DANGI Vs. STATE OF M.P.

A party should have opportunity of adducing all relevant evidence. Evidence of opponent should be taken in his presence, and should have opportunity to cross-examine witnesses of other party. No Meterial against him should be relied upon without his explanation.

LEGAL MAXIM:- Audi alteram partem, i.e. no man should be condemned unheard.

●

67. EVIDENCE ACT, SECTION 101:-
1999 (2) JLJ 304
LIFE INSURANCE CORPORATION OF INDIA Vs. AMBIKA PRASAD PANDEY

The insurer alleging fraud and suppresion of material facts by assured in filling in form must prove the same. The burden is upon the company.

INSURANCE ACT, 1938, SECTION 45:- Contract of insurance is a contract of special nature. Obligations of true disclosure of all relevant facts has been cast on assured. On such disclousure insure may decide its action.

NOTE:- JUDICIAL OFFICERS IN PARTICULAR WHO ARE ON deputation as President, Consumer Forums are requested to go through the whole ruling, so that they may be able to dispose of the claims of the claimants in speedy and proper manner.

68. MOTOR VEHICLES ACT, 1988, SECTIONS 142 AND 140 : PERMANENT DISABLEMENT:-
1999 (2) JLJ 264
SANTOSH KUMAR Vs. SANJAY MORE

Law does not require reduction of working capacity of the injured. Any of the enumerated results taking place. Victim suffers permanent disablement. The words "destruction or permanent impairing of the powers of any member or joint" used in sub clause (b) of Section 142 can be read as destruction of any member of joint. Permanent impairement of the power of the any member of any joint. Though the working capacity is not reduced victim is entitled to interim compensation under section 140, if injury described under section 142 is sustained. If one tooth lost and another imparied permanent disability caused in accordance with section 142 interim compensation has to be paid even if no working capacity has been reduced. Destruction or permanent impairement of powers of any member or joint, section 140 provides making of an award. Not with standing percentage of loss or grievousness of injury or resultant effect.

Being an important judgment delivered by Hon'ble Shri Justice R.S. Garg the judgment from paragraphs 1 to 11 are reproduced at varbatim for ready reference:-

1. The Tribunal has rejected the appellant's application filed under Section 140 holding that the fracture/extraction of tooth would not be a permanent disablement under Section 142 of Motor Vehicles Act, therefore the appellant would not be entitled to an interim award under Section 140 of the Act. Being disatisfied by the said order, the appellant/ claimant has filed this appeal.

2. Shri Kanojiya, learned counsel for the appellant contends that the Tribunal was not justified in ignoring the provisions contained in Section 142 and was unjustified in rejecting the application. On the other hand Shri Jain and Shri Rao submit that extraction/destruction of the tooth would not be a permanent disability, therefore Section 140 would not be applicable at this stage. Counsel for the respondents also submit that for the purpose of Section 140 there must be a permanent disablement as defined under

Section 142. According to them, nothing further can be added to Section 142.

3. Section 140 provides for liability to pay compensation in certain cases on the principle of no fault, Section 140 of Motor Vehicles Act, 1988 reads as under:-

"Liability to pay compensation in certain cases on the principle of no fault:- (1) Where death or permanent disablement of any person has resulted from an accident arising out of the use of motor vehicle or motor vehicles, the owner of the vehicle shall, or, as the case may be, the owners of the vehicles shall, jointly and severally, be liable to pay compensation in respect of such death or disablement in accordance with the provisions of this Section.

(2) The amount of compensation which shall be payable under sub-Section (1) in respect of the death of any person shall be a fixed sum of fifty thousand rupees and the amount of compensation payable under that sub-Section in respect of the permanent disablement of any person shall be a fixed sum of twenty five thousand rupees.

(3) In any claim for compensation under sub-Section (1), the claimant shall not be required to plead and establish that the death or permanent disablement in respect of which the claim has been made was due to any wrongful act, neglect or default of the owner or owners of the vehicle or vehicles concerned or of any other person.

(4) A claim for compensation under sub-Section (1) shall not be defeated by reason of any wrongful act, neglect or default of the person in respect of whose death or permanent disablement the claim has been made nor shall the quantum of compensation recoverable in respect of such death or permanent disablement be reduced on the basis of the share of such person in the responsibility for such death or permanent disablement.

4. According to sub- Section (1) of Section 140 where death or permanent disablement of any person has resulted from an accident arising out of the use of a motor vehicle then the owner/owners of the vehicle shall be liable to pay compensation in respect of such death of disablement in accordance with the provisions of Section 140. The word 'death' has not been defined in this Act, therefore the ordinary dictionary meaning would be sufficient to mean that where the person has lost his life.

5. Section 142 refers to permanent disablement, it reads as under:-

"Permanent disablement- For the purposes of this Chapter,Permanent disablement of a person shall be deemed to have resulted from an accident of the nature referred to in sub-Section (1) of Section 140 if such person has suffered by reason of the accident, any injury or injuries involving.

(a) permanent privation of the sight of either eye or the hearing of either ear, or privation of any member or joint, or

(b) destruction or permanent impairing of the powers of any member or joint ; or

(c) permanent disfiguration or the head or face

6. According to Section 142 permanent disablement shall be deemed to have resulted if such person has suffered any injury or injuries involving permanent privation of the sight of either eye or the hearing of either ear, or privation of any member or joint, it would also include destruction of permanent impairing of the powers of any member or joint and would also include permanent disfiguration of the head or face. When Section 142 provides permanent disfiguration of head or face to be a permanent disablement then the percentage of the loss or disablement becomes immeterial. The question that the disablement should be to a certain extent or should be of a the injury or injuries lead to a consequence then it would be deemed to be a permanent disablement. It cannot be disputed that permanent disfiguration of the head or face would not in every case affect the working capacity or ability of the person. **If there is disfiguration of the upper layer of ear, upper layer of the cheek, upper layer of the nose or upper layer of lips it is not going to affect the work and working condition of a man, that may ordinarily be not permanent disablement under any other law, but if Motor Vehicles Act Section 142 provides that such disfiguration of the head or face which is of permanent nature would be deemed to be a permanent disablement then it cannot be contended that because the ability of the person is not affected adversely it would not be a case falling under Section 142.**

7. Similarly permanent privation of the sight of either eye or the hearing of either ear or privation of any member or joint is considered to be permanent disablement for the purposes of the Section 142, in such case or cases, it is not necessary that the injury should affect the ability of the person to work. Assuming it is a case of privation of one phalange of little finger it may not affect the working capacity or ability of the person but it would certainly be permanent privation of some member of the body. Again under Section 142, the law does not require that the Court should be satisfied that this privation would permanently affect the ability or working capacity of the person. **The law only requires that if the injury has resulted into permanent privation of the sight of either eye or the hearing of either ear, or privation of any member or joint then on proof of such fact, Section 142 would immediately come into operation.**

8. Coming to Clause- (b) of Section 142, it is to seen that the clause uses two words for qualifying the result of the injury. The Clause reads "destruction or permanent impairing of the powers of any member or joint." To make it very clear it can be read as (a) destruction of any member, (b) destruction of any joint. (c) permanent impairing of the powers of any member and (d) permanent impairing of the powers of any joint. If the facts project that the

injury has caused any result out of above four then S. 142 would immediately come into play because all the above four situations are deemed to be permanent disablement under Section 142 of the Act. It may be a case where the man suffers some injury on his knee or ankle making it absolutely stiff and he is unable to move it, but it may not affect his ability to work if he is doing the table work. The insurance Company in such a case cannot contend that because his ability and working capacity is not affected he would not be entitled to an amount under Section 140. Similarly the Insurance Company cannot be permitted to say that in case of destruction of any member or destruction of any joint if the working ability or capacity is not adversely affected and the percentage of loss is very low then Section 140 would not be applicable. The requirement of the law only is, that if there is destruction or permanent impairing of the powers of any member of joint then Section 140 would come into play and under the no fault liability the owner/driver would be liable to answer the interim award and if the vehicle is insured then the Insurance Company would be jointly and severally liable to answer the claim of the claimant.

[**NOTE** : Please refer to ***L.P.A. No. 439/98 in Rajesh Vs. Dilip 1998*** JOT| Feb. issue page 21]

9. In the persent case, indisputedly there is destruction or loss of one tooth and impairment of another tooth because of the fractrue. It may appear to be little fellacious that for fracture/dislocation or extraction of the tooth an interim award has to be made, even if it does affect adversly the working condition, working capacity or ability of the person but when the law requires the provisions to be considered in their true legal perspective then the Court only has to consider the meaning of the plain words which are not otherwise ambiguous. The principle of interpretation clearly lays down that the Court must not add anything to the provision of law unless the provision in the statute book appears to be incomplete or little foolish. The law on interpretation makes it clear that the plain meaning should be given to the plain words, if those are understandable and are clear in their terms.

10. Reading the provisions as those stand, this Court is of the view that the destruction or permanent impairment of the powers of any member or joint would certainly provide a ground for making an award under Section 140 of the Motor Vehicles Act irrespective of the percentage of loss or grievousness of the injury or the resultant effect. If the Court presses upon the fact of extent of injury or the precentage of the permanent disablement then the Court would be reading or demanding something which is not there in the provision of law or is not the requirement of law. Such an interpretation or addition of the words to suit the purpose of one party would not be permissible. The plain words should be given their plain meaning. The rule of interpretation would come when there appears to be some ambiguity, but if the words are understandable and do not need any external assistance or aid the Court should not read anything in the statute beyoud what is written.

11. Considering the totality of the circumstances specially in view of the language employed under Section 142 this Court is of the opinion that the Tribunal was unjustified in rejecting the application under Section 140. The application deserves to and is accordingly allowed. The Respondents No. 1 to 3 are held severally and jointly liable to pay the amount to the claimant. The amaount (Rs. 25,000.00) shall be deposited by the respondents within six weeks from today. The claimant shall also be entitled to 12% interest of the said amount from the date of filing of the main petition till the payments are made.

NOTE:- Judicial Officers are also requested to go through the judgment of the High Court of M.P. published in 'JOTI JOURNAL' Vol. V Part I, February 1999 at page 21 ***Rajesh Vs. Dilip.***

●

69. N.D.P.S. ACT, SECTIONS 35, 43 AND 20 (b) (ii):-
1999 (2) JLJ 287
MOHAMMAD AKHTAR Vs. STATE OF M.P.

Chares in large quantity is found in the dicky of car. The accused was travelling in the car. The charas was seized from the possession of the accused. Accused travelling in the car. belonging to the another accused, is mere suggestion of prosecution witness. He was a passenger only, not enough when contraband is seized from the car itself. The physical possession of contraband proved by prosecution. Burden to prove that possession was without knowledge of the accused lies on accused. If not proved beyond reasonable doubt culpable mental state will be presumed. ***Indersen vs. State of Punjab, AIR 1973 SC, 2309*** followed.

●

70. C.P.C., SECTION 11, OR. 41 R. 22 (1) : PLAINTIFF'S APPEAL AGAINST PARTIAL DECREE:-
(1999) 7 SCC 435
RAVINDRA KUMAR SHARMA Vs. STATE OF ASSAM

In such a case, even without filing any appeal or cross-objections the defendant-respondent, held, can for the purpose of sustaining the impugned part of the decree, attack the findings on which the part of decree passed against him was based, 1976 amendment has merely clarified and not changed the law in this regard.

TORTS : MALICIOUS PROSECUTION : TEST TO DETERMINE:-

Prosecution if on facts malicious prosecution launched by police officer under instructions from the State Government, even though ultimately could not be said to be malicious or without reasonable or probable cause. The test is whether the prosecutor had not acted honestly believing the person concerned to be guilty and not the result of the criminal trial.

EVIDENCE ACT, SECTION 81: NEWSPAPER REPORTS:-

They are merely hearsay and not proof of facts stated therein.

●

71. NEGOTIABLE INSTRUMENTS ACT, SECTION 138 & CR. P.C. SECTIONS 178 (d), 177 AND 179 : TERRITORIAL JURISDICTIONS OF COURTS RELATING TO OFFENCE UNDER SECTION 138 N.I. ACT:-
(1999) 7 SCC 510
K. BHASKARAN Vs. SANKARAN VAIDHYAN BALAN

The complainant can choose any one of those courts having jurisdiction over any one of the local areas within the territorial limits of which any one of the following five acts, the components of the offence, took place : (i) drawing of the cheque; (ii) Presentation of the cheque to the bank; (iii) returning of the cheque unpaid by the drawee bank; (iv) giving of notice in writing to the drawer of the cheque demanding payment of the cheque amount ; (v) failure of the drawer to make payment within 15 days of the receipt of the notice.

NOTICE:- N.I. Act Section 138 and General Clauses Act, Section 27:-

Notice to drawer returned as "unclaimed" held, invites a liberal interpretation favouring the person who has the statutory obligation to give notice, because he is presumed to be the loser in the transaction and the provision itself has been made in his interest. Thrust in the clause is on the need to "make a demand". Strict interpretation would give a handle to a trickster cheque drawer. The principle incorporated in Section 27 of the General Clauses Act can be imported into a case where sender has despatched the notice by post with correct address written thereon.

NOTE:- Judicial Officers are requested to go through the Article "Notice" under Section 138 N.I. Act published in 'JOTI JOURNAL' Vol. IV Part II, April 1998 from pages 6 to 12 and also ***AIR 1989 SC 630 M/s Madan vs. Vazeer.***

N.I. ACT, SECTIONS 118, 138, 139 AND 148:-

When signature on cheque admitted by the accused. Further presumption under S. 139. Question of rebuttal of as the signature in the cheque is admitted to be that of the accused, the presumption envisaged in Section 118 of the Act can legally be inferred that the cheque was made or drawn for consideration on the date which the cheque bears. Section 139 of the Act enjoins on the Court to presume that the holder of the cheque received it for the discharge of any debt or liability. The burden was on the accused to rebut the aforesaid presumption.

Cr. P.C., SECTIONS 357 (3), 386 SECOND PROVISO AND 29 (2) ; ORDER TO PAY COMPENSATION INSTEAD OF FINE:-

Even the High Court when functioning as a court of appeal held, has to conform to the second proviso to S. 386 and thus cannot impose greater punishment or fine than might have been inflicted by the trial Court. However, the Magistrate or other trial court can award any sum as compensation under S. 357 (3) and compensate for the loss to the complainant. Thus held, in respect of cheque which covers an amount exceeding Rs. 5,000 such court has the power to award appropriate compensation to the complainant. High Court in appeal erred in imposing fine of Rs. 1 lakh. The Hindi version of the extract of the judgment of the ***AIR 1989 SC 630, M/s Madan vs. Wazeer*** is

reproduced below:-

ए.आय.आर. 1989 सु.को. 630 मेसर्स मदन वि. वज़िर के दृष्टांत के चरण 6 का हिन्दी अनुवाद

हमारा अभिमत है कि अधीनस्थ न्यायालय द्वारा दिया निष्कर्ष सही है तथा स्थिर रखा जाना चाहिए। यह सही है कि जम्मू कश्मीर हाउसेस एण्ड शाप्स रेंट कंट्रोल एक्ट की धारा 11 (1) के खंड (i) का परन्तुक तथा धारा 12 (3) का परन्तुक किराएदार की सुरक्षा हेतु आशयित है। फिर भी यह देखा जा सकता है कि उनकी भाषा का अधिक कठोर तथा शाब्दिक अनुपालन अव्यवहारिक तथा अकरणीय होगा। परन्तुक यह अपेक्षा करता है कि उससे पूर्व कि किराए की कोई राशि बकाया (शेष) कही जा सके इस उपबंध का पालन करने के लिए एक भूस्वामी अधिक से अधिक यही कर सकता है कि वह किराएदार के सही पते वाला एक पूर्वदत्त पंजीकृत पत्र (अभिस्वीकृति सहित या अन्यथा) डाक से प्रेषित कर दे। एक बार जब वह कर देता है तब पत्र डाकखाने में दे दिया जाता है तब उसका उस पर कोई नियंत्रण नहीं रहता है। तब इस संबंध में साधारण खंड अधिनियम की धारा 27 के अधीन प्राप्तकर्ता को दिए जाने की उपधारणा कर ली जाती है। पोस्ट ऑफिस के नियमों के अधीन पत्र को प्राप्तकर्ता या उसके द्वारा अधिकृत व्यक्ति को दिया जाता है। ऐसा व्यक्ति या तो पत्र को स्वीकार कर सकता है या उसे स्वीकार करने से मना कर सकता है दोनों ही दशाओं में, स्वीकृत या अस्वीकृत को प्राप्तकर्ता द्वारा प्राप्त या उस पर निर्वाहित मानने में कोई कठिनाई नहीं है। कठिनाई वहाँ होती है जहाँ पोस्टमैन दिए गए पते पर पहुंचता है तथा प्राप्तकर्ता या पत्र प्राप्त करने हेतु अधिकृत किसी व्यक्ति से संपर्क करने में असफल रहता है। वह केवल इतना ही कर सकता है कि वह इसे प्रेषक को वापस कर दें। भारतीय पोस्ट ऑफिस नियम ऐसे पंजीकृत पत्रों के वितरण के संबंध में कोई विस्तृत प्रक्रिया उपबंधित नहीं करते हैं। जब पोस्टमैन इसे प्रथम बार में वितरण करने में असमर्थ रहता है तो पोस्टमैन के लिए सामान्य प्रथा यह है कि उसे प्रेषक को वापस करने से पूर्व अगले एक या दो दिन में भी वितरण करने का प्रयास करे। तथापि, उसके पास न तो शक्तियां है न ही समय कि वह प्राप्तकर्ता के अते–पते के संबंध में जॉच कर सके। उससे यह आशा नहीं की जाती है कि वह पत्र को तब तक रोक कर रखे जब तक कि प्राप्तकर्ता उसे स्वीकार करने या वापस करने का चयन न कर ले तथा वह प्राप्तकर्ता की अनुपस्थिति के कारण भवन पर पत्र को चिपकाने हेतु भी अधिकृत नहीं है। अतएव उसके उत्तरदायित्व की तुलना आदेशिका वाहक से नहीं की जा सकती है जो व्यवहार प्रक्रिया संहिता के आदेश 5 के अधीन समंस के निर्वाह के दायित्व से निहित रहता है। विधानिक उपबंधों का निर्वचन इस कठिनाई के संदर्भ में तथा ऐसी स्थिति में पोस्ट ऑफिस द्वारा निर्वाह किए जाने वाले अत्यन्त सीमित भूमिका

के प्रकाश में किया जाना चाहिए। जहां किराएदार भवन से पर्याप्त समय के लिए दूर है, जैसा इस प्रकरण में है, वहाँ पत्र को वितरित नहीं किया जा सकता है। साथ ही, कोई प्राप्तकर्ता उसे संबोधित पत्र को विनिर्दिष्ट रूप से अस्वीकार किए बिना प्राप्त करने से बच सकता है। वह मामले को ऐसे जोड-तोड कर सकता है कि वह अस्पष्ट पृष्ठांकन जैसे कि "मिला नहीं", "शहर में नहीं", "प्राप्तकर्ता चला गया" आदि के साथ प्रेषक के पास पुनः पहुंचा सकता है। यह भी हो सकता है कि कोई भूस्वामी, यह जानते हुए कि किराएदार किसी कारणवश शहर से बाहर है, उसे पत्र भेजने का प्रस्ताव कर सकता है जो वह जानता है कि वितरित नहीं होगा। ऐसी संभावना भी अपवर्जित नहीं की जा सकती है। किन्तु, इसके विपरीत, यदि किसी व्यक्ति के निवास के पते से संबोधित कोई पंजीकृत पत्र सामान्य अनुक्रम में वितरित नहीं हो पाता है तथा वापस हो जाता है तो प्राप्तकर्ता के स्वयं के आचरण को आरोपित करेगा यदि वह भवन में निवास कर रहा है तो कोई कारण नहीं है कि इसे उसको वितरित क्यों न किया जावे। यदि वह कुछ समय के लिए दूर रहने के लिए बाध्य होता है तो वह इतना कर सकता है कि वह डाक प्राधिकारियों को आवश्यक निर्देश दे सकता है कि उसे संबोधित पत्र या तो कुछ समय तक, जब तक वह लौटे, रोक लिए जावे या उस पते पर अग्रेषित कर दिए जावे जहां वह गया है या उन्हें किसी अन्य व्यक्ति को, जो उसके द्वारा अधि कृत है, वितरित कर दिया जावे। ऐसी परिस्थिति में हमें सर्वाधिक युक्तियुक्त, प्रभावशाली, सामयिक तथा व्यवहारिक 'निर्वचन का चयन करना होगा जो कि "निर्वाहित" शब्द को "डाक द्वारा प्रेषित" के रूप में पढ़ना होगा किराएदार को सही तथा उचित रूप से संबोधित होगा तथा शब्द "प्राप्ति" को डाक कर्मचारी द्वारा पत्र में संबोधित पते पर प्रस्तुत करने के रूप में होगा। हमारा विचार है कि कोई अन्य निर्वचन इस परिस्थिति में उपयुक्त नहीं होगा क्योंकि सामान्यतः एक भू-स्वामी के लिए यह सुनिश्चित करना संभव नहीं होता है कि उसके द्वारा प्रेषित कोई पंजी कृत पत्र किराएदार को वितरित हो या उसके द्वारा प्राप्त किया जावे।

●

72. HINDU MARRIAGE ACT, 1955, SECTION 13 (1) (i-a) AND (i-b) : CRUELTY AND DESERTION:-
(1999) 7 SCC 311
R. BALASUBRAMANIAN Vs. VIJAYALAKSHMI

Petition by husband seeking divorce on grounds of cruelty and desertion, was dismissed. The Supreme Court held that it was rightly dismissed where cruelty stood condoned by the parties living together and celebrating wedding anniversary. Furthermore, it was rightly dismissed where the petitioner was himself in the wrong being guilty of cruelty for levelling baseless charges of adultery against the wife, for refusing to see the child, and further refusing wife's offer for a paternity test which would have proved her innocence.

MENTAL CRUELTY:- Unfounded allegation of adultery against wife, held is a serious allegation amounting to cruel conduct by the husband and entitles wife to seek relief against him under the Act or otherwise. More so where wife prepared for paternity test to prove her innoce.

The judgment being an important one, it is reproduced:-

1. This is a husband's appeal. He filed a petition for divorce against the respondent wife under Section 13 of the Hindu Marriage Act, 1955 ("Act" for short) on the grounds of cruelty and desertion (Sections 13 (1) (i-a) and 13 (1) (i-b)] He succeeded in the Family Court to the extent that he was instead granted a decree of judicial separation under Section 13-A of the Act. Against the judgment of the Family Court the wife filed an appeal in the High Court of Judicature at Madras. A Division Bench of the High Court by impugned judgment dated 19-12-1996 allowed the appeal and dismissed the petition of the husband on both the grounds of cruelty and desertion. The aggrieved husband has now come to this Court after abtaining leave to appeal.

2. The marriage was solemnised between the parties in accordance with Hindu rites on 6-7-1969. A son was born to them on 12-2-1971 and a daughter on 19-5-1975. The husband alleged that during all this period the behaviour of the wife was cruel towards him. She suspected that he was having extramarital relations with his junior woman advocate. The husband is an Income Tax Practitioner. The wife also suspected that he was having illicit relations with another woman, the wife of an acquaintance of the respondent. The husband also alleged that the wife used to behave in an erratic fashion and would consume overdose of sleeping pills. She also once threatened to commit suicide. All this the wife did only to harass him. She would also pick up quarrels with the husband without any provocation on his part. The husband also complained that he was doing well in the profession and never wanted his wife to take up a job which she did against his wishes. On 6-7-1979 the couple celebrated their tenth wedding anniversary. The husband then said that he was shocked when his wife told him that she was pregnant. He said this could not be so as he had ceased martial relations with her since June 1977. He then said that the wife, the respondent, left the matrimonial home on 10-9-1979 leaving the two minor children to his love and care. On verification the husband found that his wife had gone to her parents' house and since then she has been living there. She gave birth to a girl on 21-3-1980 at her parents' house, which, according to the husband, is a mystery to him. He said the conduct and character of the wife was not above board.

3. The wife denied all these allegations and rather alleged cruel behaviour on the part of the husband. She said she took up the job to escape constant nagging by her husband. She said she left for her parents' house to perform certain pooja and did not take her two children with her as they were schoolgoing. She denied that there was no marital relations between her and her husband. She said that the she informed her husband

in July 1979 itself that after cohabitation she had skipped her periods. She denied that she left the house of her husband without his knowledge. She said it was only after taking his permission. She said the third child, the girl named kamakshi, is born to her of her husband and she said that she was willing to undergo all scientific tests to prove that the appellant was the father of her child kamakshi. She said she was always prepared to live with her husband and was even anxious for that for the sake of her children. She said the allegation of the husband against her moral character is itself a cruelty entitling her to live separately from her husband and also to claim maintenance.

4. Mr. A.B. Rohatgi, learned counsel appearing for the husband submitted that as far as the allegation of adultery against the respondent wife is concerned he is not going to press. That may be good of him but the fact remains that the allegation that the wife had sexual intercourse with a person other than the husband is a serious allegation against the wife and shows the cruel conduct of the husband entitling the wife to seek relief against him under the Act or otherwise. It was submitted that on 6-7-1979 the parties celebrated their tenth wedding anniversary. That would show that both were living together and it is apparent that the husband has condoned the cruelty, if any, alleged by him against the wife. The husband has not gone to see his third child Kamakshi since her birth. The High Court has rejected his plea that he ever made an attempt to bring his wife and the daughter who was born to her at her parents' house. The High Court has considered pleadings and the evidence on record threadbare and come to the conclusion that the case of cruelty and desertion set up by the husband has not been proved. We agree with the High Court and rather we find that it is the husband who is in the wrong.

5. We, therefore, uphold the order of the Division Bench of the High Court and dismiss the appeal with costs. Petition seeking divorce filed by the appellant is dismissed.

●

73. EVIDENCE ACT, SECTION 45 ; WHO IS EXPERT:-
(1999) 7 SCC 280
STATE OF H.P. Vs. JAI LAL

The principles for judging the credibility of evidence of an expert and when his testimony to be admitted. Assessment of productivity of apple orchard. District Horticulture Officer produced as an expert witness. He had no scientific study of research in assessing the productivity of apple crop. It was held that his testimony cannot be given the label of expert evidence.

●

74. RENT CONTROL AND EVICTION : TAMIL NADU BUILDINGS (LEASE AND RENT CONTROL) ACT, 1960, SECTIONS 10 (3) (a) (i) AND 10 (3) (e) BONAFIDE NEED OF LANDLORD:-
(1999) 7 SCC 275
T. SIVASUBRAMANIAM Vs. KASINATH PUJARI

Mere desire to live independently of father does not constitute need or requirement of the tenanted premises. Desire may be the outcome of one's need. So when a landlord desires the tenanted premises, held, the requirement of law is that the landlord must set out his need for the premises in his petition and establish that such a need is bonafide. The need must be genuine, honest and conceived in good faith. The landlord's pleading not setting out reasons for desire to live independently of father, held, High Court in revision rightly set aside the order of eviction. The only material on record for eviction of the tenants before the Rent Controal Authority was mere desire of the landlord to live separately from his father. Such a desire is not a substitute of the need for the premises which a landlord is required to plead and establish. thus, we are of the view that the landlord's desire to live separately was not a valid ground for eviction of the tenants from the premises.

●

75. EVIDENCE ACT, SECTION 116 : RENT CONTROL AND EVICTION: DENIAL OF TITLE OF LANDLORD UNDER SECTION 116 EVIDENCE ACT:- (1999) 7 SCC 474

S. THANGAPPAN Vs. P. PADMAVATHY

Person once inducted as a tenant of an immovable property by a landlord, cannot later be permitted to say that the landlord at the beginning of the tenancy did not have a title to such property. However defective the title, the tenant cannot deny the landlord's title. But where landlord loses his title after inducting the tenant, such tenant not bound by the estoppel contained in S : 116. Appellant tenant claiming that a certain Devasthanam was the true owner of the suit premisses. On his own volition requesting Devasthanam to recognize him as a tenant and ceasing to pay rent to respondent landlord. It was held that High Court rightly dismissed the revision petitions of the appellant tenant and upheld the order for eviction granted on grounds of wilful default in payment of rent and requirement of the premises for demolition and reconstruction. When there is a question of denial of title points to be considered in a case are : (1) Whether there still exists any relationship of landlord and tenant inter se ; that is by such denial does the liability to pay rent to such landlord cease? (ii) Alternatively, at what stage would the liability cease; (iii) To whom is the rent payable?

Where relationship is found to exist, the fact that the landlord and a third party may be lessee and lessor in a different set of facts, held would make no difference to the landlord-tenant relationship. Such relationship cannot be said to have ended only because the third party files a suit claiming paramount title over the tenanted premises.

Any decision on plea of denial of title of landlord, held cannot be a finding on question of title.

●

76. PUBLIC TRUSTS ACT, 1961 (M.P.), S. 1 AND PUBLIC TRUSTS ACT, 1950 (BOMBAY), SS. 50 AND 51:-
1999 (2) JLJ 412
UNITED CHURCH OF NORTHERN INDIA TRUST ASSO. Vs. SHANTILAL AND OTHERS

Public Trust registered outside the State of M.P. having its property in M.P. State. It will be governed by the Act under which it is registered. Provisions of M.P. Act will not apply. **1968 JLJ 891** relied on.

Civil Suit for recovery of trust property situating in Madhya Pradesh is maintainable subject to compliance under Sections 50 and 51 of the Bombay Public Trusts Act. Suit not brought by charity commissioner or with his permission. Not maintainable. ***Nadiad Nagarpalik Vs. Vithalbhai Zeverbhai and other, AIR 1960 Guj. 161*** distinguished.

●

77. M.P. ACCOMMODATION CONTROL ACT, SECTION 12 (1) (f) ; SUIT BY A CO-OWNER
1999 (2) JLJ 126
AMAR SINGH Vs. RAMKUNWAR BAI

Requirement and contract not to file suit. Co-existence there of. Contract that no suit for eviction shall be filed if tenant continues to pay rent. Such contract is not binding for suit of eviction under Section 12 (1). Notwithstanding the contract the suit is maintainable. **(1994) 2 SCC 671 Shri Laxmi's** case followed.

Any co-owner/landlord can maintain an eviction suit in absence of any objection by other co-owners. **AIR 1976 SC 2335, AIR 1977 SC 1599** and **1990 JLJ 97 (FB)** relied on.

The landlord puttinga Gumti on portion of tenanted premises with permission of tenant. No rent is liable to be proportioned. Suit shop required by two landlords. One landlord examined and fact proved. Requirement found established. Another landlord need not be examined.

●

78. M.P. ACCOMMODATION CONTROL ACT, SECTIONS 12 (1), 13 (1) AND 13 (6):-
1999 (2) JLJ 118
SHYAMLAL AGRAWAL Vs. SARDAR GURUBACHAN SINGH

Tenant not admitting relationship of landlord and tenant has still to deposit rent to have the protection of defence under S. 12 (1). Rent not deposited. Defence under Section 12 (1) liable to be struck off. His general defence would be intact. There is discretion under Section 13 (6). It is available only to extend the time for deposit of rent. Such power can be exercised if tenancy is admitted.

NOTE:- Judicial Officers are requested to go through the provisions of Section 13 (3) of M.P. Accommodation Act which read as under:-

"If, any proceeding referred to in sub section (1), there is any dispute as to the person or persons to whom the rent is payable, the court may direct the tenant to deposit with the Court the amount payable by him under sub-section (1) or sub-section (2), and in such a case no person shall be entitled to withdraw the amount in deposit until the Court decides the dispute and makes an order for the payment of the same."

In this judgment following cases were referred. **1964 JLJ 87, 1991 JLJ 86 (1981) 3 SCC 486.**

The Judicial Officers are requested to go through **1990 JLJ 197 (DB)** ***Mangaram Vs. Om Prakash*** in which it was said that,

"Suit for eviction, defendant denying the plaintiff to be his landlord provisions of Section 13 (1) are still to be complied with. He is bound to deposit the rent which will not be withdrawn till the relationship is decided."

●

79. M.P. ACCOMMODATION CONTROL ACT, SECTION 12
1999 (2) JLJ 122
MOHAMMAD SHARIF Vs. KESHAR SINGH

Decree for eviction granted under section 12 (1) (e) (f) and also under S. 12 (1) (g). No direction of election by tenant under S. 18 can be given. If possession of premises after construction/ repair is given to tenant the decree of bonafide need will become useless. If there is a decree under section 12 (1) (g) for carrying out repairs direction as to re-entry of tenant under S. 18 is mandatory.

●

80. C.P.C, SECTIONS 151 AND 152: AMENDMENT AFTER JUDGMENT OR DECREE:-
1999 (2) JLJ 83 (SC)
DWARIKADAS Vs. STATE OF M.P.

Order, judgment or decree passed by Court becomes functus officio. Cannot vary terms of judgment. Only arithmetical and clerical mistake can be removed. Pendente lite interest not granted despite of demand, it will be deemed to have been rejected cannot thereafter be granted invoking powers under.

●

81. CONSTITUTION OF INDIA, ART, 21 : INDUCEMENT FOR COMPROMISE:-
1999 (2) JLJ 147
VIJAY SINGH Vs. STATE

To induce or lead an accused to plead guilty with promise to let him lightly is clear violation of this provision. ***Thippe Swamy Vs. State of Karnataka,*** **AIR 1983 SC 747** relied on.

Cr.P.C. SECTIONS 229, 241 AND 246 (3):-

Admission of guilt under these provisions. Judge/Magistrate should exercise sound and proper discretion judicially. The judgment being of common importance is reproduced here:

JUDGMENT

1. This appeal was filed by Vijay Singh. He was convicted under Sections 409 and 477-A IPC and Section 5 (1) (c) read with Section 5(2) of the Prevention of Corruption Act, 1947 on his plea of guilty' and was sentenced to rigorous imprisonment for one year on each count. He was also sentenced to pay a fine of Rs. 5,000/- for the offence under Section 409 IPC. He died during the pendency of this appeal. His widow Smt. kamlesh Thakur has been granted leave under the proviso to Section 394 of the Code of Criminal Procedure. 1973 to continue this appeal as she does not want that stigma of conviction should remain attached to the name of her husband. Thus, this appeal has not abated.

2. Vijay Singh was Upper Division Clerk in Government Higher Secondary School, Slimnabad, Jabalpur. The charge against him was that on 5.11.1985 he prepared a bill for Rs. 5,000/- and deposited it in the treasury on 4.12.1985. It was for payment of advance of Rs. 5,000/- from the provident fund account of Smt, H. Sharma who was a teacher in that school. He drew this amount on 10.12.1985 but did not make payment to her. He misappropriated this amount and falsified the relevant register of his office. The charge-sheet was filed by the Economic Offiences Investigation Bureau.

3. On 31.1.1985 the charges were framed by the Special Judge, Jabalpur. These were read over and explained to the accused. He is said to have admitted his guilt in the following words:-

"गलती हुई मैंने 5000/– रु. गबन किया था। मेरे यहां चोरी हो गई थी। मुझे टी.बी. की बीमारी थी तबियत ठीक नहीं रहती थी। मैं उच्चतर माध्यमिक विद्यालय में उच्च श्रेणी शिक्षक था। जी.पी.एफ. से 5000/– रु. मैंने बैंक से निकाले थे मेरी तबियत अचानक खराब हो गई थी। यह रुपया में से 2500/– मेरे इलाज में खर्च हो गये। बाकी 2500/– रु. देने गया तो. उन्होंने मना कर दिया। मैंने विद्यालय के हिसाब में यह नहीं दिखाया था कि 5000/– रु. मैंने बैंक से ड्रा किये हैं। मुझे अपराध स्वीकार है।"

4. It will thus appear that the accused has admitted misappropriation of the amount of Rs. 5,000/-. He has qualified his admission while pleading guilty that there was a theft in his house, he was suffering from T.B., he suddenly fell ill, he spent the amount of Rs. 2,500/- in his treatment and he went to pay the remaining amount but it was not taken.

5. The procedure of trial of warrant cases was followed in this case. After the charge was framed. read and explained the plea of the accused was recorded. According to Section 241 of the Code : "If the accused pleads

guilty, the Magistrate shall record the plea and may, in his discretion, convict him thereon". For convicting an accused on his plea of guilty two things must be kept into consideration (1) the plea of guilt must be made voluntarily (2) it must be made with full understanding of the consequences. The plea of guilt must be clear, specific and unambiguous. It should be unqualified. It must show conscious admission of guilt after fully understanding its implications. It should be distinct and unequivocal. It should be without any extraneous pressure or expectation of lenient sentence. It is especially so where the charges are serious and the sentence of imprisonment is mandatory. The judge or Magistrate has a discretion to act upon the plea of guilt keeping in view all the facts and circumstances of the case. There should be a sound and proper exercise of the Judicial discretion while acting on the admission of guilt under Sections 229, 241 or 246 (3) of the Code.

6. Unless the Court is fully satisifed that the accused knew exactly what was implied by his plea of guilty and the effect of such plea, the case should be tried and the evidence should be recorded and such a plea should be considered alongwith the evidence on record. In ***Hasaruddin, V. Emperor*** **AIR 1928 Cal. 775.** it was laid down that it is left to the discretion of the Presiding Judge in each particular case to determine whether inspite of the plea it is or is not desirable to enter upon the evidence. In ***State v. Banshi Singh*** **1959 JLJ 495= AIR 1960 M.P. 105** this Court made it clear that in order that a conviction may be sustained on a plea of guilty. it must appear that the accused admitted in his pleas all the elements of the offence. In ***State of M.P. v. Shri Rama Mal*** **1970 CrLJ 1303 (Delhi),** the accused had pleaded guilty. Yet he had set forth many circumstances which exonerated him. That was not treated as an unqualified admission of his guilt. It was held that it did not amount to a plea of guilty.

7. There is a decision of the **Supreme Court of the United States in *R.J. Henderson v. T.G. Morgan*** 1977 CrLJ 738 in which referring to earlier decisions the law on the point was summarised, **"Out of just consideration for persons accused of crime, Courts are cereful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences."**

8. In ***Tirippeswamy v. State of Karnataka*** **AIR 1983 SC 747** the **Supreme Court** has held that it would be clearly violative of Article 21 of the Constitution to induce or lead an accused to plead guilty under a promise or assurance that be would be let off lightly and then in appeal or revision, to enhance the sentence. This decision is also a pointer in the direction that a plea of guilty should be accepted when the accused has understood fully its ulitmate consequences.

9. In the present case, it appears that the accused made admission of the guilt without understanding its implications or consequences. The minimum punishment for the offence u/s. 5(1) (C) read with S. 5(2) of the

year. The admission was qualified. The accused stated that there was theft in his house and he spent half of the amount in the treatment of his disease of tuberculosis. It is clear that the admission of guilt was not unequivocal. He expected exonerztion or leniency in sentence by placing before the Court the extenuating and mitigating circumstances. He did not admit the mens-rea on his part. He did not make clear admission of dishonesty' on his part which is an essential element of the offence of criminal breach of trust. He tried to pursuade the Court the non-existence of dishonest intention. That was implicit in the words used by him.

10. The appeal is allowed. The conviction and sentence on such plea of guilt cannot be sustained. These are set aside. As the accused has died there can be no order of retrial.

[**NOTE :** Please refer to ***(1999) 8 S.C.C. 638 State of U.P. Vs. Chandrika*** which is being published in this issue] Please refer to 1999 JOTI page 578 also.

●

82. I.P.C., SECTION 302 READ WITH SECTION 34 : EFFECT OF SECTION 34:-
1999 (2) JLJ 93 (DB)
NARAYAN SINGH Vs. STATE OF M.P.

Injury caused by main accused. He was acquitted. No provision of Section 34 is attract for punishing other accused under S. 302. The remaining accused are liable to be punished for injuries caused by them, (individual acts).

Paragraph 9 of the judgment is reproduced:-

9. So far as the Devisingh is concerned, he, on the basis of evidence on record, was the person who caused the injury No. (4) and as per the evidence of the doctor, it is the injury No. (4) which in fact was the cause of death of the deceased. However, since the trial Court found lacuna in the prosecution evidence and not believing, the witnesses acquitted Devi Singh and Balwant Singh as they had no role to play. Since the main person Devi Singh who was assigned the role of causing fatal injury has been acquitted the case of the other persons cannot be brought under Section 302 IPC. It was neither the case that all the accused persons were guilty for comitting the offence u/s 302 IPC either independently or with the aid of Section 34 IPC and even there is no material on the record so to warrant to take the aid of Section 34 IPC. Even otherwise, Section 34 cannot be taken in aid when the main accused has received acquittal and no appeal there against has been filed by the State as per the information supplied by the State counsel himself . Now, the question for consideration remains as to whether the submission as advanced by the learned counsel for the appellants regarding consideration of the guilt of the accused persons under Section 323 IPC, can be accepted so far as the nature of the injuries Nos. (1), (2) and (3) concerned, they are of simple

nature and evidence on the record established that these injuries on the person of the deceased were caused by the appellants and there is evidence of the eye-witnesses deposing to establish the causing of these injuries on the person of the deceased by the present appellants.

PROBATION : BENEFIT OF:-

An offence under Section 323 IPC committed by young persons in their twenties. No previous conviction. He is entitled to benefit under.

●

83. PRECEDENT:-
1999 (2) JLJ 100
NARAYAN PRASAD Vs. M.P.S.R.T.C.

Full Bench specifically laying down that contrary view will not be deemed good law. No ruling of division bench laying down contrary view can prevail. 1978 MPLJ 664 and 1994 JLJ 648 (FB) referred to.

●

84. SUCCESSION ACT, SECTIONS 63 (c), 276, 237:-
1999 (2) JLJ 133
VIPIN PARERA Vs. DAVID LAGHRAN

Original copy of will lost from the Court file. Photocopy available. Probate can be granted on the basis of such copy. Due and valid execution of will has to be proved. Propounder should remove every suspicious circumstance from the mind of the Court. **AIR 1959 SC 443** follwed.

A registered will may be taken to be genuine. But it is not sufficient to dispel all suspicions if exist. Due execution and understanding of testator etc. have to be proved. **AIR 1962 SC 567** followed. The propounder has to prove the knowledge of the testator and his sound mental state. Testator's understanding as to nature and effect of disposition has also to be proved. **AIR 1974 SC 1999** followed.

Will shrouded by suspicious circumstances. It becomes a matter of Court's conscience. Evidence of propounder should be such which satisfies conscies of the Court. **AIR 1977 SC 74** followed. Will must be proved to have been executed and attested as indicated in law. Free violation of execution after knowing and understanding contents of by the testator should also be proved to dispel any suspicious circumstance. **(1998) 4 SCC 384** follwed.

Testatrix an old lady suffering from fracture of femur. Died within three weeks of execution of will. It is a suspicious circumstance. Not registered during her life. No mention of earlier will are further suspicious circumstances which should be dispelled by propounder.

The scribe was an Advocate contradicting propounder. Evidence not found worthy to rely will become suspicious.

Will attesting witnesses and scribe of will not proving execution of the will according to law. Deposition doubtful. Will not proved.

If a will duly proved by attesting witnesses, testatrix writing will in her own handwriting. She also read over the will to attesting witnesses will duly proved.

●

85. WORDS AND PHRASES : "ORDER":-
1999 (2) JLJ 156
MOHD. YUSUF Vs. STATE OF M.P.

The word "order" means a mandate, a command, a request or a species of writing, embodying a request, direction to do something or not to do something. It includes all kind of orders including a formal order. It also includes every decision taken by Court or Aurhotiry. It indicates some expression of opinion which is to be carried out or enforced. It is the conclusion of a body, i.e. a Court, Authority or Tribunal upon any motion. It includes all decisions taken at different stages.

●

86. CIVIL SERVICES : MARRIAGE:-
1999 (2) JLJ 368
JEETU Vs. NAGAR PALIKA PARISHAD

Remarriage of widow, does not remain widow nor dependant of deceased husband. Widow appointed on compassionate ground after death of her husband is not entitled to continue on the post after remarriage. Major son acquires such right.

●

87. MOTOR VEHICLES ACT, 1988, SECTIONS 140, 141, 147, 168 AND 173 (1) :-
1999 (2) JLJ 338
ORIENTAL INSURANCE CO. LTD. Vs. GOPAL SINGH

Payment made as interim award. Merges in the final award to be passed, under S.168 Cover-note issued on 29th. Commences from midnight of 28th. Accident taking place at 6 a.m. on 29th is covered. Insurer is liable alongwith owner and driver of the vehicle. **(1990) 2 SCC 680** followed. **1997 (2) JLJ 17** approved. **(1997) 1 SCC 66, (1998) 1 SCC 365** and **(1998) 6 SCC 534** distinguished.

●

88. MOTOR VEHICLES ACT, 1939, S. 92-A : TIME OF INSURANCE:-
1999 (2) JLJ 415
NEW INDIA ASSURANCE CO. LTD. Vs. SMT. SITA BAI AND OTHERS

Cover note timed and dated. Liability of insurer commences from the time put on cover note. Accident took place before that time. Insurer is not liable to pay interim compensation. **JT 1990 (2) SC 164 distinguished. C.A. 1550/94** and **AIR 1997 SC 2147** relied on.

●

89. **MOTOR VEHICLES ACT, SECTIONS 147 (5) AND 149 (1) READ WITH SECTION 154 CR.P.C. RELATING TO F.I.R:-**
1999 (2) JLJ 395 (DB)
BAPU Vs. KARAN SINGH

Maker and writer of FIR not examined. Statement of eye witness given on oath in claim case cannot be disbelieved on the basis of such FIR. The insurer may be entitled to avaid liability of paying compensation on some grounds. Still it is liable to pay compensation to person entitled under award. It can take step to recover same from insured. **1996 ACJ 1178 (SC)** followed.

Offending vehicle carrying more passengers than permitted. Insurer is still liable to pay compensation. May recover same from insured.

90. **COURT AND CONTEMPT OF COURT ACT, SECTIONS 12 AND 14:-**
1999 (2) JLJ 382
JAMUNA PRASAD JAISANI Vs. SMT. SHIKHA DUBEY, COLLECTOR

The High Court suspended the conviction of the member of the Panchayat. Subsequent removal from office of Panch on the basis of conviction amounts to contempt of High Court. Contemner, Smt. Shikha Dubey, Collector, Harda has been summoned for answering the charge dis-obeying the order of the High Court though in plain English language not understood by the Administratve Officer. Such Officer should seek legal advise and approach the Court for clarification. Guardian of law and order pleading ignorance of language. It is sad commentary of state of affairs in the State. One may say with Hamlet "Something is rotten in the State", Order of the Court if not acceptable to Government Officers they should seek legal remady. They are not supposed to act as ordinary street urchins. If they disobey, they violate the rule of law.

EXTRACTS FROM THE JUDGMENT :

5. Looking to the facts that she has been summoned before this Court for the first time and that she has withdrawn the offending order passed by her, this Court is of the view that it would be in the interest of justice of accept her apology rather than passing a sentence of conviction under the Contempt of Court Act. It is nevertheless duty of this Court to warn the contemner that any dis-obedience of the order passed by this Court or any other judicial Court is not likely to be tolerated in future. She should be more circumspect while discharging her duties as an administriative officer. It is pointed out to her that the "Courts of law, as Fountains of justice, represent the Majesty of law", and all the officers of her rank are especially expected to respect the Majesty of Law by following the legal procedure prescribed and not by over reaching the Courts in indirect manner. Had she been careful, she could have moved this Court for clarification/vacation of the order passed by this Court before taking any step to declare that office of the petitioner vacant. However, contrite as she is, this Court accepts her apology and discharges her after giving the above warning.

6. The Court notices the growing tendency amongst the officers of the Government who behave like an ordinary street urchins, when faced with an order of the Court, which appears them, unacceptable for whatever reason. As a rule, they should adopt a legal remady against such orders. The Courts can correct their errors. If it is not possible, they must obey the orders of Court literally. There is no escape. They cannot say that a particular order of a Court of law is unpalatable If they disobey, They violate the very rule of law, which is the foundation of their authority also.

●

91. CR. P.C., SECTIONS 161 AND 162, EVIDENCE ACT SECTIONS 27, 60, 138, 145 AND 155, I.P.C. SECTION 302:-
1999 (2) JLJ 354
RAMMIALIAS RAMESHWAR Vs. STATE OF M.P.

Section 162 of the Cr.P.C, Permits the cross examiner to use previous statement recorded under S. 161 for limited purpose of contradiction. To contradict a witness, therefore, must be to discredit the particular version of the witness. Unless the former statement has the potency to discredit the present statement, even if the latter is at variance with the former to some extent it would not be helpful to contradict that witness. ***Tahsildar Singh Vs. State of U.P., AIR 1959 SC 1012*** relied on.

Eye witness seeing incident of murder. Post event conduct of such witness varies from person to person. He did not inform police or family members of deceased. It is not his abnormal conduct. Incongruities coming in the evidence of maker of FIR and another eny witness Explanation not sought. Incongruities are immaterial. The very purpose of re-examination is to explain matters which have been brought down in cross- examination. It is not confined to clarification of ambiguities brought down in cross-examination. Any question can be put to get explanation. Eye witness examined at length. It is quite possible for him to make some discrepancies. All inconsistent statements not sufficient to impeach credit of witness. Former statement seemingly inconsistent with the statement need not necessarily be sufficient to amount to contradiction. In this case evidence of eye witness found creditable. Accused was punishable under Section 302 I.P.C.

●

92. NEGOTIABLE INSTRUMENTS ACT, SECTION 138 AND SICK INDUSTRIAL COMPANIES (SPECIAL PROVISIONS) ACT, 1985, SECTIONS 3 (1) (o) AND 22:-
1999 (2) JLJ 400
ROM INDUSTRIES LTD. (M/s.) AND ANOTHER Vs. STATE OF M.P.

Criminal complaint filed against public limited company much before its declaration as sick is not hit by these provisions, Criminal complaint against public limited company filed before its declaration as sick is not hit.

●

93. SPECIFIC RELIEF ACT, SECTIONS 16 (c) 20, 21, AND 22 & EVIDENCE ACT SECTION 114:-
1999 (2) JLJ 386 (DB)
MAHESH CHANDRA GUPTA Vs. A.K. MISHRA

Plaintiff deposing about availability of fund with him believed by two Courts. No interference in LPA can be made. Vendor not getting the land measured as agreed cannot say that time fixed for sale was essence of the contract. **AIR 1997 SC 1751** distinguished. Delay up to the period of limitation does not disentitle plaintiff to get decree. Rise in prices not a sole consideration to refuse decree. Plaintiff ever ready to perform his part cannot be refused decree. **AIR 1965 SC 1405** And **AIR 1996 SC 116** distinguished. **AIR 1996 SC 2150** followed.

In the present case plaintiff found entitled to decree for specific performance. Considerable time elapsed. Directed to pay balance price with interest @ 2% compoundable yearly. Plaintiff vendor deposing of National Savings Certificate with him but not producing the same. No adverse inference can be drawn against him. **1969 MPLJ 271 (SC)** distinguished.

●

94. M.P. ACCOMMODATION CONTROL ACT, SECTION 12 (1)-(b) : SUB-TENANT NOT NECESSARY PARTY :-
1999 (II) MPWN 5
KISHAN CHAND Vs. SMT. MANISHA LALWANI

Sub-tenant is not necessary party. He is bound by the decree.

●

95. CR. P.C. SECTION 319 : NEW ACCUSED:-
1999 (II) MPWN 12
MAHENDRA SINGH Vs. STATE OF M.P.

New accused cannot be summoned at intial stage of putting challan. Such accused can only be summoned after the evidence is recorded and if they are found guilty on the basis of material on record under Section 319 Cr.P.C.

●

96. CR.P.C., SECTION 378 (1), 454 (1) AND 452 : REFUND OF PROPERTY UNDER CR.P.C. APPEAL/ REVISION:-
1999 (2) JLJ 150
STATE OF M.P. Vs. GAURISHANKAR

Accused acquitted and property ordered to be given to accused under S. 452. Order under Section 452 Cr.P.C. is appealable Under Section 454 (1). One Compromise appeal against acquittal and handing over property may be entertained. Document relating to seized property not available on record. Accused should establish his entitlement to the property.

NOTE:- Judicial Officers are requested to note that in some cases the appeal lies from an order passed under Section 452 or 453 of the Cr.P.C. and

in rest of the cases the Revision lies. Please see the provisions of Section 454 Cr.P.C.

●

97. CONSTITUTION OF INDIA, ART. 227, BOARD OF REVENUE SUBORDINATION TO HIGH COURT:-
1999 R. N. 338 (HC)
MANGLU Vs. STATE OF M.P.

Board of Revenue is also subordinate to High Court like all other Tribunals/ Courts, under Art. 227 of the Constitution of India. The decision of Board of Revenue cannot be given preference on face of High Court decision.

Instead of following the judgment of the High Court, case was decided by the Board of Revenue and following decisions is given by it. It is the contempt of Court. Decision of Board of Revenue running counter to the decision of High Court is liable to be overruled.

●

98. CR.P.C., SECTION 394 (2) PROVISO : RIGHT TO CONTINUE APPEAL:-
1999 (2) JLJ 147
VIJAY SINGH Vs. STATE OF M.P.

Husband convicted with imprisonment who dies during the pendency of appeal. His wife may be granted leave to continue appeal as she wanted to remove the stigma attached with the name of her husband.

●

99. GUARDIAN AND WARDS ACT, SECTION 10: CUSTODY OF CHILD:-
1999 (II) MPWN 9
SANTRAM Vs. MRS. UTTARA KUMAR

Son properly educated and maintained by mother. Father not entitled to the custody of the son. Son becoming 15 years of age during litigation does not change the position.

●

100. LAND REVENUE CODE, 1959 (M.P.), SECTION 115, 116, 158 R/W LAND REVENUE AND TENANCY ACT, 1950 (M.B.) SECTION 54 (vii) AND ZAMINDARI ABOLITION ACT, 1951 (M.B.) SECTION 3 : RECORDING THE NAME OF THE PARTY:-
1999 RN 329 (HC)
BRAJ VALLABH Vs. STATE OF M.P.

Land not recorded in name of plaintiff in year 1950-51. He does not acquire right of pacca tenant. Person lawfully recorded as "mamuli maurusi" in revenue records of 1950-51 acquires right of pacca tenant. Person recorded as pacca tenant in column No. 4. Revenue authority cannot delete his name and record the same in column No. 10 as trespasser. Purchaser from pacca tenant acquires right of Bhumiswami on enforcement of the Code, on 1954. Land recorded in name of plaintiff as "mamuli maurusi" did not vest in State.

●

101. LAND REVENUE CODE, SECTION 165 AND T.P. ACT, SECTION 55:-
1999 RN 345 (HC)
PHAGUA Vs. RAMLAL

Sale deed executed for half of the actual price. Agreement of reconveyance also executed prescribing three years time. Such sale-deed is nominal and does not convey any title to the purchaser. He can receive the amount given as loan.

●

102. LAND REVENUE CODE, SECTION 165 (4):-
1999 RN 333 (HC)
NANDILAL Vs. SUNDERLAL

Vendor possessed only 6 acres of land. Transfer made in 1960 is hit by the provisions under section 165 (4).

●

103. M.P. LAND REVENUE CODE, SECTION 248 (1) AND (3):-
1999 RN 328 (SC)
STATE OF M.P. Vs. SIND MAHAJAN EXCHANGE LTD.

Decision under Section 248 (1) does not decide title to the land. Party aggrieved may file civil suit under Section 248 (3) for decision on title.

●

104. LIMITATION ACT, ARTICLE 60:
1999 RN 341
DINESH Vs. PANNALAL

Suit for setting aside alienation made by guardian, not filed within three years after attaining majority is barred by time.

●

105. LIMITATION ACT, ARTICLE 64:-
1999 (II) MPWN 16
MILLO BAI Vs. ARJUNLAL

Suit for possession of agricultural land filed after 12 years is barred by limitation.

●

106. MOTOR VEHICLES ACT, 1939, SECTION 95 AND MOTOR VEHICLES ACT, 1988 SECTION 147 :- LIABILITY OF INSURANCE COMPANY:-
1999 (2) TAC 687 (PAT. HC) (RANCHI BENCH)
NEW INDIA ASSURANCE CO. LTD. Vs. ARCHANA KUMARI

Motor insurance. Effective date of insurance cover was 9th January, 1989. Accident took place on 21st January, 1989 where as new Act of 1988 came into force on 1st July, 1989. Section 147 (2) Providing that any policy of insurance issued with any limit and in force immediately before the commencement of new Act, shall continue to be effective for a period of four months after such commencement or till the date of expiry of such policy whichever is earlier. Whether liability of Insurance Company will be governed according to

the terms of policy issued under the old Act of 139. It was held yes. Tribunal committed error of law in recording a finding otherwise.

Extent of liability of Insurance Company. Four persons of a family died in one accident. Four separate claims cases filed by same claimants. Contention that all four cases can be treated only one accident. Total liability of Insurer will be only Rs. 50,000 Whether liability of Insurance Company in Respect of one accident will be only Rs. 50,000/- as per policy. **Held** no. All four claim cases involving four separate deaths or injury will be treated as a separate accident.

●

107. MOTOR VEHICLES ACT, 1939, SECTION 96 (2) (b) (ii) (SECTION 149 (2) (a) (ii) OF ACT 59 OF 1988): DRIVING LICENCE:-
1999 (2) TAC 803 (KANT. HC)
NATIONAL INSURANCE CO. LTD. Vs. T. SHARANAPPA

Liability of Insurance Company. Driving licence. Defences available to Insurance Company. Plea of the Insurance Company regarding breach of condition viz. vehicle was driven without obtaining a valid driving licence on the date of accident. Reply of the owner that his licence was not traceable. Insurance Company failing to summon any witness or documents from R.T.O. in support of its plea. Whether Insurance Company can be exempted from liability to pay compensation. Held no. Insurance Company failed to discharge its burden to prove or establish that owner of Moped had no driving licence. Insurance Company held liable for payment of compensation.

●

108. MOTOR VEHICLES ACT, 1939, SECTION 149 (2) (a) (ii) : DRIVING LICENCE:-
1999 (2) TAC 742 (MP HC)
NEW INDIA ASSURANCE CO. LTD. Vs. VIDHYA BAI

Defences available to Insurance Company. Motor Insurance. Driving licence. Contention of the insurer that driver of truck was holding a fake licence. Administrative officer of insurer produced an application by surveyor on which Licensing Authority made remark that licence was not issued by his office. Surveyor's report produced but no official examined to prove that no such licence was issued to driver even after opportunity given to Insurer, no certificate from R.T.O. produced in relation to validity of licence. Whether insurance company can be exempted from liability of payment. Held no. In absence of record from Transport Authority indicating that driver had no licence at relevant time. Insurer cannot escape from its liability to satisfy the award.

●

109. MOTOR VEHICLES ACT, 1939, SECTION 166 : DEPENDANCY:-
1999 (2) TAC 711 (P&H HC)
RAJINDER PAL SHARMA Vs. JASWANT SINGH

Compensation. Death of son and daughter-in-law in one and same accident. Claim applications for compensation. Parents dependent on the son

and not on daughter-in-law. Compensation awarded for the death of son. Daughter-in-law not presumed to have been contributing her income or part thereof to father-in-law or mother-in-law but to her husband.

●

110. MOTOR VEHICLES ACT, 1988, SECTION 168 : DEDUCTIONS FOR LUMPSUM AMOUNT:-
1999 (II) MPWN 7
SUMAN VYAS (SMT) Vs. S. JAGJEET SINGH

Award of comepnsation, Deductions for lumpsum amount and for receiving the pension and insurance amount of deceased cannot be ordered.

●

111. CONSUMER PROTECTION ACT, SECTIONS 12, 17 & 21-A:-
1999 (3) CPR 9 (NC)
WEST BENGAL AGRO INDUSTRIES CORPORATION & ANOTHER Vs. SHRI BIJOY KUMAR ROY

Complainant purchased Power Tiller, on 21-4-89, which was found defective on use. Complaint was filed with the District Forum on 16-6-94 which directed replacement of the tiller with the new one. Plea of limitation was taken which was rejected by the State Commission. Defects were noticed in Tiller shortly after its purchase and within warnanty period of one year. Defects were brought in the notice of dealer as well as the manufacturer within the period of warranty. The cause of delay in filing complaint was the assuarance given by the dealer to get the defects rectified. Report given by Mechanic of the manufacturer corroborated the case of the complaint. No reason to interfere with the order of State Commission.

●

112. EVIDENCE ACT, SECTION 32 AND CR. P.C. SECTION 161:-
1999 (4) CRIMES 191 (SC)
SUKHR Vs. STATE OF U.P.

Under Section 161 of the Criminal Procedure Code Statement of injured recorded by police and said statement was treated as FIR, During trial the injured person died. Cause of death and time not known. Held, FIR as well as statement given by the injured to the investigating officer is not admissible as dying declaration under Section 32.

●

113. EVIDENCE ACT, SECTION 32 : DYING DECLARATION:-
1999 (4) CRIMES 150 (SC)
PAPRAMBAKA Vs. STATE OF A.P.

Dying declaration. Reliability of. Before recording statement of the victim doctor did not certify that the victim was in fit condition to make statement of the incident. magistrate after putting some questions to the victim then in the end recorded that while giving statement of the incident victim was in fit condition to make statement. At the end of dying declaration the doctor had certified

that the victim was conscious during recording of the statement. Consciousness and fit state of mind are distinct and not synonymous. Such dying declaration is doubtful. Conviction cannot be based on such doubtful dying declaration.

●

114. C.P.C., O. 26 R. 9: MEASUREMENTS OF PROPERTY : MINIMUM : REQUIREMENT:-
1999 (2) M.P.L.J. S.N. 27
KAPURI DEVI Vs. BHAGRI

Dispute between parties as to identity of land and also as to encroachment. Appointment of Commissioner to take measurement is the invariable rule when there is dispute as to boundary or as to encroachment. Trial Court directed to appoint a competent Revenue Officer and submit report. 1974 MPLJ SN 65, 1991 MPRCJ NOC 65 and 1975 MPLJ 801 referred.

●

115. EASEMENTS ACT, SECTIONS 15 AND 33 : ALTERNATIVE WAY AVAILABLE, EFFECT OF:-
1999 (2) M.P.L.J. S.N. 33
SUNDERLAL Vs. SHIVHARI

Plaintiff enjoying right of way from main road to his house through "Khandhar" for more than 30 years. Right of way of plaintiff obstructed by defendants by putting a fence. Defendants proceeded ex parte in suit but plaintiff's claim rejected on the ground that he has an alternative way to his house. Right of plaintiff based on easement by prescription over disputed land could not be negatived on mere existence of an alternative way. Claim decreed.

●

116. M.P. ACCOMMODATION CONTROL ACT, SECTION 12 (1) (o) AND COURT FEES ACT, S. 7 (xi) (cc):-
1999 (2) M.P.L.J. 686
MADAK CHAND JAIN Vs. SMT. FATMA BAI

Suit for eviction comprising tenanted premises and encroached protion. No separate court fee payable in respect of encroached portion. In respect of claim as made for eviction court-fee is payable under Section 7 (xi) (cc) of the Court Fees Act.

●

117. LAND ACQUISITION ACT, SECTION 4 (1) : ACTION FOR ACQUISTION OF LARGE AREA COMPRISING OF SEVERAL PLOTS:-
1999 (2) M.P.L.J. 714
SIYARAM VS. STATE OF M.P.

Specification of particular land needed for specific purpose not necessary. Notification under publication of its substance in locality. Presumption under Section 114 (c) of Evidence Act could be drown for discharge of official

duties. The purpose of acquisition, The public purpose 'New Housing Policy' indicated in Notification. Said notification is valid. Notification under section 4 (1) Land Acquisition for 'Housing Scheme' by Housing Board. Specification of public purpose can only be with reference to acquisition of whole area. State must exercise its statutory power fairly. Person aggrieved must also act with utmost despatch for redressal of his grievances. Exercise of jurisdiction in the interests of justice and not merely on the making of a legal point.

●

118. CRIMINAL TRIAL : APPRECIATION OF EVIDENCE, EVIDENCE ACT, SECTIONS 32 AND 45, I.P.C. SECTION 302 AND ARMS ACT SECTION 27:-

2000 (1) M.P. HIGH COURT TODAY 183

VIJAY SINGH Vs. THE STATE OF M.P.

The deceased said to have been shot with a gun in broad day light at a place where large number of persons were present and had witnessed the crime. But all the eye witnesses, including the brother of the deceased who was himself injured in the incident, turned hostile and not supporting the prosecution story. The only evidence against the accused consisted of report made by the deceased to the police and his statement recorded by executive magistrate, both treated as dying declarations, stating that at the exhortation of accused Vijaysingh the latter's son, accused Manoharsingh had fired at the deceased, causing injury on his private part and on one of his buttocks. Medical evidence proving injuries although wrongly stating the buttock injury as entry wound, instead of exit wound. Held, on close scrutiny of the dying declarations there was no infirmity in them. Conviction of accused Manoharsingh for the offence under Section 302 IPC and of accused Vijaysingh for the offence under Section 302/ 34 I.P.C. recorded by the trial Court mainly on the dying declarations, upheld by the High Court.

EVIDENCE ACT, SECTION 32, DYING DECLARATION:-

To be admissible as dying declaration the statement must relate to the cause of death or as to any circumstance of the transaction which resulted in the death of the deceased, Statements of the deceased, treated as dying declarations, stating about his being fired at by one of the accused upon exhortation of the father of that accused. The firing taking place on 18-1-1989. The deceased dying after about 3 months, i.e. on 22-4-1989; Throughout that period, the deceased remaining admitted in Medical College Hospital, when operation was also done upon him in order to manage his injuries. Death due to peritonities resulting in toxaemia. Held it was not necessary that death should have got nexus in terms of fixed time with the statement, Statements of the deceased relating to the circumstance of the transaction which resulted in his death and were properly admitted as dying declarations. JT 1998 (3) SC 449 and AIR 1997 SC 768 relied on.

EVIDENCE ACT, SECTION 45 : EXPERT'S EVIDENCE:-

The doctor's evidence that gluteal wound of the deceased was an entry

wound. No reasons given by the doctor in support of his opinion. Also contradictory to medical opinion expressed by eminent doctors or experts in their text books on Medical Jurisprudence. Held the doctor's evidence was primafacie wrong and the Court was not bound by it.

I.P.C. Ss. 302 AND 302/34:- NATURE OF INJURY:-

A single gun shot fired by an accused on the exhortation of father of that accused causing piercing wound near the root of the penis of the deceased, resulting in entry exit wounds. The injury upon medical evidence was dangarous to life. The death occurring nearly three months after the incident in Medical College Hospital, where the deceased throughout remained admitted. An operation was also done on the deceased while he was admittedin the hospital. Death due to peritonitis resulting in toxaemia. Held, the shot was fired at vital part of the body; the death was the direct result of the gun shot injury and the accused who shot wanted to cause death. The accused who shot rightly held to have been convicted of the offence under Section 302 I.P.C. and his father of the offence under Section 392/34 I.P.C.

ARMS ACT, SECTION 27:-

The offence of using fire-arm. An accused firing at the deceased on exhortation by another accused, who was father of the first accused. Held asking another to shoot was not using of the fire arm and, therefore, the father committed no offence under section 27 of the Arms Act. His conviction under Section 27 of the Arms Act set-aside. The conviction of the son who actually shot was however, maintained for the offence under Section 27 of the Arms Act.

●

119. CR. P.C. SECTIONS 354 (3) AND 366 : CAPITAL PUNISHMENT:-
2000 (1) M.P.H.T. 160 (SC)
MOLAI Vs. STATE OF M.P.

Two accused asked by Jailor to work at his house in Jail. One of the accused was guard in the Jail and the other was convict undergoing jail sentence in the Jail. Confidence reposed in them. Both committing rape and murder of the young daughter of the jailor, aged about 16 years, while she was alone in the house. Both the accused then causing disappearance of body throwing it in a spetic tank of the house. No mitigating circumstances. Held, the case squarely fell in the category of rarest of the rare cases and the only proper punishment was capital punishment.

EVIDENCE ACT, SECTION 3 : CRIMINAL TRIAL : APPRECIATION OF EVIDENCE:-

Circumstantial evidence. Furnishing of false information by the accused when they were asked about the deceased. Held that this was circumstance which could be used against the accused. Two panchanama witnesses. Only one examined. effect of. The otherwitness need not be examined. Paragraph 27 partly reproduced:-

Mr. Shukla while assailing the findings as regards the recovery of various incriminating articles urged that the prosecution ought to have examined other panch witnesses to corroborate the evidence of Shyamji Singh (PW 7). No Such contention was raised in the Courts below and we do not think it proper to entertain at this late stage. In addition to this, it is not necessary to examine both the panch witnesses. If the accused wanted the other panch witness for cross examination, certainly he could have taken proper recourse during the trial.

●

120. CRIMINAL TRIAL : APPRECIATION OF EVIDENCE:-

2000 (1) M.P.H.T. 153

RAMMI Vs. STATE OF M.P.

The trial Court pointed out that he did not inform the members of the family of the deceased nor did he bring this matter to the notice of the police. The Sessions Judge regarded the above as a conduct incompatible with the normal behaviour of a person witnessing such a crime. Such a remark on the conduct of a person who witnessed **the murderous attack is least justified in the realm of appraciation of evidence. This Court has said time and again that the post event conduct of a witness varies from person to person. It cannot be a cast-iron reaction to be followed as a model by everyone witnessing such event. Different persons would react differently on seeing any violence and their behaviour and conduct would, therefore, be different.**

EVIDENCE ACT, SECTION 138:- PURPOSE OF RE-EXAMINATION:-

There is an erroneous impression that re-examination should be confined to clarification of ambiguities which have been brought down in cross-examination. No doubt, ambiguities can be resolved through re-examination. But that is not the only function of the re-reexaminer. If the party who called the witness feels that explanation is required for any matter referred to in cross-examination, he has the liberty to put any question in re-examination to get the explanation. The Public Prosecutor should formulate his questions for that purpose. Explanation may be required either when ambiguity remains regarding any answer elicited during cross-examination or even otherwise. If the Public Prosecutor feels that certain answers require more elucidation from the witness he has the freedom and the right to put such questions as the deems necessary for that purpose, subject of course to the control of the Court in accordance with the other provisions. But the Court cannot direct him to confine his question to ambiguities alone which arose in cross-examination.

EVIDENCE ACT, SECTIONS 145 AND 155:-

Mere inconsistency in evidence is not sufficient to impair the credit of a witness. Only such inconsistency as amounts to contradiction affects the credit of a witness.

(**NOTE** : Mark the distinction between the words 'omission', 'inconsist-

ency' and 'material contradiction'. For that please go through Section 154 Evidence Act read with Sections 161 and 162 Cr.P.C. also)

Merely because there is inconsistency in evidence it is not sufficient to impair the credit of the witness. No doubt, Section 155 of the Evidence Act provides scope for impeaching the credit of a witness by proof of inconsistent former statement. But a reading of the Section would indicate that all inconsistent statements are not sufficient to impeach the credit of the witness. A former statement though seemingly inconsistent with the evidence need not necessarily be suffifcient to amount to contradiction. Only such of the inconsistent statement which is liable to be "contradicted" would affect the credit of the witness. To contradict a witness, therefore, must be to discredit the particular version of the witness. Unless the former statement has the potency to discredit the present statement, even if the latter is at variance with the former to some extent it would not be helpful to contradict that witness.

●

121. M.P. ACCOMMODATION CONTROL ACT, SECTIONS 23-A AND 23-A (a) : CO-OWNER ENTITLED TO POSSESSION
2000 (1) M.P.H.T. 266
MOHAMMAD ISMIL Vs. MEHMOODA KHANAM

An owner of a house cannot be denuded of his or her rights while affording statutory protection to the tenant. After all he cannot become practically an owner of that house. That is not the legislative intent. The landlord must get possession of the house back when it is required by her for own residence, otherwise it will be a self-defeating exercise to achieve the goal of socio-economic justice.

There is a statutory presumption incorporated in Section 23-D (3) of the Act that requirement of the landlord under Section 23-A (a) of the Act is bonafide. Apart from this statutory provision the applicant by the evidence on record has proved her bonafide requirement.

"Jurisprudentially is not correct to say that a co-owner of a property is not its owner. He owns every part of the composite property along with others and it cannot be said that he is only a part-owner or a fractional owner of the property.... a co-owner is as much an owner of the entire property as any sole owner and the absence of other co-owners will not disentitle a co-owner from maintaining an action for eviction when the other co-owners do not object to the same". In view of this legal position the applicant is entitled to maintain the action for eviction as co-owner even if it is assumed that the said HIBA suffers from any legal infirmity.

●

122. I.P.C., SECTION 295 : SUICIDE BY A MALE PERSON:-
2000 (1) M.P.H.T. 295
RAM SEWAK Vs. STATE

Suicide by a mele person occasioned due to threats by persons enemical to him. Person giving threats cannot be said to have abetted the commission

of suicide. No presumption of abetment under Section 114 Evidence Act also arises against them.

●

123. SCHEDULED CASTE AND SCHEDUL TRIBE (PREVENTION OF ATROCITIES) ACT, SECTION 3 (1) (v):-
2000 (1) M.P.H.T. 281
JANGGU ALIAS SHOBIT Vs. STATE OF M.P.

The offence of dispossession from any land or premises, stated in the first clause of section 3 (1) (v), does not take place unless the prosecution establishes that the concerned member of Scheduled Caste or Scheduled Tribe was in possession of the land or premises, of which he was subsequently disposed. Prosecution failing to establish the possession. Offence held not committed.

●

124. SERVICE LAW: DEPARTMENTAL ENQUIRY:-
2000 (1) M.P.H.T. 216
MUKHUL Vs. S.B.I.

HAND WRITING EXPERT : OPINION EXAMINATION OF:-

The report of Handwriting expert admitted in evidence without examination of Hand-writing expert. But the Handwriting expert not examined as the employee himself opposed the prayer for his examination made by the Presenting Officer. Held, that because of the conduct of the employee himself non-examination of the Handwriting expert did not vitiate the enquiry.

NOTICE OF THE PROPOSED PUNISHMENT NOT GIVEN EFFECT OF:-

Notice of the proposed punishment was not given to the employee. Held, this was not necessary as the concerned serevice Rules did not provide for such notice to be given.

NON-SUPPLY OF ENQUIRY REPORT BEFORE THE ORDER OF PUNISHMENT WAS PASSED EFFECT OF:- Non- supply of enquiry report to the employee before the order of punishment was passed by the disciplinary authority. The concerned service Rules not requiring the furnishing thereof at that stage. The order of the disciplinary authority also prior to the cut-off date laid down in the case of ***Union of India and Ors. Vs. Mohd. Ramzan Khan, (1991) 1 SCC 588.*** Held, the non-supply of the enquiry report at the above stage was of no consequence.

DEPARTMENT EQUIRY : NO REASONS ASSIGNED IN SUPPORT OF THE CONCLUSION: EFFECT OF:-

No reasons given either by the disciplinary authority or the appellate authority in support of its conclusion. The concerned Service Rules not contemplating the giving of reasons. Held, in case the disciplinary authority as also the appellate authority agreed with the findings of the Enquiry Officer, no detailed reasons were required to be given. **1995 AIR SCW 4117** relied on.

INTERFERENCE BY THE COURT TO WHAT EXTENT:-

Interference by the High Court with the quantum of punishment. Ordinarily no interference by the High Court unless the penalty imposed is schocking to the conscience of the Court or is disproportionate to the gravity of the allegations. **AIR 1999 S.C. 578** relied on.

125. CRIMINAL TRIAL :- PLEA BARGAINING

(1999) 8 SCC 638

STATE OF UP Vs. CHANDRIKA

The respondent along with two others was charged under Section 302 read with Sections 307 and 34 IPC for committing murder. The Sessions Judge convicted the respondent under Section 304 IPC and sentenced him to undergo eight years' RI. Aggrieved by the said order, the respondent preferred an appeal before the High Court and at the time of hearing he opted not to challenge the findings of conviction recorded by the trial court with a view to bargain on the question of sentence. A Single Judge of the High Court accepted the bargain and allowed the appeal by observing. inter alia, that as the incident had taken place long back and since the appellant had been in jail for some time, both as undertrial prisoner and as a convict, it was desirable to substitute his remaining period of jail sentence as awarded by the trial court and altered the sentence to the period of imprisonment already undergone (without stating the actual period of imprisonment undergone by the respondent) plus a fine of Rs. 5000, in default of payment RI for six months. Allowing the appeal, the Supreme Court

Held:

The concept of "plea bargaining" is not recognised and is against public policy under our criminal justice system. Section 320 Cr.P.C. provides for compounding of certain offences with the permission of the court and certain others even without permission of the court. Except the above, the concept of negotiated settlement in criminal cases is not permissible. This method of short circuiting the hearing and deciding the criminal appeals or cases involving serious offences requires no encouragement. Neither the State nor the Public Prosecutor nor even the Judge can bargain that evidence would not be led or appreciated in consideration of getting flea-bite sentence by pleading guilty. The Court has to decide it on merits. If the accused confesses his guilt, an appropriate sentence is required to be imposed. Further, the approach of the court in appeal or revision should be to find out whether the accuesed is guilty, not on the besis of the evidence on recevied. If he is guilty, an appropriate sentencess required to be imposed or maintained. If the appellant or his counsel submits that he is not challenging the order of conviction, as there is sufficient evidence to connect the accused with the crime, then also the court's conscience must be satisfied before passing the final order that the said concession is based on the evidence on record. In such cases, sentence commensurate with the crime committed by the accused is required

to be imposed. Mere acceptance or admission of the guilt should not be a ground for reduction of sentence. Nor can the accused bargain with the court that as he is pleading guilty the sentence be reduced.

●

126. J.T. (JUDGMENT TO-DAY) 1999 (7) SC. 355

BHASKAR @ PRABHAKAR Vs. STATE S. 326 Cr.P.C.

Terrorist and Disruptive Activities (Prevention) Act 1987- Sections 1 (4), 3,5,9,12,14,18- Indian Penal Code 1860, Sections 302 read with 120B along with Tamil Nadu Property (Prevention of Damage and Loss) Act 1992- Section 4 -TADA- Expiry due to efflux of time-Designated court ceasing to function- Effect-Held offences not falling under TADA could be continued in regular criminal court.

TADA- Designated court- Who could be appointed as Judge- Designated court framing charge- There after Designated court ceasing to function due to expiry of TADA- Case made over to Additional Sessions Judge. Held since the Designated court is in effect a Sessions Court the powers and procedure are same and as such transfer the case to Additional Sessions Judge proper.

Terrorist and Disruptive activities, Prosecution- Procedure- Designated Court framing charges against appellant accused- Expiry of TADA due to efflux of time Case made over to Additional Sessions Judge-Judge proposing to proceed with trial from the stage at which Designated Court ceased to function-Appellant requiring the court to start the proceedings de novo Trial court over ruling the objections-High Court declining to reverse the progress of the Trial. Held conclusion of Trial Court confirmed by High Court unassailable.

It was held that the fall out of non- existence or cessation of the existence of a Designated Court is that no offence under TADA can be tried against any accused. But what would happen to the offences not falling under TADA, which could be tried in regular Sessions Court? The answer is simple that the case then must go for trial to a regular court.

The Judge of the Designated Court is in effect a Sessions Judge, his powers are those of a Sessions Judge and the procedure to be followed by him is that of a trial before a Court of Sessions. In Such a situation when the judge of Designated Court ceased to have jurisdiction on account of abolition of that court, the Sessions Judge to whom the case is transferred for trial of the offences charged (after dropping out the offences under TADA) must be regarded as a successor Judge. It is immaterial that such successor Judge cannot try the offences under TADA or that in the trial before a Designated Court certain items of materials could be admitted as evidence which could not get such admission in the trial before regular criminal courts.

The court cannot afford to be oblivious to the reality that no witness is, on his own volition, desirous of going to the court for remaining there until his turn is called to mount the witness stand and to undergo the agony of facing gruelling questions. He does it as he has no other option when summoned by the court. Most of the witnesses can attend the courts only by bearing with all the

inconveniences to himself and at the cost of loss of his valuable time. When any witness had already undergone such agony once in connection with the same case, no effort to save him from undergoing that agony once again for the very same case should be spared, unless such re-sum morning is absolutely necessary to meet the ends of justice. On the contrary, no prejudice would be caused to the accused as he can invoke the powers envisaged in the proviso to sub-section (1) of Section 326 of the Code. If the successor Judge is of opinion that further examination of any witness, whose evidence has already been recorded is necessary in the interest of justice, the Judge would re-summon such witness either for further examination or further cross-examination and re-examination. When such a course is permitted by law there can be no possible grievance for the accused that prejudice would be caused to him if the evidence already on record is treated as evidence in the case.

●

127. BOMBAY STAMP ACT, 1958, SECTIONS 2 (q), 32-A r/w Sch I, Art. 25 Expl. 1:-

(1999) 5 SCC 725

VEENA HASMUKH JAIN Vs, STATE OF MAHARASHTRA

Paragraph 8 and 9 of the judgment are reproduced:-

The duty in respect of an agreement covered by the Explanation is leviable as if it is a conveyance. The conditions to be fulfilled are that if there is an agreement to sell immovable property and possession of such property is transferred to the purchaser before the execution or at the time of execution or subsequently without executing any conveyance in respect thereof, such an agreement to sell is deemed to be a "conveyance". In the event a conveyance is executed in pursuance of such agreement subsequently, the stamp duty already paid and recovered on the agreement of sale which is deemed to be a conveyance shall be adjusted towards the total duty leviable on the conveyance. Now, in the present case, the agreement entered into clearly provides for sale of an immovable property and there is also a specific time within which possession has to be delivered. Therefore, the document in question clearly falls within the scope of Explanation I. It is open to the legislature to levy duty on different kinds of agreements at different rates. If the legislature thought that it would be appropriate to collect duty at the stage of the agreement itself if it fulfils certain conditions instead of postponing the collection of such duty till the completion of the transaction by auction of a conveyance deed in as much as all substantial conditions of a conveyance have already been fulfilled such as by passing of a consideration and delivery of possession of the property and what remained to be done is a mere formality of execution of a sale deed, it would be necessary to collect duty at a later (sic agreement) stage itself though right, title and interest may not have passed as such. Still, by reason of the fact that under the terms of the agreement, there is an intention of sale and possession of the property has also been delivered, it is certainly open to the State to charge such instruments at a particular rate

which is akin to a conveyance and that is exactly what has been done in the present case. Therefore, it cannot be said that levy of duty is not upon the instrument but on the transaction. Therefore, we reject the contention raised on behalf of the appellants in that regard.

The learned counsel for the appellants urged that the character of an instrument cannot be determined by reason of a subsequent event to take place such as handing over of possession. But a close examination of the provisions of the Explanation will make it clear that in the case of an agreement to sell immovable property possession is transferred at any time without executing the conveyance in respect thereof and such an instrument is deemed to be a "conveyance". The object of the Explanation is clear that if an agreement is entered into and that agreement itself contemplates the delivery of possession of the property within the stipulated time, then such an agreement should be deemed to be a conveyance for the purpose of duty leviable under the Bombay Stamp Act.

[**Note :** Please refer toArt. 23 Sch. I-A of the Stamp Act (M.P. Amendment.)]

●

128. PRACTICE AND PROCEDURE : PARTIES:-
(1999) 5 SCC 711
JOSEPH Vs. BATHO MARY

Parties instituting new proceedings in connection with subject matter already under litigation are bound to notify their opposite parties in the earlier proceedings.

Paragraphs 6 and 7 of the judgment are reproduced:-

The most crucial aspect in this case is the admitted premise that the appellants were kept in complete darkness about the joint applications when they chose to file OA No. 1810 of 1971. Even the Land Tribunal was kept in the the dark that another application for the same land was filed by the appellants and which was hostly contested by the contesting respondents.

Learned Single Judge had not disputed the proposition that when fraud is established the appellants have a right to institute a suit for a declaratory decree that the resultant order is vitiated and is therefore a nullity. At any rate the binding legal position on that score in the state of keral was based on a decision of the High Court in ***Velappan Vs. Thomas, 1979 KLT 412.*** Though a reference to the said decision was made by the learned Single Judge in the impugned judgment, its correctness has not been doubted.

●

129 ATTENTION
S. 3/7 AND S. 12A, 12AA OF THE E.C. ACT
ORDER IN M. CR.C.NO 6111/ 1999 DECIDED ON 15.10.1999 *NEMCHAND AGRAWAL Vs. STATE*, ORDER PASSED BY HON'BLE JUSTICE SHRI DIPAK MISRA AT JABALPUR MAIN SEAT OF M.P. HIGH COURT, JABALPUR.

1. In this application preferred under section 438 of the Code of criminal Procedure (hereinafter referred to as 'the code') the applicant has sought for grant of privilege of anticipatory bail in connection with crime No. 58/99 instituted for offences punishable under sections 3/7 of the Essential Commodities Act for violation of Motor Spirit and High Speed Diesel (Prevention of Malpractices in Supply and Distribution) Order, 1999, The Kerosene (Restriction on use and fixaction of celling prices) Order, 1993 and M.P. Kerosene Dealers Licensing Order, 1979.

2. It is not necessary to state the nature of allegations against the applicant as Mr. Manish Datt, learned counsel for the applicant, has urged that the offences punishable under sections 3/7 of the Essential Commodities Act have become bailable and in that event an application for grant of anticipatory bail would not be maintainable but the learned Special Judge, Raigarh has not been able to appreciate the same, and therefore, the applicant has been compelled to approach this Court for grant of anticipatory bail.

3. On 25-9-99 when the matter was taken up for hearing Miss Alka Pandya, learned Govt. Adv. for the State, had urged with vehemence that the offences are non-bailable in nature and the applicant does not deserve the privilege of anticipatory bail.

4. Mr. Manish Datt, learned counsel for the applicant, has contended that the (The) Essential Commodities (Special Provisions) Act, 1981 (Act No. 18 of 1981) was brought into existence to deal more effectively with persons indulging in hoarding and black-marketing of, and profiteering in essential commodities, and initially it was for a period of 10 years but later on period of 10 years stood amended by period of 15 years by Essential Commodities (Special Provision Amendment) Act, 1993 (Act No. 34 of 1993) and the said stature was a temporary statute and had spent its force. after expiry of 15 years. It is his further submission that after the expiry of the said Act the (The) Essential Commodities (Special Provisions ordinance, 1997 (No. 21 of 1997) was brought into force on 3.10.97, and there after, (The) Essential Commodities (Amendment) Ordinance, 1998 (No. 13 of 1998) was brought into existence on 25-4-98 but at the time of institution of the present case the ordinance had lost its force, and therefore, there is no provision at present declaring the offences under sections 3/7 of the Exsential Commodities Act to be non-bailable.

5. It is worth noting here that when the matter was taken up for hearing on 1.10.99 Mr. Tankha, learned advocate General, had prayed for sometime to find out whether any fresh ordinance has come into existence. Mr. R.S. Patel, learned standing counsel for Union of India, he also prayed for time to obtain instructions. On 6-10-99 Miss. Alka Pandya, learned Govt. Adv. and Mr. R.S. Patel, learned standing counsel, made statements that no fresh ordinance has been promulgated.

6. Indisputedly, under the Essential Commodities Act, 1955 (Act No. 10 of 1955) the offences punishable under sections 3/7 of the Act were bail-

able. In the 1981 Act Section 10-A of the principal Act was amended, after the words "cognizable". the words "and non-bailable were incorporated. The 1981 Act was to remain in force for a period of 10 years. By virtue of amendment in the 1993 "period of ten years" was substituted as "fifteen years". After the expiry of Act the (The) Essential Commodities (Special Provisions) Ordinance, 1997 was promulgated and in the said ordinance section 10-A of the principal Act stood substitute as under:-

> "10-A Provision as to cognizance and bail- Not withstanding anything contained in the code of criminal Procedure, 1973 (2 of 1974) every, offence punishable under-
>
> (a) This Act shall be cognizable.
>
> (b) This Act except the offence punishable under Sub- clause (i) of Clause (a) of Sub-sec. (1) of Sec. 7 shall be non-bailable.
>
> (c) Sub- clause (i) of Clause (a) of Sub-sec. (1) of Sec. 7, if committed more than once shall be non-bailable."

The said provision continued as such under the (The) Essential Commodities (Amendment) ordinance, 1998. The 1998 ordinance was promulgated on 25.4.98 and was published in the Gazette on the same date. As admitted, no further ordinance has come into force. In view of this, there remains no iota of doubt that the offences punishable under sections 3/7 of, the Essential Commodities Act, 1955 are no more non- bailable.

7. In view of the aforesaid the application under section 438 of the Code is not maintainable. The application is accordingly rejected.

(नोट अध्यादेश की नकल भी यहां प्रकाशित की जा रही है। यह समस्त सामग्री श्री एस.सी. सिन्हों, जिला न्यायाधीश टीकमगढ़ ने उपलब्ध कराई है)

THE ESSENTIAL COMMODITIES (AMENDMENT) ORDINANCE, 1998

NO. 13 OF 1998

Published in Gazette of India (Extraordinary) Part II. Section I dated 25-4-98 Pages 1-4.

CONTENTS

Promulgated by the President in the Forty-ninth year of the Republic of India.

An ordinance further to amend the Essential Commodities Act, 1955.

Whereas Parliament is not in session and the President is satisfied that circumstances exist which render it necessary for him to take immediate action;

Now therefore, in exercise of the powers conferred by clause (1) of article 123 of the Constitution, the President is pleased to promulgate the following Ordinance:-

1. **Short title and comencement-**

(1) This Ordinance may be called the Essential Commodities (Amendment) Ordinance, 1998.

(2) **It shall come into force at once.**

2. **Amendment of Section 2.-** In Section 2 of the Essential Commodities Act, 1955 (hereinafter referred to as the principal Act),-

(a) clause (ia) shall be re- numbered as clause (iia), and before clause (iia) as so re-numbered, the following clause shall be inserted, nemely:-

(ia) "Code" means the Code of Criminal Procedure, 1973 (2 of 1974); and

(b) in clause (a), sub-clause (iii) shall be omitted:

(c) after clause (e), the following clause shall be inserted, nemely:-

"(f) words and expressions used but not defined in this Act and defined in the Code shall have the meanings respectively assigned to them in that Code."

3. **Amendment of Section 3.-** In Section 3 of the principal Act,-

(i) In Sub-section (2), to clause (i), the following proviso shall be inserted, nemely:-

"Provided that where a person authorised under an order issued under this section to make the entry, search, examination or seizure is below the rank of a Magistrate of the first class or its equivalent, he shall obtain prior permission of an officer not below the rank of a Magistrate of the first class or its equivalent before making such entry, search, examination or seizure.",

(ii) after sub-section (2), the following sub- section shall be inserted, nemely:-

(2A) An order made under this section may provide for certain allowance for difference between physical stock and stock in record of any essential commodity which may occur due to climatic conditions or handing of the essential commodity."

4. **Amendment of Section 6A.-** In section 6A of the principal Act, for the proviso to sub-section (2), the following proviso shall be substituted, namely:-

"Provided that, in case of any essential commodity the retail sale price where of has been fixed by the Central Government or a State Government under this Act or under any other law for the time being in force and which is being sold through fair price shops, the Collector may, for its equitable distribution and availability at fair prices, order the same to be sold through fair price shops at the price so fixed."

5. **Amendment of Section 7.-** In section 7 of the principal Act,-

(a) In sub-section (1), in clause (a)-

(i) for sub-section (i), the following sub-clause shall be substituted, nemely:-

"(i) in the case of an order made with reference to clause (h) or clause (i) of sub- section (2) of that section, with imprisonment for a term which may extend to one year, or with fine which may extend to ten thousand rupees, or with both:

Provided that, if any person is again convicted of the same offence under this sub-clause, he shall be punishable with imprisonment for the second and for every subsequent offence for a term which shall not be less than three months but which may extend to one year and with fine which may extend to twenty thousand rupees or with both:

Provided further that the court may, for any adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than three months."

(ii) in sub-clause (ii) for the words "seven years and shall also be liable to fine", the words **"two years and shall also be liable to fine which shall not be less than twenty-five thousand rupees"** shall be substituted."

(b) in sub-section (2), for the words "seven years and shall also be liable to fine", the words **"two years and shall also be liable to fine which shall not be less than twenty-five thousand repees"** shall be substituted;

(c) in sub-section (2A), for the words "seven years and shall also be liable to fine", the words **"two years and shall also be liable to fine which shall not be less than fifty-thousand repees"** shall be substituted.

6. **Amendment of Section 10A.-** For section 10A of the principal Act, the following section shall be substituted, namely:-

"**10A. Provisions as to cognizance and bill.-** Notwithstanding anything contained in the Code, every offence punishable under-

(a) this Act shall be cognizable;

(b) this Act, except under sub-clause (h) or sub-clause (i) of clause (a) of sub- section (1) of section 7, shall be non- bailable;

(c) sub- clause (h) or sub- clause (i) of clause (a) of sub-section (1) of section 7, if committed more than once, shall be non-bailable for the second and every subsequent offence."

7. **Insertion of new Section 10 AA.**- After section 10 A of the principal Act, the following section shall be inserted, nemely:-

"10AA, Power to arrest- Notwithstanding anything contained in the Code, no officer below the rank of sub-inspector of police shall arrest any person accused of committing an offence punishable under this Act."

8. **Omission of Section 12.**- Section 12 of the principal Act shall be omitted.

9. **Substitution of new section for Section 12 A.**- For section 12 A of the principal Act, the following sections shall be substituted, nemely:-

'12A. **Constitution of Special Court.**- (1) The State Government may, for the purpose of providing speedy trial of the offences under this Act, by notification in the Official Gazette, constitute as many Special Courts as may be necessary for such area or areas as may be specified in the notification.

(2) A Special Court shall consist of a single judge who shall be appointed by the High Court upon a request made by the State Government.

Explanation.- In this sub-section, the word "appoint" shall have the meaning given to it in the Explanation to section 9 of the Code.

(3) A person shall not be qualified for appointment as a judge of a Special Court unless-

(a) He is qualified for appointment as a Judge of a High Court, or

(b) he has, for a period of not less than one year, been a Sessions Judge or an Additional Sessions Judge.

12 **AA. Offences triable by special courts.**- (1) Notwithstanding anything contained in the Code,-

(a) all offences under this Act shall be triable only by the Special Court constituted for the area in which the offence has been committed or where there are more Special Courts than one for such area, by such one of them as may be specified in this behalf by the High Court;

(b) a Special Court may upon a perusal of police report of the facts constituting an offence under this Act or upon a complaint made by an Officer of the Central Government or a State Government authorised in this behalf by the Government concerned or any person aggrieved or any recognised consumer association, whether such person is a member of that association or not, **take cognizance of that offence without the accused being committed to it for trial.**

(c) all offences under this Act shall be tried in a **summary way** and the provisions of sections 262 to 265 (both inclusive) of the Code shall, as far as may be apply to such trial:

Provided that in the case of any conviction in a summary trial under this Section, it shall be lawful for the Special Court to pass a sentence of imprisonment for a term **not exceeding two years.**

(2) When Trying an offence under this Act, a Special Court may also try an offence other than an offence under this Act, with which the accused may, under the Code, be charged at the same trial:

Provided that such other offence is, under any other law for the time being in force, triable in a summary way:

Provided further that in the case of any conviction for such other offence in such trial, it shall not be lawful for the Special Court to pass a sentence of imprisonment for a term exceeding the term provided for conviction in a summary trial under such other law.

(3) A Special Court may, with a view to obtaining the evidence of any person suspected to have been directly or indirectly concerned in, or privy to, an offence under this Act, tender a pardon to such person on condition of his making a full and true disclosure of the whole circumstances within his knowledge relating to the offence and to every other person concerned whether as principal or abettor in the commission thereof and any pardon so tendered shall, for the purposes of section 308 of the Code, be deemed to have been tendered under section 307 thereof.

12 AB. Appeal and revision.- The High Court may exercise, so far as may be applicable, all the powers, conferred by Chapters XXIX and XXX of the Code on a High Court, as if a Special Court within the local limits of the jurisdiction of the High Court were a Court of Sessions trying cases within the local limits of the jurisdiction of the High Court.

12AC. Application of Code to proceedings before a Special Court- Save as otherwise provided in this Act, **the provisions of the Code (including the provisions as to bail and bonds) shall apply to the proceedings before a Special Court and for the purposes of the said provisions, the Special Court shall be deemed to be a Court of Sessions** and the person conducting a prosecution before a Special Court shall be deemed to be a Public Prosecutor.

10. Repeal and saving.- (1) The Essential Commodities (Special Provisions) Second Ordinance, 1998 (Ord. 1 of 1998) is hereby repealed.

(2) Notwithstanding such repeal, if any appeal, application, trial, inquiry or investigation is pending immediately before such repeal, then, such appeal, application, trial, inquiry or investigation shall be disposed of, continued, held or made, as the case may be, in accordance with the provisions of the principal Act as amended by the Essential Commodities (Special Provisions) Ordinance, 1998 as in force immediately before the commencement of this Ordinance, as if, this Ordinance had not come into force.

●

GIVE US THE TOOLS AND WE WILL FINISH THE JOB

Winston Churchill

STAR FIRMAMENT:-

MOTOR VEHICLES ACT, SECTION 166 (3) AND LIMITATION ACT, ARTICLE 137 : ANY APPLICATION:-

2000 (1) M.P. H.T. 253

ORIENTAL INSURANCE COMPANY Vs. BANWANT SINGH AND OTHERS

The intention of the legislature caused by repeal of Section 166 (3) of 'the Act'. It is clarified by object and reason for omitting Section 166 (3) of 'the Act'. It is found that the legislature wanted to do away with the limitation altogether, as its working was found to be defective. Thus object and reasons indicate that the defect was to be cured by repealing Section 166 (3) of the Act. The Court is entitled to give full effect to the principle of 'purposive Construction' to the repeal of Section 166 (3) of the Act while applying the 'Mischief Rule'.

Thus the intention of legislature was not to apply Section 6 of the General Clauses Act, 1897. Therefore, the intention was not to save the operation of Section 166 (3) of the Act to pending cases or to cases where the 'cause of action' has already accrued. The intention of Parliament can be given full effect to by holding that it wiped out the disability imposed by Section 166 (3) of the Act with retrospective effect as if that sub-section stood repealed from date of the enforcement of "the Act". A two judge Bench of Supreme Court has taken this view in the case of ***Dhannalal Vs. D.P. Vijayvargiya,*** reported in **AIR 1996 SC 2155.**

It has already been seen that Parliament wanted no limitation clause after it omitted Section 166 (3) of the Act on 14-11-94. This Court cannot smuggle in by back door Article 137 of the Limitation Act, 1963. If the intention was to extend the limitation by three years, Parliament would have prescribed that limitation in Section 166 (3) of the Act rather than omitting it altogether.

●

PREVEATION OF FOOD ADULTERATION ACT AND PROBATION OF OFFENDERS ACT:-

A Judgment by Hon'ble Shri Justice S.P. Khare in Criminal Appeal No. 2777 of 1999. State Vs. Tikeshwar Prasad at Jabalpur Main Sat of M.P. High Court on 4.1.2000.

NOTE:- In a case under Prevention of Food Adulteration Act benefit under Probation of Offenders Act cannot be given:

1. This is an appeal under Section 377 of the Code of criminal Procedure, 1973 for enhancement of sentence.
2. Respondent Tikeshwar Prased Patel has been convicted under Section 16 (1) (a) of the Prevention of Food Adulteration Act, 1954 and he has been released under Section 4 of the probation of offendere Act, 1958. It appears that the trial Magistrate has completely overlooked the provisions of Section 20-AA of the prevention of Food Adulteration Act, 1954 which provides that nothing contained in the probation of offenders Act,

1958 or Section 360 of the Code of Criminal Procedure, 1973 shall apply to a person convicted of an offence under this Act, unless that person is under 18 years of age. In this case the respondent is 24 years of age and therefore order of the trial Magistrate releasing the accused under Section 4 of the probation of offenders Act, 1958 is illegal."

3. It appears that the accused admitted the guilt under some "plea bargaining". Therefore, as held by the Supreme Court in ***Tuppeswami Vs. State AIR 1983 S.C. 747*** the conviction and release of the respondent on probation are set aside. The case is sent back to the trial Magistrate to proceed with the trial according to law. A copy of this order be sent to District and Sessions Judge, Raigarh. He should explain to Shri M.P. Jagdalla, Judicial Magistrate First Class, Saranggarh the provisions of the prevention of Food Adulteration Act, 1954. He will further explain to the concerned Magistrate that in case such an illegal order is passed by him in future, appropriate disciplinary action will be taken against him. The respondent is directed to appear before the trial Magistrate on 14.2.2000.

●

CONFLICTS AND SELF-IMAGE

"Learn to live with your mental doors unlocked, so that you can let ideas come in."

Conflicts occur when our self-image is very different form the reality. That is to say that you actually think you are a certain kind of person- honest, sensitive, fair etc., but in reality you may not be so. This makes life difficult for yourself and for others also.

Problems of personality and social adjustment are caused by self-image conflicts. Some of these are easily recognised. The man who thinks he is Napoleon has a self-image problem. However, most self-image conflicts are not so easily seen or acknowledged. The man who is tone-deaf but insists he can sing is a harmless nuisance. His self-image is in direct conflict with reality. He will have no problems if he sings only for himself. But if he tries to join the church choir or wants to sing for people, then it will clash with his false image of himself as an accomplished singer.

Conflicts are caused when our self-image is different to the way in which others see us.

There is also a possibility of conflict when our self-image and capabilities of conflict match.

It is natural that we perceive ourselves somewhat differently from what others see us as. The confilict arises when we try to impose that self image on others, and also when we deny the validity of the outsider's view of ourselves.

The closer to reality your self-image become, the happier you will be.

*Courtesy- **Shri Arun K. Agrawal, Hind Pocket Books***

CIVIL & CRIMINAL COURT DEPOSITS

By P.K. Tiwari, Advocate,
(Retd.) Senior Audit Officer,
A.G.M.P. Gwalior, Ex-Accounts Officer,
High Court of M.P. JBP.

The moneys deposited with the Nazir under orders of Court are Civil or Criminal Court deposits. If this money relates to a civil matter, it is civil court deposit. On the other hand if it relates to a criminal matter, it is a criminal court deposit. The Nazir is required immediately on the same day or by next day to deposit the amount in the Treasury. The amounts are held under 'Public Account' of the State Government. In High Court of M.P. instead of Nazir, the cashier, Judicial receives the deposits.

The Nazir or Cashier judicial keeps details of the deposits, the Treasury only keeping the running balances of the amounts (SR 575 Treasury Code). Under Art. 283 (2) of the Constitution of India, transactions relating to Public Account in which such deposits are held are at present governed by the orders of the Governor of M.P. The orders of the Governor are contained in Chapter VIII of the M.P. Treasury Code. Supplementary Rules 536 to 543 apply generally to all classes of deposits which are received under some order of Government or competent Authority. Vide S.R. 568, subject to orders of the High Court contained in Rules & Orders Civil & Criminal, the provisions applicable to Revenue Deposits as contained in S.Rs. 544 to 565 apply to the CCD receipts and payments. Vide S.R. 572, the amounts held in account by the Nazir must be tallied with that held by the Treasury and discrepancies, if any, promptly reconciled every month.

SAFEGUARDS:- The opening balance of the Cash Book or General Cash Account must be checked with the closing balance of the previous day, daily total of the cash book or General Cash Account got duly checked by some responsible officer like Deputy Clerk of Court and whatever amounts are directly incorporated in the cash book or General Cash Account from subsidiary registers like Register of receipts and repayments of CCD, totals of such subsidiary register must be checked by him and it should be ensured that the amounts thereof are correctly entered in the cash Book. Any default in this duty may lead to defalcations. Similarly the vouchers of repayments should be carefully examined to ensure that they bear sanction and contain full & proper particulars of the original deposit and that the same deposit is not repaid twice or more. It must also be seen that the payee is the original depositor or holds valid authority from him to receive the amount.

RESPONSIBILITY:- The deposits are held under public account. Therefore lot of care is required to be exercised. The monthly, quarterly and annual returns and accounts which are required to be furnished to the Accountant General as laid down in S.Rs. 556 to 561 must be duty submitted. The officer-in-charge Najarat must pay personal attention to this because delays may actually cause fraudulent transactions, favoured payments, double repayments and defalcations.

RECEIPT BOOKS- It must be ensured that proper custody and account of

receipt books is kept and amounts collected on receipt books are promptly accounted for (SR 59 to 61 Treasury Code).

VERIFICATION OF REMITTANCE LIST AMOUNTS:- The Nazir must arrange to verify the amounts deposited or withdrawn from treasury during the month with treasury records, daily advice list [SR 572 (2)] and ascertain the correctness of the amounts deposited or withdrawn and the duputy clerk of court checking the accounts must see that these are the very amounts which are included in the cash book and its subsidiary registers.

CUSTODY OF CASH:- It should be seen that adequate safeguards for custody of cash, bonds, safeguard of duplicate keys exist to leave no room for danger to cash. (SR 84 to 87 Treasury Code).

AGE OF DEPOSIT:- A lot of confusion exists regarding age of deposit. The age of deposit starts from the date of deposit under proper order and continues till the matter is decided and refund of deposit ordered by competent Court. But for the purpose of avoiding thrusting of voluminous account load on departmental authorities, for financial convenience it is laid down that the deposit amounts if not claimed for 3 consecutive financial years must be lapsed. The lapsing does not terminate the life of the deposit but only shifts the venue of account keeping from the Nazarat to the Accountant General. Lapsed deposit amounts can be authorised for repayment only by the Accountant General after verifying that the deposit actually exists, that there is no double repayment involved, that the voucher contains claim from proper payee or his duly authorised person or attorney and that sanction duly directs repayment there of. Any dereliction in Nazarat may result in double repayment or fradulent payment. Hence the officer-in-charge Nazarat must be observant of this position.

SURPRISE VERIFICATION:- Surprise verification of cash and pending applications is an important safeguard.

OBSERVANCE OF RULES:- SR 53 of M.P.T.C. Vol. I and special instructions contained in Rules and Orders, Civil & Criminal must be complied with carefully and strictly.

COURT FEE AND CANCELLATION OF VOUCHERS:- When an application with prayer for repayment is made, it must bear appropriate court fee stamps. Note 2 below Rule 466 Rules & Orders Civil. Court Fee stamp should be duly cancelled so that it may not be reused. All paid vouchers must be duly cancelled or so enfaced to prevent their use again.

PLUS MINUS MEMORANDUM :- The officer-in-charge must carefully examine this to see that not only are the balances correct but also difference between Treasury balances & that as per Nazarat account are duly explained and that amounts which ought to be lapsed are not held up so that accounts do not grow unwieldy. The Accountant General ultimately keeps account of Consolidated Fund, Contingency Fund & Public Account and duty entrusted to him should be left to him.

OPINIONS AND VIEWS EXPRESSED IN THE MAGAZINE ARE OF THE WRITERS OF THE ARTICLES AND NOT BINDING ON THE INSTITUTION AND FOR JUDICIAL PROCEEDING.